Journal of the Australasian Law Teachers Association

Volume 11

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(2018) Volume 11

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.

Typeset by Stan Lamond

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FOREWORD

It is my great pleasure to welcome readers to the 2018 issue of the *Journal of the Australasian Law Teachers Association* (JALTA). This issue follows the successful 10th anniversary issue that was published in 2017. This issue also marks my last as Editor-in-Chief as I have decided to step down following a long innings due to increasing work commitments including becoming Chair of the Academic Board of my University in April 2018. I want to take this opportunity of thanking the ALTA Executive for giving me the privilege to be Editor for 11 issues.

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 Emily Hazlewood who edited this issue and Stan Lamond for his efforts in typesetting. Lastly, I need to record a special thanks to Sarah Parker who has worked tirelessly as the Secretariat Coordinator for ALTA and assumed responsibility for the completion of this journal. Sarah has worked professionally and most efficiently on all aspects dealing with JALTA and without Sarah's hard work JALTA would not be produced in a timely and professional manner. Well done, Sarah and sincere thanks once again!

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

POST–WORLD WAR II ICONS OF AUSTRALIAN LEGAL EDUCATION: PROFESSORS DAVID DERHAM, HAL WOOTTEN, DENNIS PEARCE AND TOM CAIN

*David Barker**

Abstract

This paper examines the reluctance of those involved in Australian legal scholarship to acknowledge the effect of particular law academic luminaries on the development of Australian legal education. Whilst there has always been a willingness on the part of the legal community to recognise the influence of Chief Justices such as Samuel Griffith, Owen Dixon. Anthony Mason and Murray Gleeson on the development of Australian jurisprudence, there has never been the same enthusiasm to embrace similar leaders within Australian legal education. This is in contrast to that of English legal education, which has not suffered from a similar reluctance; there has been no holding back on the part of English legal historians to acknowledge the part played by Sir William Blackstone, Sir Frederic Maitland and Sir Frederick Pollock in the first phase of English legal education and Sir John Baker, Professor William Twining and Professor Michael Zander in its modern phase.

In endeavouring to correct this impression, this paper attempts to discover those who have exercised a major influence on change and innovation within Australian legal education following on from World War II. In its selection of Professor Sir David Derham, acknowledged as the prime influence behind the legal reforms advocated by the Martin Report and his subsequent appointment as the Foundation Dean of the Monash University Law Faculty; Professor Hal Wootten, the pioneering Dean of the University of New South Wales Law Faculty; Professor Dennis Pearce, both Dean of The Australian National University Law Faculty and the instigator of the influential Pearce Report on modern legal education; and Professor Tom Cain, Head of the Queensland University of Technology Law School, a leader in innovation both of full-time and part-time legal education, this paper recognises their long-standing influence on modern Australian legal education.

I Introduction

Within the discussion and writings of Australian legal historians, there has always been a reluctance to highlight the effect of particular academic luminaries on the development of Australian legal education. Whilst there has always been a willingness to acknowledge the influence of such Chief Justices as Griffith, Dixon, Mason and Gleeson on the development of Australian jurisprudence, there has never been the same enthusiasm to embrace similar leaders within Australian legal education. The English have never suffered from a similar reluctance; there has been no holding back on the part of English legal historians to acknowledge the part played by Sir William Blackstone, Sir Frederic Maitland and Sir Frederick Pollock in the first phase of English legal education, and Sir John Baker, Professor William Twining, Professor Michael Zander and even Richard Susskind[1] in its modern phase.

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1 Richard Suskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2nd ed, 2017).

Having endeavoured to correct this approach with examining the earlier role played by Professors Sir John Peden, Sir William Moore, Dugald McDougall and Frank Beasley,[2] I was disappointed at the lack of enthusiasm on the part of many at the 2017 Australasian Law Teachers Association Conference presentation and readers of my subsequent JALTA paper[3] on the topic to embrace the major influence that these earlier Australian law academics had, in my view, on the development of Australian legal education.

Nevertheless, it is important to attempt to discover those who have exercised a major influence on change and innovation within Australian legal education following on from World War II. This is to acknowledge that 'in the wider sphere of legal education this includes those scholars whose writing shapes the curriculum and can thus influence legal thinking, including judicial decision-making, for generations to come'.[4] It would be acknowledged that because of its profound impact on Australia, this conflict gave rise to an expectation of change in the country's major institutions. Whilst the immediate post-war years could be viewed as a period of reflection in the reinstatement of the traditions and values that permeated legal education prior to World War II, there were changes in attitude of those involved in legal education, particularly by returned service personnel, whether law students or academic law staff.

It might be that a change of approach was first mooted when the inaugural meeting took place of what was to become the Australian Universities Law Schools Association (subsequently renamed as the Australasian Law Teachers Association). Professor Paton, who was to become the first President of the Association, expressed its aims by stating with a sense of irony: 'At a preliminary meeting, the world could not be remoulded, but some energetic preparatory work in the circulation of documents enabled the broad issues to be discussed.'[5] It has to be remembered that at this time, other than the Dean or a long-standing professor, most of the law school staff were employed part-time. It is estimated that there were only 'from around 15 full-time teachers Australia-wide in the immediate post–World War II period'.[6]

II Professor (later Sir) David Derham

The first of those who might be regarded as one of the leading luminaries of modern Australian legal education is Professor David Derham. Professor Derham could be judged to have had a major influence within tertiary education in more than one way. Not only did he become Vice-Chancellor of the University of Melbourne, a position he held from 1968 to 1982, he is also chiefly remembered for the crucial role he played as Foundation Dean in the establishment of the Monash University Faculty of Law in 1963. In addition, there is an undisputed claim in John Waugh's history of the Melbourne Law School that it was Professor Derham who was solely responsible for the drafting of the Legal Education chapter[7] in Volume 2 of the Martin Report, published by the Committee on the Future of Tertiary Education in Australia. The Martin Report is important in that it reviewed the spectrum of legal education that existed at the time of the Report. This incorporated the roles of faculties of law, admission to practice, practical training for lawyers, university law syllabuses and teaching, research and postgraduate work,

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2 David Barker, *A History of Australian Legal Education* (Federation Press, 2016).

3 David Barker, 'Reflections on Four Leading Early Australian Law Academics' (2017) 10 *Journal of the Australasian Law Teachers Association* 1.

4 Email from anonymous referee to JALTA Editor, 12 October 2018.

5 George Paton, 'Australian Universities Law School Association' (1946) 20 *Australian Law Journal* 99.

6 Michael Coper, 'Law Reform and Legal Education: Uniting Separate Worlds' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 388, 391.

7 John Waugh, *First Principles: the Melbourne Law School 1857–2007* (Miegunyah Press, 2007) 157.

the optimum size of law schools and a comparison with American legal education.[8] There is also information about the qualifications of those admitted to practice in each state in 1962,[9] and about the total number of students enrolled in university law schools in 1954–63.[10]

What marks Professor Derham out from his peers at the time of the Martin Report was that he was willing to face up to the challenge that was growing with respect to legal education at this time as to whether it should be mainly concerned with the development of the intellectual demands of a university education and/or simultaneously satisfy professional demands for admission to practice.[11] The Report also endeavoured to deal with another ongoing problem concerning the teaching of law at tertiary level in Australia: that of the chronic underfunding of legal education:

> In comparison with education provided for other recognised professions, the lawyer's education has never been expensive. In the more populous states little or no support from public moneys had been required for it. This is not the matter for congratulation that is sometimes it is thought to be. It is much more a measure of past inadequacies in the teaching and research facilities provided in comparison with the provision made for other comparable disciplines.[12]

One of the most impressive conclusions that may be gained from the Martin Report and the injection of Professor Derham's influence into the chapter on legal education is that it regarded itself as having a clear mandate to recommend the modernising of legal education. It is often forgotten with the passing of time in this era that in its criticisms of undergraduate teaching, the Report publicised the phrase, subsequently much quoted, that 'Law, it has been said, can be taught under a gum tree, and for much of Australia's history it might as well have been so taught'.[13] It went on to declare, even more strongly, its concern that teaching law be regarded merely as the dissemination of information in the form of legal principles that could be memorised for examination, with teaching methods reduced to the expository lecture and the dogmatic textbook. It then went even further, stating that if this was in fact the situation then 'since the invention of the printing press, it could be argued that only the textbook would be required'.[14]

In recognising the challenges faced by the conflicting demands of the legal profession in 'favour of apprenticeship and part-time training for lawyers',[15] the Committee on the Future of Tertiary Education in Australia stated its belief 'that the likely demands of the future are such that it is very desirable that lawyers seeking admission to independent practice should, wherever possible, have an education founded upon full-time studies at university level'.[16]

This statement was made on the basis that:

> [Students] should have had at least three years of university education designed not so much as to train them as legal practitioners as to provide them with background intellectual training necessary for leaders in the highly complex society of the future.[17]

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8 Committee on the Future of Tertiary Education in Australia, *Tertiary Education in Australia: Report of the Committee on the Future of Tertiary Education in Australia to the Australian Universities Commission* (the Martin Report) (Government Printer, 1964) 49–50.
9 Ibid 71–74.
10 Ibid 75–76.
11 Ibid 53.
12 Ibid 49.
13 Ibid 57.
14 Ibid.
15 Ibid 49.
16 Ibid.
17 Ibid.

It did, however, add the caveat that 'the need for basic education and organized intellectual training must not be subordinated to the immediate practical and detailed requirements of the existing legal system'.[18]

It was in 1949 that he became a lecturer in Constitutional Law at the University of Melbourne, having previously been a tutor of law at Queen's College. In 1951, he succeeded Sir George Paton as the University's Professor of Jurisprudence, a post he held until 1964.[19]

The energy and innovation that Professor Derham displayed in composing the legal element of the Martin Report was replicated in his approach to establishing the law school at Monash University. The University's Professorial Board had recommended in 1962: 'That a Dean of the Faculty of Law be appointed as soon as possible, with the first duty of making recommendations to the Council upon the best way establishing a Faculty of Law.'[20] It should have been no surprise that in seeking to select a dean of high standing and eminence, Monash University appointed Professor Derham. Appointed to this new position in October 1963, Professor Derham was required to remain at the Melbourne Law Faculty until 1964, but this did not prevent him immediately developing a curriculum for the new Monash Law School. In his development of the new Monash law program, the focus was on transferable legal skills, incorporating small group teaching. The innovative first-year program led to a three-year degree titled BA (Law), which subsequently became a Bachelor of Jurisprudence. First-year students could also proceed to a Bachelor of Laws (LLB) (Pass degree), taken over four years, or an LLB (Honours) of five years. This meant that Monash students could be awarded a combined BA/LLB on the basis of four years' study. The philosophy underlining this proposed law program was contained in a statement by Professor Derham: 'All lawyers should be pounded with advanced law and educated.'[21]

Professor Derham characterised the approach and qualities of other foundation deans of this era in that he had a highly individualistic and innovative approach to teaching law, which was far removed from that of traditional law schools. The establishment of the new library at Monash was an excellent example of this approach. He sought the approval of the Monash Professorial Board for the appointment of Professor Frank Beasely as law library consultant, who was retiring from a Chair of Law that he had held at the University of Western Australia since 1927. Professor Derham informed the Board that not only did Professor Beasely have contacts with 'Every law library in the world', but also that 'Few men knew more than [him] about the sources and techniques of building up a collection of law books'.[22] The outcome was that the Board approved the appointment of Professor Beasely to a special lectureship involving the law library.

To stock this library, Professor Derham arranged the acquisition of law libraries from two former judges of the Supreme Court of Victoria: Sir Charles Gavan Duffy, deceased, and Sir Charles Lowe, who had retired. By the end of its first year in 1964, Monash Law School possessed a substantial library of 10,000 volumes, which increased to 138,000 by 1989.[23]

Another aspect of Professor Derham's approach to the changing circumstances of Monash as compared to Melbourne, the other original law school in Victoria, was the problem faced by the Law School in attracting staff and students because of its relative remoteness — 24 kilometres by road from the centre of Melbourne. This was exacerbated by the need to involve legal

18 Ibid.

19 'Derham, David P. (David Plumley) (1920–)' (2009) *Trove* <https://trove.nla.gov.au/people/807429?q=807429&c=people> (accessed 31 October 2018).

20 Peter Bamford, 'The Foundation of Monash Law School' (1989) 15 *Monash University Law Review* 152.

21 Ibid 167.

22 Ibid.

23 Ibid 168.

practitioners who obviously were based near the courts, and students who needed to develop connections with the legal profession mainly situated in the central business district. Professor Derham highlighted his approach to solving the 'Topography' problem in his 'Plan for a New Law School'. His remedy was:

> Full-time academic members of the profession will have to be responsible for all courses conducted at Monash, and that new methods for meeting the need for close contact with actual practice will have to be devised.[24]

The manner in which Professor Derham was able to deal with such problems characterised him as one of the doyens of new Australian legal educationalists, an approach that could be summed up in his introduction to the first edition of *In Gremio Legis* ('In the bosom of the Law'), the new Monash student law society publication:

> The Monash Law School began in a tremendous hurry. Students were enrolled at the beginning of 1964 before even the natures of their degree course were fixed for the future. They have no place of their own in the University. They still face years of 'camping' in other faculties' buildings before proper facilities can be provided for them. In such circumstances it has been very pleasing indeed to see the growth of a vigorous and ambitious law students' society constituted by the energy and interest of the students themselves.[25]

The optimism shown by Derham for the future of Monash Law School was, as its subsequent history indicates, well founded.[26] It is a prime example of how the development of the character and reputation of a law school depends on the credentials and enthusiasm of its foundation law Dean.

It was in 1968 that Derham again succeeded Paton, this time as Vice-Chancellor of University of Melbourne — a post he held until he retired in 1982. During his time as Vice-Chancellor, he undertook a reform of the University's administrative structure and had to deal with outbursts of student activism.[27] In addition, he was Deputy Chairman of the Australian Vice-Chancellors' Committee 1972–74, becoming Chairman 1975–76.

His contributions to legal scholarship included as editor of G W Paton's *A Textbook of Jurisprudence* and then as joint author, with F K Maher and P L Waller, of an *An Introduction to Law and Cases and Materials on Legal Processes*.[28]

In recognition of his contribution to the administration of tertiary education, and legal education in particular, he was appointed as a CMG in 1968 and as a KBE in 1977.[29]

III Professor J H (Hal) Wootten QC

There is no doubt that Professor Wootten's major contribution to Australian legal education will always be regarded as his tenure as Foundation Dean and Professor of the University of New South Wales (UNSW) Law School. The reason for the establishment of a second law school in New South Wales was similar to that which had arisen in Victoria with regard to the founding

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24 Ibid 170.

25 David Derham, 'Introduction' (1964) 1(1) *In Gremio Legis*.

26 Peter Yule and Fay Woodhouse, *Pericleans, Plumbers and Practitioners: The First Fifty Years of the Monash University Law School* (Monash University Publishing, 2014).

27 Cecily Close, 'Derham, Sir David Plumley (1920–1985)' in *Australian Dictionary of Biography* (Melbourne University Press, 2007) <http:adb.anu.edu.au/biography/derham-sir-david-plumley-12414/text22317> (accessed 15 October 2018).

28 Ibid.

29 Ibid.

of the Monash Law School; in this case, it was the University of Sydney Law School not having the capacity to accommodate all qualified students for entrance to the law school.

The appointment of the inaugural Dean of Law at UNSW involved a change of approach in the profile for the position and the manner of selection. Part of this has been attributed to the attitude of Sir Philip Baxter, the UNSW Vice-Chancellor, who was of the view that such positions should be occupied, where appropriate, by members of the practising profession and not necessarily by university academics.

Interestingly, one of the persons consulted was Professor David Derham, to whom Sir Philip explained that UNSW wished to appoint as the Foundation UNSW Dean of Law a 'senior member of the profession who could spend some time planning the course and the Faculty'.[30]

The selection process also involved wide consultation with all the holders of leading judicial positions in New South Wales. The consensus view of those consulted was that the most appropriate person for the position was J H (Hal) Wootten QC. However, it was thought that he would not accept the position because of his current financial needs with a family of four children to educate. This supposition was reinforced by the fact that in 1969 it was common knowledge that he had already turned down two offers of a judicial position.

Nevertheless, the newly appointed Vice-Chancellor of UNSW, Professor Rupert Myers, decided that it would be worth approaching Hal Wootten with the offer of Foundation Dean. Wootten's response to the offer was 'The only thing I know about legal education was how bad my own was',[31] to which Professor Myers responded: 'That might be a pretty good start.'[32] Wootten accepted the invitation, later stating that he found the offer 'irresistible'.[33]

It could be argued that Hal Wootten's appointment was an inspired choice of a Dean to lead a new Australian law school in the post–World War II years. Because of his background as a prominent member of the legal profession, he was most likely able to approach and make demands of the University in ways that would not have been acceptable from a conventional law academic. First, he resisted demands for the UNSW Law School to commence operating in 1970, which had been the expectation of most of those who had been involved with its formation. Second, he persuaded the Vice-Chancellor to permit him to use the year of 1970 to plan for the new Law School. These arrangements incorporated travel throughout Australia visiting other law schools and obtaining ideas on the best ways to operate a modern law school. It also offered him the chance to seek out law academics willing to accept the challenges of working in a law school that incorporated new concepts relating to legal education, and to put these into operation. The UNSW Law School's records indicate Wootten using the year's delay as a chance to appoint academic staff who supported his vision, the new Dean selecting his original academic staff from an eclectic variety of backgrounds. Wootten also extended his study tour to law schools in England, Canada and the United States, besides attending the Annual Conference of the Association of American Law Schools at San Francisco in January 1970.

Wootten approached fashioning the UNSW Law Faculty in a way that would satisfy his vision for a law school embodying modern law teaching methods, while creating a stimulating atmosphere for all involved with developing its reputation, whether as staff or students. The UNSW Law School's history contains a description by Rob Brian, its first law librarian, as to how he worked closely with Wootten in employing unorthodox methods to build up the law

30 Marion Dixon, *Thirty Up: the Story of the UNSW Law School 1972–2001* (University of New South Wales, 2001) 2.

31 Ibid.

32 Ibid 3.

33 Ibid.

collection. In its first five years, the collection reached 50,000 volumes, and it would now be regarded as among the best law libraries in Australia.[34]

The influence of Monash Law School was seen not only in the development of the law library collection, but also in the original curriculum for the law program: Wootten devised a syllabus that envisaged a five-year combined degree in either arts/law or commerce/law. The program was divided into two semesters each year, and included among its first-year subjects legal research and writing, and incorporated an interactive approach to the teaching of all law subjects.[35]

Among the other innovations introduced by Wootten in the early days of the UNSW Law School was 'discussion';[36] the Dean believed this could play an important part in stimulating participation of law students, aided by the insistence on small classes. One of the foundation law academics, George Curt Garbesi, who had been recruited from Loyala University, Los Angeles, interpreted this approach as incorporating the Socratic method of law teaching, whereby the teacher involved him or herself in a dialogue with the student. In this development of an interactive method of teaching, Wootten sought the advice of Fred Katz, the Head of the UNSW Teaching and Education Research Centre (TERC).[37] This collaboration led to the videotaping of some of the early classes to assist staff in developing their teaching technique. At this stage of the school's development, there was a radical atmosphere prevalent among early staff members; Garth Nettheim, another of the foundation law academics, recollects some colleagues even posing the question: 'What are classes for?'[38]

This approach of questioning the conventional norms of legal education is also illustrated by UNSW Law School's introduction of continuous class assessment. A study by TERC indicated there was a wide discrepancy as to how this assessment scheme would be administered by participating academics. Nevertheless, a majority of the students responding to a survey by TERC opted for the scheme to continue.[39]

As the UNSW Law School enrolled more law teaching staff, differences inevitably began to arise regarding the original methods that had been employed there. As the Dean, Wootten appears to have been unaffected by these criticisms, regarding them as representing vitality within the UNSW Law School:

> It is due less to change in the law than to the continual quest of active scholars and teachers to find new meanings in their studies, new ways of looking at them, and fresh ways of presenting them. Show me a law school that does not have a bristling Curriculum. Review Committee and I won't bother to look at it.[40]

This relaxed attitude of the Dean towards this type of academic controversy has carried over into the current UNSW Law School. It still manifests itself in the outcome of research that indicates UNSW law students are still differently motivated than those joining more conventional law schools. The results of a 2015 TERC survey of 219 new undergraduate students indicated that at least half the students had a state high school background and that there were very few who had parents with either a tertiary education or background as lawyers. The survey also revealed that the motivating factor for most students enrolling at UNSW was their interest in law and legal work, with little emphasis on the financial rewards they might

34 Ibid 10.
35 Ibid 14.
36 Ibid 15.
37 Ibid 17.
38 Ibid.
39 Ibid.
40 Ibid 20.

enjoy as qualified lawyers. Another factor had been the opportunity to study the combined degree course in commerce and law, a program unique at that time to UNSW.[41]

In the 1970s, the inclusive nature and informality of the teaching at the UNSW Law School combined to create an atmosphere of social consciousness. This contributed to the Law School quickly gaining a reputation for the promotion of social justice, which manifested itself in the establishment of numerous organisations committed to social change, such as a Prisoners Action Group, New South Wales Society of Labour Lawyers and the Feminist Legal Action Group.[42] It was this sense of social consciousness that could be regarded as the visionary period of enlightenment for the UNSW Law School, signalled as being brought to an end when Hal Wootten resigned as Dean on 28 June 1973. Two months later, he was appointed as a justice of the Supreme Court of New South Wales.[43]

IV Professor Dennis Pearce AO

There are relatively few law academics who are instantly recognisable because of their association with a report also bearing their name. Within Australian legal education only two names spring to mind: the Priestley Eleven, the subjects originally nominated by the then Consultative Committee of State and Territorial Authorities, first headed by Justice Priestley and who therefore gave his name to the list of compulsory subject areas for academic legal study that individuals have to complete in order to fulfil admission requirements;[44] and the Pearce Report. The latter, although it was released as long ago as March 1987, still retains a major influence on the development of Australian legal education. The Pearce Report was commissioned in 1985 and submitted in 1987. The members of the Committee were Professor Dennis Pearce, Professor of Law, The Australian National University (ANU) (Convenor); Professor Enid Campbell; Sir Isaac Isaacs, Professor of Law, Monash University; and Professor Don Harding, Professor of Law at UNSW.

As the Convenor of the Report, Professor Dennis Pearce reminds anyone who would read or quote from the Report[45] that it was part of a general ongoing review initiated by the Commonwealth Tertiary Education Commission (CTEC) to ensure that there was 'a program of thorough and authoritative assessments of the work of higher education institutions measured against objectives which are acceptable in academic and social terms'.[46]

Additionally, the background to the review states:

> It is intended that each discipline assessment will be undertaken by a small committee of people pre-eminent in their fields, who will act independently of the Commission and furnish advice to the Commission.[47]

The Pearce Report consisted of four volumes including 48 recommendations to the CTEC and 64 principal suggestions to law schools. Through its four volumes, it focuses in the first on the aims and issue of law schools and legal education. Volume 2 is concerned with other aspect of law schools such as research and publications, service to the community and resources. Volume

41 Ibid 23.
42 Ibid 33.
43 Ibid 39.
44 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Justice System*, Report No 89, 17 February 2000, [2.21].
45 Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Commission* (the Pearce Report) (Australian Government Publishing Service, 1987).
46 Ibid li.
47 Ibid.

3 examined practical matters with which law schools were concerned such as administration, law libraries and practical legal training, while Volume 4 was devoted to a survey of recent Australian law graduates.

Whilst over the succeeding years since its publication there have been various evaluations of the Pearce Report, most commentators would agree with the statement that it was 'the most comprehensive and significant investigation undertaken of Australian legal education'.[48] This statement is supported by David Weisbrot, who commented: 'the Pearce Report is the first important review of, and comprehensive compilation of data on, Australian legal education, and will be point of departure for all debate on legal education for some time.'[49]

In a document as far-reaching as the Pearce Report, it is necessary to be selective in considering those matters that are directly relevant to the development of legal education in Australia. In this respect, most matters of primary relevance to this topic in 1987 are contained in Volume 1 of the Report. Its contents had profound effect on those involved in teaching law in the tertiary sector, apart from being of major interest to the general legal community. The Pearce Report was willing to explore the challenges that had been raised at the time, and subsequently with regard to best practice in relation to teaching law, by stating that:

> It sometimes seems to be suggested that there only two methods of teaching adopted in Australian law schools and that they are mutually exclusive and mutually opposed to one another. They are labelled the expository or straight lecture method and the case, discussion or Socratic method.[50]

The Report goes on to describe these forms of teaching objectively and in some detail, although the Pearce Committee's preference was clearly against the expository method and in favour of casebook, discussion or Socratic teaching, or its later development into the problem method. However, it has never been recognised in any of the subsequent reports or papers that the Pearce Report was remarkably open-minded as to the teaching style adopted in Australian law schools. Although it might not be the conventional approach to current teaching methods, the statement in the Report that 'teachers have tended to use the method with which they feel most comfortable and which they think is best suited to the subject matter with which they are dealing'[51] recognises the realities of the teaching situation evident in Australian law schools at that time. This view was supported by the subsequent recognition that:

> Not all teachers are able to use the same techniques effectively; not all material is best dealt with in the same way; but above all we think there is considerable advantage in students being exposed to a variety of teaching methods.[52]

Importantly, these statements were subject to the caveat about what the Report might 'have to say later about a review of individual teacher's performance and resources available'.[53]

Volume 2 is principally concerned with research and publications. The Committee was faced with a difficulty in drawing a distinction 'between *legal research* carried out by lawyers in assisting clients, and academic research in law'.[54] This required:

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48 Eugene Clark, 'Australian Legal Education A Decade after the Pearce Report' (1997) 8 *Legal Education Review* 214.

49 Ibid.

50 Pearce, Campbell and Harding, above n 45, 155.

51 Ibid 156.

52 Ibid 157.

53 Ibid.

54 Craig McInnis, Simon Marginson and Alison Morris, *Australian Law Schools after the 1987 Pearce Report* (Centre for Study of Higher Education, University of Melbourne, 1994) 181.

> Distinguishing between *doctrinal research* or legal scholarship which started from law as a given field of knowledge (law as the subject), from *non-doctrinal research* which has its starting point outside law and looked at the social, economic, political or cultural implications of legal practices (law as the object).[55]

The difficulties at this time in developing a wider approach to legal research were emphasised in an article by Michael Chesterman and David Weisbrot, two leading law academics at UNSW, who stated that:

> Both the recent Report on Australian law schools and the submission of the law school deans to the writers of that Report refer to the predominance of *doctrinal, black-letter* research in Australian law schools, and the submission contains a plea for more theoretical and reform-oriented research.[56]

The recommendations of the Pearce Report were not always successful in their outcomes on future developments in Australian legal education, as evidenced by two principal recommendations in Volume 3 of the Report. These relate to the problems that gave rise to a crisis in governance of Macquarie Law School and a statement concerning the need for any future law schools within Australia.

The problems involving the Macquarie Law School are the most memorable. As reported in Volume 3:

> The disputes that have racked Macquarie Law School for some years now are of public notoriety. They have been pursued not only within the law school but also in the University and the media.[57]

Despite the unpromising conclusion of the Pearce Report that the Macquarie Law School should be closed, phased out or divided due to the irreconcilable differences, the Macquarie Law School did survive. However, it should be noted that an alternative recommendation that some of the law staff be transferred to another school within the university, which was originally rejected by a Macquarie Review Committee appointed in 1978, was eventually accepted as a remedy and introduced in 2000.

The other recommendation for which the Pearce Committee is still remembered is its statement that it did 'not think that there will be need for a new law school, except perhaps in Queensland'.[58] However, very soon after the publication of the Report, there was (in this author's words) 'An Avalanche of Law Schools'.[59] This marked an increase in an additional 16 law schools being established between 1989 and 1997, with a further 10 in the first 15 years of the 21st century.

Where does this leave the Pearce Report, and obviously the influence of Dennis Pearce, when considering its and his place in the history of Australian legal education? No doubt at its time it was regarded as a major influence throughout Australian legal education. This was not only because it incorporated a comprehensive survey of legal education in 1987, but also because of its wide-ranging review of Australian law schools and its analysis of the many aspects of teaching and learning practised by them at this time. Many commentators have emphasised the

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55 Ibid.

56 Michael Chesterman and David Weisbrot, 'Legal Scholarship in Australia' (1987) 50 *Modern Law Review* 709, 723.

57 Pearce, Campbell and Harding, above n 45, 944.

58 Ibid 988.

59 David Barker, 'An Avalanche of Law Schools: 1989 to 2013' (Paper presented at the Australasian Law Teachers Association Conference, Legal History Interest Group, Canberra, 1 October 2013) 153.

intangible benefits that flowed from the Pearce Report to legal education generally, encouraging greater cooperation between the law schools, especially through the then Committee (now Council) of Australian Law Deans, leading to the development of law as an academic discipline.

It is interesting to read Professor Pearce's own reflections on the long-term outcomes of the Report, which he recently expressed in a paper entitled 'The Past is a Different Country', presented at the Australian Academy of Law's Conference 'The Future of Australian Legal Education', and which was subsequently published in an edited book under the same title.[60] In this he acknowledges that there were two major developments that the Committee did not foresee and which have had a significant impact on legal education in Australia.[61]

The first is what he describes as the Canute-ish recommendation that no further law schools be established, and which he now recognises as wrong in that competition between law schools and choice for students is desirable.[62]

The other was a major development that could not have been anticipated at the time of a report written in the mid-1980s: the advent of the internet. This outcome, which he describes as 'having an impact on our recommendations for the future of law schools has been dramatic', meant that the ability to access material online not only affected the basis and form of law libraries, but also had a significant impact on courses offered and teaching methods.[63]

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

> the committee has been most anxious in the Report to avoid any suggestion that there is one form of legal education with which all schools must comply. There is no agreement among commentators on the form of legal education and it has in fact changed markedly over the years. Nonetheless the Committee thinks that there are some minimum levels that have to be met if the degree awarded is to be recognised as a professional law degree and it has indicated here it thinks law schools fall short of this standard.

It would be remiss to consider Professor Pearce's influence on Australian legal education solely in his role as the convenor of the Pearce Report. He has been and does remain a very active legal academic at the ANU College of Law where has served as Dean for two terms — the first from 1982 to 1984 and the second from 1992 to 1993.[64] Among other appointments he has held have been Commonwealth Ombudsman from 1988 to 1990, and Chair of the Australian Press Council from 1997 to 2000.[65] He is also recognised for his expertise in Administrative Law and Statutory Interpretation in Australia, being the author of the leading text in the former and co-author in the latter subject. Although now an Emeritus Professor at ANU, in 2017 he was named the Regulatory Practice Lawyer of the year for Canberra, while in previous years he received the Canberra Lawyer of the Year award for Public Law.[66]

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60 Kevin Lindgren, Francoise Kunc and Michael Coper (eds), *The Future of Australian Legal Education* (Lawbook Co., 2018) 49.

61 Ibid 53.

62 Ibid.

63 Ibid 53–54.

64 Australian National University, *Our People: ANU College of Law, Dennis Pearce* (19 February 2015) ANU College of Law <http://law.anu.edu.au/staff/dennis-pearce.ao> (accessed 31 October 2018).

65 Lindgren, Kunc and Coper above n 60, xv.

66 'ANU Law professor and alumni named best lawyers in their fields' (11 April 2017) ANU College of Law <https://law.anu.edu.au/news-and-events/news/anu-law-professor-and-alumni-named-best-lawyers-their-fields> (accessed 19 October 2018).

V Professor Tom Cain

Of the four law academics considered in this review Tom Cain is likely the least well-known to the general Australian legal community. This does not mean he was the least influential of them in affecting Australian legal education. He did, however, have an eclectic background before his final appointment as the Foundation Head of what was originally the Queensland Institute of Technology (QIT) law school before its elevation to the Queensland University of Technology (QUT). Prior to coming to Australia, he had been a partner in the Gibson and Weldon Law Firm in Chancery Lane, London, which had been the premier tutorial law college preparing law graduates for the entry examination into the English Bar. It also had another outlet in Guildford for the preparation of law students for the English Law Society Examinations. It subsequently merged with the Law Society School of Law to form the English College of Law, now the University of Law. Tom Cain had been the lead company law academic and also the joint author of the leading English textbook on company law.[67] He subsequently moved to Australia where he took over responsibility for administering the Law Extension Course at the University of Sydney — so he was the ideal candidate to undertake the formation of a law school that was going to have its principal mission of preparing law students, both in full-time and part-time mode of learning. Originally, Tom Cain led a small staff to undertake the teaching of the first intake of 110 full-time students, who commenced their studies at QIT at the beginning of the 1977 academic year.[68] In addition to accommodating students studying for what was originally designated as a BA (Law) degree (subsequently converted to an LLB) at the request of the Queensland Law Society, the Law School commenced a legal practice course in 1978 to accommodate 13 foundation students. This was provided as an alternative to articles of clerkship and laid the foundation for a future practical legal training course at the Law School.[69]

The practical legal training course was originally founded on the Ormrod continuum of legal education and training,[70] which was based on the English and Welsh criteria for legal education established in 1967 by a committee chaired by Sir Roger Ormrod, an English High Court judge.[71] The Law School acknowledged its ongoing influence on the QUT Practical Legal Training Course whilst recognising that 'the original objectives of the Course were those adopted at the Australian Professional Legal Conference in Australia'.[72]

Considering Tom Cain's background as the original director of the New South Wales Law Extension course, it is not surprising that QUT made early provision for the teaching of a part-time law course. As Cain stated: 'We had a separate set of lectures and seminars, mostly in the evening, to suit the convenience of the part-time internal students, which was uncommon in 1977.'[73]

Apart from the part-time internal course, there was also a part-time external course, which illustrated Cain's forward-looking attention to detail and planning. Whilst the external students were taught by the same lecturers and tutors as the internal students, their teaching was supplemented by local coordinators and tutors. The students were supplied with individual subject study guides prepared by the lecturer in charge of the course, and they were also given

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67 J Charlesworth, *Company Law*, T E Cain and Enid A Marshall (eds) (Stevens, 10th ed, 1972).

68 David Gardiner, 'The Law Faculty over Twenty Years' (1997) 13 *Queensland University of Technology Law Journal* 16.

69 Ibid 17.

70 Allan Chay, 'Wal's Legacy: QUT'S Practical Legal Training course' (1987) 13 *Queensland University of Technology Law Journal* 36.

71 United Kingdom, *Report of the Committee on Legal Education 1971*, Cmd 4595 (1971).

72 Chay, above n 70, 37.

73 Tom Cain, 'Reflections as Foundation Dean' (1997) 13 *Queensland University Technology Law Journal* 3, 7.

written exercises. In addition, they were supported by the establishment of basic law libraries in various parts of the state, and by a number of weekend study schools in Brisbane. First- and second-year students were assisted by telephone tutorials conducted by a tutor located in Brisbane. From 1983, a photocopying service was provided and, in 1985, a quarterly student newsletter was commenced.

Such was the success of the QIT/QUT external part-time course that the Pearce Committee commented in its report: 'QIT's efforts in its external course were commendable and we think that it should take over sole responsibility for external legal studies in Queensland.'[74]

This commendation was to cause problems for the Law School when in 1987 there was a recommendation by the CTEC that QIT should take responsibility for the conduct of all external law studies throughout all Australia. Tom Cain gave this proposition a great deal of thought but turned it down on the basis that it would upset the balance of the courses in the Law School. His reasons for refusal are interesting, considering that today most tertiary institutions would be tempted to adopt an expansionist attitude to such a proposition. These were:

> that a Law School of a reasonable size can run a good external LLB course when the number of external students is about 15 per cent of the total number of LLB students (and the number of external and part-time internal students is not more than 35–40 per cent of the total number of students) without upsetting the balance of courses and losing staff.[75]

Tom Cain's influence as Foundation Head of the Law School is illustrated by the manner in which the Law School gained control over the new law library at QIT. David Gardiner, Tom Cain's successor as Dean, comments on this in his reminiscences of the early days of the Law School when describing the problems of the move by the Law School into the new law library building at QIT, stating:

> We were not the sole occupier of the premise and our strata title neighbours were not necessarily ones we should have been associating with and what was more they were dominant occupants and controlled the body corporate. This was of course the University Librarian and the rest of Main Library and there was many a campaign and skirmish associated with the Law Library's operations being in conflict with those of Main Library.[76]

To Cain, there was obviously no question as to whether the law library should come under the control of the Law School. In many tertiary institutions, control of the law library has been a contentious issue for the Head of the Law School and the University Librarian, often requiring intervention and arbitration by the Vice-Chancellor or the Academic Board. Cain did not become embroiled in such discussions or arguments. He stated:

> The Law School Library was the heart of the Law School. There were several reasons for it being part of the Law School and for the Law Librarians being members of my staff. I wanted to determine the content of the Library and the classification of books used. I also decided that we would acquire books rather than audio-visual material and that, in general, it would be a reference and not a lending library. I also decided that we would adopt the Moys classification, a feature of which is its separation of primary (statues and law reports) and secondary (other) materials. Most of all, I wanted the Law Librarians to have a teaching as well as a librarian role and to conduct courses for the students on how to use a law library.[77]

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74 Ibid.
75 Ibid 8.
76 Gardiner, above n 68, 17.
77 Cain, above n 73, 8.

Tom Cain retired as Foundation Dean of the QUT Law School in 1989, leaving behind a highly regarded law school that had been complimented by the Pearce Report on many of its practices.

VI Review

It could be argued that at any time from settlement in Australia by Europeans in 1788 to the present day, the evolution of legal education has been a gradual process and that it is a difficult if not an impossible task to name those legal academics who have had such an imposing influence as to make them stand out from their colleagues. In an earlier paper, as I have stated, I attempted to name four academics — Professors Peden, Moore, McDougall and Beasley — whom I considered had fulfilled this role. However, with effluxion of time this was probably an easier task than attempting a similar exercise with respect to those academics who have exercised an outstanding influence over the development of Australian legal education during the post–World War II era. Also to be taken into account is the subjective view of those critics who consider the non-selection of a particular law academic from their law school must reflect adversely on the ongoing influence exercised by their particular tertiary educational institution. Nevertheless, it is important to attempt a comparative assessment and to recognise the outstanding influence that has been exercised by some particular law academics. In this respect, the names of Professors Derham and Pearce are linked not only to their particular law schools, but also to the reports with which they were closely connected and which are acknowledged as having a lasting effect on the ongoing development of Australian legal education. Professor Derham is also, of course, recognised as the academic who established the Monash University Law School, which has subsequently occupied a major role in Australian legal education. Professor Hal Wootten has occupied a similar role to that of Professor Derham in that he was responsible for establishing a second university law school in New South Wales, which is also recognised as possessing a similar reputation to that of Monash Law School in Victoria for its innovative influence on the development of modern legal education. Where then does Professor Cain stand in comparison to these other three leading law academics? Close examination would indicate that he has had a similar although less spectacular influence. Despite its lack of resources when it was first established, the QUT Law School was the second university law school in Queensland. It has been recognised as having had a pioneering influence in both the development of part-time law courses and practical legal training, which was noted in the Pearce Report. Its staff have always provided leadership in innovative law teaching, which has been acknowledged by the receipt of many national teaching awards. Much of this has been due to the early leadership and inspiration given to the Law School by Professor Tom Cain, and so it could be argued that he is worthy of occupying an equal standing to that of the other three of his law academic peers of the modern era.

THE 'DOCTRINE OF ERRONEOUS ASSUMPTION' — CLEARING UP THE CONFUSION

*Matthew Berkahn and Lindsay Trotman**

Abstract

A number of cases dealing with the prohibition on misleading or deceptive conduct have referred to the so-called 'doctrine of erroneous assumption'. In early cases, the focus was on determining if the consumer had preconceived ideas, already in their mind, that caused them to be misled, rather than being misled by the conduct of the defendant. Later cases draw a distinction between 'ordinary' or 'reasonable' assumptions and those that are 'extreme or fanciful'. Confusion has arisen because the phrase 'erroneous assumption' has also been used to refer to an assumption a person, without preconceived ideas, might make in response to conduct.

We consider the origin and development of this 'doctrine' and the confusion associated with it. We also suggest a solution to the confusion — namely, the discarding of any reference to a 'doctrine of erroneous assumption'.

I Introduction

The general prohibition on misleading or deceptive conduct is well known.[1] The question of whether conduct is misleading or deceptive, or likely to mislead or deceive, is answered by characterisation of the conduct. Characterisation 'is a task that generally requires consideration of whether the impugned conduct viewed as a whole has a tendency to lead a person into error'.[2] Any error must be caused by the impugned conduct and not by some other cause: 'there must be some causal relationship between the conduct … and the … prospect that people will be led into error by it'.[3] When considering that causal relationship, reference has sometimes been made to a so-called 'doctrine of erroneous assumption'.[4] Our thesis is that reference to such a doctrine does not aid coherence of analysis when characterising impugned conduct. There is confusion about what is meant by the doctrine. This confusion has arisen because the phrase 'erroneous assumption' has been used to mean two different things. Furthermore, we will show that the doctrine has been largely rejected in favour of a different approach to the causal relationship between conduct and the prospect of error. For these reasons, we conclude with a suggestion that the discourse on misleading or deceptive conduct discontinues reference to a so-called 'doctrine of erroneous assumption'.

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1 *Competition and Consumer Act 2010* (Cth) sch 2 ('Australian Consumer Law') s 18; *Fair Trading Act 1986* (NZ) s 9.

2 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 319 [25]; *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640, 651 [39].

3 R S French, 'A Lawyer's Guide to Misleading or Deceptive Conduct' (1989) 63 *Australian Law Journal* 250, 258.

4 See, eg, *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 ('*Campomar*'); *Tasman Insulation New Zealand Ltd v Knauf Installation Ltd* [2016] 3 NZLR 145 (NZCA) ('*Tasman Insulation Appeal*'); *10th Cantanae Pty Ltd v Shoshana Pty Ltd* (1987) 79 ALR 299, 324–325 ('*10th Cantanae*'); *Hogan v Pacific Dunlop Ltd* (1988) 83 ALR 403, 426; *Niagara Sawmilling Co Ltd v Carter Holt Harvey Ltd* [2012] NZHC 441; I Finch, 'The Fair Trading Act 1986', in *Intellectual Property Law in New Zealand* (online ed, Thomson Reuters) [10.4.13].

II Origin of the 'Doctrine'

The 'doctrine' stems from *McWilliam's Wines Pty Ltd v McDonald's System of Australia Pty Ltd* ('*McWilliam's*').[5]

In that case, McDonald's, well-known sellers of hamburgers including one extensively advertised under the name 'Big Mac', objected to McWilliam's using the words 'Big Mac' in advertisements for its wine, alleging an infringement of the general prohibition on misleading or deceptive conduct. There was evidence that consumers had 'erroneous assumptions and preconceived ideas'[6] about the name 'Big Mac'. The assumptions and ideas were that McDonald's 'owned' the name and that nobody else would be able to use it without the consent of McDonald's. Neither of these things was true, so the assumptions and ideas were erroneous. On reading the advertisement, a person with those preconceptions was likely to make another false assumption 'that … McDonald's must be in the wine venture in some way'.[7] Such a person was thus led into error on reading the advertisement. But the 'critical question' was considered to be 'whether conduct otherwise neither misleading nor deceptive acquires deceptive quality because persons under the influence of erroneous ideas draw erroneous inferences concerning it'.[8] The answer given to this question was 'no'. In the words of Smithers J:

> those persons who, by approaching the advertisement with erroneous ideas in their mind and interpreting its contents by reference thereto and are thereby misled do not arrive at their erroneous conclusion as a consequence of the terms of the advertisement, but because of the application, to those terms, of reasoning based on erroneous assumptions of their own. A member of the public can hardly complain of being misled by the conduct of another if because of errors made by himself he erroneously interpreted the nature of that conduct. And one would not contemplate that conduct, only misleading to those who misinterpret it because they apply erroneous assumptions in the exercise of interpretation, would be proscribed by the legislature. Such conduct would not be, one would think, truly misleading or deceptive.[9]

Fisher J, who agreed with Smithers J,[10] also used the term 'erroneous assumption'[11] in conjunction with the terms 'preconceived notion'[12] and 'unwarranted albeit reasonable assumption'.[13] It is clear from a careful reading of his entire judgment that, when he used each of these terms, he was also referring to an assumption that a person had made prior to exposure to the impugned conduct. Thus, the concern of both judges was on determining if consumers had preconceived ideas that caused them to be misled when they applied those ideas to impugned conduct. By this articulation, the cause of any error was said to be the consumer's preconception rather than the conduct impugned.

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5 (1980) 49 FLR 455; see also *Campomar* (2000) 202 CLR 45, 85–86 [104].

6 *McWilliam's* (1980) 49 FLR 455, 464 (Smithers J).

7 Ibid 465.

8 Ibid.

9 Ibid 466. See also *Johnson Tiles Pty Ltd v Esso Australia Ltd* (2001) ATPR 41-794, 42,547 (FCA): 'There must be a logical causal connection between the conduct and some hypothesised error. But not every case involving a logical connection between conduct and alleged error will result in the conduct being regarded as misleading or deceptive … By way of example, it might be said that, strictly speaking, a causal connection exists between conduct and error where the error is based upon erroneous assumption derived from but not logically justified by the conduct. The conduct will not ordinarily be treated on that account, as misleading or deceptive in such a case.'

10 *McWilliam's* (1980) 49 FLR 455, 475.

11 Ibid 479.

12 Ibid 478 and 479.

13 Ibid 479.

III Developments following *McWilliam's*

Although it was possible to interpret *McWilliam's* as propounding a general proposition that the application of a preconception to impugned conduct would always mean that the necessary causal link between conduct and likely error would be absent,[14] this was quickly rejected by the Full Federal Court in *Taco Bell*.[15] Deane and Fitzgerald JJ, referring to *McWilliam's*, said:[16]

> In the course of their respective judgments, Smithers J and Fisher J placed particular emphasis on the fact that a person would only be misled or deceived into thinking that the use of the expression 'BIG MAC' by McWilliam's indicated some arrangement between McWilliam's and McDonald's if he made the erroneous assumption that the expression could not have been used by McWilliam's in the absence of such an arrangement. There has been a tendency — in our view mistaken — to see their Honours' comments in that regard as involving some general proposition of law to the effect that intervention of an erroneous assumption between conduct and any misconception destroys a necessary chain of causation with the consequence that the conduct itself cannot properly be described as misleading or deceptive or as being likely to mislead or deceive.

Use of the phrase 'erroneous assumption' in this passage must be taken to mean an erroneous assumption made before exposure to impugned conduct because Deane and Fitzgerald JJ referred to that term as employed by Smithers and Fisher JJ. On this analysis, the passage is saying that the application of a preconception to impugned conduct will not always mean that the necessary causal link between conduct and likely error is absent. In other words, the characterisation inquiry is not necessarily ended by pointing to a preconception. The impugned conduct may still be capable of leading a person into error independently of that person's preconception. This is consistent with Smithers J's critical question, being 'whether conduct *otherwise neither misleading nor deceptive* acquires deceptive quality because persons under the influence of erroneous ideas draw erroneous inferences concerning it'.[17] This question acknowledges the possibility that conduct might be misleading or deceptive for reasons other than the application of a preconception to the conduct.

Deane and Fitzgerald JJ went on to make the following comments:[18]

> In truth, of course, no conduct can mislead or deceive unless the representee labours under some erroneous assumption. Such an assumption can range from the obvious, such as a simple assumption that an express representation is worthy of credence, … to the fanciful, such as an assumption that the mere fact that a person sells goods means that he is the manufacturer of them. The nature of the erroneous assumption which must be made before conduct can mislead or deceive will be a relevant, and sometimes decisive, factor in determining the factual question whether conduct should properly be categorized as misleading or deceptive or as likely to mislead or deceive.

Use of the phrase 'erroneous assumption' in this passage must be taken to mean an erroneous assumption made *after* exposure to impugned conduct. The examples in the passage support this interpretation. There can be no assumption about an express representation until the representation is received by a person. Likewise, there can be no assumption about a person selling goods until that person sells goods. The natural interpretation of the passage is that it refers to the need for an erroneous assumption in response to impugned conduct. So, here we

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14 See, eg, Finch, above n 4 [10.4.13]. See also French, above n 3, 258.
15 *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 ('*Taco Bell*').
16 Ibid 200.
17 *McWilliam's* (1980) 49 FLR 455, 465 (emphasis added).
18 *Taco Bell* (1982) 42 ALR 177, 200.

see the first use of the phrase 'erroneous assumption' to mean something different from what Smithers and Fisher JJ meant when they used the same term in *McWilliam's*.

Lockhart describes the *Taco Bell* decision as having questioned the status of the 'doctrine' (as enunciated in *McWilliam's*) 'virtually immediately after [that] enunciation'.[19] However, Deane and Fitzgerald JJ in *Taco Bell* did not disagree with what Smithers and Fisher JJ had said in *McWilliam's*. Rather, they sought to make it clear that what had been said did not amount to a general rule that the existence of a preconception would always preclude the characterisation of conduct as misleading or deceptive. Indeed, as Lockhart himself notes,[20] these two judges employed the doctrine in the *Lego*[21] case to characterise conduct as not misleading or deceptive. This was another case involving use of a similar name: irrigation equipment was sold in Australia and elsewhere under the name 'Lego', resulting in action being taken by Lego Australia Pty Ltd, the marketer in Australia of the well-known children's building blocks of the same name. There was evidence that some members of the public mistakenly thought that the Lego irrigation equipment being sold was made by the manufacturer of the Lego toys. The evidence showed that members of the public had a prior familiarity with the use of the name 'Lego' in respect of Lego plastic toys and no familiarity with it being applicable to any other products. Some of the evidence went so far as to show 'that it would be possible to find some members of the public who would assume that any product at all to which the name was applied was manufactured by the manufacturer of the toy'.[22] Deane and Fitzgerald JJ said that it was 'necessary to inquire why proven misconception has arisen'[23] in order to determine whether those shown to have been led into error were so led by the impugned conduct. That inquiry revealed that persons were led into error because of the preconceptions they had about the name 'Lego', which they brought to bear on the impugned conduct. It was the application of preconceptions to the conduct that caused their error, not the conduct per se. Deane and Fitzgerald JJ concluded that the conduct:

> viewed objectively, cannot properly be seen as involving or conveying any representation to the effect that the manufacturer of the irrigation equipment was connected with the manufacturer of the plastic building blocks. Any members of the public who were confused or under a misconception in that regard were so confused or under such a misconception as a result of an unwarranted assumption which they themselves made.[24]

The term 'unwarranted assumption' employed in this passage equates to the term 'unwarranted albeit reasonable assumption'[25] used by Fisher J in *McWilliam's* and the term 'erroneous assumption' used by Smithers J in that case. It is clear from a reading of the judgments as a whole that all four judges were each referring to an assumption that a person had made prior to exposure to the impugned conduct. In *Lego*, the assumption was essentially that the toy manufacturer owned the name 'Lego', and that any product to which that name was applied must therefore have a connection with the toy manufacturer.

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19 C Lockhart *The Law of Misleading or Deceptive Conduct* (4th ed, LexisNexis, 2015) [3.30].
20 Ibid [3.31]
21 *Lego Australia Pty Ltd v Paul's (Merchants) Pty Ltd* (1982) 60 FLR 465 ('*Lego*').
22 Ibid 473.
23 Ibid, quoting from *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216, 228.
24 *Lego* (1982) 60 FLR 465, 474.
25 *McWilliam's* (1980) 49 FLR 455, 479. See above.

IV A Less Confusing Name for the Doctrine

The doctrine was described by Gummow J as a doctrine of 'erroneous preconception' in *10th Cantanae Pty Ltd v Shoshana Pty Ltd ('10th Cantanae')*.[26] We think this is a better name than the 'doctrine of erroneous assumption' because it directs attention to a preconceived idea or assumption — that is, an idea arrived at or assumption made by a person before encountering the impugned conduct. As we have endeavoured to articulate above, this is what the doctrine is concerned with. This name also avoids confusion arising from using the term 'erroneous assumption' to mean two different things, which, as we have pointed out, is what Deane and Fitzgerald JJ did in *Taco Bell*.[27] Gummow J's name conveniently allows the term 'erroneous assumption' to be confined to the second sense in which it was used by Deane and Fitzgerald JJ in *Taco Bell* — that is, an erroneous assumption made *after* exposure to the impugned conduct.

The doctrine was not applied in *10th Cantanae* by either Gummow J or the trial judge because any preconception was correct rather than erroneous. Nor did Gummow J endorse the doctrine. Agreeing with the judge at first instance, he said:

> whatever be the true scope of any doctrine of 'erroneous preconception', his Honour held, in my view correctly, that it had no application to this case. If there was a preconception, it was a correct one.[28]

V In the High Court of Australia

Early in its existence, the doctrine was endorsed by Brennan J in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd*.[29] Expressly agreeing with *McWilliam's,* but using the term 'erroneous preconceived belief' rather than erroneous assumption, he opined that 'an erroneous preconceived belief' might cause a consumer to make a false assumption in response to conduct. If that is so, the false assumption or error 'is self-induced'[30] rather than caused by the impugned conduct. The express agreement with *McWilliam's*, but use of the term 'erroneous preconceived belief', supports our view expressed above[31] that the doctrine as articulated in *McWilliam's* is concerned with thoughts harboured prior to exposure to impugned conduct, which cause a wrong impression to be taken from the conduct.

Eighteen years passed before the doctrine was again considered by the High Court of Australia in *Campomar Sociedad, Limitada v Nike International Ltd* ('*Campomar*').[32] Campomar, seeking to invoke the erroneous assumptions 'doctrine', claimed that Nike's case was based on 'exploiting a false belief — a belief built up by [Nike's own] advertising and promotional expenditure that … the only goods that are or will be marketed under the mark "Nike" are those of the respondents',[33] and that there was therefore no 'nexus between [Campomar's] conduct and [consumers'] misconceptions or deceptions'.[34]

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26 (1987) 79 ALR 299 (Full FCA), 325.
27 *Taco Bell* (1982) 42 ALR 177, 200. See above.
28 *10th Cantanae* (1987) 79 ALR 299 (Full FCA) 325.
29 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 225 ('*Parkdale*').
30 Ibid. See R Durie, 'Commercial Law Note' (1985) 59 *Australian Law Journal* 115, 117.
31 See above, 'II Origin of the Doctrine'.
32 *Campomar* (2000) 202 CLR 45. See E Webb and D Farrelly, 'Before the High Court: *Campomar Sociedad Limitada and Anor v Nike International Ltd and Anor*' (1999) 21 *Sydney Law Review* 278, written on the eve of High Court of Australia determination in *Campomar*; B McCabe, 'Consumer Protection' (2000) 8 *Trade Practices Law Journal* 180, 185–186, written shortly thereafter.
33 *Campomar* (2000) 202 CLR 45, 55 [5].
34 Ibid 83 [98].

The court, in response, did not adopt the erroneous assumptions 'doctrine' articulated in *McWilliam's,*[35] declaring that 'the courts in Australia have not applied any "erroneous assumption" doctrine'.[36] The court gave attention to that part of the joint judgment of Deane and Fitzgerald JJ in *Taco Bell* that emphasised 'no conduct can mislead or deceive unless the representee labours under some erroneous assumption'.[37] As we have noted above,[38] the 'erroneous assumption' referred to there is an erroneous assumption made *after* exposure to impugned conduct. The interest of the High Court was in that type of assumption. It did not seek to determine if they were the result of preconceptions, preferring to consider if the assumptions made were likely to be made by a reasonable consumer.[39] It distinguished between 'extreme or fanciful' assumptions on the one hand, and 'ordinary or reasonable' assumptions on the other, noting that 'the court may well decline to regard … those assumptions by persons whose reactions are extreme or fanciful'.[40] Evidence given by a witness in the case (a pharmacist) was noted by the court as an example of 'not only erroneous but extreme and fanciful' assumptions:[41]

> he assumed that 'Australian brand name laws would have restricted anybody else from putting the Nike name on a product other than that endorsed by the [Nike sportswear company]'. Further, [his] assumption … extended to the marketing of pet food and toilet cleaner … They would not be attributed to the 'ordinary' or 'reasonable' members of the classes of prospective purchasers of pet food and toilet cleaners.

There have been few subsequent considerations in the High Court of Australia of the role of erroneous assumptions in misleading or deceptive conduct cases.[42] Those that do deal with the issue have approached it in a manner that is consistent with the *Campomar* decision; they have looked for an erroneous assumption made after exposure to the impugned conduct, which might be made by a reasonable or ordinary member of the relevant class of persons said to be affected by the conduct.

In Forrest v Australian Securities and Investments Commission,[43] the High Court did not refer to any 'doctrine' of erroneous assumption. It considered the determinative issue to be: what did the impugned statements convey to their intended audience?[44] Citing *Campomar*, it was the

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35 See above, 'II Origin of the Doctrine'.

36 *Campomar* (2000) 202 CLR 45, 89 [110], citing *10th Cantanae* (1987) 79 ALR 299, 324–325; *Hogan v Pacific Dunlop Ltd* (1988) 83 ALR 403, 426. This statement was made in that part of the court's judgment concerning passing off but the court proceeded on the assumption that questions respecting sufficiency of causation were the same for both passing off and misleading or deceptive conduct: see [110].

37 See text following n 18 above.

38 See above, 'III Developments following *McWilliam's*'.

39 *Campomar* (2000) 202 CLR 45, 85 [103], citing *Parkdale* (1982) 149 CLR 191,199.

40 *Campomar* (2000) 202 CLR 45, 86–87 [105].

41 Ibid.

42 There is a brief noting of the *Campomar* case's references to the 'doctrine' in *I and L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, 125 [49], but that case dealt with remedies, rather than the characterisation of conduct. There is perhaps an allusion to the 'doctrine' in *Miller and Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, 370–371 [21]–[22], where the court noted the need for 'attention to the effect or likely effect of [conduct] unmediated by antecedent erroneous assumptions'. The *High Court in Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640, 646 [19] also briefly alludes to the concept when it notes that the trial judge's conclusion states 'the ordinary or reasonable consumer would not have any starting assumption' about the defendant's product.

43 (2012) 247 CLR 486 (*'Forrest').*

44 Ibid 504 [31].

message conveyed to an ordinary or reasonable member of that audience that mattered.[45] An extreme or fanciful understanding was not to be attributed to the ordinary or reasonable member of that audience.[46] Thus, the determination of whether conduct is misleading or deceptive, or likely to mislead or deceive, involves an inquiry into how an ordinary or reasonable member of the intended audience would receive a message.[47] *Forrest* and *Campomar* are at one.

VI Other Australian Cases

The approach taken in *Campomar* has also been followed in a number of Federal Court cases. In *Knight v Beyond Properties Pty Ltd*, Buchanan J in the Federal Court responded to evidence that certain witnesses had made an erroneous assumption about a connection between Mr Knight (the author of a series of children's books with 'Mythbusters' in the title) with the *Mythbusters* TV show. He held that their beliefs, although misplaced, did not necessarily mean that their evidence should 'be rejected simply because their impressions or reactions were coloured or affected by a wrongful assumption'.[48] However:[49]

> The particular knowledge and association of the witnesses relied on by Mr Knight prevents them … being regarded as representative of the class as a whole … [T]he reactions of these witnesses, who each had a pre-existing association of some kind or other with Mr Knight, are not a reliable or representative guide to the reactions to be imputed to ordinary or typical members of the class in question.

Peter Bodum A/S v DKSH Australia Pty Ltd[50] was a case dealing with the sale of coffee plungers whose shape and features were alleged to be likely to mislead consumers into believing that they were either manufactured by or promoted with the sponsorship or approval of Bodum. The court held:[51]

> In order to test whether a misconception has arisen or might arise amongst members of the relevant cohort by reason of the impugned conduct, the inquiry is to be made notionally of the hypothetical individual excluding 'assumptions by persons whose reactions are extreme or fanciful' … The question is 'whether the misconceptions, or deceptions, alleged to arise, or to be likely to arise, are properly to be attributable to the ordinary and reasonable members of the class of prospective purchasers' … The evidence should be viewed objectively to determine whether the reputation subsisting in Bodum's coffee plunger is such that members of the public (that is, ordinary and reasonable members of the relevant class excluding those making extreme or fanciful assumptions) would assume that a rival product exhibiting those features … is a product of Bodum or a product sold with the licence, sponsorship or approval of Bodum.

In *Australian Competition and Consumer Commission v AGL South Australia Pty Ltd*, it was noted:[52]

> In some cases, the circumstance that a representation is misleading only because of an erroneous assumption made by the representee will preclude a finding of the requisite causal link. In

45 Ibid 508 [43].
46 Ibid 510 [50].
47 Ibid 512 [59].
48 *Knight v Beyond Properties Pty Ltd* (2007) 71 IPR 466 [169]; upheld on appeal by the Full Federal Court: (2007) 74 IPR 232.
49 Ibid [173]–[174].
50 *Peter Bodum A/S v DKSH Australia Pty Ltd* (2011) 280 ALR 639.
51 Ibid [204]. The quotes are from *Campomar* (2000) 202 CLR 45, 86–87 [105].
52 *Australian Competition and Consumer Commission v AGL South Australia Pty Ltd* [2014] FCA 1369 [228].

> particular, in cases in which the misleading or deceptive character of conduct or of a representation depends on the representee having made an 'extreme or fanciful' assumption, the requisite causal nexus will not usually be found as such assumptions will not be attributed to the ordinary or reasonable class of representees.

In *Telstra Corporation Ltd v Phone Directories Company Pty Ltd*, Murphy J in the Federal Court held that the erroneous assumption doctrine was relevant to a claim that the defendant's conduct, in publishing telephone print directories, a website and mobile phone app, was likely to mislead directory users and advertisers that those products were published by or were otherwise associated with Telstra:[53]

> This is relevant in the present case because I infer that it is likely that many consumers think that all telephone directories originate from or are associated in some way with Telstra. I infer that they do so because for many decades Telstra's predecessors were government agencies and the sole producers of official telephone directories.

The trend of current Australian authority is thus contrary to the approach in *McWilliam's*. The 'critical question' has not been considered to be, as it was in *McWilliam's*, 'whether conduct otherwise neither misleading nor deceptive acquires deceptive quality because persons under the influence of erroneous ideas draw erroneous inferences concerning it'.[54] Rather, the courts have focused on the message conveyed by the impugned conduct to an ordinary or reasonable member of the target audience.[55]

VII Erroneous Assumptions in New Zealand

Erroneous assumptions as a factor in misleading or deceptive conduct litigation first appeared in *Mills v United Building Society* ('*Mills*'), the second case ever to consider s 9 of the *Fair Trading Act 1986* (NZ).[56] Mr Mills purchased a leasehold property, believing that its value was sufficient to provide security for a substantial mortgage that he planned to take to fund an upgrade of the property. He discovered later that the lease was worth much less than he had paid. He claimed that the defendant had breached s 9 by '[s]tating or implying' that the lease was worth around $230,000, when it was in fact worth around $66,000.[57] He had been warned that the property was leasehold, that the lease contained some onerous terms and that he ought to seek legal advice. He was also given a copy of the lease, which 'he simply skimmed through … and assumed it was similar to [more common] leases, with which he was very familiar … He quite failed to pick up or appreciate the onerous rental conditions'.[58] Sinclair J in the High Court noted *McWilliam's*[59] and held:[60]

> if a party assumes a certain set of facts which leads him to a particular conclusion, then in the absence of anything said or done by any other party which results in that conclusion being reached, it is not possible for the parties to say they have been misled or deceived by the conduct of that other party. It highlights the basic principle that it is the conduct of the party in question which must be looked at to see whether it has deceived or misled the party

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53 *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* (2014) 316 ALR 590 [405], citing both *McWilliam's* and *Campomar*.
54 *McWilliam's* (1980) 49 FLR 455, 465 (Smithers J).
55 *Campomar* (2000) 202 CLR 45, 86–87 [105]; *Forrest* (2012) 247 CLR 486, 508 [43].
56 See *Mills v United Building Society* [1988] 2 NZLR 392 (NZHC and NZCA) 404.
57 Ibid 395.
58 Ibid 412.
59 Ibid 406.
60 Ibid 407–408 and 410; upheld by the Court of Appeal: [1988] 2 NZLR 392 at 411–413.

> complaining … [Mr Mills's belief] was an assumption which was erroneous and not brought about at all by the conduct of the defendant … it was an assumption made by him — and one that was not warranted.

The approach taken in the *Mills* case thus mirrors that taken in *McWilliam's*. Mr Mills had preconceived ideas about ordinary leases. He applied those ideas to an extraordinary lease, which caused him to misunderstand that lease. He may have been misled or deceived, but not by the impugned conduct. *Mills* is the high-water mark of the 'doctrine' of erroneous assumption in New Zealand.

In Trust Bank Auckland Ltd v ASB Bank Ltd ('Trust Bank'),[61] the court was encouraged by the defendant to find that 'consumer confusion based on erroneous assumptions … does not establish a breach of the section', but 'doubt[ed] whether an unqualified general proposition to that effect was intended to be laid down and, if it were, would respectfully regard it as a gloss on the statute open to misuse'.[62] On the subject of erroneous assumption, the court stated that it generally agreed with Deane and Fitzgerald JJ in *Taco Bell.*[63] There is a difficulty with this statement of general agreement because, as noted above,[64] Deane and Fitzgerald JJ in *Taco Bell* used the term 'erroneous assumption' to mean two different things and the court in *Trust Bank* gave no indication whether it was agreeing with both or just one of those meanings.

The most recent New Zealand reference to erroneous assumptions occurred in the Court of Appeal's decision in *Tasman Insulation New Zealand Ltd v Knauf Installation Ltd* ('*Tasman Insulation Appeal*').[65] In the High Court, Brown J concluded:[66]

> a hypothetical reasonable person is likely to form the erroneous assumption that the Earthwool® product is manufactured from animal wool, probably sheep's wool … It is my conclusion that the erroneous assumption would be a reasonable and not fanciful assumption.

The Court of Appeal agreed. Randerson J, for the court, said:[67]

> Addressing the 'so-called doctrine of erroneous assumption' and the possibility prospective purchasers might adopt false assumptions that are extreme or fanciful the Judge[68] adopted the approach of the High Court of Australia in *Campomar Sociedad, Limitada v Nike International Ltd.*[69] The initial question which must be determined is whether the misconceptions or deceptions alleged to arise are properly attributed to the ordinary or reasonable members of the classes of prospective purchasers.

This passage is problematic. The approach in *Campomar* was not that of the 'so-called doctrine of erroneous assumption'. In truth, both Brown J and the Court of Appeal followed *Campomar*, not the 'so-called doctrine of erroneous assumption'.

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61 *Trust Bank Auckland Ltd v ASB Bank Ltd* [1989] 3 NZLR 385 (NZCA) ('*Trust Bank'*). See also *Bonz Group Pty Ltd v Cooke* (1996) 7 TCLR 206; *Commerce Commission v Telecom Corp. of New Zealand Ltd* (1990) 4 TCLR 1.

62 *Trust Bank* [1989] 3 NZLR 385, 389, citing *Parkdale* (1982) 149 CLR 191.

63 *Taco Bell* (1982) 42 ALR 177, 200.

64 See above, 'III Developments following *McWilliam's'.*

65 *Tasman Insulation Appeal* [2016] 3 NZLR 145.

66 *Tasman Insulation New Zealand Ltd v Knauf Installation Ltd* [2014] 108 IPR 162 ('*Tasman Insulation*'), [313] and [317].

67 *Tasman Insulation Appeal* [2016] 3 NZLR 145 [225].

68 Brown J in the High Court: *Tasman Insulation* [2014] 108 IPR 162.

69 *Campomar* (2000) 202 CLR 45, 86–87 [105].

VIII Confusion

Reference to a 'doctrine' of erroneous assumption is beset with semantic difficulties. As originally articulated in *McWilliam's*, 'erroneous assumption' referred to an idea or understanding that a person had prior exposure to impugned conduct, which makes them likely to err when encountering that conduct. In *McWilliam's*, the focus was on determining if the consumer had preconceived ideas that caused them to be misled when they applied those ideas to impugned conduct.

But the term 'erroneous assumption' has also been used to refer to an assumption a person, without preconceived ideas, might be likely to make in response to conduct. It is universally accepted that 'no conduct can mislead or deceive unless the representee labours under some erroneous assumption'.[70] But here the phrase refers to an assumption made in response to conduct, without bringing to bear preconceptions on that conduct. This is the way the phrase has been used in most cases subsequent to *McWilliam's*. Thus, in *Campomar*, when the High Court of Australia referred to 'the nature of the erroneous assumption which must be made'[71] before conduct may be characterised as misleading or deceptive or likely to mislead or deceive, it was in the context of assessing likely reactions of persons to impugned conduct. It was not in the context of persons reacting to conduct under the influence of a preconception.[72]

Because the phrase has been used to mean two different things, it is perhaps not surprising that there is confusion about the so-called 'doctrine' of erroneous assumption. The courts have conflated the two meanings, confounding clear thinking on the characterisation of conduct as misleading or deceptive or likely to mislead or deceive.

Tasman Insulation[73] illustrates the confusion. In the High Court, Brown J referred to 'the so-called doctrine of erroneous assumption',[74] citing *Campomar* for this description. He then immediately cited the words of Deane and Fitzgerald JJ in *Taco Bell*, where they use the phrase 'erroneous assumption' in accordance with the second meaning we have articulated above.[75] All further references by his Honour to an 'erroneous assumption' are in connection with an erroneous assumption caused by impugned conduct, not to an erroneous assumption caused by ideas or understandings that precede exposure to such conduct. The confusion continued in the Court of Appeal. Randerson J, for the court, spoke of '[a]ddressing the 'so-called doctrine of erroneous assumption' and the possibility prospective purchasers might adopt false assumptions that are extreme or fanciful …'.[76] This conflates the two meanings of 'erroneous assumption'. In both courts, the case was decided by assessing the likely consumer reaction to the conduct impugned, not by assessing the likely consumer reaction, having regard to preconceptions.

IX A Solution

The confusion can be overcome by discarding reference to a 'doctrine of erroneous assumption'. In truth, any such 'doctrine' did not advance beyond *Lego*. From *Taco Bell* onwards, the phrase 'erroneous assumption' has been used to refer to a likely consequence of impugned conduct,

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70 *Taco Bell* (1982) 42 ALR 177, 200; See also *Lego* (1982) 60 FLR 465; *Forrest* (2012) 247 CLR 486; *Trust Bank* [1989] 3 NZLR 385; *Bonz Group Pty Ltd v Cooke* (1996) 7 TCLR 206; *Commerce Commission v Telecom Corp. of New Zealand Ltd* (1990) 4 TCLR 1.

71 *Campomar* (2000) 202 CLR 45, 86 [104].

72 See generally *Campomar* (2000) 202 CLR 45, 86–87 [104]–[105].

73 *Tasman Insulation* [2014] 108 IPR 162 (NZHC); *Tasman Insulation Appeal* [2016] 3 NZLR 145 (NZCA).

74 *Tasman Insulation* [2014] 108 IPR 162 [280].

75 *Taco Bell* (1982) 42 ALR 177, 200. See text following n 18 above.

76 *Tasman Insulation Appeal* [2016] 3 NZLR 145 [225].

unencumbered by preconceptions held by persons likely to be affected by that conduct. To describe the phrase as a 'doctrine' muddies the water and risks breathing life back into the moribund approach of Smithers and Fisher JJ in *McWilliam's*. Since *Taco Bell*, the courts, despite the occasional reference to a 'doctrine of erroneous assumption', have not tried to divorce error from impugned conduct, as Smithers and Fisher JJ did in *McWilliam's*. Instead, they have accepted that error that is a consequence of conduct (albeit not all such error) will suffice to characterise that conduct as misleading or deceptive or likely to mislead or deceive. Error that is extreme or fanciful will not suffice. To continue to speak of a 'doctrine of erroneous assumption' is to compound the confusion identified above. In 1989, French J, as he then was, writing extra-judicially, stated that *McWilliam's* 'should not be allowed to burden the language of the statute with a quasi-doctrine of "erroneous assumptions"'.[77] The courts have met his wish. It is time to eschew reference to a 'doctrine of erroneous assumption'.

77 French, above n 3, 258. See also Webb and Farrelly, above n 32, 293, where the desire was expressed that the High Court in *Campomar* would 'define the ambit of "erroneous assumption" … and perhaps provide guidance regarding the standard to be applied to those persons who are privy to the impugned conduct'.

LANDLORD AND TENANT RELATIONSHIPS ON SHAKY GROUND AFTER THE CANTERBURY EARTHQUAKES

Toni Collins *

Abstract

The Canterbury earthquakes in 2010 and 2011 not only shook what was supposed to be firm ground beneath us but tested what we thought were firm relationships. Commercial tenants who had enjoyed good relationships with their landlords prior to the earthquakes found these relationships changed afterwards and, in many cases, deteriorated. For many parties, their inability to access buildings owing to the cordon set up around the central business district, the loss of essential services, the damage to their buildings and the prospect of long-term repairs and strengthening were significant issues they had to deal with. To make matters worse, the leases did not cover these problems and the law was unclear, which meant the parties were left in the unenviable position of not knowing their legal rights.

This paper reveals the results of empirical research undertaken soon after the earthquakes. It highlights the problems faced by commercial landlords and tenants, how they dealt with each other to resolve them and the lessons to be learned from these experiences to promote change for the future.

I Introduction

The Canterbury earthquakes in 2010 and 2011 caused significant and widespread damage to the central business district (CBD) of Christchurch. Two multi-storey buildings collapsed; many others suffered substantial damage. Over 1,000 commercial buildings had to be demolished.[1] In order to safeguard the public from dangerous buildings and demolition work, a cordon was set up around the CBD, making a 3.9 square kilometre red zone to which only authorised people had access. The cordon remained in place for nearly two-and-a-half years, although it was reduced over that time as areas were made safe. This was an unprecedented response to a natural disaster in New Zealand.

Although many buildings were seriously damaged, there were a large number that came through the earthquakes with only minor issues. These buildings could have been occupied and used, but the cordon prevented access to them. This caused a major problem for commercial tenants[2] as they could not access their buildings and therefore operate their businesses. Tenants turned to their leases to clarify their legal rights but discovered this issue and many others — such as the loss of essential services and long-term repairs and strengthening of buildings — were not covered. The legislation did not provide clarity and it was unclear whether the common law provided a remedy.

Landlords and tenants were left in the unenviable position of not knowing their legal rights. Were tenants required to pay rent for a building they could not access or use? Could they terminate their leases on this basis? Owing to the uncertainty of the situation, parties had

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1 The demolitions list on the Canterbury Earthquake Recovery Authority (CERA) website reported that 1,086 had been demolished as of April 2015 <www.cera.govt.nz>.

2 All tenants and landlords referred to are commercial tenants and commercial landlords with leases of commercial buildings. Residential tenancies were not part of this research. Furthermore, the tenant and landlord participants were not connected in any way with each other.

to make their own decisions about what to do. Some tenants stopped paying rent and found alternative premises; some tried to terminate their leases. Landlords were torn two ways. From a legal perspective, they believed they had the right to demand rent because there was nothing in the lease that provided otherwise. However, they also understood their tenants' reasons for not paying rent and some felt that, from a moral point of view, it was not right to demand rent in a post-disaster situation. The problem was that landlords also had financial obligations, which were supposed to be met by the rent they received. In their defence, they were not the ones preventing tenants from accessing or using the buildings. This was a difficult situation for all involved.

Leaving landlords and tenants to resolve these problems themselves was not ideal. First, the obvious power imbalance between landlords and tenants created a tension between their respective positions. Second, the difference in resources available to each created a problem in terms of access to justice. Third, the length of time the courts were taking to deal with cases in a post-disaster environment did not provide for the needs of these parties.

This paper examines how the relationships between landlords and tenants were affected as a consequence of the earthquakes. It describes the results of empirical research obtained from those who had direct experience of earthquake-related lease issues, and from lawyers who acted for clients facing these problems. It looks at how the parties dealt with each other in light of the challenges they faced and how they resolved their issues. To conclude, there is a reflection on lessons learned from the research and suggestions for change in the hope that there will be an improved outcome for landlords and tenants in possible future events.

II Relationships Put to the Test

A The Research

Empirical research was undertaken by questionnaires and interviews to obtain qualitative data. In total, information from 33 participants was collected: 14 tenants, 10 landlords (including one property manager acting for landlords) and 11 lawyers who had advised tenants and/or landlords who experienced issues with their commercial leases. The landlord and tenant participants came from a broad cross section of business. The lawyers were from a range of law firms of various sizes, including a lawyer in sole practice.

The questionnaires used a mixture of multi-choice and open-ended questions. For both types, participants were given an opportunity to enlarge on their answers. The interviews sought to capture any information that may have been missed in the questionnaires by asking participants to tell their story, talk through responses given and expand where necessary or desired. The majority of the interviews took place in 2013 and 2014, at a time when those who had lived through the events had taken time to reflect on their experiences, having dealt with many insurance, employment and personal issues that also arose as a consequence of the earthquakes.

1 TENANTS

New Zealand is made up of predominately small to medium-sized businesses.[3] To ensure the participants were representative of a broad range of businesses, there was also a sole trader, a trading trust and a non-governmental organisation (NGO). Most of the tenants had businesses in Canterbury, although two conducted business at a national level and one internationally. At the

3 It states on the Ministry of Business, Innovation and Employment website that small enterprises of up to 20 employees account for 97 per cent of all enterprises in New Zealand: 'Small enterprise' (29 August 2018) *Ministry of Business, Innovation and Employment* < www.mbie.govt.nz/info-services/business/business-growth-and-internationalisation/small-enterprise> .

time of the earthquakes,[4] 12 of the 14 tenants leased only one building; one had leases of between two and five buildings; and one had leases of more than 10 buildings. Most tenants shared their buildings with other tenants.[5] The majority of tenants had landlords with Canterbury-based businesses; only a few had landlords with national or international businesses. These landlords comprised partnerships, companies and trusts.

II LANDLORDS

The landlord participants were mainly companies with Canterbury-based businesses,[6] although one operated in New Zealand and internationally. Four leased between one and four buildings, four leased between five and 20 buildings, and one leased over 100 buildings. The majority of landlord participants had tenants with Canterbury-based businesses, three had tenants with national businesses and two had tenants with international businesses.

III LAWYERS

The lawyer participants were a cross section of the legal profession in Christchurch who practised commercial and/or property law. They were all senior lawyers having been in practice for eight years or more, and eight of them had been in practice for more than 20 years. One was a sole practitioner. The majority of the lawyers acted for both landlords and tenants, with only two acting solely for tenants.

Nine of the 11 lawyers had been tenants themselves at the time of the earthquakes, and two had also been landlords. Their ability to give advice about earthquake-related lease issues was affected by their own experiences as tenants and landlords. They were able to understand their clients' problems and 'had a real appreciation for the practical implications of situations'.[7]

B Research Results

The research results point strongly to the fact that the problems that arose as a consequence of the earthquakes tested landlord and tenant relationships. It is clear that prior to the earthquakes these relationships were strong and in good shape. Tenants described their relationships with their landlords prior to the earthquakes as being 'very good' or 'good', with only one saying it was 'poor'.[8] Landlords too described their relationships with their tenants prior to the earthquakes as 'extremely good' and 'very good'.

The research revealed, however, that for many tenants the positive views held of their relationships prior to the earthquakes changed afterwards. Half said their relationships had deteriorated. By comparison, only one landlord participant reported their relationship with the tenant had worsened. There were many reasons for this, including the particular issues that arose for the parties, how the parties dealt with each other and how the issues were resolved.

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4 When the term 'earthquakes' is used, it refers to the period starting with the first earthquake on 4 September 2010 and continuing for the sequence of large earthquakes until December 2011, including the most damaging aftershock on 22 February 2011.

5 Eleven of the 14 tenants had between two and 12 other tenants in their buildings, while three were the sole tenant.

6 Eight of the 10 landlords had Canterbury-based businesses.

7 FQ008. The codes beginning with FQ were given to participants in the research to ensure anonymity.

8 The scale was between 1 and 5 with 1 being 'poor'; 2 being 'not very good'; 3 being 'good'; 4 being 'very good'; and 5 being 'extremely good'.

I THE ISSUES ARISING FROM THE EARTHQUAKES

a. The cordon, lack of essential services, damage and long-term repairs and strengthening

A multitude of issues arose for landlords and tenants as a consequence of the earthquakes. A major issue was the cordon. It was difficult and slow to get information about the buildings situated within the cordon in order to determine whether the leases could be terminated and to obtain business equipment, stock, records and other business necessities from them. Furthermore, the local authority was unable to provide a time frame for the required work in the CBD and was therefore unable to say how long the cordon would remain in place. Landlords and tenants did not know what to do in this situation.

One lawyer said:

> [The disputes we had were] more the ones where the building itself was actually okay but nothing around it was okay or they were stuck in a cordon and the landlord was saying, 'well it's tenantable and simply because you can't get access to it because of the cordon is not my problem and you will continue to pay rent'. [9]

There were also other issues. Essential services were disrupted owing to damaged infrastructure in the central city. Power, water and waste facilities were unavailable for many months. Furthermore, over 2,000 buildings in the CBD required assessment for damage and either demolition or repair. Owing to a shortage of suitably skilled personnel to carry out both assessment and repair work, there were significant delays despite many coming from other parts of New Zealand and overseas. Delays were also caused by insurance disputes and the complicated nature of the repair work to be undertaken.

b. The lease did not provide for the issues that arose

A major problem for landlords and tenants was the uncertainty about their legal rights. Most participants had an Auckland District Law Society lease 2008, 5th edition or earlier (ADLS lease), being one of two standard form leases commonly used in New Zealand.[10] The ADLS lease, the focus of this research,[11] did not cover the situation of a building that could not be accessed, nor did it cover a number of the other earthquake-related issues. As a consequence, the parties were unclear about what to do. Did tenants have to pay rent for an inaccessible building, for a building without essential services, for a building requiring long-term repairs or strengthening? Could the lease be terminated for these reasons? The lease simply did not provide the answers. One lawyer explained:[12]

> For the vast majority of people, and I suspect 95 per cent of practitioners, they would never have to deal with [these issues] in the entire lifetime of [their] career. All of a sudden, in the space of two years, every single practitioner had to try and figure out what these [clauses in the ADLS lease] actually mean and try to work through them … I think the earthquake created a lot of other issues that were simply not anticipated and I think … the [leases] simply did not cover the number of issues that needed to be dealt with and I think that all of the uncertainty came out.

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9 FQ006.

10 The other commonly used lease is the Property Council of New Zealand Standard Office lease.

11 Most participants had the ADLS lease; it was therefore the focus of this research. Thirteen out of 14 tenants and six of the nine landlords used this lease, and the property manager reported that the majority of his landlords had this lease. Of the lawyer participants, seven said all clients who sought advice on earthquake-related lease issues had an ADLS lease; the other three lawyers reported 90 per cent of their clients used this lease too. Any other forms of lease mentioned by participants were very much in the minority.

12 FQ010.

Furthermore, the legislation[13] did not assist and it was unclear whether the common law would apply.[14]

c. Hardship suffered

Tenants did not know if they could terminate their leases in the aftermath of the earthquakes. Many realised early on the situation was dire and worked as quickly as possible to obtain new premises to keep their businesses going. As a consequence, they became liable for two leases: the one for their inaccessible building and the one for their alternative premises. However, a number of tenants stopped paying rent for their inaccessible building so, at that time, they were only paying rent for one. Most landlords were able to claim on their insurance for loss of rent.

With the CBD out of bounds, tenants had the expense of moving and setting up business elsewhere. The suburbs and the outskirts of the city were popular places, but, owing to the demand for premises, rents in these areas increased. Furthermore, landlords of buildings in these areas who had struggled to fill them in the past now had a strong demand from tenants desperate for premises. Therefore, leases were obtained for terms longer than had been the norm in the CBD. This meant that tenants who were still contractually bound by their leases in the CBD ran the risk their building in the CBD would become available before the second longer term lease had finished. As a consequence, tenants who had stopped paying rent because their buildings were inaccessible could become liable for rent for two buildings in the future.

Many tenants could not afford to pay rent for two buildings. Nor did they have the means to test the legal position, particularly as the law was unclear and they could not afford to risk being unsuccessful.

Some tenants did not want to return to the CBD even if their buildings became accessible. It was clear the CBD had suffered significant damage and this meant a loss of inner-city workers, pedestrians and therefore foot-traffic, which was the main source of business for those working in the city. All of these uncertainties created worry and stress for tenants. Landlords may also have been concerned if their tenants could not conduct business because they might have been unable to pay their rent.

d. Access to information

One of the main criticisms tenants had after the earthquakes was their inability to obtain information. First, they did not have authority to access their buildings. Landlords were able to apply for access rights to the cordoned area, the CBD's red zone, through the Canterbury Earthquake Recovery Authority (CERA), which was in control of the area. Tenants were not. They were reliant on their landlord for access to retrieve items from their buildings or to assess their buildings for damage, which was difficult where relations were strained.

Second, tenants had problems obtaining information about their building, which they needed in order to decide whether it was likely to be repaired or demolished. This information would have given tenants more insight into whether their lease would remain on foot or be terminated and they could have planned accordingly. Landlords, as owners, received information from engineers, the authorities and their insurance companies. However, they had no obligation to

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13 The legislation that covers commercial leases is the *Property Law Act 2007* (NZ). The *Property Law Act 1952* (NZ) (repealed) may still have applied to leases dated prior to 1 January 2007 when the latest Act came into force.

14 One possible solution might be to apply the common law doctrine of frustration to bring the leases to an end, but, at the time of the earthquakes, it was unclear whether it applied. This research is outside the scope of this paper and is addressed in the author's thesis, see TL Collins, *The doctrine of frustration, commercial leases and the Canterbury earthquakes* (PhD Thesis, University of Canterbury, 2016).

pass any information on to tenants. Most landlords obtained building and engineering reports for insurance purposes, but few tenants were shown or had access to these reports. In some cases, tenants asked the landlord directly for the report, but they were not forthcoming. In other cases, the reports were obtained indirectly through a property manager or insurance assessor, which tenants perceived to be a most unsatisfactory way of getting information.

The lack of information-sharing left tenants feeling very frustrated and disempowered. One expressed his views:

> We were only able to get copies of the engineering reports and CERA information through our landlord, so we felt we did not have direct access to official information that would have helped our decision-making. We felt powerless and unable to get the information and advice we needed.[15]

Furthermore, insurance companies had control of important information on the buildings. One landlord reported that the insurance company told them to keep building reports confidential, which meant they did not have the authority to share the information with the tenant.

Lawyers also reported a problem with the disclosure of information to tenants. Half of the lawyers thought there should be a legal requirement that landlords disclose information on their buildings to tenants, because in their experience this was not done.

e. Access to justice

Landlords and tenants had problems with access to justice. After the earthquakes, there was very little litigation between landlords and tenants over their earthquake-related lease issues. Few tenants sought legal advice or considered litigation for the simple reason that the court system is expensive and slow. One tenant even said it was prepared to pay two rents rather than challenge the landlord's demand through the court. There is a clear problem here.

II HOW THE PARTIES DEALT WITH EACH OTHER

The earthquake-related lease issues created a lot of difficulties for landlords and tenants. The research reveals that the way the parties dealt with each other after the earthquakes explains why tenants reported their relationships with their landlords had deteriorated. Tenants reported that one of their main frustrations was the lack of communication. Many comments evidenced a general feeling of being kept in the dark or out of the loop in relation to matters concerning the building. This may not have been the landlords' intention, but was certainly the perception of a large number of tenants. For example, one tenant said:[16]

> The landlord would not respond to our communications, did not give us any information about the building or its status. He referred us to his lawyer rather than speaking to us directly. It was only after he had resolved his own insurance situation with the building that he was prepared to speak with us.

Another said:[17]

> I rang the company [landlord] every month looking for an update. They did give us a release [from the lease] eventually, but there was a lot of time where they obviously were in a position to do so and chose not to reveal that to us.

Another frustration for tenants was the lack of certainty about their legal rights. They did not understand why they were being asked to pay rent for their buildings when they were inaccessible and unable to be used or occupied. A common reaction was summed up by one tenant:[18]

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15 FQ200.
16 FQ200.
17 FQ204.
18 FQ207.

> I don't see why the tenant should have to pay rent for a building that cannot be accessed or used. It is up to the landlord to provide the necessary environment we pay our monthly rent for. The landlord has got more money than the tenant.

Tenants also believed the law would reflect the morality of the situation. They were clear that, if the building was not available for them to use, they should not have to pay rent unless they had done something to make it untenantable. One tenant said, 'I did not find out my legal rights. I just assumed I didn't have to pay for a building I couldn't access'.[19] For others, it was a matter of not being released from the lease. A good example was one tenant who had to live with the uncertainty of not knowing whether she would have to go back to the building in the city after the February 2011 earthquake. She was out of the building for eight weeks and then returned only to be told seven months later the building needed earthquake strengthening and she would have to move out again. Three-and-a-half years passed before she was told she had been released from her lease.[20]

Landlords were also unclear about their legal rights. They too had financial obligations that needed to be met by rent payments. Some landlords were able to claim insurance to cover loss of rent; however, some policies did not cover the total length of time the building was inaccessible and the rent remained unpaid.

Most landlord participants took a pragmatic approach to dealing with the situation. It was clear they were concerned about their relationships with their tenants. One lawyer said:[21]

> There was a very strong view that [rent] was payable; that the cordon is not [the landlord's] problem, it's [the tenant's] problem. But in most cases the commercial decision that was made was that these guys aren't going to pay so you have to go and enforce it. Do you want to spend money enforcing [payment of rent] and damage your relationship and lose the tenant? I think the view was that reading the strict interpretation of the lease, tenants were liable to pay but we just came to a commercial decision [that] it's actually unfair to require them to pay and it's just not a good look if you want to get them back.

III RESOLUTION OF ISSUES

Only half of the tenant participants sought legal advice about their earthquake-related lease issues, the main reason being the expense. Landlords sought help from their lawyers, but the legal advice obtained was that the law was unclear, which did not help them. Therefore, most participants chose a pragmatic solution. The majority of tenants stopped paying rent for their building in the CBD and their landlords claimed on their insurance for loss of rent. Some tenants, however, continued to pay rent for two buildings, usually where the landlord did not accept the tenant's decision not to pay. This is likely to have been in situations where the landlord's insurance did not pay out. One tenant told of her experience:

> I contacted the landlord and said, 'I have signed up a lease for another building … I understand we are not going to be able to get back into the building for some time so we [will] no longer be paying rent'. He said, 'Read your contract; your contract states that if you don't pay you will have penalties to pay as well'. I made a decision to continue paying the lease because the penalty was 25 per cent … so it was a lot of money to be penalised if we didn't pay.[22]

A number of tenants who had no communication with their landlords immediately after the earthquakes not only stopped paying rent, but also walked away from their leases and were

19 FQ214.
20 FQ205.
21 FQ005.
22 FQ208.

never contacted again. There was no official end to the lease by the parties agreeing to terminate it; silence, it seems, was louder than words. However, that approach does not provide certainty for either party, particularly tenants, because at any time during the remaining term of the lease the landlord might say the building is now available for use and expect the tenant to meet his or her contractual obligations. This problem is illustrated by one tenant whose building had minimal damage but was inaccessible for years owing to the cordon. Her landlord never contacted her, so she was unsure about his intentions. However, she was adamant she did not want to return to her building in the CBD:[23]

> I had signed up [to a new lease] in the winter after the earthquakes but I was still legally liable for the other lease. But I thought I don't care, they can take me to court if they made me go back … I wasn't willing to go back.

In other cases, solutions were worked out between the parties. A property manager (acting for landlords) gave one example. His problem was tenants not wanting to return to their buildings when they were available for use. As there was nothing in the lease that applied to this situation, he took what he thought was a fair approach to the problem and developed his own rule of thumb: if the tenants were unable to return to their buildings for more than a year, they were given the choice to return or terminate the lease; if the time was under a year then the property manager held the tenants to the lease. The property manager said he did not have any tenants complain about this approach, but he did admit that he may not have been as accommodating to tenants had the insurance companies not covered the loss of rent.

III Reflection on Lessons Learned

In times of disaster, it is essential that business relationships stay strong to work through the inevitable issues that will arise. One way to do this is to provide clear, robust law to which parties can turn, to determine their legal rights at a time of uncertainty. In addition, an affordable and efficient dispute resolution process should also be available to the parties for those problems that are not foreseen and therefore not provided for.[24] Both were lacking at the time of the Canterbury earthquakes.

A suggested solution to this problem is to enact legislation that is specific to commercial tenancies: a Commercial Tenancies Act.[25] It could serve two purposes: one to provide separate legislation that would not only acknowledge the unique and ongoing relationship that exists between landlords and tenants, but also cover aspects of law that are not provided for in the leases; second, it could set up a dispute resolution service for commercial landlords and tenants that they do not currently have.

A new Commercial Tenancies Act could contain provisions to deal with the earthquake-related lease issues that might once again arise — in particular, inaccessible buildings, lack of essential services and long-term repairs. It could also provide a solution to the problem of communication and information-sharing highlighted by a number of tenants. This could be dealt with by the imposition of a new obligation on the parties to deal with each other in good faith, similar to the good faith requirements for employer/employee relationships in the *Employment Relations Act 2000*.[26] The obligation could include a duty to disclose information to each other,

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23 FQ210.

24 It must allow parties to represent themselves. As noted earlier, half of the tenants did not seek legal advice or representation because they could not afford the cost of a lawyer.

25 In Canada, British Columbia has a *Commercial Tenancy Act* [RSBC 1996] c 57, but it is outside the scope of this paper to examine this and the proposals for a new Act.

26 *Employment Relations Act 2000*, s 4.

and this duty could be implied into every lease. The parties should not be able to contract out of it.

Tenants were clear that they did not want to go to court to deal with their earthquake-related lease issues because it was too expensive and too slow (they needed answers quickly).[27] Therefore, the other purpose of a new Act could be to establish a Commercial Tenancies Tribunal as an affordable and speedy dispute resolution service with judges who have a specialist knowledge of the law in this area. It would not be difficult to establish such a tribunal as it could be based on the Residential Tenancies Tribunal, which is already well established in New Zealand. Alternatively, to reduce costs, there could be one Tenancy Tribunal with two arms to cover both residential and commercial tenancies.

Another option is to set up a specialist tribunal specifically to deal with the unique issues arising from a disaster, which would operate in times of emergencies. The government has shown it is willing to provide such services by the introduction of the new Canterbury Earthquakes Insurance Tribunal Bill on 1 August 2018. Its purpose is to establish a tribunal to provide 'speedy, flexible and cost-effective services to help resolve insurance claims between policyholders and insurers' that have arisen as a result of the earthquakes.[28] This type of tribunal might have been a great help to landlords and tenants in their time of need immediately after the Canterbury earthquakes.

IV Conclusion

The Canterbury earthquakes were a significant natural disaster that created problems landlords, tenants and lawyers had not turned their minds to previously. The erection of a cordon around the CBD was an unprecedented response to the devastation. The loss of essential services and the substantial damage to buildings necessitating extensive repair work and strengthening were also issues that affected landlords and tenants. The leases did not provide for these problems and the law was unclear. The parties did not know their legal rights and, consequently, communication decreased and suspicion increased. Tenants, in particular, believed their relationships with their landlords had deteriorated after the earthquakes. This is not a satisfactory outcome because landlords and tenants have a special relationship that requires them to interact on an ongoing basis over many years.

It is simply not feasible nor cost effective for commercial leases to cover every possible eventuality that might befall a building following a natural disaster. However, there are things that can be done in preparation. First, lessons can be learned from the Canterbury earthquakes and the law expanded to provide clarity around the issues that arose. Second, where the law does not cover an issue, there should be a strong, quick and affordable dispute resolution process for the parties to turn to, rather than having to negotiate the court system. This can be achieved by the creation of a Commercial Tenancy Tribunal through the introduction of a Commercial Tenancies Act. This Act could also impose an obligation on the parties to act in good faith and share information with each other.

Parties are more likely to resolve their issues and maintain good relationships through difficult times if they know their legal rights. Certainty in the law is essential to achieve this objective, which in turn is important for the long-term recovery of the affected community, city and nation.

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27 The High Court set up the High Court Earthquake List in 2012 to manage litigation resulting from the Canterbury earthquakes, and this is ongoing.

28 Canterbury Earthquakes Insurance Tribunal Bill, cl 3.

FACEBOOK: BRIDGING THE 'OTHERNESS' OF DISTANCE LEGAL EDUCATION

Amanda-Jane George, Alexandra McEwan** and Julie-Anne Tarr****

Abstract

In *The Merchant of Venice*, Shylock the Jew represents the quintessential 'other'. While he longs for acceptance, he is ultimately humiliated, and his alterity affirmed. Shylock's sense of otherness fuels his appeal to the Venetian court to allow him his bond — a pound of his tormentor's flesh. This paper adopts the concept of otherness as a lens to discuss distance education theory and student experience in online legal education. Fully online legal education is a relatively new form of pedagogy, and it presents a range of challenges. One of those challenges is how to reach out to undergraduate law students who — by virtue of the mode of education they engage in, their place of residence and other demographic factors — are positioned as 'other' according to traditional ideas about the legal profession and tertiary education in general. After discussing survey results from an online cohort, it considers the value of Facebook in bridging isolation and building student perceptions of inclusion and community.

I Introduction

The story of 'Shylock the Jew' in Shakespeare's *The Merchant of Venice* is one of a person longing for acceptance,[1] though unable to make his worldview understood or respected by the dominant majority. While Shylock craves acceptance and vindication, the story closes with him impoverished and deeply humiliated. Shylock is humiliated by his adversary Antonio, a Christian businessman, and the cunning of those familiar with the technicalities of the law. Shylock's visceral concept of justice — the excision of a pound of Antonio's flesh as the agreed penalty for a breach of contract — evaporates in the face of Portia's clever arguments as to the interpretation of Antonio and Shylock's contract. Though Shylock seethes '[i]f you deny me, fie upon your law',[2] his curse finds no resonance. Moreover, the justice meted out by the Duke's court extends to the ideological: Shylock suffers the additional humiliation of forced conversion to Christianity.

Shakespeare weaves a tale spun around the reification of alterity and the role of the law as an instrument of exclusion. Shylock's character is an emblematic representation of otherness. It opens to various interpretations and translates to other arenas of marginalisation.[3] This paper brings the notion of otherness into 21st-century legal education by exploring otherness and

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1 Gerda Tischler, *The Representation of 'Otherness' in Shakespeare's Othello and The Merchant of Venice* (PhD Thesis, Karl-Franzens-Universität Graz, 2013) 68.

2 William Shakespeare, 'The Comical History of the Merchant of Venice, or Otherwise Called the Jew of Venice' in Stanley Wells and Gary Taylor (eds), *The Complete Oxford Shakespeare* (Oxford University Press, 1987) ('*Merchant*') 4.1.100.

3 See, for example, Oldrieve's discussion focusing on otherness as it pertains to anti-Semitism (Shylock) and woman (Portia): Susan Oldrieve, 'Marginalized Voices in the Merchant of Venice' 5 *Cardozo Studies in Law & Literature* (1993) 87–105.

isolation as it manifests for online distance education students in an undergraduate Australian law program.

Fully online legal education is a relatively new form of pedagogy, and it presents a range of challenges. One of those challenges is how to reach out to undergraduate law students who — by virtue of the mode of education they engage in, their place of residence and other demographic factors — are positioned as 'other' according to traditional ideas about the legal profession and tertiary education in general.

Early distance education scholars, such as Moore, viewed distance learning primarily as an individual endeavour undertaken by students who are highly autonomous, emotionally independent and self-motivating.[4] However, more recent studies suggest that students engaged in online learning crave connection, and, like Shylock, experience the brunt of social isolation and exclusion.[5]

The idea that a sense of social belonging is a fundamental need for human beings has been recognised in the seminal work of Durkheim,[6] Maslow,[7] and Baumeister and Leary.[8] Yet, belonging implies 'otherness'; it assumes inclusion and exclusion and a dynamic of relating between 'those who feel like they belong and those who feel they do not'.[9] It is also the case that a sense of belonging arises within, and is constantly negotiated through, everyday social practice.[10] To 'belong' means to *be* somewhere, in relation to another person or a social group. We have to be present in some way. Social presence has long been recognised as key to success in distance education,[11] and there is increasing interest in pedagogical literature as to the value of social media in ameliorating student isolation and 'otherness'.[12]

This paper brings together the elements noted above to address some of the concerns raised by former High Court Justice the Hon Michael Kirby, at the inception of the Central Queensland University (CQU) online law degree program in 2011, regarding social isolation.[13] In particular, it identifies the potential of Facebook as an adjunct to institutional Learning Management

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4 Michael G Moore, 'On a Theory of Independent Study' (Ziff Paper No 16, FernUniversitat, 1977) 20; see also Michael G Moore, 'Theory of Transactional Distance' in Desmond Keegan (ed), *Theoretical Principles of Distance Education* (Routledge, 1997) 22–38; Cheryl Amundsen, 'The Evolution of Theory in Distance Education' in Desmond Keegan (ed), *Theoretical Principles of Distance Education* (Routledge, 1993) 61, 63–64.

5 Penny Rush, 'Isolation and Connection: The Experience of Distance Education' (2015) 30(2) *International Journal of e-Learning and Distance Education* <http://www.ijede.ca/index.php/jde/article/view/936/1597>.

6 Èmile Durkheim, *Suicide* (JA Spaulding and George Simpson trans, The Free Press, 1951) [trans of: *Le suicide* (first published 1897)].

7 Abraham H Maslow, *Motivation and Personality* (Harper and Row, 2nd ed, 1970).

8 Roy F Baumeister and Mark R Leary, 'The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation' (1995) 117(3) *Psychological Bulletin* 497–529.

9 Rachel Wilson, *The Importance of Belonging: A Higher Education Perspective* (PhD Thesis, RMIT University, 2016) 29; M Antonsich, 'Searching for Belonging — An Analytical Framework' (2010) 4(6) *Geography Compass* 644, 645.

10 Antonsich, cited in Wilson, above n 9, 29.

11 D Randy Garrison, Terry Anderson and Walter Archer, 'Critical Inquiry in a Text-Based Environment: Computer Conferencing in Higher Education' (2000) 2(3) *The Internet and Higher Education* 87–105.

12 S Manca and M Ranieri, 'Is Facebook Still a Suitable Technology-Enhanced Learning Environment? An Updated Critical Review of the Literature from 2012 to 2015' (2016) 32 *Journal of Computer Assisted Learning* 503–528.

13 Michael Kirby, 'Online Legal Education in Australia: The New CQU Law Degree' (2011) 34 *Australian Bar Review* 237.

Systems (LMS) (such as CQU's Moodle) as a strategy to combat learner social isolation, and engender a sense of belonging that supports student learning experience and well-being.

The paper begins by examining Shylock as the quintessential 'other' and the notion of otherness more generally. It then discusses the concept of otherness in the context of early distance education theory, before moving on to examine online study and Facebook as a platform for social presence. The results of a small survey of undergraduate students studying law online at CQU in 2017 will be discussed, including the strong endorsement students gave to Facebook as a means of social engagement and educational support. The paper concludes by outlining some of the challenges faced in adopting Facebook in presenting course content.

II Shakespeare's Quintessential 'Other'

There is little doubt that the 'other' is a powerful literary device because it captures the tragedy of the human condition: the pain of social isolation and the ignominy inherent in that state of being. Belonging is a basic social good that defines the human being as a full person; in general, its lack is felt keenly. There is evidence that feelings of connectedness are a protective factor against depression and suicide.[14]

Shylock[15] is an enduring exemplar of the 'other'. He is 'other' 'for his ultimate pride in who he is and what he does against the heavily anti-Semitic atmosphere'.[16] He is spurned and spat on. His debtor adversary Antonio is unrepentant.

Shylock laments:

> He hath disgraced me, and/hindered me half a million; laughed at my losses,/mocked at my gains, scorned my nation, thwarted my/bargains, cooled my friends, heated mine enemies, and/what's his reason? — I am a Jew./ … If you prick us/do we not bleed?[17]

> Still have I borne it with a patient shrug,/For suff'rance is the badge of all our tribe,/You call me misbeliever, cut-throat, dog,/And spit upon my Jewish gaberdine,/And all for use of that which is mine own'.[18]

And Antonio?:

> I am as like to call thee [dog] again,/To spit on thee again, to spurn thee too.[19]

Shylock's 'suff'rance' turns to hate, and he seeks revenge when an opportunity presents. When Antonio defaults on their loan contract, Shylock seeks to enforce the stipulated penalty: that he carve out a pound of Antonio's flesh.[20] In 'lodged hate and … certain loathing',[21] he presses for a strict reading of the contract, which excludes the provision of medical attention to

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14 See, for example, Ian M Shochet, Mark R Dadds, David Ham and Roslyn Montague, 'School Connectedness Is an Underemphasized Parameter in Adolescent Mental Health: Results of a Community Prediction Study' (2006) 35(2) *Journal of Clinical Child & Adolescent Psychology* 170–179; Centers for Disease Control and Prevention (CDC), *Connectedness as a strategic direction for the prevention of suicidal behaviour* <https://www.cdc.gov/ViolencePrevention/pdf/Suicide_Strategic_Direction_Full_Version-a.pdf>.

15 *Merchant*, above n 2.

16 Kuan-Yu Lin, 'Otherness as A Dramatic Device in "The Merchant of Venice" and "Othello"', 3 <https://www.academia.edu/13506577/Otherness_as_A_Dramatic_Device_in_The_Merchant_of_Venice_and_Othello>.

17 *Merchant*, above n 2, 3.1.50–60.

18 Ibid 1.3.108–112.

19 Ibid 1.3.128–129.

20 Ibid 1.3.147–150.

21 Ibid 4.1.59.

prevent Antonio's death.[22] Yet, Portia's intervention as a member of the Venetian court stymies Shylock's claim for redress. Adopting a 'hypertechnical'[23] contractual interpretation against which Shylock cannot rail, Portia reveals that the contract does not allow Shylock to spill a drop of Antonio's blood. Shylock's call for his due is denied. In addition, Venetian law leaves him penniless and at Antonio's mercy. As part of his redress, Antonio compels Shylock to convert to Christianity. Shylock is mocked — told to beg leave to hang himself, though he does not even have 'the value of a cord'.[24]

Some argue that *Merchant* is about the need for law to align with and reflect community mores.[25] More recent renditions of the play have changed the ending, leaving the Christian protagonists weeping and guilt-ridden, reflecting on how they have treated Shylock.[26] The play is as controversial now as it ever was, with many coming to the same conclusion as Kornstein: 'The more I think about it, the more I find myself in the [Shylock] camp.'[27]

In *Merchant*, Shakespeare shines a light on the dramatic *consequences* of the other's desire for acceptance and how this craving can morph into revenge when acceptance is denied. Shylock's hurt, even his hatred, seems an understandable response to his humiliation.

For the purposes of this paper, we ask: what was Shylock's *hope*, which, when dashed, led to this terrible turn of events? We glimpse it only briefly in *Merchant*:

I would be friends with you, and have your love,/Forget the shames that you have stained me with,/ Supply your present wants, and take no doit/Of usance for my moneys*, and you'll not hear me*.[28]

The symbolism of otherness is a useful metaphor in which to explore student experience in fully online legal education. Our aim is to prevent this marginalisation, and to keep students connected by facilitating a sense of belonging between students and their peers, lecturers and the educational institution. Before we consider otherness in early distance learning theory, and its expansion to issues of social presence, we tease out the dimensions of suffering inherent in the notion of otherness.

III Otherness: Isolation and Ignominy

What and who is the other?

According to post-colonial literary theorist Homi Bhabha, amongst other things, '[t]he Other loses its power to signify, to negate, to initiate its historic desire, to establish its own institutional and oppositional discourse'.[29] In post-colonial discourse, the construction of the 'other' assumes geography and spatiality: it exists in the East and constitutes a European projection.

Geography and otherness go hand in hand. To be the other is also to be unable to assert self-sovereignty. Recall that Shylock had no real voice in court, nor could he practise the religion of his choosing. His defeat brings with it acute ignominy.

Two forms of otherness are relevant to this paper: social and geographical isolation, and ignominy. As noted above, the first represents a denial of a basic human need for belonging. Our understanding of the role of belonging in living a good life, or in preventing the type of

22 Ibid 4.1.256–259.
23 Daniel J Kornstein, 'Fie upon your law!' (1993) 5(1) *Cardozo Law Review* 35, 38.
24 *Merchant*, above n 2, 4.1.361.
25 Kornstein, above n 23.
26 Clarissa Sebag-Montefiore, 'If a Shakespeare play is racist or anti-Semitic, is it OK to change the ending?', *The Guardian* (online), 3 November 2017 <https://www.theguardian.com/culture/2017/nov/03/if-a-shakespeare-play-is-racist-or-antisemitic-is-it-ok-to-change-the-ending>.
27 Kornstein, above n 23, 35.
28 *Merchant*, above n 2, 1.2.136–139.
29 Homi K Bhabha, *The Location of Culture* (Routledge, 1994) 31.

loneliness associated with suicide, has developed significantly over the last two centuries. It is useful to give the concept of 'belonging' some historical context.

In pointing to the implications of social disconnection in Western societies, 19th-century sociologist Durkheim conceptualised the other through his notion of anomie. Anomie refers to the state of being deprived within 'a society [in] which [s]he expresses or serves' — that is, in which a person enjoys meaningful social interaction.[30] Contemporary educational theorists such as Tinto have drawn on Durkheim's work to explain college drop-out rates. Tinto has argued that a lack of social integration with peers in college may lead to insufficient congruency with college values, low institutional commitment and increased attrition risk.[31]

In his hierarchy of human needs, Maslow[32] placed belonging and social relationships as the most important after physiological survival needs and safety. In Maslow's view, the isolated other lacks 'affectionate relations with people in general … for a place in [their] group' and, like Shylock, 'the thwarting of these needs is the most commonly found core in cases of [psychological] maladjustment'.[33] It is only after such needs are met that humans are able to satisfy what Maslow reasoned were 'higher' needs,[34] including self-esteem and self-actualisation, or making full use of one's talents and capabilities.[35] Self-actualisation has sometimes been described as the ultimate goal of learning.[36]

Maslow's theory was intuitive and has been influential in the way we think about ourselves a social agents and individuals on a personal though fundamentally social journey from life to death. However, as Baumeister and Leary note, Maslow's assertion of a belongingness need was not accompanied by original data, nor a review of previous findings.[37] It was only in the mid-1990s, and despite frequent, speculative assertions that people need to belong, that the 'belongingness hypothesis' was critically evaluated according to available evidence.[38] Baumeister and Leary's analysis confirmed that, on the basis of extant empirical evidence, the 'need to belong can be considered a fundamental human motivation'.[39]

Given that belonging is a fundamental human motivation or need, it is not difficult to translate the idea into the online learning environment and understand that student isolation[40] involves risks. The absence of physical co-location, and associated lack of access to the social and learning benefits of non-verbal body language, suggest that isolation and its experiential sibling, a sense of belonging, must be given particular attention in online learning environments.[41] This provides the motivation for our work and efforts to understand and respond to student needs in this dimension of tertiary education. Current statistics demonstrate that in Australia we need to improve in this area. Online student attrition rates exceed 30 per cent, more than double the

30 Durkheim above n 6, 213. Indeed, loneliness may pose a greater health risk than smoking or obesity. See, for example, Mattie Quinn, *Loneliness may be a bigger public health risk than smoking or obesity* (May 2018) Governing: the States and Localities <http://www.governing.com/topics/health-human-services/gov-the-loneliness-epidemic.html>.

31 Vincent Tinto 'Drop-out from Higher Education: A Theoretical Synthesis of Recent Research' (1975) 45(1) *Review of Educational Research* 89, 92.

32 Abraham H Maslow, 'A Theory of Human Motivation' (1943) 50(4) *Psychological Review* 370–396.

33 Ibid 381 (emphasis added).

34 Ibid 375.

35 Ibid 382.

36 Malcolm Knowles, *The Adult Learner* (Routledge, 2005) 14–15.

37 Baumeister and Leary, above n 8, 497.

38 Ibid.

39 Ibid 521.

40 See, for example, Rush, above n 5.

41 Fatemeh Bambaeeroo and Nasrin Shokrpour, 'The Impact of Teachers' Non-verbal Communication on Success in Teaching' (2017) 5(2) *Journal of Advances in Medical Education and Professionalism* 51–59.

rates for traditional face-to-face or blended learning formats.[42] In the United States, large-scale studies have consistently confirmed worse outcomes for students studying online, as compared to the traditional face-to-face format.[43]

Like our protagonist Shylock, otherness, for online students, may manifest in an experience of ignominy. This may be at the hands of peers, or by self-judgement against traditional values about what tertiary education involves and its non-negotiable attributes — in short, what might be referred to as the 'Educational Establishment' (the Establishment). Surely, the Establishment reasons, face-to-face instruction is the best, blended learning is next best, and fully online study is what you get when you cannot attend on campus at all. Kirby has alluded to how important it is to avoid this mindset and how it can contribute to 'othering' for law students when he compared his traditional face-to-face legal education with the fully online law program offered by CQU in Australia:

> There is a natural tendency in human affairs to think that the familiar is good; that the well-established is better; and that the training that produced a person as estimable as oneself, is best of all. *It is important that practitioners of the law should resist such thinking.*[44]

Importantly, Kirby suggests that it is better not to rely on taken-for-granted views. Rather, practitioners of the law ought to be curious and open-minded.

While Kirby alerts us to ignominy as an issue that offers fertile ground for further research in online legal education pedagogy, this paper focuses on 'isolation' as a distinct form of 'othering'. In the next section, as background to our analysis, we discuss otherness as it was perceived in early distance learning theory, and the notion of social presence. We then discuss our experience using Facebook as an adjunct to CQU's official LMS platform, ie Moodle.

IV Otherness in Distance Learning Theory and Some Hard Questions About Social Presence

In Maslow's theory of human needs, belonging is a precondition for self-actualisation. Self-actualisation is the product of an internal struggle that occurs when the desire for personal growth outweighs the (satiated) desires for safety and belonging. For the purposes of this paper, we accept the intuitive appeal and logic in these ideas.

Some educational theorists have argued that 'higher' learning processes require a focus on the *self*, and that learning is an individualistic (isolated?) pursuit: 'man always and only learns by himself [sic]'.[45] In an early work on andragogy, Knowles viewed adults as typically unprepared for *self*-directed learning, requiring educators to take them on a 'process of reorientation to learning as adults'.[46] This, according to Knowles, is a process of maturing and being motivated by internal incentives. The student is to become increasingly self-reliant, taking initiative for their own learning '*with or without the help of others* ... [although t]here is a lot of mutuality among a group of self-directed learners' (are they 'together alone'?).[47] Knowles has maintained

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42 See, for example, Rush, above n 5.

43 Peter Shea and Temi Bidjerano, 'Online Course Enrolment in Community College and Degree Completion: The Tipping Point' (2018) 19(2) *International Review of Research in Open and Distributed Learning* 282, 284.

44 Kirby, above n 13, 2 (emphasis added).

45 Sidney Jourard, 'Fascination. A Phenomenological Perspective on Independent Learning' in Melvin L Silberman, Jerome S Allender and Jay M Yanoff (eds), *The Psychology of Open Teaching and Learning: An Inquiry Approach* (Little, Brown, 1972) 66, cited in Knowles, above n 36, 15.

46 Malcolm S Knowles, *The Modern Practice of Adult Education* (Association Press, 1970) 39–40.

47 Malcolm S Knowles, *Self-Directed Learning: A Guide for Learners and Teachers* (Cambridge University Press, 1975) 18.

this position[48] and the notion of self-directed learning has made its way into mainstream pedagogical thought.

In the late 1970s, Moore drew on Knowles to assert 'the very nature of good adult education is the restoration and support of learners' autonomy'.[49] Moore puts a positive value on distance *because* it facilitates autonomy.[50] He hypothesises that since distance learning requires greater autonomy, successful students will be autonomous learners.[51] For Moore, the fully autonomous learner is emotionally independent (*no need* for reassurance or approval) and motivated only by the need for self-approval. They will define their needs independently, maintain their own direction and prefer self-evaluation. They will be task-oriented and less affected by social stimuli.[52] Moore's testing found that field independence was indeed a predictor in distance study,[53] although others testing similar hypotheses have had mixed results.[54] Holmberg, another early distance learning luminary, also viewed learning as an essentially individual activity.[55]

Hence, in the early days, when technology was limited and distance learning consisted mostly of pre-packaged one-way communication, 'othering' occurred by way of technology. The ability to bear these 'othering practices' or technologies was considered a learning strength, indeed, a goal.

As technology advanced, perspectives on distance education that grew in the absence of sustained, contiguous, two-way communication began to give way to a socio-constructivist view.[56] For example, in 1993, Garrison advocated a move away from the 'apparent excessive emphasis on independence in distance education'.[57] His work utilised a more 'inclusive' notion of shared control in the 'educational transaction'.[58] Shared control referred to a dynamic interaction between teacher, learner and curricula at the macro-level, and between proficiency, support and independence at the micro-level.[59] Garrison's later work with Anderson and Archer

48 Knowles, above n 36.
49 Moore (1977), above n 4, 21.
50 Amundsen, above n 4, 64.
51 Moore (1977), above n 4, 26.
52 Ibid 20.
53 Ibid 27. Moore is better known for his later theory of transactional distance, which distance learners experience because of the physical separation from the instructor. Transactional distance is mediated by both structure (in terms of instructional design and supporting media) and dialogue (communication between stakeholders in the learning process): Moore (1997), above n 4. Moore's later theory recognised, 'to a limited extent, that the process of learning was situated socially': see David Starr-Glass, 'From connectivity to connected learners: transactional distance and social presence' in Charles Wankel and Patrick Blessinger (eds), *Increasing Student Engagement and Retention in e-Learning Environments: Web 2.0 and Blended Learning Technologies* (Emerald Group Publishing, 2013) 113, 120.
54 Amundsen, above n 4, 64.
55 B Holmberg, 'Guided didactic conversation in distance education' in D Sewart, D Keegan and B Holmberg (eds), *Distance Education: International perspectives* (Croom Helm, 1983) 114–122.
56 We say nothing here of the subsequent rise of connectivism and its emergent collective of human activity — a 'socially constituted entity that is, despite this, soulless' — nor of the future hybrid human/machine collective: Terry Anderson and Jon Dron, 'Three Generations of Distance Education Pedagogy' (2011) 12(3) *International Review of Research in Open and Distance Learning* 80, 88.
57 D Randy Garrison, 'Quality and access in distance education: theoretical considerations' in Desmond Keegan (ed), *Theoretical Principles in Distance Education* (Routledge, 1993) 9–21, 14.
58 Ibid 9.
59 Ibid 14.

gave rise to their self-proclaimed 'iconic'[60] Community of Inquiry (CoI) framework. In this model, human belonging in the form of *social presence* is introduced explicitly, as an element in distance education, which supports and 'indirectly facilitat[es]' cognitive presence.[61]

Garrison and colleagues define social presence as the ability of participants 'to project themselves socially and emotionally, as "real" people (ie their full personality), through the medium of communication'.[62] The indicators of social presence are open, two-way communication (mutual awareness and recognition of each other's contributions), group cohesion and emotional expression.

Emotional expression is of particular interest for present purposes. Among other things, it may be demonstrated by the use of humour and self-disclosure. Strategies like 'humorous banter, [friendly] teasing, and joking' assist in constructing group cohesion, and self-disclosure results in a virtuous cycle of reciprocation and establishment of trust.[63] While socio-emotional interaction is possible in text-based computer mediated communication (CMC), it is 'not automatic' given the lack of nonverbal cues. So, for text-based CMC, we see users doing things like 'adapt[ing] text behaviour to present socially revealing, relational behaviour', such as the use of 'unconventional symbolic displays' like :), :S, :/ (ie early emoji).[64] These can be understood as attempts to build a sense of belonging around the learning process.

While the CoI framework discussed above may have intuitive resonance for some, social presence is a contested and elusive concept, as is its value in the educational experience. Garrison and colleagues do not clearly define its function.[65] However, they do see it as supporting cognitive presence, the element they consider central to learning, and thus success, in higher education. In addition, Garrison et al identify social presence as having an important role where 'there are affective, as well as purely cognitive goals', such as increasing learner enjoyment and fulfilment so they remain within 'the cohort of learners for the duration of the program'.[66] On a macro-level, then, the implications of these arguments are that social presence may contribute to persistence-building[67] and lowering the risk of attrition. Garrison et al also talk of emotion being inseparable from 'task motivation and persistence' and, hence, essential to the skill of critical inquiry.[68] On a micro-level, social presence motivates and assists skills building.

The above notwithstanding, Garrison and colleagues' discussion of social presence becomes problematic in relation to its value as an indicator of group cohesion. Garrison et al position social presence within their notion of learning itself as a collaborative venture, stating that building a

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60 D Randy Garrison, Terry Anderson and Walter Archer, 'The First Decade of the Community of Inquiry Framework: A Retrospective' (2010) *Internet and Higher Education* 5, 5.

61 Garrison et al, above n 11, 89 (emphasis added). While Garrison and colleagues acknowledge earlier social presence theorists, they distinguish their view in that they do not believe that the effect of media per se is the most salient factor in determining the level of social presence; they argue the communication context created via familiarity, skills, motivation, organisational commitment, activities and length of time in using the media are more influential on the development of social presence: 94–95.

62 Ibid (emphasis added).

63 Ibid 100.

64 Ibid 95. Emoji have developed almost to the point of constituting their own language, and have been construed in judicial decision-making as such: see Elizabeth Kurley and Marilyn McMahon, 'How the law responds when emoji are the weapon of choice' on *The Conversation* (5 December 2017) <https://theconversation.com/how-the-law-responds-when-emoji-are-the-weapon-of-choice-88552>.

65 Starr-Glass, above n 53, 130, also notes they do not specify it as a separate variable or moderator/modified of teacher presence and cognitive presence.

66 Garrison et al, above n 11, 89.

67 Tinto, above n 31, 90.

68 Garrison et al, above n 11, 99.

CoI is a collaborative process during which critical reflection and discourse are encouraged. It is this collaboration that draws learners into a shared experience of *constructing and confirming meaning*.[69] Given their study involved a qualitative analysis of computer conference discussions involving graduate-level students where critical analysis was the learning goal, this perspective is perhaps unsurprising.

Reflecting on the CoI model 10 years on, Garrison et al observed that the notion of group cohesion was intended to 'reflect the collaborative nature of the community *and its activities*'.[70] Garrison's subsequent work attempted to prove 'a stronger link between social presence and the purposeful, academic nature of the inquiry process'.[71]

It is perhaps for these reasons that the social presence model has been criticised by a number of commentators including Annand, who argues that it is of 'questionable value' in online higher education because it is not demonstrated to have a direct bearing on the level of academic performance or cognitive presence.[72] Annand does not take issue with social presence as adjunct or support, but with the notion of social presence as the collaborative learning vehicle, and that knowledge is co-constructed and impossible without group-based interaction.[73] Firmly rooted in the cognitivist camp, Annand suggests that deep and meaningful learning may be achieved just as efficaciously with appropriately structured learning materials, timely non-contiguous instructor–learner communication, and a teaching focus that enhances learner attributes (this is especially so for 'hard disciplines').[74]

Although we take a general socio-constructivist perspective, the focus in this paper is not on social presence as collaborative co-construction of learning. There is already adequate emphasis on collaborative learning and teamwork in the Australian law degree, as required by the Assurances of Learning (AoL) framework. Instead, we examine social presence and social media in the manner perhaps originally intended by Garrison et al: as a support or adjunct to the formal learning processes (whatever those processes may involve). In any event, the educational literature discussing Facebook generally indicates more support for the use of social media in this capacity than as a replacement for formal learning platforms, such as the institutional LMS. A survey of the literature on this topic by Manca and Raineri in 2016 demonstrated that most studies found Facebook an '*informal*, dynamic, social, and flexible environment where more or less structured learning experiences can take place'.[75] What social media can do well, compared

69 Ibid 95 (emphasis added).
70 Garrison et al, above n 60, 7 (emphasis added).
71 Ibid (emphasis added).
72 David Annand, 'Social Presence within the Community of Inquiry Framework' (2011) 12(5) *Research Articles* 40, 49.
73 Ibid 43, 49.
74 Ibid 49, 51.
75 Manca and Ranieri, above n 12, 520 (emphasis added).

to the LMS, is assist in providing a sense of belonging and community-building.[76] This was the basis for its implementation in the present study.

V Otherness in Fully Online Study and the Need for Community-Building

As noted above, early distance educators assumed online learning was a deliberate choice that suited autonomous learners. However, a 2013 Australian study of more than 1,000 online learners conducted by Rush debunked this orthodoxy, finding that for many students the choice to study online was the outcome of necessity. As Rush explains, lifestyle, location and economic constraints informed the decision to undertake online study:

> While it remains generally true (since Moore's original work in the 1970s) that with increased distance comes increased autonomy … we cannot assume that students who are compelled by circumstance or who choose distance education for practical or economic reasons will be, or even likely be, the 'autonomous learners' characterised by Moore and Holmberg in the 1970s and 80s.[77]

Indeed, in response to the question 'what do you think is the worst aspect of being a distance student?', only 81 responses mentioned 'lack of autonomy' or 'flexibility', while 429 mentioned lack of responsiveness, information, support or *having to take responsibility* as *negative* features of distance education.[78] Hence, at least for these participants, autonomy was not perceived as a positive aspect of their online learning experience.

Apposite to the arguments being put forward here, Rush found that, for the majority of her respondents (68 per cent), the 'worst aspect' of online learning was isolation related: feeling alone, lack of connection or lack of real-time interaction. Interestingly, many of these respondents referred to lack of interaction with the university itself.[79] Rush concludes that her study validates Tinto's hypotheses on the value of both social integration and academic commitment.[80] In response to the question 'what would make distance learning better for you?', the most strongly emergent code (31.8 per cent) was 'contact', which included all appeals for more contact, synchronous and physical (although physical was a small code, n=12).[81] It seems that this cohort felt a lack of social presence in the online learning mode.

Rush's findings of significant levels of student feelings of isolation and the implied 'othering' that this mode of learning involves reflects Kirby's concerns regarding CQU's (then fledging) fully online law degree. Kirby's reference to emotion is reminiscent of Garrison and

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76 M Camus, N E Hurt, L R Larson and L Prevost, 'Facebook as an Online Teaching Tool: Effects on Student Participation, Learning, and Overall Course Performance' (2016) 64(2) *College Teaching* 84–94; V Benigno, O Epifania and C Fante, 'Facebook And Moodle Use Among University Students: A Descriptive Study Of Students Habits' (Paper presented at the International Technology, Education & Development Conference, Valencia, Spain, 7–9 March 2016); L M Gomes, H Guerra, A Mendes and I E Rego, 'Facebook vs Moodle: surveying University Students on the Use of Learning Management Systems to Support Learning Activities Outside the Classroom' (Paper presented at the Information Systems and Technologies (CISTI) 10th Iberian Conference, 17–20 June 2015); V Gulieva, 'Moodle vs Social Media Platforms: Competing for Space and Time' (Paper presented at Conferinta Bunele Practici de Instruire Online, 2014); N Petrovic, V Jeremic, M Cirovic, Z Radojicic and N Milenkovic, 'Facebook vs Moodle: What do students really think?' (Paper presented at the Information Communication Technologies in Education Conference, Crete, 4–6 July 2013).

77 Rush, above n 5.

78 Ibid.

79 Tinto, above n 31, 93.

80 Ibid.

81 Ibid.

colleagues' indicator of social presence, and Tinto's notion of social integration and institutional commitment. At that time, Kirby worried that it would be

> … difficult online, and at long distance, to replace the vibrant, exciting and often emotional contacts provided by universities through participation in student societies. This is part of the 'entire university experience for undergraduates who physically attend for instruction at a university campus'.[82]

In addition, Kirby suggests:

> To repair as far as possible, the lack of regular physical interaction with teachers and other students, CQU will need to give thought to providing supplementary opportunities for electronic and physical interaction and dialogue.[83]

This latter sentiment echoes distance education theorist Keegan's notion that distance educators need to 'artificially recreate' the intersubjectivity of teacher and learner to offset the adverse impact on interpersonal communication.[84] We suggest that learner–learner intersubjectivity must also be re-created and maintained. In other words, what we need to do for fully online law programs is replicate a three-way form of reciprocity as a community of legal scholarship.

While the CQU law program provides weekly face-to-face/synchronous videoconferencing per unit of study, there are difficulties with tapping into these sessions in any more than a limited social sense. Lecturers engage in the usual social pleasantries, though, given the time constraints, will focus on substantive content fairly quickly; discussion then turns to the formal learning task or problem for the week. Once tutorial work is complete, the videoconference is typically ended by the host lecturer. Many students hurry to the next videoconference for the evening. There is little opportunity to engage in the relaxed post-lecture banter that typically occurs on campus.

The social media trial that is the subject of this paper was borne out of a Kirby-inspired search for a vehicle to build in some social presence and facilitate community-building for these 'othered' online students. In line with previous studies, we found that CQU online learners did not really want to use the Moodle LMS as a social space to 'project' themselves as 'real people'.[85] Before settling on Facebook, we trialled Twitter, though it did not gain any traction (the 140-character limit and highly visible digital footprint being the likely reasons). Subsequently, a Facebook closed group was selected as a trial adjunct to a first-year contract law unit in the CQU online law degree program.

VI The Facebook Trial as an Adjunct to the Contract Law Moodle Site

The Facebook closed group membership fluctuated between 40–50 student members — ie approximately 66 per cent of the cohort of 62. This relatively small cohort proceeded to make 369 posts and 2,424 comments to the posts over the next three months. The number of comments is particularly interesting, as comments are the dialogue or banter that followed an

82 Kirby, above n 13, 15.

83 Ibid.

84 Desmond Keegan, *The Foundations of Distance Education* (Croom Helm, 1986) 120. Keegan felt compensation was required for several 'differences' in distance education as compared to interpersonal communication, including the lack of heard language, absence of non-language communication, delayed reinforcement and change in the role of non-cognitive learning processes (peer contact, anxiety, peer support and criticism): at 117.

85 Garrison et al, above n 11.

originating post in a thread. Many students, sometimes pejoratively called 'lurkers',[86] simply read the posts but did not provide written comments in response, or merely pressed a reaction button in response (reactions being a simple click on an emoji: 👍❤️😆😮😢😡). There was a significant 4,100 reactions to posts and comments. The activity over this period is shown in Figures 1–3 below.

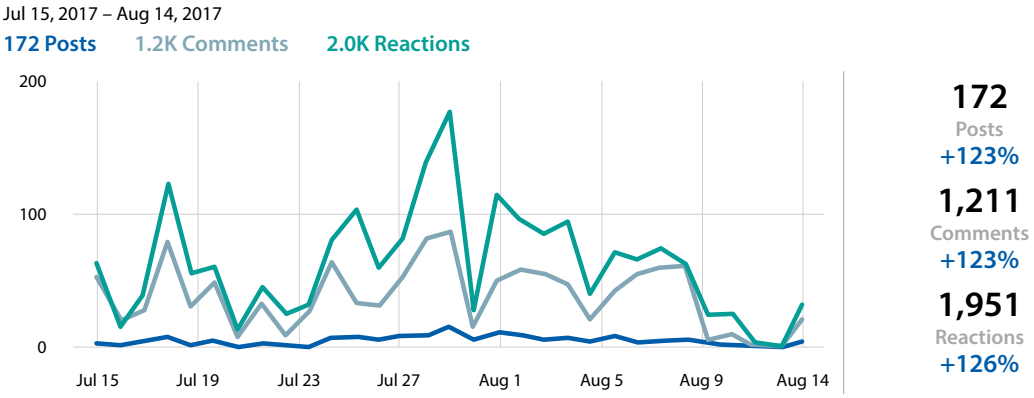

Figure 1: Facebook activity in the first month

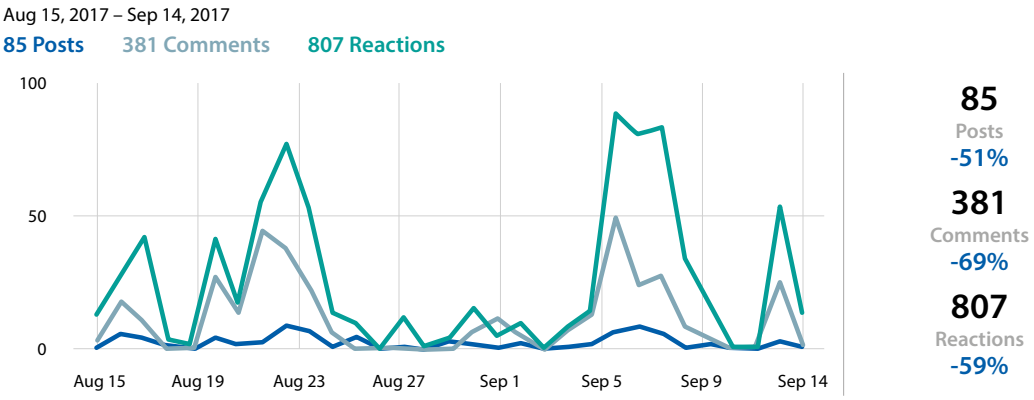

Figure 2: Facebook activity in the second month

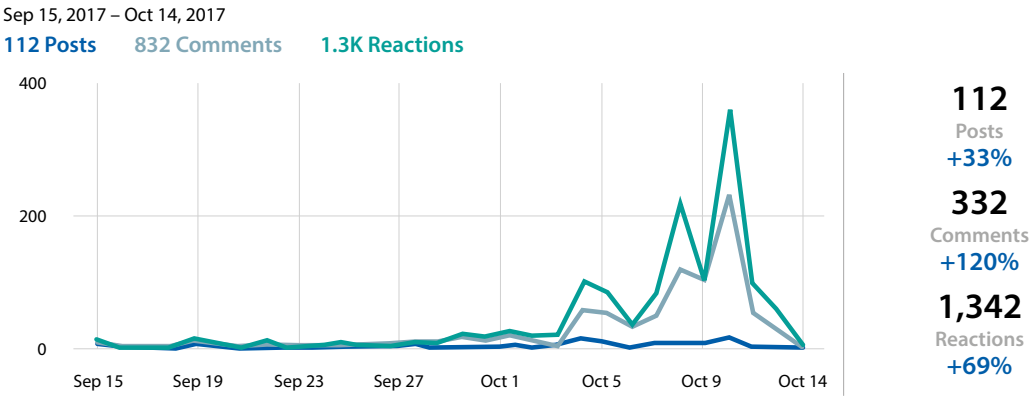

Figure 3: Facebook activity in the third month

86 V P Denen and K J Burner, 'Identity, Context Collapse, and Facebook Use in Higher Education: Putting Presence and Privacy at Odds' (2017) 38(2) *Distance Education* 173–192.

Posting in the group could be divided roughly into 'academic' (discussion of unit content, clarification of concepts, assessment) or 'non-academic' (messages of encouragement, observations, self-talk and, of course, good doses of humour). Non-academic posts or small talk constituted the vast bulk of posting activity.[87] The kind of small talk that peppered the Facebook posts is known as 'phatic communion' to linguists. That is, communication that serves a social function. Phatic communion is a wonderful term that was first used by anthropologist Malinowski in the 1920s in relation to his work on primitive language and relationship-building. The phrase brings to mind the notion of supping or communing together, highlighting the role of small talk as linguistic facilitator of connection and shared social experience. Particularly in CMC systems, phatic communion can be invaluable in sustaining 'social connection and human awareness' in the absence of verbal and visual/non-verbal cues present in face-to-face dialogue.[88]

In addition to increasing the level of what we will call phatic communion amongst student and participating lecturers, the Facebook group was used, after Garrison et al, to enhance task motivation and persistence. The task selected was a text-based problem with characters embroiled in contract litigation involving vitiating factors. After reading the problem, students signed up to represent one of the parties and had to submit a video of oral submissions for that party for a total of 30 per cent of their marks for the unit.[89] Following release of the problem, the lecturer brought the assessment characters to life in the Facebook world. A 'fake news' report and subsequent news updates were posted to the group. Students were encouraged to interact with this virtual world by creating and posting their own fake news video media releases featuring them as legal representative for their client.[90] No marks were awarded, but, surprisingly, eight student videos were posted.

This activity had three valuable pedagogical functions.[91] First, it increased student interest by bringing the assessment to virtual life. As Colbran notes, visually stimulating assessment items are increasingly being incorporated into tertiary education.[92] Second, it assisted skills development and gave the students a valuable opportunity for feedback. A number of students were apprehensive about talking to camera; the activity allowed them to try video-making without the pressure of summative grades, just for fun. Again, as Colbran notes, incorporating enjoyable formative activities into assessment practice is good learning and teaching pedagogy that raises performance.[93] Finally, the exercise served as a vehicle for some light-hearted banter. The posting of increasingly humorous 'sledging' videos was a highlight of the phatic communion that grew up on Facebook around the edges of the formal summative assessment.[94] Towards the end of the trial, the Facebook members were asked to participate in a survey to gather their views on the experience.

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87 A J George, 'Facebook Engagement and Learning' in Stephen Colbran, A J George and Scott Beattie, *Online Legal Education — Lessons for the Classroom* (Paper presented at the Institute for Law Teaching and Learning Summer 2018 Conference, Spokane, Washington, 18–20 June 2018).

88 F Vetere, J Smith and M Gibbs, 'Phatic Interactions: Being Aware and Feeling Connected' in P Markopoulos and W Mackay (eds), *Awareness Systems: Advances in Theory, Methodology and Design* (Springer, 2009) 177.

89 George, above n 87.

90 Ibid.

91 Ibid.

92 S Colbran and A Gilding, 'Exploring Legal Ethics using Student Generated Storyboards' (2014) *The Law Teacher. The International Journal of Legal Education* 1–25; Stephen Colbran, 'The ethics of delinquent and guilty clients — using animation as a formative assessment tool' (Paper presented at Association of Law Teachers 47th Annual Conference, Oxford, 1–3 April 2012); S Colbran, A Gilding and S Colbran 'Animation and multiple-choice questions as a formative feedback tool for legal education' (2017) 51(3) *The Law Teacher. The International Journal of Legal Education* 249–273.

93 Colban and Gilding, above n 92.

94 George, above n 87.

A detailed review of the survey results is beyond the scope of this paper.[95] In summary, while the survey sample size was relatively small,[96] the results indicated strong student support for Facebook closed groups as an adjunct to learning in a fully online law degree program.[97] Eighty per cent of students found that, overall, Facebook was excellent or good value. As to social presence, an impressive 81.5 per cent of students agreed or strongly agreed that Facebook was useful for engaging with the lecturer; 88.9 per cent found it useful for engaging with classmates; and 81.5 per cent found it created a connected sense of learning community. These findings were supported by qualitative comments, with 77.8 per cent finding a greater sense of connection. One comment in particular showed just how far the relatively simple expedient of Facebook connection can go toward ameliorating the feeling of otherness:

> Creating a real relationship with my lecturer has built up a sense of trust, I don't feel intimidated to put everything on the table and in turn learn where I am lacking or coming undone, I've been able to ask for help I might not otherwise have. It's also made me feel like I have someone I can talk to about any other issues, being isolated can be tough and sometimes you just need a professional ear. This has literally changed my entire learning experience and what I have gained I will be forever grateful for. On the basis of relationships with peers, I initiated a group chat with colleagues and we talk about everything from our families to university struggles. We are each other shoulders on the tough days and a sense of banter on the good ones. Some of these people will become lifelong friends and it is a pleasure to be a part of their journeys.

A pleasing byproduct of the trial was that over 80 per cent of students agreed the group helped them to engage with unit content, and some respondents called for an increase in academic posting by the lecturer.

VII Conclusion

In this paper, we examined Shakespeare's Shylock as the quintessential other, and identified some forms of otherness bound up in distance education. Further research is planned to investigate the notion of ignominy for online learners. We then used the notion of otherness as a lens to briefly examine the evolution of distance learning theory, drawing on Garrison and colleagues' work that integrated the element of social presence in online learning. As Rush's study shows, online learners in the 21st century do not appear to be the autonomous learners envisaged by early distance education theorists (if they ever were). We then examined a trial of Facebook as a social adjunct to a small cohort of fully online learners in the CQU law degree program, and a survey of the students' experience. Our survey results are limited given its relatively small number of participants. Nevertheless, the initial trial indicates potential for the use of Facebook as a means of building a social community to support formal learning that occurs in videoconferencing and on the Moodle LMS.

As a postscript, at the end of the trial the students did not want to close down the contract law Facebook group, given the social bonds that were formed. It was renamed the Law Via Distance (LVD) group, and membership has swelled to 248 members, or around one-third of the total CQU law cohort. The LVD dynamic is significantly different from the original trial group, and further research is planned to study how best to capture the benefits and minimise the drawbacks of a large group environment. However, one thing was clear from this study: Facebook facilitated connection between the learners in the CQU fully online law program, who were able to connect and find some belonging to combat the dynamics of othering that appear to be inherent to online learning tertiary education.

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95 See A J George, Alexandra McEwan and Stephen Colbran, 'Facebook, phatic communion and isolation in online learning' (forthcoming).

96 Approximately 27 participants for most questions.

97 George, above n 87.

CONSUMER LAW IMPLICATIONS OF ECOMMERCE AND GOODS WAREHOUSING

Prafula Pearce and Dale Pinto***

Abstract

Australian consumers are increasingly purchasing goods online from platforms such as eBay. It is anticipated that global ecommerce sales will reach US$4.5 trillion by 2021, with Australia being in the top 10 countries worldwide to engage in this form of trade. Online platforms and logistic companies are increasingly providing overseas sellers with a local address, a warehouse and a local bank account.

This paper examines whether the consumers in Australia have adequate consumer protection against overseas online sellers and associated problems with redress in the case of consumer law breaches. The paper also explores the shortcomings of the Australian and the Organisation for Economic Co-operation and Development (OECD) guidelines for consumer protection of electronic commerce and offers possible solutions.

I Introduction

There is a growing demand for foreign goods and services in Australia, which is being satisfied with new ecommerce business models. This paper focuses on consumer law implications arising through a new and emerging ecommerce model based on the 'ship first, sell later' concept. Under this model, a foreign seller is able to hold stock of goods in an Australian warehouse ready to deliver when an Australian customer places an order through an electronic distribution platform such as eBay. This model allows an overseas seller to compete with local businesses by improving delivery times and other services such as returns or exchanges of products. This model has dramatically grown over recent years due to the sophistication of global ecommerce companies that provide comprehensive customised services, including international shipping, overseas warehouse management and delivery to the final consumer (a one-stop shop model). Consequently, there has been a growth of state-of-the-art warehousing facilities in Australia and around the world, where warehouses that use inventory management software are able to store the inventory of multiple clients and provide up-to-date reports to minimise stock holding and promote the growth of ecommerce.

An example of an ecommerce company that provides such services can be gleaned from an eBay China announcement in December 2014 that their ecommerce company Winit Corporation would offer comprehensive overseas warehousing services together with a one-stop supply chain solution, which includes international shipping, transparent tracking and inventory management.[1] Winit Corporation has warehouses in Australia, United States, United Kingdom, Germany and Belgium. The exponential growth of ecommerce has occurred in the last five to

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1 eBay Inc staff, 'EBay China Warehousing Deal Benefits All' (15 December 2014) eBay Inc <https://www.ebayinc.com/stories/news/ebay-china-warehousing-deal-benefits-all/?utm_source=301Redirect&utm_medium=301Redirect&utm_campaign=301Red> (accessed 15 November 2018).

10 years, and this paper argues that existing consumer laws in Australia are not able to adequately deal with sophisticated global ecommerce models of the type described in this article.

This paper explores the consumer protection issues arising from a hypothetical scenario based on the 'ship first, sell later' ecommerce model. The paper examines whether consumers in Australia have adequate consumer protection and are able to enforce their consumer rights against overseas online sellers due to losses arising from non-compliance with Australian laws and regulations. The paper explores the shortcomings of the Australian and the Organisation for Economic Co-operation and Development (OECD) guidelines for consumer protection of electronic commerce and offers possible solutions.

The structure of this paper is as follows: the next part of the paper describes a scenario of an ecommerce transaction between an Australian consumer and an overseas merchant, and explores the possible breaches of the Australian laws and regulations arising from that scenario. Part III explores whether the Australian Consumer Law provides adequate protection to the consumer in the stated scenario and problems associated with redress in the case of Consumer Law breaches. Part IV examines the shortcomings of the Australian and the OECD guidelines for consumer protection of electronic commerce in light of the stated scenario and proposes possible solutions. Part V concludes the paper.

II Scenario of an eCommerce Transaction Between an Australian Consumer and a Chinese Merchant

Arnold, an Australian resident consumer, surfs the web to purchase an inflatable dinghy in order to use it for recreational purposes with his family. He narrows down his decision to a choice of two dinghies from eBay: one for $750 supplied from China and the other for $999 supplied from Rubber Ducky Inflatable Boats (Rubber Ducky) from a Sydney location. Arnold had narrowed down his search on eBay to surf for Australian suppliers only and Rubber Ducky's dinghy was listed as an Australian supplier. The listing stated that the goods are located in Sydney. Arnold is prepared to pay the higher price because Arnold knows that it will be difficult to claim warranty from a foreign seller located in China. He places the order through Rubber Ducky's eBay website and makes the payment to Rubber Ducky using PayPal to effect payment. The dinghy arrives at his home address within four days.

When Arnold tries to register the dinghy with the Department of Transport, he is asked for the Australian Builders Plate. He contacts Rubber Ducky through eBay and receives a reply from an apologetic Ken, who is located in China. Ken could only provide Arnold with the boat-building specifications from China and a Chinese certificate. Arnold questions the location in Sydney and is informed that Ken's Chinese incorporated company has an arrangement with an ecommerce logistics company that has a warehouse located in Sydney to store the dinghies and the company delivers them to customers when Ken forwards the sale details of orders he receives through eBay. On further investigation about how to register his new dinghy, Arnold finds out that he may be able to obtain an Australian Builders Plate through the Boating Industry Association (BIA). However, the BIA informs Arnold that the Australian Builders Plate cannot be obtained without a Hull Identification Number (HIN) certificate, and this requires the dinghy to be inspected by a recognised Boatcode provider listed on the Department of Transport website.

Arnold persists and finally gets the dinghy registered with the Department of Transport. He is excited to use the dinghy with his wife and children. However, on the fifth outing and after just nine hours of use, when Arnold is about to take the children on the Murray River, he hears a hissing sound of air escaping from the dinghy. On further inspection, he finds the glue has given way in many places and the dinghy is deflating rapidly. Arnold was glad that he realised this before exposing his young children to the danger of drowning.

A *Analysis of the eCommerce Scenario*

The advertisement on eBay from Rubber Ducky has misled Arnold into believing that the dinghy he purchased for $999 was from an Australian supplier and not an overseas supplier. The advertisement may be in breach of s 18 of Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (CCA) (Australian Consumer Law, or ACL) for misleading and deceptive conduct. Rubber Ducky has also not complied with Australian regulations pertaining to boat registration in relation to the dinghy and, as a result, the dinghy cannot be registered with the Department of Transport without incurring further expenses. Arnold appears to have been misled into believing that the dinghy is an Australian-compliant product ready to put into use. This could also give rise to a breach of s 18 of the ACL. In addition, the dinghy only lasted for nine hours of use before the glue gave way. Therefore, there may be a breach of consumer guarantees that pt 3-2 div 1 of the ACL attaches to the supply of goods and services to consumers. For example, the consumer guarantee in s 54 of ACL[2] may have been breached for the dinghy not being of acceptable quality. Where the consumer guarantees are not complied with, pt 5-4 of the ACL gives the consumer, like Arnold, a remedy against the supplier and possibly the manufacturer. In addition, pt 3-5 of the ACL could have been invoked against the manufacturer if Arnold or his family member suffered personal injury or death as a result of the defective dinghy.

The possible breaches of the ACL may give rise to remedies; it is therefore necessary to identify the responsible parties to seek the remedies against, and whether the ACL provisions apply to a foreign seller. This is explored in the next part. Rubber Ducky is likely to be only a Chinese trading company that has purchased goods from wholesale distributors in China and sells goods through an online distribution platform such as eBay, utilising the services of a logistic company that uses the 'ship first, sell later' warehousing model. The next part also explores the answer to the question of whether the responsibility under the ACL can be extended to the person who imported the goods through the Australian Customs Service, which in the stated scenario is the ecommerce logistic company that enabled the transportation, warehousing and distribution of the goods.

III Redress of Consumer Law Breach Arising from an eCommerce Transaction

In order for Australian consumers like Arnold to obtain remedies from foreign sellers like Rubber Ducky in the above scenario, an analysis of whether the ACL consumer guarantees are attached to the foreign seller in an ecommerce transaction is required. Section 5(1) of the CCA states that the provisions of the Act, including the ACL, applies to conduct by Australian incorporated bodies or those carrying on business in Australia, and Australian citizens or people

2 Section 54 of the Australian Consumer Law (ACL) requires goods that are advertised and sold in Australia to be of acceptable quality, meaning 'that they are safe, durable and free from defects, are acceptable in appearance and finish and do what they are ordinarily expected to do': 'Advertising and Selling Guide' (2018) Australian Competition and Consumer Commission <https://www.accc.gov.au/publications/advertising-selling/advertising-and-selling-guide/consumer-guarantees/what-are-the-guarantees> (accessed 15 November 2018).

ordinarily resident within Australia.[3] Thus, unless the foreign seller is carrying on a business in Australia, the ACL provisions may not apply.

In order to answer the question whether Rubber Ducky, a Chinese trading company, in the above scenario is carrying on a business in Australia, it is necessary to examine the Full Federal Court judgment in *Valve Corporation v Australian Competition and Consumer Commission* ('*Valve Appeal*').[4] In this case, Valve, a US company distributed an online game called *Steam* to worldwide customers. It had 118 million subscribers worldwide, of which 2.2 million were located in Australia. The content servers in Australia supplied the content to Australian customers. The customers in Australia had ticked an online term of the contract that all *Steam* fees were payable in advance and not refundable in whole or in part. The Australian Competition and Consumer Commission (ACCC) alleged that Valve had engaged in misleading and deceptive conduct and breached s 18 of the ACL by trying to exclude consumer guarantees under the ACL. At first instance, Justice Edelman found that Valve had engaged in misleading and deceptive conduct and imposed a AU$3 million pecuniary penalty.[5] Valve appealed to the Full Court where the appeal was dismissed.

In the Full Federal Court, Valve contended that, having regard to s 67 of the ACL,[6] the consumer guarantees in the ACL do not apply where the supply is made pursuant to a contract and the objective proper law governing that contract is the law of a country other than Australia. Valve submitted that, in their case, the law of Washington State applied. The trial judge held that although the proper law of contract was Washington State, s 67(b) extended the ACL to consumer guarantees and Valve could not rely on the choice of law term in a contract to substitute the consumer guarantee provisions in pt 3-2 div 1 of the ACL. The Full Federal Court also rejected Valve's argument and held that ACL guarantees could not be shifted through contractual obligations.

Valve also contended that Valve did not carry on business in Australia, and therefore the relevant misleading conduct did not occur in Australia. Section 5(1)(g) of CCA provides an extended application of the ACL (other than pt 5-3) to conduct outside Australia by bodies corporate incorporated or carrying on a business within Australia. The trial judge examined the ordinary meaning of 'carrying on business' and, relying on cases such as *Thiel v Commissioner of Taxation* (Cth),[7] *Pioneer Concrete Services Ltd v Gall*[8] and *Hope v Bathurst City Council*,[9] he concluded that it involves a series of repetitive acts; those acts will commonly involve 'activities

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3 For a discussion of s 5(1) of the *Competition and Consumer Act 2010* (Cth), see J Malbon 'Online Cross-border Consumer Transactions: A Proposal for Developing Fair Standard Form Contract Terms' (2013) 37 *University of Western Australia Law Review* 20–44. Also see Justin Malbon, *Application of Australian Consumer Law to Overseas Internet Purchases: Expert Legal Commentary* (2013) Monash University Faculty of Law <https://www.monash.edu/law/news-and-events/news/expert-legal-commentary-application-of-australian-consumer-law-to-overseas-internet-purchases> (accessed 15 November 2018).

4 [2017] FCAFC 224 (22 December 2017) ('*Valve Appeal*').

5 *Australian Competition and Consumer Commission v Valve Corporation (No 3)* [2016] FCA 196 (24 March 2016) ('*Valve*').

6 Section 67 of ACL states: 'If: (a) the proper law of a contract for the supply of goods or services to a consumer would be the law of any part of Australia but for a term of the contract that provides otherwise; or (b) a contract for the supply of goods or services to a consumer contains a term that purports to substitute, or has the effect of substituting, the following provisions for all or any of the provisions of this Division: (i) the provisions of the law of a country other than Australia; (ii) the provisions of the law of a State or a Territory; the provisions of this Division apply in relation to the supply under the contract despite that term.'

7 [1990] HCA 37; (1990) 171 CLR 338, 350 per Dawson J.

8 [1985] VicRp 68; [1985] VR 675, 705.

9 [1980] HCA 16; (1980) 144 CLR 1, 8–9

undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis'.[10] The primary judge concluded that Valve undoubtedly carried on business in Australia for six reasons being:

1. Valve had many customers in Australia and earned significant revenues from Australian customers on an ongoing basis.
2. The content was 'deposited' on Valve's three servers in Australia; the ACCC compared these content servers to 'digital warehouses'.
3. Valve had significant personal property and servers located in Australia.
4. Valve incurred tens of thousands of dollars per month of expenses in Australia for the rack space and power to its servers.
5. Valve relied on relationships with third-party members of content delivery providers who provide proxy catching for Valve in Australia.
6. Valve has entered into contracts with third-party service providers.[11]

On appeal to the Full Federal Court, Valve argued that s 5(1)(g) required a particular nexus with Australia, and since Valve had no physical activity in Australia through human instrumentalities, no place of business in Australia, the members of their management team did not reside in Australia, had no subsidiary companies through which it transacted and had no employees or agents who regularly acted on its behalf, Valve therefore had no nexus with Australia.[12] Valve had relied on the case of *Bray v F Hoffman-La Roche Ltd*.[13] However, the Full Court in Valve's judgment took Merkel J's approach in Bray's case, where he said:

in the context of s 5(1), he saw no reason for importing the additional requirement that to carry on business in the jurisdiction the foreign company must also have a place of business in the jurisdiction; a place of business is not a requirement of comity; and importing such a requirement would impermissibly supplement the corporate requirement of carrying on business with the additional requirement of corporate presence or residence.[14]

The Full Federal Court judges in *Valve* also examined the case of *Campbell v Gebo Investments (Labuan) Ltd* ('*Gebo Investments*'),[15] where Barrett J considered whether the mere solicitation of business transactions by the internet constituted carrying on business in Australia. The mere fact that materials posted on the internet from an unknown place can be accessed by anyone in Australia would not amount to carrying on a business in Australia, as this would only amount to internet solicitation. Carrying on a business requires evidence of activities, such as placing materials on the internet, or processing and dealing with inquiries or applications received through the internet.[16] The Full Federal Court judgment in Valve's case stated that 'the case of *Gebo Investments* makes clear that the territorial concept of carrying on business involves acts within the relevant authority that amount to, or are ancillary to, transactions that make up or support the business'.[17] The appeal judges held that the primary judge had not made an error in concluding that Valve Corporation carried on a business in Australia since Valve has a business presence in Australia.[18]

Thus, Valve's decision confirms that the ACL applies to transactions that involve sales to Australian consumers by online overseas providers, regardless of where the contract is

10 *Valve*, above n 5, [197].
11 Ibid [199]–[204].
12 *Valve Appeal*, above n 4, [142].
13 [2002] FCA 243; (2002) 118 FCR 1, [60].
14 *Valve Appeal*, above n 4, [145].
15 [2005] NSWSC 544; (2005) 190 FLR 209; 54 ACSR 111.
16 *Valve Appeal*, above n 4, [148].
17 Ibid [149].
18 Ibid [150].

concluded. The decision also confirms that a foreign company can be regarded as carrying on a business in Australia if the company makes repeated sales, generates revenue and has business relationships in Australia.[19]

Applying Valve's case to the scenario in Part II, Rubber Ducky is likely to be carrying on a business in Australia for ACL purposes since:

- Rubber Ducky has been continuously advertising a range of dinghies through eBay Australia and is earning revenues from Australian customers on an ongoing basis.
- The advertisement states that the dinghy is located in Australia at the time of sale; this implies that Rubber Ducky has placed some stock in a warehouse in Sydney that is intended for sale in Australia.
- Rubber Ducky has entered into a contractual relationship with warehouse owners for storage and delivery of dinghies to customers in Australia.

Although Rubber Ducky is not incorporated in Australia and has no Australian-based staff, it has evidence of activities of placing an advertisement on the Australian eBay and processing and dealing with inquiries and customer orders, and this would amount to carrying on a business in Australia. These acts are more than just mere internet solicitations. Thus, Rubber Ducky will be subject to the CCA and the ACL, and Arnold may be able to invoke s 54 and s 18 of ACL against Rubber Ducky. However, there is likely to be a problem of enforcement. An expert legal commentary by Professor Justin Malbon appropriately sums up the position of a consumer: it would be expensive to bring an action against an overseas seller and, even if they succeed in obtaining an order against the overseas seller in an Australian court, the enforcement may not be easy if the seller does not voluntarily comply with the order or does not have assets within Australia.[20]

Thus, it is necessary to explore whether the new ecommerce goods warehousing model of 'ship first, sell later' can extend the consumer guarantees to the person who imported the goods into Australia. Part 5-4 of the ACL provides the consumer to take action against the supplier for failure to comply with consumer guarantees, and also against the manufacturer for breach of a guarantee under s 54 of the ACL. A supplier is defined under the ACL as a person who, in relation to goods, supply by way of sale, exchange, lease, hire or hire purchase. A manufacturer is defined in s 7 of the ACL to include a person who imports goods into Australia if the person is not a manufacturer and, at the time of importation, the manufacturer does not have a place of business in Australia. Section 7(3) of the ACL further states that if goods are imported into Australia on behalf of a person, the person, being the importer, is taken to have imported goods into Australia.

In the above scenario, Rubber Ducky has used the services of a global logistics and warehousing corporation. The question is whether the global logistics and warehousing corporation, who made the taxable importation on behalf of Rubber Ducky within the meaning of the *Customs Act 1901* (Cth) when the dinghies entered Australia, can be classified as an importer and hence a deemed manufacturer under s 7 of the ACL. In order to import goods into Australia, the *Customs Act 1901* requires the 'owner' of the goods to provide appropriate information to Customs. However, an 'owner' is widely defined in s 4 of the *Customs Act 1901*, and includes 'any person (other than an officer of Customs) being or holding himself out to be the owner, importer, exporter, consignee, agent, or person possessed of, or beneficially

19 James North, Richard Flitcroft, Carly Chenoweth and James Wallace, 'Businesses Beware — Are You Caught By The Australian Consumer Law? Implications of the ACCC v Valve Decision' (21 April 2016) Corrs Chambers Westgarth Lawyers <http://www.corrs.com.au/publications/corrs-in-brief/businesses-beware-are-you-caught-by-the-australian-consumer-law-implications-of-the-accc-v-valve-decision/> (accessed 15 November 2018).

20 Malbon, above n 3.

interested in, or having any control of, or power of disposition over, the goods'.[21] The reason for the broad definition is for Customs to ensure that the person named as the owner under Customs declaration is responsible for the payment of duty. Thus, a global logistics company is likely to be the importer for record purposes under the *Customs Act 1901*. As a result, it is proposed that s 7 of the ACL should recognise the 'owner' under the *Customs Act 1901* as a deemed manufacturer against whom consumers can enforce the consumer guarantees under the ACL. The reason for this is that it is the sophisticated ecommerce and logistics companies that are behind the scenes and providing the physical presence of foreign goods into Australia, and hence they should bear the responsibility of ensuring that the goods comply with the ACL. Both the *Customs Act 1901* and the ACL should be reformed to promote the safe growth of ecommerce. With the growth of ecommerce and the use of new ecommerce models such as the 'ship first, sell later' model, it is time for the Australian Government to examine the inadequacy of the law in this emerging area of consumer protection for ecommerce transactions. The next part explores whether the Australian and the global OECD guidelines for consumer protection of electronic commerce are effective in protecting consumers.

IV The Australian and the Global OECD Guidelines for Consumer Protection of Electronic Commerce and Possible Solutions

At the end of 1999, the OECD Committee on Consumer Policy developed Guidelines for Consumer Protection in the Context of Electronic Commerce. These OECD Guidelines were revised in 2016.[22] The objective of the OECD Guidelines are 'to provide a framework for governments to use when reviewing, formulating and implementing consumer and law enforcement policies in the context of effective online commerce protection'.[23] The Guidelines are a first step in encouraging a global approach to consumer protection. Some of the provisions include:

- consumers who participate in ecommerce should be provided the same level of consumer protection as in other forms of commerce
- businesses engaged in ecommerce should engage in fair business, advertising and marketing practices and should not misrepresent or hide terms and conditions that may affect a consumer's decision regarding the transaction
- businesses should make themselves readily identifiable by providing name and contact details, and make it easy for the consumer to communicate in order to appropriately and effectively resolve any disputes.

The Australian Government also developed *The Australian E-commerce Best Practice Model* in 2000,[24] which was replaced in 2006 by *Australian Guidelines for Electronic Commerce* ('Australian Guidelines').[25] The Australian Guidelines do not apply to traders located outside

21 *Customs Act 1901* (Cth) s 4.

22 See OECD, *Consumer Protection in E-commerce: OECD Recommendation* (OECD Publishing, 2016) <https://www.oecd.org/sti/consumer/ECommerce-Recommendation-2016.pdf> (accessed 15 November 2018).

23 Kananke Chinthaka Liyanage, 'The Regulation of Online Dispute Resolution: Effectiveness of Online Consumer Protection Guidelines' (2012) 17(2) *Deakin Law Review* 251, 256 <http://www5.austlii.edu.au/au/journals/DeakinLawRw/2012/11.html> (accessed 15 November 2018).

24 L Boxall, 'E-commerce Codes of Conduct' (2000) 74(10) *The Law Institute Journal* 44.

25 Commonwealth, *The Australian Guidelines for Electronic Commerce* (Treasury, Australian Government, 2006). Also see Dan Svantesson and Roger Clarke, 'A Best Practice Model for E-Consumer Protection' (2010) 26(1) *Computer Law & Security Review* 31 <http://linkinghub.elsevier.com/retrieve/pii/S0267364909001915> (accessed 15 November 2018).

Australia who are dealing with Australian consumers. Overseas traders are only encouraged to follow the Australian Guidelines.

Both sets of guidelines are only recommendations and do not have any binding force. The recent focus of the OECD Committee on Consumer Policy is to encourage consumer protection enforcement authorities to cooperate across borders.[26] The ACCC is active in this area with the signing of a Memorandum of Understanding (MoU) in 2012 with China to promote cooperation and coordination of enforcement and training activities.[27]

The OECD and the Australian guidelines only show the Australian Government's commitment to develop rules and incorporate the principles reflected in the guidelines. However, from the discussion above, it is obvious that the Australian consumer protection laws pertaining to ecommerce, especially the 'ship first, sell later' model of ecommerce, has yet to be developed. Australian consumers would want to know that the products that are available for sale in Australia, whether purchased through a physical store or online, are safe to use and comply with the consumer guarantees under the ACL. In addition, the Australian consumer would want to know whether the seller is or is not an Australian entity in order to assess problems with return of goods, warranties and the difficulty of enforcing their strict legal rights. It may be better to protect the Australian consumers by placing the responsibility on the overseas traders and also include all parties that assist the overseas traders in bringing about an ecommerce transaction.[28]

A concept proposed as a possible solution could be that the Australian Government legislate and require all foreign entities carrying on a business in Australia to apply for a Foreign Business Number (FBN) to a central government authority, should the foreign entity wish to advertise and sell products and services in Australia. The FBN should not be granted unless the foreign entity can demonstrate that the goods and services they are selling comply with the Australian laws and regulations, and the foreign entity has appropriate insurance coverage. The foreign entity should be required to quote their FBN number in their dealings with Australian consumers and to Customs authorities under the *Customs Act 1901*. This would not only inform Australian consumers about the type of entity they are contracting with and be able to extract further information about the foreign business, if required, but would also give confidence to Customs authorities when approving the goods as they pass through Customs and assist in the collection of duties and taxes.[29] It is not possible to explore the proposed concept solution in detail in this paper; however, it may be a concept worth exploring with further research.

V Conclusion

This paper has highlighted that, as a result of the growth in ecommerce, foreign entities are able to capture the Australian market without the need for any physical presence in the country. Although the growth of ecommerce cannot and should not be halted, the current laws need to change and incorporate implications on Australian consumers and businesses. As demonstrated

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26 See Yoshida Akira, 'Consumer Protection Enforcement in a Global Digital Marketplace' (OECD Digital Economy Papers, No 266) 49.

27 Ibid 24.

28 Similar thinking has been applied in the *GST Low Value Goods Act 2017*. The legislation establishes a hierarchy of who is responsible for the Goods and Services Tax (GST) for supplies of goods whose Customs value is $1,000 or less. The operator of the electronic distribution platform (EDP) is liable for the GST in the first instance if the supply is made through an EDP, even if it is the merchant who actually assisted in the delivery of goods into Australia. If the EDP operator is not responsible for the GST, then the merchant could be liable for the GST. A re-deliverer is only responsible for GST if the EDP operator or the merchant is not responsible.

29 This would be similar to the *Corporations Act 2001* (Cth) that requires Australian Company Numbers (ACN) to be displayed on all public documents.

in the scenario discussed in this paper, the consumer protection laws have not kept up with the implications arising on Australian consumers if foreign entities have breached consumer guarantees under the ACL or have engaged in conduct that is misleading or deceptive. Besides the consumer protection implications highlighted in this paper, the growth of ecommerce has wider implications, including the effect on local businesses that may lose their market share, and also taxation implications for the Australian Government as highlighted in the recent Treasury consultation paper on the digital economy and Australia's corporate tax system.[30]

The Australian Government should not wait for any global solutions promoted through the OECD Guidelines, but take immediate steps in ensuring that the goods that enter Australia comply with the ACL and that Australian consumers have and are able to enforce the same level of consumer protection as in other forms of commerce. It is time for the Australian Government to bring about conversations for possible future reform of laws in order to inform and protect Australian consumers when purchasing foreign goods and services, such as the possible solution proposed in this paper of requiring an FBN for foreign entities conducting business in Australia.

30 Commonwealth, *The Digital Economy and Australia's Corporate Tax System*, Treasury Discussion Paper, (October 2018).

INTERTEACHING: AN ALTERNATIVE FORMAT OF INSTRUCTION FOR LAW CLASSES

Elizabeth Shi, Paul Myers** and Freeman Zhong****

I Introduction

This article describes a new format for legal education trialled at RMIT known as interteaching. Broadly, interteaching involves students in small groups teaching each other the content of a class with the guidance of a preparatory guide distributed before each session, and with the instructor taking a supervisory and facilitative role. The article provides an overview of the empirical and theoretical literature supporting interteaching as a teaching method, largely originating from psychology faculties in the United States. It then describes the strengths of interteaching in the context of legal education, factors to consider when implementing interteaching for a law class, and the authors' experience of implementing interteaching in an Australian law class. In the authors' experience, interteaching has the potential to be an effective alternative to the traditional lecture format for teaching law.

II An Overview of Key Criticisms of the 'Traditional Model'

The advantages of interteaching can be explained by reference to some of the key weaknesses of the traditional model of legal education in Australia. This is not intended to be an exhaustive or comprehensive statement of those criticisms; the purpose of this section is to identify important criticisms to provide a basis for the discussion of the strengths of interteaching in the remainder of this article.

In 2004, Keyes and Johnstone observed that legal education in Australia had 'struggled entirely to transcend the traditional model of legal education'.[1] Their conception of the traditional model had five key characteristics, many of which are still apparent, to a significant degree, in law teaching today:

1. It is 'teacher-focused'. The teacher's role is to 'transmit their expertise' to their students, 'who are conceived as empty vessels to be filled with information'. Further, teachers are not trained pedagogically, instead being expected to be subject matter experts for the area of law they teach.
2. It is focused on the teaching of legal rules, particularly from case law, with less emphasis on skills. Students are then assessed on their ability to apply the rules to problem scenarios.
3. It conceives of law as an 'autonomous' discipline, isolated from other areas of academia.
4. Law teaching is closely related to practice, and practitioners exert 'a very large degree of control over the curriculum'.
5. There is little formal coordination between teachers of different subjects and little formal opportunity for students to learn collaboratively.[2]

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1 Mary Keyes and Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality and Prospects for the Future' (2004) 26 *Sydney Law Review* 537, 537.

2 Ibid 543.

Keyes and Johnstone then forcefully criticised each aspect of the traditional model. Many of these criticisms are now uncontroversial.

For example, Keyes and Johnstone argue that the teacher-focused nature of law teaching means that the student learning experience is not 'taken seriously' — it is assumed that any failure of the students to learn is a failure on the students' part.[3] Citing Keyes and Johnstone, Kift argued that this model of law teaching — the 'transmission' model — is ineffective.[4] In educational psychology, the lecture format of instruction has long been criticised for its ineffectiveness.[5] Modern legal education literature emphasises the importance of student-centred processes, whereby teachers pay more attention, and are more responsive, to students' learning experiences,[6] especially for less academically inclined students.[7] Keyes and Johnstone themselves argued that, according to modern educational theory, teaching should be about 'enabling, stimulating, prompting and guiding students to develop their own conceptions and abilities'.[8]

They also argued that law schools did not place much emphasis on 'generic' or 'transferable' skills such as communication and teamwork, a criticism also made by the Australian Law Reform Commission.[9] Stuesser similarly defends the value of inter-personal and problem-solving skills for lawyers and law graduates who do not practise law.[10] He argues that much of the content of a law curriculum can be picked up by lawyers at any time through textbooks, so greater emphasis should be given to teaching material that is of 'lasting' value. This includes core principles that are 'essential to the understanding of the law', as well as inter-personal skills.[11] Stuesser's argument can be bolstered by consideration of more recent cognitive research indicating that knowledge of specific areas of substantive knowledge is easily lost, particularly if it is not supported by the application of skills,[12] as well as the fact that many areas of law change rapidly.[13]

Even aside from the benefits of generic or transferable skills, modern educational theory recognises that students learn more effectively if required to develop or apply skills related to the substantive content they are taught through an 'integration of theory and practice'.[14] As a consequence of the widespread acceptance of these criticisms, legal education in recent years has begun to focus on the student as an active learner rather than a passive recipient of

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3 Ibid 540; see also Sally Kift, 'My Law School — Then and Now' (2005) 9 *Newcastle Law Review* 1, 5.

4 Kift, 'My Law School', above n 3, 11–12.

5 Diane F Halpern and Milton D Hakel, 'Applying the Science of Learning to the University and Beyond: Teaching for Long-Term Retention and Transfer' (2003) 35(4) *Change: The Magazine of Higher Learning* 36; Marilla D Svinicki and Wilbert J McKeachie, *McKeachie's Teaching Tips: Strategies, Research, and Theory for College and University Teachers* (Wadsworth, 14th ed, 2006).

6 Tin Bunjevac, 'Critical Reflection and the Practice of Teaching Law' (2013) 6 *Journal of the Australian Law Teachers Association* 97.

7 Ibid.

8 Keyes and Johnstone, above n 1, 546.

9 Ibid 541, 544–545, citing Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Discussion Paper No 62 (1999) 46 [3.23].

10 Lee Stuesser, 'Skills for the Masses: Bringing Clinical Skills to More Students at Less Cost' (1992) 10 *Journal of Professional Legal Education* 119, 122–123.

11 Ibid 123.

12 A Collins, J S Brown and S E Newman, 'Cognitive Apprenticeship: Teaching the Crafts of Reading, Writing and Mathematics' in L B Resnick (ed), *Knowing, Learning and Instruction: Essays in Honour of Robert Glaser* (New Jersey: Lawerence Erlbaum, 1989), cited in Sally Kift, 'Lawyering Skills: Finding their Place in Legal Education' (1997) 8(1) *Legal Education Review* article 2.

13 Kift, 'Lawyering Skills', above n 12.

14 Ibid.

information.[15] Pedagogical approaches such as 'blended learning' (also known as the 'flipped classroom' approach), for example, are being used more often as a supplement to lecture-based instruction.[16] In the blended learning approach, the student is given online resources and activities to gain some familiarity with the course content before attending class.

III Interteaching and its Strengths

As a pedagogical approach, interteaching is motivated by the view that 'the best way to learn something is to teach it'.[17] Interteaching is carried out in six steps, across two different classes. The first class includes the interteaching session itself and the second class is a clarifying lecture.

STEP 1

Before the first class, the teacher completes a preparation guide based on the reading material for the week. The preparation guide contains a range of question types, from simple definitional questions to more complex questions such as problem-based or normative questions. The questions are designed to guide students through the course content and reading material. In an employment law class, examples of questions used in interteaching sessions include:

(Definitional) Describe an example of an employer engaging in indirect discrimination in the workplace.

(Problem-based) Martin sues his employer for breaching a provision of the Australian Consumer Law. His employer dismisses him as a result. Has Martin's employer breached pt 3-1 of the Fair Work Act?

(Normative) Read Gleeson CJ's judgment in *New South Wales v Amery* (2006) 230 CLR 174. Do you agree with Gleeson CJ's assessment of the department's policy as reasonable?

(Normative/Policy) Should it be legal for employers to keep employee workspaces under surveillance?

(Personal Experience) Have you or anyone you know ever experienced workplace discrimination?

(Personal Experience) Does your workplace have a social media policy? If yes, what does that policy say? Do you think it is a fair and reasonable policy?

STEP 2

The teacher distributes the preparation guide to students prior to the class. Students are asked to write answers to these questions and prepare to discuss their answers in small groups in class.

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15 Kylie Burns et al, 'Active Learning in Law by Flipping the Classroom: An Enquiry into Effectiveness and Engagement' (2017) 27(1) *Legal Education Review* article 14.

16 See, eg, ibid; Melissa Castan and Ross Hyams, 'Blended Learning in the Law Classroom: Design, Implementation and Evaluation of an Intervention in the First Year Curriculum Design' (2017) 27(1) *Legal Education Review* article 13; Jennifer Ireland, 'Blended Learning in Intellectual Property: The Best of Both Worlds (2008) 18(1) *Legal Education Review* article 8.

17 Thomas E Boyce and Philip N Hineline, 'Interteaching: A Strategy for Enhancing the User-Friendliness of Behavioural Arrangements in the College Classroom' (2002) 25 *The Behaviour Analyst* 215, 218; Ming Tsui, 'Interteaching: Students as Teachers in Lower-Division Sociology Courses' (2010) 38 *Teaching Sociology* 28, 28.

STEP 3

Students attend the first class (the interteaching session), wherein the teacher reviews and assesses students' preparatory work individually and provides feedback. This would usually take up around one hour of a three-hour seminar. If the class size is large, it is best to only assess a portion of the class, then rotate to another portion of the class in the following week. For example, for a class size of 30 students, the teacher can assess 10 students each week.

In this assessed session, and while the teacher assesses the students' preparatory work, students form small groups of two or three to teach each other the content by discussing their answers to the interteaching questions. Students are marked on their class preparation and also on their discussion.

STEP 4

After the first hour during which the students' written preparation are assessed by the teacher and the students are simultaneously engaged in small group discussion, the entire class moves into a U-shape to form one single large group. In this large group, each small group contributes by taking turns to present their thoughts on certain questions (for example, group 1 speaks about question 1, group 2 speaks about question 2, and so on). Upon listening to the small groups' answers, the floor is then open for the entire class to speak up and make comments and/or add their own input to the questions. The discussion that took place in the small group stage can be shared with the large group.

If the subject matter is controversial, the large group discussion can get heated as different students have very different views. This is also very important for learning, as students hear each other's viewpoints.

The teacher facilitates this large group discussion and also makes notes on the discussion performance of students to collect evidence of the discussion component of the assessment.

STEP 5

At the end of the first class, the students complete a record sheet, which records which areas students found challenging, interesting and enjoyable.

STEP 6

In the next class, the teacher delivers a clarifying lecture based on the record sheets filled out by students. The purpose of the lecture is to supplement the interteaching sessions. Its content is determined by what topics students struggled with and which ones they found to be more interesting. Saville et al describe the advantage of putting the lecture after the interteaching sessions using the terms of behavioural psychology: 'the clarifying lectures are more likely to function as consequences for desired behaviours and not as antecedents, which tends to be the case with lecture-based courses'.[18] In other words, because lectures *follow* interteaching sessions, the lectures function as positive reinforcement for student behaviour. They do this by making the subsequent lectures dependent on what students do in the interteaching sessions, rather than simply being static and unresponsive to student behaviour. Lack of positive reinforcement in teaching had been criticised in a seminal paper on educational psychology by B F Skinner.[19]

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18 Bryan K Saville, Tony Lambert and Stephen Robertson, 'Interteaching: Bringing Behavioural Education into the 21st Century' (2011) 61 *The Psychological Record* 153, 157.

19 B F Skinner, 'The Science of Learning and the Art of Teaching' in *Cumulative Record, Definitive Edition* (B F Skinner Foundation, 1999) 179–91.

Interteaching is regarded as a behavioural approach to teaching, involving the application of behavioural psychology to educational theory.[20] Interteaching combines aspects of several previously proposed behavioural approaches. Key elements include the requirements for students to teach each other the content of a course, learn cooperatively, and learn through the application of problem-solving skills.[21]

There is considerable empirical support for the effectiveness of behavioural approaches generally and interteaching specifically, with much empirical work carried out by Bryan Saville and his co-authors. In a 2005 study, they compared the performance of students on multiple choice quizzes across four groups: interteaching, lecture, reading and the control group. The interteaching students achieved the best results.[22] In a similar 2006 study, they compared interteaching and lectures by testing graduate and undergraduate students who had received instruction through both interteaching and lectures, and completed short quizzes after both types of class.[23] Interteaching yielded better quiz results and was preferred by students over lectures.[24] While not testing academic performance, Goto and Schneider studied interteaching in the nutritional science context, and found that students reported greater enjoyment of interteaching classes compared to other formats of instruction.[25]

The authors have also had remarkable success with using interteaching in law classes. Students report increased student satisfaction, greater engagement in learning, increased confidence in speaking in class and enhanced learning outcomes.

These are some of the free text comments and emails received from students:

> Being university students, many of us are faced with part-time and casual jobs, where students share their experience on their employment issues that are related to the topic, such as modern awards or topics like discrimination, to have a better and clearer picture of the real world (Undergraduate Employment Law student, Semester 2, 2017).
>
> The small group activities allowed for everyone to feel included. There was a very strong emphasis on collaboration in Elizabeth's class (Postgraduate Employment Law student, Semester 1, 2017).
>
> Interteaching encouraged me to study throughout the semester, rather than leaving study until the week before the exam (Postgraduate Employment Law student, Semester 1, 2018),
>
> This class was definitely something that I looked forward to every week, personally I loved preparing questions and news articles for each class and made time to go beyond the required content and conduct extra research, this is not something I felt compelled to do in any of my other classes (Undergraduate Employment Law student, Semester 2, 2017).
>
> I enjoy the experienced I had in Elizabeth's classes as it is always full of weekly activity and most importantly it boosts my confident in public speaking … I also learned a lot from listening to other students' input (from both local students and international students) in her class (Undergraduate Employment Law student, Semester 2, 2017).

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20 Saville, Lambert and Robertson, above n 18, 155–156.

21 Bryan K Saville et al, 'A Comparison of Interteaching and Lecture in the College Classroom' (2006) 39 *Journal of Applied Behaviour Analysis* 49, 49–50.

22 Bryan K Saville, Tracy E Zinn and Marcus P Elliott, 'Interteaching Versus Traditional Methods of Instruction: A Preliminary Analysis' (2005) 32 *Teaching of Psychology* 161.

23 Saville et al, above n 21.

24 Ibid.

25 Keiko Goto and Julie Schneider, 'Learning through Teaching: Challenges and Opportunities in Facilitating Student Learning in Food Science and Nutrition by Using the Interteaching Approach' (2009) 9 *Journal of Food Science Education* 31.

IV The Suitability of Interteaching for Law

A Strengths of Interteaching in Legal Education

It is not hard to see how interteaching, as described above, would be suitable to legal education. Like blended learning approaches, it demands active learning from the student and pre-class preparation.[26] This is a departure from the first, and frequently criticised, characteristic of the traditional model by making learning student-focused rather than teacher-focused. In interteaching, the student is required to prepare to teach the content to other students using a preparatory guide and questions. At interteaching sessions themselves, students have the opportunity to be more highly engaged than they are in lectures.

Interteaching requires students to apply a range of legal and generic skills. Answering the questions on preparatory guides, particularly the problem-based questions, involves the application of legal skills much like a traditional law exam does. However, generic skills are also involved in the interteaching process. Students are required to explain legal concepts to each other in simplified terms and develop other interpersonal and communication skills in interteaching sessions. As such, it also involves collaborative learning.

Attendance and engagement are also incentivised by allocating marks to students' participation in interteaching sessions, a point made by Saville, Lambert and Robertson.[27] Particularly in the legal education context, there is evidence that the level of student engagement, especially attendance levels, affects learning outcomes.[28]

Another strength of interteaching is that while it makes use of lectures, it does so in a way that ensures the lectures respond to the students' feedback and their learning needs. Retaining lectures in a modified form may avoid some of the reasons why other alternatives to the lecture format have failed to gain traction, as discussed by Saville, Lambert and Robertson; namely, student resistance to unfamiliar teaching approaches and teachers' hesitation to relinquish too much control over the classroom.[29]

Instead of discarding lectures, interteaching adapts them to overcome some of their weaknesses and make them more engaging for students. As noted above, the supplementary lectures after interteaching sessions are based on student feedback in the record sheets, which means the lectures can function as positive reinforcement. Keyes and Johnstone explain that '[g]ood teaching requires teachers to engage with students at their own level of understanding, motivating them to learn by stimulating their interest in the subject'.[30] This involves responding to the diversity of students' backgrounds and learning styles 'in the selection of teaching material and activities'.[31] The lecture format in interteaching is one way of making lectures more responsive to students' needs, interests and learning styles. Rather than the content of the lecture being set by the teacher and imposed on the students as passive recipients of the lecturer's knowledge, lectures in interteaching are guided by the students' interests, level of understanding and feedback.

Lastly, the types of questions that can be asked in a law class are conducive to effective interteaching discussions. In law, it is easy to formulate questions at every level of difficulty and complexity, from definitional questions to problem-based or policy questions. The examples of

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26 Kylie Burns et al, above n 15, 2–3.

27 Saville, Lambert and Robertson, above n 18, 158.

28 Lillian Corbin, Kylie Burns and April Chrzanowski, 'If You Teach It, Will They Come? Law Students, Class Attendance and Student Engagement' (2010) 20(1) *Legal Education Review* article 3.

29 Saville, Lambert and Robertson, above n 18, 156.

30 Keyes and Johnstone, above n 1, 547.

31 Ibid.

questions used in an employment law class shown above are illustrative of this point. Questions that require the application of legal standards to particular fact situations, such as standards of reasonableness, can lead to focused and engaging discussions in which students can benefit from each other's perspectives. The same is true of normative or policy-based questions. There will be further discussion on question design in Part V.

B *Limitations of Interteaching*

Like all approaches, interteaching has its limitations and weaknesses, many of which it shares with other teaching approaches that require a high level of student engagement. Interteaching is highly reliant on student attendance and participation. As the core of the content is taught during interteaching sessions, with lectures being supplementary only, students will fall significantly further behind if they do not attend, do not adequately prepare or do not participate. While attendance is correlated with learning outcomes even where traditional lectures are concerned,[32] the impossibility of recording interteaching sessions — compared to recording lectures — means that students who do not attend have limited options in catching up. Combined with studies in Australian law schools and other disciplines demonstrating that many students do not regularly attend class, and that non-attendance can be for a wide variety of reasons (including financial reasons such as the need to work and other unavoidable responsibilities),[33] any teachers looking to use interteaching should be prepared to address the issue of non-attendance.

Further, interteaching requires much smaller classes and a higher ratio of instructors to students compared to lectures. While this could be regarded as a weakness of interteaching, given the additional resources that would be required, it is important to note that small classes are, in themselves, likely to be a benefit. In the educational literature generally, there is much research on the benefits of small classes.[34] As a specific example in the legal context, Anker et al report on the benefits of smaller classes (of around 25–40) after a shift from lecture to seminar-based instruction. According to them, positive staff feedback included:

> It is less intimidating as a lecturer.
>
> Students are more engaged.
>
> Small groups can create an environment where students feel they can participate. This is important as oral skills are a really important part of teaching people to make arguments about law, which is often undervalued in the system with a large emphasis on written work.
>
> Students tend to be a lot less prepared in lecture/tutorial format. In a small group, students are quite aware that their lack of knowledge is going to be apparent.

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32 Regard should, of course, be had to the difficulty of using empirical methods to isolate the causal effect of attendance or non-attendance against other possible factors affecting student performance, such as the character traits of individual students. However, see, eg, Garey C Durden and Larry V Ellis, 'The Effects of Attendance on Student Learning in Principles of Economics' (1995) 85 *American Economic Review* 343; Paul Friedman, Fred Rodriguez and Joe McComb, 'Why Students Do and Do Not Attend Classes: Myths and Realities' (2001) 49 *College Teaching* 124; Elchanan Cohn and Eric Johnson, 'Class Attendance and Performance in Principles of Economics' (2006) 14(2) *Education Economics* 211.

33 See, eg, Corbin, Burns and Chrzanowski, above n 28.

34 See, eg, David Jaques, *Learning in Groups* (Kogan Page, 2nd ed, 1991); Leonard Springer, Mary Elizabeth Stanne and Samuel S Donovan, 'Effects of Small Group Learning on Undergraduates in Science, Mathematics, Engineering, and Technology: A Meta-Analysis' (1999) 69 *Review of Educational Research* 21.

> The educational experience is much more diffuse when there's a fluid discussion in class and the teacher is not playing the authority figure. It puts much more pressure on students to work it out for themselves.
>
> This year's group, who have had their whole foundation in small group teaching, take this approach seriously. The expectation now is that they will have to be prepared and the information won't just be dished out.[35]

Many of these benefits might themselves counteract some of interteaching's weaknesses. For example, the dependence on student preparation and participation might be outweighed by the fact that students will be more aware that their lack of knowledge will be apparent if they fail to prepare. Further, where students are in an environment where they 'feel they can participate', they might be more willing to attend class where they would otherwise not attend due to lack of motivation.

V Adapting Interteaching to Law

Interteaching has the advantages associated with other forms of small group learning.[36] However, small group learning is not a 'magic bullet' and should not be adopted thoughtlessly simply due to the results of those empirical studies or faculty encouragement. When designing group learning activities such as interteaching sessions, teachers should ask themselves the questions raised by Blumenfeld et al:

> Will students actually learn more information and learn to think more deeply if they work in groups? Will they cooperate with each other, sharing in the labor and contributing to the thinking? Will they help each other and seek guidance from peers when they need it? Will they be happy with lowered grades if one of the group members does not understand a concept? Will they be willing to work with students who look different from themselves, speak English with a different accent, or have different attitudes about the world?[37]

Blumenfeld et al go on to explain that:

> Research has shown that successful groups promote (a) student exchanges that enhance reasoning and higher-order thinking; (b) cognitive processing such as rehearsing, organizing and integrating information; (c) perspective-taking and accommodation to others' ideas; and (d) acceptance and encouragement among those involved with the work (Bossert, 1988–1989).[38]

The discussion of students who speak English with a different accent was especially pertinent, in the authors' experience. Frequently, international students and domestic students are hesitant to interact with each other. In discussions, it is often helpful for the teacher to encourage international students to contribute. Doing so productively requires facilitative skills from the teacher. This may be another disadvantage of interteaching in some circumstances. However, in the authors' experience, one effective way to encourage participation from international students is to ask questions about the law of their home countries, which they can compare to Australian law. Such questions also introduce a unique perspective to the class discussion.

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35 Kirsten Anker et al, 'Evaluating a Change to Seminar-style Teaching' (2000) 11(1) *Legal Education Review* article 4.

36 See above n 34.

37 Phyllis C Blumenfeld et al, 'Learning with Peers: From Small Group Cooperation to Collaborative Communities' (1996) 25 *Educational Researcher* 25(8) 37, 38.

38 Ibid, citing S T Bossert, 'Cooperative Activities in the Classroom' (1988–1989) 15 *Review of Research in Education* 225.

As interteaching discussions are guided by the questions set by the teacher, it is important that the questions encourage and promote the processes outlined by Blumenfeld et al. That is the reason for preferring a mix of question types in interteaching preparatory guides, including problem-based and normative questions. Problem-based questions requiring the application of open-textured legal concepts and standards require higher-order thinking and cognitive processing. Problem-based questions requiring the application of morally loaded normative standards (of fairness, justice, unconscionability, etc), and policy questions about what the law ought to be, can require students to take different perspectives and accommodate others' ideas, particularly if students disagree about the answers.

Questions based on personal experience, such as the students' own experiences of (for example) social media policies or discrimination at work, are important for developing generic skills such as communication, collaboration and students' ability to empathise. They also help 'bring home' the relevance of the topic to their own lives. In the authors' experience, students have benefited greatly from the increased opportunity to learn from each other. For example, in the topic of Discrimination Law, one international student spoke about the discrimination they faced when applying for a job in Australia; another spoke about the precarious nature of their work as a food delivery worker and how their employer regularly underpays them but they do not complain because that is the only job they could find. Experiences like these might be foreign to other students who are in a better social and economic position and may have more options.

Teachers must also ensure that these processes are promoted while they facilitate and supervise the interteaching discussions. Inappropriate responses or discussion must be caught and stopped. Teachers should take an active role in guiding discussions to promote successful learning during interteaching sessions.

Assessing participation was discussed above, but the role of other assessment tasks also should not be overlooked. Barnes has explained how assessment contributes to student learning by clarifying learning objectives and content, implementing broader faculty objectives, instilling appropriate attitudes to learning, encouraging the development of lawyering skills, and presenting an opportunity to give feedback to students.[39] Interteaching is typically combined with frequent evaluative assessment throughout the semester — Saville, Lambert and Robertson suggest that students be assessed at least five times per semester.[40] There should be a clear link between the content covered in interteaching sessions and the content of assessments to enable assessments to contribute to learning in the way Barnes describes. In Saville, Lambert and Robertson's words, tying test and exam content to the preparatory guide ensures that 'there is a clear link between the behaviours students practice during the in-class discussions and the behaviours they emit while taking exams … when students take exams, the questions should exert strong stimulus control over their behavior'.[41]

VI Conclusion

Interteaching represents an alternative approach to law teaching, which has the potential to be more effective than the traditional lecture format. In the authors' experience, it leads to greater student engagement and satisfaction. There are also empirical studies suggesting that it can lead to better learning outcomes than the lecture format. In summary, it is a promising pedagogical method that, as this article has explained, represents an attempt to overcome the limitations of

39 Jeffrey W Barnes, 'The Functions of Assessment: A Re-Examination' (1991) 2(1) *Legal Education Review* 177.

40 Saville, Lambert and Robertson, above n 18, 157.

41 Ibid 158.

the traditional model of legal education. At the same time, it has been designed to overcome some of the weaknesses of behavioural approaches to teaching. Interteaching has the potential to deliver the benefits of such behavioural approaches, such as increased student engagement and responsiveness to students' individual learning experiences. It addresses the drawbacks of behavioural approaches by retaining lectures in an altered form, allowing the instructor to address gaps or shortcomings in the students' knowledge after interteaching sessions. Interteaching strikes a balance between the traditional, teacher-centric, lecture-focused model of legal education and behavioural approaches that completely do away with lectures.

However, in adopting interteaching, its limitations and specific requirements must be borne in mind. Interteaching is most effective with a relatively small class size and a high ratio of instructors to students. As explained in Part V, the questions to be considered in interteaching sessions must be carefully designed to promote productive discussion among students and engagement with other students' perspectives. Supplementary lectures should be responsive to what happens at the interteaching sessions. Because the design of interteaching sessions and supplementary lectures is so important, it is necessary for the instructor to play a more active role. In particular, the instructor should formulate questions and facilitate discussion in a way that promotes productive exchanges between students. He or she should ensure that the content of the supplementary lectures is responsive to the students' learning styles, interests and level of understanding. This dependence on the instructor's skill means that interteaching cannot be regarded as an easy and universally applicable solution to the shortcomings of the traditional model. However, as has been argued, it is a promising alternative in circumstances where it can be effectively implemented.

The authors' experiences with interteaching and the arguments in this article can, to a limited extent, also inform other forms of small group learning. A theme of this article is that the benefits of small group learning do not come automatically: they arise only where students are put in the right environment and where teachers foster productive interactions between students. The suggestions in this article about what kinds of questions should be put to students and how student discussion should be facilitated can potentially be generalised to other forms of small group learning.

LAW STUDENTS' AWARENESS OF UNIVERSITY GRADUATE ATTRIBUTES

Leigh Smith and Christina Do***

Abstract

Despite the importance of university graduate attributes, and the emphasis that is placed on them, it is unclear whether students fully comprehend what university graduate attributes are, why they exist, and the specific graduate attribute(s) of the institution at which they are enrolled. This paper explores university graduate attributes from the perspective of students. While the paper provides an overview of the concept of university graduate attributes, the focus of the paper is on the examination of the data collected from a pilot project conducted at Curtin Law School in 2018, which explored law students' awareness of the Curtin Graduate Attributes. This paper also reflects on how academic staff can help enhance students' awareness and acquisition of university graduate attributes.

I Introduction

A significant number of universities globally have established a set of graduate attributes that students enrolled at the institution will develop and demonstrate over the course of their degree.[1] Generally, university graduate attributes relate to knowledge, skills and values, which are selected to optimise graduate employability.[2] Strategies for the effective formation and integration of university graduate attributes are an important issue in Australian higher education and have been the focus of a wide range of Commonwealth-funded projects.[3] Multiple stakeholders must be considered in the creation of university graduate attributes (university management, academic staff, students, industry, etc.). This paper focuses on the student perspective and, more specifically, students' awareness and understanding of university graduate attributes. By gaining insight into students' awareness, perceptions and understanding, university management and academic staff can make informed choices with respect to the strategies that they use to develop, teach and assess the university graduate attributes.

The present research sought to examine the extent to which law students at Curtin Law School were aware of the Curtin Graduate Attributes. As part of the project, a sample of first-, second- and third-year students were asked to complete a questionnaire about their knowledge

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1 Carey Normand and Lorraine Anderson, 'Introduction' in Carey Normand and Lorraine Anderson (eds), *Graduate Attributes in Higher Education: Attitudes on Attributes from Across the Disciplines* (Taylor and Francis, 2017) 1, 2.

2 See generally Duncan Bentley and Joan Squelch, 'Internationalising the Australian Law Curriculum for Enhanced Global Legal Education and Practice' (Final Report, Curtin University, 2012); Duncan Bentley and Joan Squelch, 'Employer Perspectives on Essential Knowledge, Skills and Attributes for Law Graduates to Work in a Global Context' (2014) 24(1&2) *Legal Education Review* 93.

3 See, eg, the results for a search of 'graduate attributes' at the following link: Universities Australia, *Learning and Teaching Repository* (2018) <https://ltr.edu.au/> (accessed 22 November 2018).

and understanding of the Curtin Graduate Attributes, and university graduate attributes more broadly. Part II of the paper will introduce the concept of university graduate attributes: what they are, why they exist, why it is important that students are aware of them, some of the challenges associated with their use, and the difference between an 'embedded' and 'bolt-on' approach to teaching them.[4] In Parts III and IV, the focus turns to the present research. Part III provides an overview of the research methodology, while Part IV outlines and discusses the results of the project (including the implications and potential for further research). Part V concludes the paper.

II An Introduction to University Graduate Attributes

Before engaging in an examination of the present research, it is necessary to introduce the concept of university graduate attributes. This part of the paper is divided into five sections. First, the concept of university graduate attributes is explained; as part of this discussion, university graduate attributes will be distinguished from related concepts, such as unit and course learning outcomes. Second, the rationale for the existence of graduate attributes will be examined. This discussion will show that graduate attributes are primarily seen as a way of promoting the employability of university graduates. Third, the link between employability and university graduate attributes will be used to show the importance of student awareness of university graduate attributes. Fourth, some of the challenges identified in the literature relating to university graduate attributes are outlined. Finally, two approaches to teaching university graduate attributes are briefly explained.

A Defining University Graduate Attributes

University graduate attributes are regularly defined in the literature.[5] The Tertiary Education Quality and Standards Agency ('TEQSA') has also defined them. According to TEQSA, university graduate attributes are 'generic learning outcomes that refer to transferable, non-discipline specific skills that a graduate may achieve through learning that have application in study, work and life contexts'.[6] Graduate attributes can be distinguished from unit or course-based learning outcomes, which tend to be more discipline-specific;[7] an example can help illustrate this distinction. At Curtin University, each course has specific Course Learning Outcomes. There are nine for the Bachelor of Laws course.[8] Course Learning Outcome 2 is as follows: 'critically and creatively analyse legal problems to articulate the issues involved and apply legal reasoning to make a considered choice between competing solutions'.[9] Curtin University also

4 Lorraine Anderson, 'The Learning Graduate' in Carey Normand and Lorraine Anderson (eds), *Graduate Attributes in Higher Education: Attitudes on Attributes from Across the Disciplines* (Taylor & Francis, 2017) 4, 8.

5 See, eg, Simon C Barrie, 'Understanding What We Mean by the Generic Attributes of Graduates' (2006) 51(2) *Higher Education* 215, 217; Simon Barrie, Clair Hughes and Calvin Smith, 'The National Graduate Attributes Project: Integration and Assessment of Graduate Attributes in Curriculum' (Final Report, The National Graduate Attributes Project Issues, 2009) 6; Beverley Oliver, 'Good Practice Report: Assuring Graduate Outcomes' (Report, Australian Learning and Teaching Council, 2011) 7–9.

6 Tertiary Education Quality and Standards Agency, *Glossary of Terms* (2017) Australian Government <https://www.teqsa.gov.au/glossary-terms> (accessed 22 November 2018).

7 See Oliver, above n 5, 8.

8 Curtin University, *Courses Handbook 2018: B-LAWS v.1 Bachelor of Laws* (18 May 2018) <http://handbook.curtin.edu.au/courses/31/319279.html> (accessed 22 November 2018).

9 Ibid.

has nine Curtin Graduate Attributes.[10] Curtin Graduate Attribute 2 requires students to: 'Think critically, creatively and reflectively'.[11] Comparing the two, it is readily apparent that both relate to thinking — more specifically, critical and creative thinking. However, the Course Learning Outcome is much more discipline-specific than the equivalent Curtin Graduate Attribute; the former can arguably be said to be the implementation of the latter in the context of the Bachelor of Laws course, an exercise that is not without its challenges.[12]

B *Rationales for the Existence of University Graduate Attributes*

Having defined university graduate attributes, it is necessary to consider why they exist. One of the most common reasons put forward in the literature is that the achievement of such attributes can help the employability of university graduates.[13] While the promotion of graduate employability is a significant driver, there are also regulatory reasons why universities adopt university graduate attributes. For example, pursuant to Standard 1.4.2 of the *Higher Education Standards Framework (Threshold Standards) 2015* (Cth),[14] the 'specified learning outcomes for each course of study encompass discipline-related and generic outcomes, including: … b. generic skills and their application in the context of the field(s) of education or disciplines involved'.[15] However, it is important to note that it is not only regulatory bodies like TEQSA that can influence university graduate attributes; industry bodies, such as Universities Australia, can also play a significant role.[16] For example, in March 2017, Universities Australia released its *Indigenous Strategy 2017–2020*.[17] A central aim of the Strategy is 'increasing cultural capabilities of graduates' with specific reference to 'Aboriginal and Torres Strait Islander cultural content'.[18] Responsibility for the achievement of this aim is placed directly on individual universities, and the creation of a specific graduate attribute is one suggestion put forward to achieve it.[19]

C *The Importance of University Graduate Attributes from a Student Perspective*

In Section A, it was explained that university graduate attributes are often characterised by their transferability; that is, while they are developed at university, they are intended to be applied both at university and beyond.[20] Section B commented on the connection between

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10 Curtin Learning and Teaching, *Curtin Graduate Attributes* (2017) Curtin University <http://clt.curtin.edu.au/teaching_learning_practice/graduate_capabilities.cfm> (accessed 22 November 2018).

11 Ibid.

12 See Oliver, above n 5, 9.

13 See, eg, Beverley Oliver, 'Assuring graduate capabilities: evidencing levels of achievement for graduate employability' (Final Report, ALTC National Teaching Fellowship, 2015) 8; Normand and Anderson, above n 1, 1.

14 Created pursuant to *Tertiary Education Quality and Standards Agency Act 2011* (Cth) Pt 5 div 1.

15 See also Oliver, above n 13, 8–11, and, in particular, the discussion of Standards 1.4.1, 1.4.2, and 1.4.4.

16 See Universities Australia, *About Us* (25 June 2013) <https://www.universitiesaustralia.edu.au/about-us#.W1LGU8K-mpo> (accessed 22 November 2018).

17 Misha Schubert and Bella Counihan, *Universities Unveil Indigenous Participation Targets* (1 March 2017) Universities Australia <https://www.universitiesaustralia.edu.au/Media-and-Events/media-releases/Universities-unveil-indigenous-participation-targets#.W1LGH8K-mpo> (accessed 22 November 2018).

18 Universities Australia, *Indigenous Strategy 2017–2020* (2017) 30 <https://socialsciences.arts.unsw.edu.au/media/SOSSFile/FINAL_Indigenous_Strategy.pdf > (accessed 22 November 2018).

19 Ibid.

20 Tertiary Education Quality and Standards Agency, above n 6.

university graduate attributes and employability.[21] Combined, these help to demonstrate the importance of university graduate attributes from the student perspective. Given that students need to demonstrate their competency with respect to these attributes while at university (through assessment performance),[22] and ultimately possess these skills when they enter the workforce, awareness and understanding of these university graduate attributes is essential. Through awareness of the graduate attributes, students are able to construct their own learning and understanding, and optimise their assessment performance in the course and units in which they are enrolled.[23]

D *Challenges Associated with Implementing University Graduate Attributes*

Despite their importance in the Australian higher education context, even a cursory review of the literature on university graduate attributes reveals that there are a number of challenges associated with them. Six challenges will be identified here. First, as noted by Barrie, university graduate attributes can often be somewhat vague.[24] By way of illustration, Oliver has identified a list of 'common generic skills' that include, for example, 'written and oral communication', 'critical and analytical (and sometimes creative and reflective) thinking', and 'ethical and inclusive engagement with communities, cultures and nations'.[25] If university graduate attributes were to be defined at that level of generality, they would be 'open to interpretation' and therefore could be problematic.[26] Second, as evidenced by the numerous government inquiries both in Australia and internationally,[27] the world of work is changing and, as a result, it is difficult to know exactly what attributes future graduates will require.[28] For example, in the Australian legal context, the recent *Future of Law and Innovation in the Profession* report explicitly recognised the impact of technology on both the legal profession and legal education.[29]

Third, a significant challenge identified in the Final Report of the National Graduate Attributes Project, a major Australian Learning and Teaching Council ('ALTC')–funded project, was that 'the way in which a university coordinates and approaches the implementation of its graduate attributes policy is often neglected'.[30] Closely linked to this is the fourth challenge: finding local (within the school or faculty) and broader institutional support for attempts to more fully engage with university graduate attributes. Without those who are prepared to champion engagement with graduate attributes, and without financial support, such initiatives will likely fail.[31] Fifth, there is the question of whether efforts to promote university graduate attributes should be driven from a top-down or bottom-up perspective.[32] This dilemma is further complicated by

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21 See, eg, Oliver, above n 13, 8; Normand and Anderson, above n 1, 1.
22 See, eg, Curtin Learning and Teaching, above n 10.
23 See generally John Biggs, 'Enhancing Teaching Through Constructive Alignment' (1996) 32 *Higher Education* 347.
24 Barrie, above n 5, 218.
25 Oliver, above n 13, 8.
26 Barrie, above n 5, 218.
27 See generally Senate Select Committee on the Future of Work and Workers, *About this inquiry* (2018) Parliament of Australia <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Future_of_Work_and_Workers/FutureofWork> (accessed 22 November 2018).
28 Normand and Anderson, above n 1, 1.
29 The Law Society of New South Wales, 'FLIP Report: The Future of Law and Innovation in the Profession' (2017) 77 <https://www.lawsociety.com.au/sites/default/files/2018-03/1272952.pdf> (accessed 22 November 2018).
30 Barrie, Hughes, and Smith, above n 5, 2.
31 Barrie, above n 5, 218.
32 Elke Stracke and Vijay Kumar, 'Realising Graduate Attributes in the Research Degree: The Role of Peer Support Groups' (2014) 19(6) *Teaching in Higher Education* 616, 617.

the different conceptualisations of 'top-down' and 'bottom-up'.[33] One potential solution to this challenge is to adopt a 'whole-of-institution approach'.[34] Finally, there are significant questions about the extent to which students are actually aware of, and attain, the university graduate attributes, not least of which is how to measure such awareness and attainment.[35]

E *Promoting Awareness and Attainment of University Graduate Attributes*

How then can a university ensure that its students graduate having attained the university graduate attributes? According to Anderson, a distinction can be drawn between an 'embedded' and a 'bolt-on' approach.[36] With an embedded approach, the teaching of graduate attributes is embedded into a unit through the curriculum. The principles of constructive alignment can be very helpful in this respect.[37] Constructive alignment is a term well explored in the literature on teaching in higher education.[38] It is about the achievement of 'maximum consistency' between the different elements of the educational experience.[39] In the present context, constructive alignment would indicate that a unit should be taught and assessed in such a way that students meet specific unit learning outcomes, the achievement of which will contribute to the achievement of the course learning outcomes, and ultimately result in the attainment of the university graduate attributes. Theoretically, in such a situation, students who successfully complete a unit should have made progress towards the attainment of the relevant graduate attributes; however, the reality is that the subtlety associated with the embedded approach can mean that students 'do not "see" the graduate attributes or fully comprehend their value'.[40]

The alternative bolt-on approach is somewhat different. Students have their attention specifically drawn to the relevant graduate attribute(s) through an additional component to the course.[41] Bolt-on approaches have their disadvantages, however. Most notably, they can be perceived as 'optional' because they are not a core part of the curriculum.[42] As will be explained later, the authors propose that the most effective approach is a combination of both. By embedding the graduate attributes into the curriculum and providing voluntary bolt-on programs to facilitate their development, the graduate attributes are at the forefront of the students' minds, and their ability to perform the attributes is assessed.

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33 See, eg, ibid. The authors consider a bottom-up approach to be (at least partially) peer-driven. Cf Normann Witzleb and Natalie Skead, 'A Bottom-Up Approach to Developing LLB Course Outcomes and an Integrated Curriculum' (2009) 43(1) *The Law Teacher* 62, 66–67, who explore top-down and bottom-up more from the perspective of whether the starting point should be the individual unit or a broader policy.

34 Beverley Oliver, 'Teaching Fellowship: Benchmarking Partnerships for Graduate Employability' (Final Report, LSN Teaching Development Unit, Curtin University, ALTC, 2010) 45.

35 Oliver, above n 13, 10–11.

36 Anderson, above n 4, 8.

37 See, eg, Lesley Treleaven and Ranjit Voola, 'Integrating the Development of Graduate Attributes Through Constructive Alignment' (2008) 30(2) *Journal of Marketing Education* 160, 161.

38 See, eg, Biggs, above n 23; Helen Larkin and Ben Richardson, 'Creating High Challenge/High Support Academic Environments Through Constructive Alignment' (2015) 18(2) *Teaching in Higher Education* 192.

39 Keith Trigwell and Michael Prosser, 'Qualitative Variation in Constructive Alignment in Curriculum Design' (2014) 67(2) *Higher Education* 141, 142.

40 Anderson, above n 4, 8.

41 Ibid.

42 Ibid.

III Project methodology

A Research Method

A survey method was adopted for the project.[43] The survey contained a mixture of basic quantitative and qualitative questions, which included basic demographic information about the participant (including current degree, and length of time in the degree), general questions about university graduate attributes (for example, a question that asked students to define the concept of a university graduate attribute, and one that explored the extent to which students feel that graduate attributes are important), and specific questions about the Curtin Graduate Attributes (including questions about what they are, and how academic staff can improve student awareness of them). The survey method was an appropriate match for the exploratory (pilot) nature of this project;[44] it enabled the research team to canvass many of the major issues relating to the research topic and to start identifying themes that can be explored in further research.

B Sampling

The survey was made available to students enrolled in three Bachelor of Laws units at Curtin Law School: a first-year core unit, a second-year core unit and a third-year elective unit. Unit enrolments ranged from 34 (third-year elective) to 132 (first-year core). The rationale for the selection of one unit from each year of the Bachelor of Laws degree was to allow for an examination of students' awareness of the university graduate attributes at different points throughout the degree.[45] The response rate for each unit can be found in Table 1 below. Overall (across all three units), the response rate was 61.57 per cent. It is important to note that the survey was administered in hard copy in tutorials for each unit; consequently, the response rate was impacted upon by the level of attendance in each tutorial. The project received human research ethics approval,[46] students were provided with a Participant Information Form and indicated their consent to participate in the survey instrument itself.

Table 1: Sample size and response rate

UNIT	NUMBER OF STUDENTS ENROLLED	NUMBER OF STUDENT RESPONSES	RESPONSE RATE
First-year core unit	132	83	62.88%
Second-year core unit	63	36	57.14%
Third-year elective unit	34	22	64.71%
Total	229	141	61.57%

43 For an overview of the survey method, see Wing Hong Chui, 'Quantitative Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law (Edinburgh University Press*, 2nd ed, 2017) 48, 62.

44 Exploratory research is one type of research that a survey method can be useful for. See Lawrence W Neuman, *Social Research Methods: Qualitative and Quantitative Approaches* (Pearson, 7th ed, 2014) 317.

45 While the decision to select a unit from each year group was purposive, selection of the individual units to survey was based primarily on convenience. See generally Chui, above n 43, 58.

46 Curtin University Human Research Ethics Office approval number: HRE2018-0111.

C Data Analysis

The survey collected both quantitative and qualitative data. The quantitative data was collated into a Microsoft Excel spreadsheet (one per unit) to determine the frequency distribution (a form of descriptive statistics).[47] While such analysis is limited in the depth that it can provide, it is suitable for the current project, given the questions asked in the survey. The qualitative data was collated into a Microsoft Word document (one document per question, separated by unit), with each document then imported into NVivo (qualitative data analysis software) for analysis.[48] The data were then coded thematically,[49] consistent with qualitative data analysis principles.

IV Research Project: Results and Discussion

This part of the paper will provide and discuss the results of the research project. It is organised into six sections. First, how students attempted to define the concept of a university graduate attribute will be examined. Second, student perceptions of the importance of university graduate attributes will be outlined. The data show that most students have at least a basic idea of the concept of a university graduate attribute, and view them as important, often because of their link to employability. In the third section, the data showing the number of students who were able to correctly identify the number of Curtin Graduate Attributes will be considered. The data evinces a concerning disparity between the number of students who perceive graduate attributes as important, and the number who were able to accurately identify the number of Curtin Graduate Attributes. The fourth section will explore student views on whether an embedded or bolt-on approach to teaching graduate attributes is preferable. The fifth section will consider the implications of the research, while the final section will state the limitations of the project and propose directions for further research.

A Defining a University Graduate Attribute

To gain an understanding of the extent to which respondents were familiar with the concept of a university graduate attribute, the survey asked them to provide a definition. An outline of the quantitative data can be found in Table 2.

Table 2: Definition of university graduate attribute

Question: Please explain (in your view) what is meant by a university graduate attribute				
UNIT	RESPONSE			
	ATTEMPTED DEFINITION	INDICATED UNCERTAINTY BUT ATTEMPTED DEFINITION	INDICATED UNCERTAINTY AND DID NOT ATTEMPT DEFINITION	DID NOT ANSWER
First-year core unit	71	5	5	2
Second-year core unit	31	0	3	2
Third-year elective unit	19	1	1	1
Total	121	6	9	5
Percentage	85.82%	4.26%	6.38%	3.55%

47 Neuman, above n 44, 396–398.

48 See QSR International, *What is NVivo?* (2018) <https://www.qsrinternational.com/nvivo/what-is-nvivo> (accessed 22 November 2018).

49 Lyn Richards, *Handling Qualitative Data: A Practical Guide* (SAGE, 2nd ed, 2009) 97.

The data in Table 2 show that only five of the 141 respondents did not provide any comment in relation to the question. Nine of the respondents expressed uncertainty as to the meaning of the concept and did not attempt a definition. For example:

> I am unaware of what 'university graduate attribute' means (FY32).

However, six respondents, while expressing uncertainty, did attempt to define what they thought a university graduate attribute was. For example:

> Not entirely sure. But maybe it could be the qualities a university student who has completed a degree would possess (FY75).

Amongst the 127 respondents who provided a definition of a university graduate attribute (the 121 who simply included a definition, plus the six who expressed uncertainty but also defined it), the level of detail of the definition varied considerably. At the less detailed end were, for example:

> Something you come away with following completing your degree (TY11).
>
> Skills that a student comes out with at the end of the degree (SY27).

In contrast, others provided a more expansive definition. For example:

> Attributes that are developed by students over their course at Curtin which makes them industry ready as these are attributes which professionals, firms and companies look for in their employees (FY61).
>
> Qualities that students are exposed to during their tertiary studies that will equip them with sought after skills in future graduate employment opportunities, ie make them 'career ready' (TY13).

What is notable about both of these more detailed definitions is the connection to employability. Forty-six of the 127 definitions (36.2%) contained an explicit connection to employability, through the use of a keyword or phrase ('real-world', 'employment', 'employability', 'workforce', 'job', 'profession', etc).[50] Given the connection between university graduate attributes and employability in the literature,[51] it is important that there is at least some awareness of the connection among those who responded to the survey.

While not strictly part of the question (and therefore not a common feature of the responses), 12 of the 127 that defined university graduate attributes made some attempt to identify the types of attributes that are relevant. The attributes identified included, for example, time management (FY10), leadership (FY35), professionalism (FY70) and critical thinking (SY28). Some attributes were identified by multiple respondents. Those most frequently identified were integrity (FY16, FY35, FY48, FY67), communication skills (FY10, FY26, FY35), honesty (FY15, FY16, FY67) and behaving ethically (FY15, FY51, FY70). Although drawn from a small sample, these responses demonstrate a degree of similarity with the list identified by Oliver, discussed earlier in the paper.[52]

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50 A number of other definitions provided reference to some future value to be gained from the possession of university graduate attributes, but were not sufficiently specific to be said to have an explicit connection to employability.

51 Oliver, above n 13, 8; Normand and Anderson, above n 1, 1.

52 Oliver, above n 13, 8.

B *Students' Perspective on the Importance of University Graduate Attributes*

As can be seen from Table 3, it was widely recognised among respondents that graduate attributes are important (86.52 per cent of respondents indicated that they perceived them to be important).

Table 3: Importance of university graduate attributes

Question: Do you think university graduate attributes are important?					
UNIT	RESPONSE				
	YES	NO	INDIFFERENT	DID NOT ANSWER	DID NOT ANSWER PROPERLY
First-year core unit	72	3	8	0	0
Second-year core unit	32	0	3	1	0
Third-year elective unit	18	0	3	0	1
Total	122	3	14	1	1
Percentage	86.52%	2.13%	9.93%	0.71%	0.71%

Consistent with the academic literature,[53] and the discussion above in relation to Table 2, the link between university graduate attributes and employability was a dominant theme. Of those who answered 'yes' (122), 110 provided an additional comment. Seventy-nine of the 110 (71.8%) who provided such a comment linked their response to employability.[54] Three examples, one from each year group, are provided below for illustrative purposes:

> Because they define a university graduate and separate them from non-graduates. They are skills that are supposed to help advance an individual in the recruitment stages of employment (FY9).
>
> They make the grad more employable and show a variety and depth of social and academic skills (SY13).
>
> They make you a better employee. So that you can contribute more effectively to your work (TY12).

Others raised the potential future benefit of possessing university graduate attributes, but did not provide a sufficient link to employability to be included in the above. For example:

> As it can help us further in the future beyond class (FY36).

Another interesting, albeit far less prevalent, theme in the 'yes' responses can be seen in relation to those who explicitly (or implicitly) commented on the importance of university graduate attributes from the university perspective.[55] One sub-theme in these responses was the importance of university graduate attributes to the reputation of the university:

> It defines a University's reputation and should hold graduates in good stead (FY23).
>
> Keeps graduate qualities consistent and maintains university reputation amongst employers. Gives prospective students a guide as to what skills and attributes they should expect from course (FY38).

53 Oliver, above n 13, 8; Normand and Anderson, above n 1, 1.

54 Employability was defined in the same way as for the definition question, with reference to specific keywords and phrases.

55 Employability and the university perspective were not mutually exclusive, ie a response could be coded into both if appropriate.

In contrast to those who answered 'yes', for those who answered 'indifferent', the primary reason for their response was that they did not sufficiently understand what university graduate attributes were. Fourteen respondents (9.93%) selected 'indifferent'. Five provided no further comment, but of the nine that did, eight drew attention to their lack of understanding. For example:

> They sound important but I am unaware of what they are (SY11).
>
> Have not heard much about them (TY5).

Only three respondents (2.13%) indicated that they did not view university graduate attributes as important. Two of the three reflected on the source of a person's attributes, commenting that they are not just shaped by university:

> Most attributes come from the individual 'character' and can be built on. However, they are 'hard' to be taught if you don't always possess initiative (FY51).
>
> Attributes can be gained from a range of experiences (FY69).

In contrast, and similar to the majority of those who answered 'indifferent', the third respondent who answered 'no' felt that their lack of knowledge about university graduate attributes meant that they were not important (FY40).

C *Students' Awareness of the Curtin Graduate Attributes*

At present, Curtin University has nine Curtin Graduate Attributes.[56] These attributes are 'explicitly communicated to staff and students in all course and unit documentation', such as unit outlines, and are readily accessible online on the university's webpage.[57] Theoretically, it could be expected that students would be familiar with the Curtin Graduate Attributes, and that those most familiar would be those towards the end of their degree (because they have read through many more unit outlines). Despite 86.52 per cent of respondents indicating that university graduate attributes are important (see Table 3), only 13.5 per cent were able to correctly identify the number of Curtin Graduate Attributes. The responses submitted were varied, with 27.7 per cent of respondents not even attempting the question, likely reflective of uncertainty. Table 4 depicts the distribution of the results.

Table 4: Respondents' awareness of the Curtin Graduate Attributes

Question: How many Curtin University Graduate Attributes are there?												
UNIT	RESPONSE											
	1	2	3	4	5	6	7	8	9	10+	DID NOT ANSWER	DID NOT ANSWER PROPERLY
First-year core unit	1	1	3	5	6	7	7	12	18	6	14	3
Second-year core unit	0	0	0	2	2	4	3	5	0	6	13	1
Third-year elective unit	0	0	0	0	4	2	0	1	1	2	12	0
Total	1	1	3	7	12	13	10	18	19	14	39	4
Percentage	0.7%	0.7%	2.1%	5.0%	8.5%	9.2%	7.1%	12.8%	13.5%	9.9%	27.7%	2.8%

56 Curtin Learning and Teaching, above n 10.
57 Ibid.

Of particular concern is that, of those respondents enrolled in the second- and third-year units, only one was able to correctly identify the number of Curtin Graduate Attributes. It is not entirely clear why this is the case; however, some additional insight is provided by the data contained in Table 5 and Table 6.

Table 5: The connection between the Curtin Graduate Attribute(s) and law unit(s)

Question: Are you aware of which Curtin Graduate Attribute(s) the law unit(s) you are currently enrolled in are intended to promote?				
UNIT	RESPONSE			
	YES	NO	DID NOT ANSWER	DID NOT ANSWER PROPERLY
First-year core unit	18	64	1	0
Second-year core unit	2	33	1	0
Third-year elective unit	4	18	0	0
Total	24	115	2	0
Percentage	17.02%	81.56%	1.42%	0%

Table 6: The extent to which teaching staff explain the connection

Question: Do you feel that the Curtin Law School teaching staff adequately explain the connection between the unit(s) you are currently enrolled in and the Curtin Graduate Attributes that the unit(s) are intended to promote?				
UNIT	RESPONSE			
	YES	NO	DID NOT ANSWER	DID NOT ANSWER PROPERLY
First-year core unit	19	61	2	1
Second-year core unit	2	30	2	2
Third-year elective unit	2	19	1	0
Total	23	110	5	3
Percentage	16.31%	78.01%	3.55%	2.13%

Two points can be noted here. First, in relation to Table 5, only 24 (17.02%) respondents indicated that they were aware of the connection between the Curtin Graduate Attributes and the unit(s) they were studying, while 115 (81.56%) said they were not. Both the first-year and third-year units were reasonably similar, with 18 (21.69%) and 4 (18.18%) 'yes' answers respectively. The second-year unit, by contrast, had only two 'yes' answers (5.56%). Second, in relation to Table 6, 110 respondents (78.01%) felt that teaching staff did not adequately explain the connection between the Curtin Graduate Attributes and the units they taught. In contrast to Table 5, second-year and third-year units were closer, with 2 (5.56%) and 2 (9.09%) 'yes' answers respectively, while the first-year unit had 19 (22.89%). It is, however, important to keep in mind the small sample size of the third-year unit.

D *Students' Opinion of the Best Approach to Promote Greater Awareness and Acquisition of the Curtin Graduate Attributes*

As can be seen from the discussion above, it is apparent that while students appreciate the importance of university graduate attributes in a general context, their understanding of the Curtin Graduate Attributes is very limited. Further, there is a perception that academic staff have a key role in helping to make the connection(s) for students. Building upon this, the final question in the survey asked respondents to consider whether academic staff should adopt an embedded or bolt-on approach to graduate attributes (to avoid confusion, the term bolt-on was not used in the survey — 'explicit and separate coverage' was used instead). Table 7 sets out the results.

Table 7: Student perceptions on how academic staff can better promote awareness and acquisition of the Curtin Graduate Attributes

Question: What approach do you think should be taken by the Curtin Law School teaching staff to promote greater awareness and acquisition of the Curtin Graduate Attributes amongst students?						
UNIT	RESPONSE					
	EMBED INTO THE CURRICULUM	EXPLICIT AND SEPARATE COVERAGE (in addition to the curriculum)	EMBED AND EXPLICIT AND SEPARATE COVERAGE	UNCERTAIN	DID NOT ANSWER	DID NOT ANSWER PROPERLY
First-year core unit	24	12	28	11	7	1
Second-year core unit	10	7	12	6	0	1
Third-year elective unit	7	1	10	4	0	0
Total	41	20	50	21	7	2
Response percentage	29.08%	14.18%	35.46%	14.89%	4.26%	1.42%

The most common response, a combination of embedded and bolt-on, received support from 50 (35.46%) respondents, while an embedded-only response received considerably more support (41, 29.08%) than a bolt-on approach alone (20, 14.18%). Additional insight can be drawn from the qualitative data. Of the respondents, only 79 provided a qualitative comment for this question. It is useful to conduct a comparison of the reasons of those who preferred an embedded to a bolt-on approach. Among those who commented in favour of an embedded approach, a number of themes arose, including ensuring coverage of the university graduate attributes, the potential for wasted time (and other resources) with a separate approach, and the perception that an embedded approach would make it easier to connect the course content to the graduate attributes. An example of each theme is provided below:

> So every student will cover the attributes, ie the students who usually won't read through [the] whole unit outline will encounter anyways (FY37).
>
> Teaching the attributes separate to the curriculum might just waste time/money unnecessarily. Just go over them in class every so often to make students more aware of them (SY20).
>
> It would probably be useful if they embedded them so then students know what skills relate to the particular parts of their learning (FY31).

Among those who indicated a preference for a bolt-on approach, ensuring coverage of the Curtin Graduate Attributes was the dominant theme. Ten of the 13 comments reflected this theme. For example:

> To raise awareness towards the attributes (FY13).
>
> (1) No one reads the curriculum. (2) I'd never heard of 'graduate attributes' before taking this survey so clearly it has been lost amongst all the information we receive (SY22).

The second response (SY22) is also interesting because it equates the unit outline with the curriculum (and, like FY37 extracted earlier, sees the unit outline as inadequate). The other responses in favour of a separate approach raised the distinction between examinable and non-examinable content (FY6), and commented on how a separate approach could work (FY64, FY70).

As to how to operationalise the teaching of the Curtin Graduate Attributes (and, more broadly, university graduate attributes), the respondents proposed a range of possibilities, including (but not limited to) explicitly stating them (and their connection to the content) in the first lecture, directing students on where to find them, using emphasis and repetition, and the development of compulsory online modules.

E Implications

Reflecting on the data, a number of points can be made. First, the majority of respondents have a basic understanding of university graduate attributes, at least to the extent that they can attempt to provide a definition of them (even if the quality of the definition was variable). Second, there is evidence of student awareness of the connection, recognised in the literature,[58] between university graduate attributes and employability. As noted earlier, a link to employability could be seen in 46 of the 127 definitions (36.2%), and in 79 of the 110 comments (71.8%) on the importance of university graduate attributes. At a broad level then, the data suggest that most students understand the concept of a university graduate attribute, and why they are important.

Third, there is a concerning lack of awareness of the Curtin Graduate Attributes among those who participated in the survey. As noted in Part II, Section C, having an awareness of the Curtin Graduate Attributes is likely to benefit students, who will be required to demonstrate these attributes both in their degree and their subsequent work. Only 19 out of 141 students (13.5%) were able to correctly identify the number of Curtin Graduate Attributes, and 18 of the 19 were enrolled in the first-year unit. This lack of familiarity is despite a standard section in each unit outline where the unit learning outcome(s) are explicitly matched to the relevant Curtin Graduate Attribute(s).[59] It also appears that many respondents were aware of this, as evidenced by the responses to the question: 'What action(s) do you think students can take to obtain a greater understanding of the Curtin Graduate Attributes?'[60] The three most common responses were: 'ask staff' (110), 'read Unit Outline' (96) and 'read the policy' (90). Given the responses to the above question, it appears that students are not reading relevant documentation in sufficient depth. Consequently, any approach to increasing awareness of university graduate attributes should involve more than their inclusion in documentation.

Turning to the final implication of the data — the question of whether an embedded or bolt-on approach to university graduate attributes is preferable — from a quantitative perspective, a combined approach gained the greatest support (50, 35.46%) with an embedded-only approach the second-most popular (41, 29.08%). The qualitative data discussed above in relation to Table 7 echo some of the themes in the literature with respect to the strengths and weaknesses

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58 See, eg, Oliver, above n 13, 8; Normand and Anderson, above n 1, 1.

59 See also, Curtin Learning and Teaching, above n 10.

60 The question allowed for multiple responses.

of the embedded and bolt-on approaches; for example, the potential to connect the graduate attribute(s) to the curriculum more closely through an embedded approach,[61] the ability of a bolt-on approach to raise awareness of a specific graduate attribute,[62] and the time and resource cost associated with a bolt-on approach.[63] Given the student preference for a combined approach, and that each approach by itself has its limitations, a combined approach appears to be the most appropriate. Such an approach could involve the integration of university graduate attributes into the curriculum, with teaching staff explicitly making connections where appropriate (for example, in lectures, in assessment documentation, etc) and the use of the occasional bolt-on initiative to target specific graduate attributes.

F Limitations and Further Research

There are three main limitations associated with this study. First, the project was limited to students enrolled in the three units surveyed; their experience may not be reflective of those who study a law degree elsewhere, or undertake a different course of study. Second, the study was not longitudinal; a longitudinal study, which traces students' awareness of university graduate attributes over the course of their degree, could be an option for further research in the area. Finally, the survey method itself is not without its limitations.[64]

As to further research: first, the present research does not consider the perspective of academic staff. An examination of the extent to which academic staff are aware of university graduate attributes, and the way(s) in which they are approached from a teaching and learning perspective could provide a valuable additional perspective. Second, the use of a longitudinal study, in which students' awareness and understanding of university graduate attributes are traced from the first year in their degree through to the end of their degree, could show the requisite development (or lack thereof), providing a way for academic staff to more appropriately target their efforts. Such research could help to answer some of the unresolved questions that arise from the present research.

V Conclusion

Although university graduate attributes can be perceived as a regulatory measure used to gauge student achievement, as demonstrated in Part II, they are also relevant to graduate employability.[65] Many Australian universities, including Curtin University,[66] have developed a set of graduate attributes: 'transferable, non-discipline specific skills that a graduate may achieve through learning', but which they can use outside of the university context.[67] From a teaching and learning perspective, graduate attributes can be approached from multiple perspectives; the perspectives explored in Part II consider whether the teaching of university graduate attributes should be embedded into the curriculum or taught through a bolt-on approach.[68]

The present research, detailed in Parts III and IV of this paper, involved a pilot project at the Curtin Law School, which sought to investigate the extent to which law students are aware of, and understand, university graduate attributes. Despite evidence of an understanding of university graduate attributes at a conceptual level, the data show a lack of understanding

61 Anderson, above n 4, 8.
62 Ibid.
63 Ibid.
64 See, eg, the discussion of the survey method in Neuman, above n 44, 316–367.
65 See, eg, Oliver, above n 13, 8; Normand and Anderson, above n 1, 1.
66 See Curtin Learning and Teaching, above n 10.
67 Tertiary Education Quality and Standards Agency, above n 6.
68 Anderson, above n 4, 8.

of the Curtin Graduate Attributes. Respondents also indicated a lack of understanding of the connection between the Curtin Graduate Attributes and the units they were enrolled in, evincing a perception that academic staff could do more to make the connection explicit. From an educator's perspective, such results indicate a need for more to be done. By increasing students' awareness and understanding of their university graduate attributes, educators' will not only optimise students' acquisition of the graduate attributes, but also assist students to contextualise and further their own learning and understanding.

Overall, the present study offers some important insights into law students' awareness and understanding of university graduate attributes. The most notable of these findings is the apparent disconnect between the perceived importance of university graduate attributes and the understanding of specific university graduate attributes. Such findings reinforce the need for university management and academic staff to think carefully about how to utilise a combination of the embedded and bolt-on approaches to best promote student awareness and acquisition of the university graduate attributes.

NEUROPLASTICITY, BELIEF BIAS AND IRAC — OLD PEDAGOGY BUT BRAND-NEW TOOLS FOR FIRST-YEAR LEGAL EDUCATION?

Kenneth Yin and Jennifer Moore***

Abstract

'Belief bias' is the tendency to be influenced by the believability of the conclusion when attempting to solve a syllogistic reasoning problem, or to judge the strength of arguments based on the plausibility of their conclusion rather than how strongly its premises support that conclusion.

This paper explores whether the presentation of a supportable, yet implausible, syllogistic conclusion to a legal problem, coupled with a direction to the student to plot the analytic path to that conclusion, enhances the student's predisposition to base an argument on legal logic rather than their own beliefs, and thereby ultimately enhance their cognitive skills.

IRAC, the formulaic legal problem template, is the legal variant of the Aristotelian syllogism. These hypotheses thus find a parallel in legal problem-solving and also align closely with an objective of advocacy training of presenting the premises of a syllogistic argument convincingly.

I Introduction

'Neuroplasticity', according to one lay definition is:

> The brain's ability to reorganize itself by forming new neural connections throughout life. Neuroplasticity allows the neurons (nerve cells) in the brain to compensate for injury and disease and to adjust their activities in response to new situations or to changes in their environment.[1]

The belief bias effect — that people are more likely to accept the conclusion to a syllogism if they believe it than if they disbelieve it irrespective of its logical validity — has long been accepted in the psychology of reasoning.[2] Proponents of the belief bias effect propound also that people are more likely to engage in logical thinking if a syllogistic conclusion is unbelievable.[3]

IRAC, the well-known acronym for 'Issue, Rule, Application and Conclusion', is a framework for legal problem-solving introduced early in Australian studies. It is frequently stated in legal commentary that IRAC is the legal variant of the Aristotelian syllogism, where the 'R' (for

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1 'Neuroplasticity' (24 January 2017) MedicineNet <https://www.medicinenet.com/script/main/art.asp?articlekey=40362> (accessed 17 June 2018).

2 Stephen Newstead, Paul Pollard, Jonathan Evans and Julie Allan, 'The source of belief bias effects in syllogistic reasoning' (1992) 45 *Cognition* 257, 258.

3 Newstead et al, above n 2, 257.

'rule') corresponds with the syllogistic major premise; the 'A' (for 'application'), with the minor premise; and the conclusion the logical outcome of the premises.[4] The hypotheses above can immediately be seen to be applicable to a legal problem. This paper explores whether it would be a beneficial development to incorporate this model within the law curriculum.

In Part II, 'Critical Thinking, Belief Bias and the Legal Syllogism', we explore the correlation between the three, focusing on the pedagogy that compelling the student to confront the unbelievable premises of a syllogistic argument will enhance their reasoning ability.

Part III is 'Overcoming Belief Bias — Tinkering with the Legal Curriculum'. In this part, we demonstrate practical ways in which those pedagogies can be adapted within the legal studies curriculum, focusing on how the law lecturer can create legal problem questions that align with those approaches. The discussion is prefaced by a brief introduction of a pedagogy called 'schemata theory'.[5] We then commence the discussion proper with a non-legal example to demonstrate the reasoning mind-set demanded, followed by two authentic legal examples.

II Critical Thinking, Belief Bias and the Legal Syllogism

A syllogism, to provide a layperson's definition that is adequate for present purposes, is a 'formal argument in logic that is formed by two statements and a conclusion which must be true if the two statements are true'.[6]

Newstead and colleagues describe belief bias as a 'well-established finding in the psychology of reasoning'[7] that:

> People are more likely to accept the conclusion to a *syllogism* if they believe it than if they disbelieve it, irrespective of its actual logical validity.[8]

Newstead et al also infer that there is a correlation between logical validity and the believability of the conclusion, and that logic has a larger effect on unbelievable than on believable conclusions, so that people focus on the conclusion and only engage in logical processing if this is found to be unbelievable.[9]

Even advocates of the phenomenon of belief bias — psychologists who have performed empirical psychological experiments such as Newstead and colleagues — acknowledge that its

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4 Anita Schnee, 'Legal Reasoning "Obviously"' (1997) 3 *Legal Writing: The Journal of the Legal Writing Institute* 105, 116; Kenneth Yin and Anibeth Desierto, *Legal problem-solving and syllogistic analysis: A guide for foundation law students* (LexisNexis, 2016) 6; Bradley C Clary and Pamela Lysaght, *Successful Legal Analysis and Writing: The Fundamentals* (Thomson West, 3rd ed, 2010) 842.

5 Camille Lamar Campbell, 'How to use a tube top and a dress code to demystify the predictive writing process and build a framework of hope during the first weeks of class' (2010) 48 *Duquesne Law Review* 273, 281.

6 'Syllogism' (2018) Merriam-Webster Dictionary <http://www.merriam-webster.com/dictionary/syllogism> (accessed 11 November 2018).

7 For example, it was noted elsewhere: 'Belief bias is most clearly marked by a tendency for subjects to accept invalid conclusions which are a priori believable': J St B T Evans, S E Newstead, J L Allen and P Pollard, 'Debiasing by instruction: The case of belief bias' (1994) 6(3) *European Journal of Cognitive Psychology* 263. Also, to similar effect: 'The notion of the rational reasoned has been challenged … untrained reasoners are not strictly logical and they base their decisions primarily on their personal knowledge … when solving such syllogisms students do not appear to base their judgments on the logical form of the arguments; instead they appear to base their judgements on the believability of the conclusions': Russell Revlin and Von Otto Leirer 'The effects of personal biases on syllogistic reasoning: Rational decision from personalized representations' in R Revlin and R Meyer (eds), *Human Reasoning* (Wiley, 1978) 52.

8 Newstead et al, above n 2, 258. They also acknowledged that whilst there was little doubt about the effects of belief bias, little was known about its source.

9 Newstead et al, above n 2, 257.

origins cannot be identified with certainty.[10] Newstead et al concede that their own hypotheses[11] may not, invariably, be accurate.

We do not claim Newstead et al's conclusions to be immediately applicable to legal argumentation since, amongst other things, their findings are underpinned by empirical psychological experimentation rather than authentic legal scenarios. We nevertheless rely on Newstead et al for the limited proposition that the presentation of an implausible legal syllogistic conclusion should increase the prospect that the participant (a law student) will engage the processes of logic more so than a plausible conclusion. Newstead et al's conclusion thus provides at least a bare foundation on which to graft further layers of legal pedagogy.[12]

As law lecturers, it is important to understand that the effect of belief bias must be confined to *syllogistic* conclusions, as this immediately aligns with the idea that IRAC is the legal variant of the Aristotelian syllogism described above.[13] Students are taught early on a feature of our common law tradition: that whenever a lawyer makes an assertion of legal principle, it must be supported by authority.[14] The idea that syllogism is a pedagogical tool to compel students to engage with principle is well explained by Professor Barbara Kalinowski as follows:

> It is the process of *forcing* ideas into a syllogism — whether revealing an objective 'truth' or not — that is likely to improve students' critical thinking skills.[15]

Legal commentators posit that '[e]very good legal argument is cast in the form of a syllogism',[16] and that 'legal analysis and argument must be grounded in the legal syllogism'.[17] Also, advocates and law students must know how to present an argument that is both supportable and convincing. Professor James Gardner, in his seminal work on syllogistic argumentation, explained that the syllogism was the model whereby one could reshape an 'argument into a tool capable of converting the most sceptical decision maker to the advocate's point of view'.[18]

Professor Kalinowski noted the science of neuroplasticity recognises that the brain can efficiently reorganise allocation of its resources to meet demands, and that humans can form bad and good neurological habits.[19] Her observations admittedly do not themselves add substantive material to our understanding of neuroplasticity[20] — inasmuch as they are essentially a reprise of the fundamental definitions of the same — but are noteworthy as they were directed to their application in legal studies and for her adoption of syllogistic logic. She lamented a 'modern trend of diminishing thinking skills' and advocated that law students be taught the means to employ logic, and that the syllogistic structure promotes clarity and consistency by

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10 Ibid 258.

11 Ibid.

12 '[I]t is possible that there are individual differences in the way in which people tackle syllogisms, and that not everyone attempts to construct mental models. There is indeed a strong possibility that more than one theory may be appropriate to explain performance in syllogistic reasoning tasks': ibid 283.

13 Newstead et al, above n 2, 258.

14 Catriona Cook, Robin Creyke, Robert Geddes, David Hamer and Tristan Taylor, *Laying Down the Law* (LexisNexis Butterworths, 9th ed, 2014) 484.

15 Barbara A Kalinowski, 'Logic Ab Initio: A Functional Approach to Improve Law Students' Critical Thinking Skills' (2018) 22 *Legal Writing: The Journal of the Legal Writing* Institute 109, 129 (emphasis added).

16 James A Gardner, *Legal Argument: The Structure and Language of Effective Advocacy* (LexisNexis, 2nd ed, 2007) 8; Yin and Desierto, above n 4, 5.

17 James Boland, 'Legal Writing Programs and Professionalism: Legal Writing Professors can join the Academic Club' (2006) 18(3) *St Thomas Law Review* 711, 719.

18 Gardner, above n 17, 3.

19 Kalinowski, above n 16, 120.

20 Especially 'Neuroplasticity', above n 1.

allowing one to observe each step of the analytic process.[21] Professor Kalinowski proposed the introduction of a practical method of harnessing the metacognitive benefits of logic,[22] and familiarity with syllogistic logic, including the skills of induction[23] and deduction,[24] was integral to her proposal.[25]

Professor Hillary Burgess[26] similarly stated that law professors might benefit from lessons in neuroscience and psychology by incorporating efficient and innovative teaching methods,[27] and argued that there should be a 'Revised Taxonomy' for learning and teaching.[28]

We introduce the various tiers of cognition on the Revised Taxonomy briefly, starting with the *fourth* tier — 'analysing'.[29] Professor Burgess explained 'analysis' to be a learning objective that was procedural such that, when students were presented with a hypothetical, analysis of that hypothetical served the purposes of deepening the students' knowledge of the rule, as well as teaching students the procedural knowledge of how to analyse similar problems.[30]

The *fifth* tier of cognition on the Revised Taxonomy — 'evaluating' — requires students to assess a situation based on defined criteria such as quality, effectiveness and consistency, including discriminating between relevant and irrelevant facts. This meant (for example) that students had to check their new understanding of the rule for inherent inconsistencies and with the cases that created the rule.[31]

The *sixth*, and highest, taxonomic tier — 'creating' — is 'combining multiple cases to create an understanding of the rule of law and thereby creating their own understanding of how the cases work together'.[32]

We propose that the learning outcomes of each taxonomic tier be enhanced by the prescription of an *implausible* syllogistic conclusion to a hypothetical, and students directed to plot a supportable analytic path towards that conclusion. The observant reader might note that our model of the hypothetical predicates an *implausible*, rather than *unbelievable*, syllogistic conclusion. This is because a lawyer's appreciation of syllogistic reasoning is different to the psychologist's, as Professor Gardner clearly explains:

> Unlike a philosopher, a legal advocate does not deal with open-ended questions, nor does the advocate approach a legal problem with an open mind. 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 …[33]

It is therefore unhelpful for a law student to engage the *impossibilit*y of a syllogistic conclusion, merely that it is *implausible* yet supportable. Syllogistic analysis for a law student

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21 Kalinowski, above n 16, 129.
22 Ibid 111.
23 Ibid 132.
24 Ibid 127.
25 Ibid 139.
26 Hillary Burgess, 'Deepening the Discourse Using the Legal Mind's Eye: Lessons From Neuroscience and Psychology that Optimise Law School Learning' (2011) 29 *Quinnipiac Law Review* 1, 16.
27 Ibid 2.
28 Ie 'revised' from Bloom's celebrated 'Taxonomy for learning, teaching and assessment' — for convenience, we call it here 'the Revised Taxonomy'. L Anderson, D Krathwohl and B Bloom, *A taxonomy for learning, teaching, and assessing: A revision of Bloom's taxonomy of educational objectives* (Longman, abridged ed, 2001), as cited in Burgess above n 26, 7.
29 Ibid 16.
30 Ibid.
31 Ibid 19.
32 Ibid 21.
33 Gardner, above n 17, 11; Yin and Desierto, above n 4, 11 (emphasis added).

has a purely pedagogical focus: to furnish an adequate foundation for teaching and understanding legal problem-solving.

Case methodology, eponymously, is a pedagogy that is underpinned by the concept that doctrine is developed via the cases through which it evolved, such that the only way of mastering doctrine was by studying those cases.[34] To that end, only a small portion of cases was considered necessary for analysis and were selected for study, as those decisions revealed a relevant body of doctrine or a mistaken deviation from the rules.[35]

In syllogistic reasoning, the student explores their repository of cases in order to determine the appropriate legal arguments that support their case and engages the processes both of *induction* and *deduction*. The following excellent explanation captures the essence of both processes and illustrates the movement between both: 'Induction creates and evolves rules; deduction applies them',[36] and syllogism is the vessel in which these processes find expression, within the respective major and minor premises.

Professor Catherine Wells[37] posited that case methodology invokes a process of 'second-order induction',[38] which demands that a certain relationship must hold true on all occasions; that the presence of even one non-conforming case means that the second-order induction is 'false', and that 'success (in identifying a relevant rule) is usually obtained' by restricting the field of search to a few well-chosen instances and attempting to find a pattern or construction that these few will *precisely* fit.[39]

It is comparatively straightforward to plot an analytic path to a syllogistic conclusion that aligns with the fundamental legal principle being applied; achieving this would require little more than a superficial appreciation of the leading cases. On the other hand, by comparison, when confronted with a mandated implausible syllogistic conclusion, the student must 'ferret'[40] through the development of the cases to search for the 'patterns and constructions'[41] within that

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34 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, 11–12.

35 Ibid 11.

36 Schnee, above n 4, 117; see also Yin and Desierto above n 4, 14.

37 Catherine Pierce Wells, 'Langdell and the invention of legal doctrine' (2010) 58(3) *Buffalo Law Review* 551.

38 In contrast to 'a general fact' that Wells described as an induction by simple enumeration, which is mentioned only for completeness, the idea 'general fact' methodology is not invoked today: ibid 600.

39 Ibid 601. Her reference to the need to find a 'pattern' or construction is pivotal and itself might attract a dedicated study of its own. A more detailed discussion is contained in Yin and Desierto, above n 4, 61, where I describe induction as including the process 'of drawing on fact patterns or generalisations that need to be present for the principles under discussion to apply in the case to apply in the case being decided'. Professor Linda Edwards, in her most useful work, gave the wise advice that 'Learning to recognize rule structures will be fundamental to your legal analysis in all settings — legal writing assignments, course outlines and examinations': L H Edwards, *Legal Writing Process, Analysis and Organisation* (Wolters Kluwer, 6th ed, 2014) 17.

40 'Ferreting' was a useful description of case methodology adopted by Professor Scott Anderson, who said: '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': Scott A Anderson, 'A Novel Teaching Practice: Using Nonlegal Fiction to Instil Legal Values' (2012) 21 *Perspectives: Teaching Legal Research and Writing*, 28.

41 Wells, above n 38.

would apply to the mandated conclusion. This is the *inductive* phase of syllogistic reasoning of rule *creation*.

Second-order induction in case methodology is the legal pedagogical equivalent of the search for what would be termed in math the 'highest common factor'.[42] This mathematical description evocatively conveyed to us the idea of second-order induction. Second-order induction — the search for the jurisprudential highest common factor — where the mandated syllogistic conclusion is anomalistic or implausible, ipso facto poses greater challenges than where the conclusion is in conformity with some general body of doctrine.

Professor Gardner provides useful advice that the major premise may need to be 'tinkered with' in order to yield the desired conclusion. In addressing the argument that the law is externally fixed, Professor Gardner noted that 'there is far more play in the joints of the law than the fiction of legal determinancy would have us believe'.[43] The result was that there is a degree of 'uncertainty' that is the lawyer's job to exploit, by attempting to 'fill in' a grey area of law in a way favourable to his client. Professor Gardner also noted that this does *not* mean that 'any argument at all will be acceptable', but, rather, that these arguments are dictated by the 'general contours of the law', which require '[s]ome limits on the types of arguments that can be considered contextually plausible'.[44] The veracity of Professor Gardner's advice will be evident when performing the case studies in Part III below.

The exercise of second-order induction immediately engages the various taxonomic tiers in the Revised Taxonomy.

In passing, it must not be assumed that a 'rule' is confined to some pithy proposition containing a solitary concept such as 'the age at which one can vote is 18'. Obviously, these rules do exist and are important,[45] but the discussion of rule structures and contours would be sterile if rules were always as simple. Far more useful, both jurisprudentially and pedagogically, is the challenge of having to synthesise more sophisticated and complex rules.

Having now identified the applicable rule (the achievement of 'success' in second-order induction),[46] the *deductive* phase of syllogism creation is then characterised by 'shoehorning'[47] the facts within the parameters of that rule.

The *fourth* taxonomic tier in the Revised Taxonomy — 'analysing'— is thereby engaged by the students' attempts to identify some applicable legal principle to support their implausible syllogistic conclusion. By their process of 'second-order induction',[48] they are compelled en route to explore the relevant case law to identify the principles that would capture the circumstances of their case study, an exercise that will likely result in a greater understanding of the cases beyond their stark findings as this outcome can be achieved only by 'ferreting' out the rationales that underpin the principles of case law.

The *fifth* taxonomic tier — 'evaluating' — is immediately engaged also. The process of induction, performed in their search for the correct rule, demands that students actually confront the question of whether their understanding of the rule is consistent with its underpinning rationales. If their understanding of the rule is not supported by, or inconsistent with, the

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42 For those unfamiliar, this is a term in elementary math. The highest number that can be divided exactly into each of two or more numbers: '6 is the highest common factor of 12 and 18': 'Highest common factor' (2018) Oxford Dictionary https://en.oxforddictionaries.com/definition/highest_common_factor (accessed 11 November 2018).

43 Gardner, above n 17, 25; Yin and Desierto, above n 4.

44 Gardner, above n 17, 25; Yin and Desierto, above n 4, 61.

45 Professor Edwards calls them 'a simple declarative statement with no sub-parts': Edwards, above n 40, 17; Yin and Desierto above n 4, 123.

46 Edwards, above n 40.

47 Kalinowski, above n 16, 26.

48 Edwards, above n 40.

underpinning rationales extracted from their research, then their understanding of the rule is necessarily flawed.

The *sixth* taxonomic tier — 'creating' — is a logical extension of the two lower tiers, which is immediately engaged by their synthesising the various principles and cases to bring into existence a composite rule addressing the particular problem (here the implausible, mandated syllogistic conclusion).

Each of the above processes is more clearly explained via the case studies discussed in Part III.

III Overcoming Belief Bias — Tinkering with the Legal Curriculum

There are two sub-parts to this part: in the first, we introduce the methodology by using an everyday example; in the second, we show its workings by an authentic legal example.

Using a non-legal example to teach legal writing principles is aligned with a method in adult education termed 'Schemata Theory', which is based on the idea of using acquired knowledge as a scaffold for creating new knowledge.[49] Professor Charles Calleros, a proponent, notes that non-legal examples perform the 'vital function of making abstract concepts more concrete'.[50] Professor Camille Campbell, another proponent, explains that legal writing professors commonly use non-legal examples to introduce fundamental legal writing principles[51] and demystify the legal reasoning process for first-year law students.[52] Professor Campbell cites the very example of 'rule synthesis' as the type of concept whose teaching is enhanced by the use of non-legal examples.[53]

We adopt the pedagogy of the Schemata Theory in our first case study, 'Shadow the Vicious (Maybe) Labrador', before exploring authentic legal examples:

Case Study 1 — Shadow, the Vicious (Maybe) Labrador

Consider the following exercise:[54]

The postman has been bitten by a dog, and Shadow the Labrador is suspected to be the culprit. The postman says:

> I reckon Shadow bit me but I didn't see it as it was dark. I know Labradors are meant to be generally friendly dogs — in fact, nearly all Labradors are friendly. I guess there is never any way of being 100 per cent sure, even with a Labrador though. I know that Shadow was the subject of inbreeding and also had been subject to abuse as a pup, which might have caused some problems and made it vicious.

There are three sub-parts to the question:

a. Disregarding questions of evidence, and confining your answer within the factual parameters above, set out an argument in the form of a syllogism/IRAC leading to the conclusion: *it is likely that Shadow bit the postman*. Shadow's propensity for viciousness

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49 Campbell, above n 5, 281, citing (inter alia) Joan Catherine Bohl, 'Generations X and Y in Law School: Practical Strategies for Teaching the "MTV/Google Generation"' (2008) 54 *Loyola Law Review* 775, 784.

50 Charles R Calleros, 'Using Classroom Demonstrations in Familiar Nonlegal Contexts to Introduce New Students to Unfamiliar Concepts of Legal Method and Analysis' (2001) 7 *Legal Writing: Journal of the Legal Writing Institute* 37; Campbell, above n 5, 278.

51 Campbell, above n 5, 276.

52 Ibid 278.

53 Ibid 277.

54 This exercise is an adaptation of one that I created for Yin and Desierto, above n 4, online resources that were created for the purposes of syllogism creation.

is the only substantive issue. Direct a student who proclaims themselves to be a dog/Labrador-lover to perform this part.

b. Using the same fundamental facts and assumptions adopted above, construct a syllogism in which the conclusion is: *it is not likely that Shadow bit the postman.* This sub-part should be directed to a student who is ambivalent towards dogs — or better, asserts they do not like dogs!
c. Discuss how to provide greater certainty to support 'their' respective conclusions; assume that any relevant 'research' material is readily accessible.[55]

The following answer would be considered a satisfactory response to sub-part a:

Issue: Did Shadow the Labrador bite the postman?

Major premise/rule: Labradors are generally, if not nearly always, friendly. Inbreeding and abuse as pups might, however, cause them to develop vicious tendencies.

Minor premise/application: Although Shadow is a Labrador and can therefore be expected to be friendly, as Labradors mainly are, it was the subject of inbreeding and suffered abuse as a pup. For these reasons, it cannot be confidently said that Shadow would, like almost all Labradors, be friendly, but might have vicious tendencies.

Conclusion: It is likely that Shadow may have had vicious tendencies, and consequently that it bit the postman.

The following would be an appropriate response to sub-part b:

Major premise/rule: Labradors are generally, if not nearly always, friendly. Inbreeding and abuse as pups might, however, cause them to develop vicious tendencies.

Minor premise/ application: Shadow was the subject of inbreeding and was subject to abuse as a pup. This might result in Shadow, unlike Labradors in general, having vicious tendencies. Nevertheless, since Labradors are generally, if not nearly always, friendly, it is unlikely that, despite its inbreeding and that it suffered abuse as a pup, Shadow could turn out differently.

Conclusion: It is unlikely that Shadow bit the postman.

Depending on the participant's predisposition towards dogs, a particular conclusion may be implausible. A participant who does not like dogs, in order to derive the mandated conclusion in the above example, must overcome their predisposition by dispassionately articulating the major premise fully and completely and then applying it to the circumstances of the particular case in order to demonstrate the analytic path culminating in the mandated syllogistic conclusion, a process that Professor Kalinowski would have described as 'forcing' their ideas into a syllogism.[56]

We next address another pair of responses to demonstrate the flawed thinking that attempting the exercise will hopefully overcome:

Version 1

Issue: Did Shadow the Labrador bite the postman?

Major premise/rule: Labradors that were the subject of inbreeding or abused as pups are likely to be vicious/can be vicious.

Minor premise/application: Shadow was abused and was the subject of in breeding.

Conclusion: Shadow was likely vicious and likely bit the postman.

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55 The direction here to assume that 'any relevant material is readily available' is made in order to align the case study more readily with a fundamental precept of conventional case methodology, which is that only a small portion of cases was considered useful and those were the ones selected for study: Wells, above n 38, 41.

56 Kalinowski, above n 16.

Version 2

Issue: Did Shadow the Labrador bite the postman?

Major premise/rule: Labradors are generally friendly.

Minor premise/application: Shadow was a Labrador.

Conclusion: Shadow was likely friendly and likely did not bite the postman.

The major premise in Version 1, 'Labradors that were the subject of inbreeding or abused are likely to be vicious', is seriously flawed as this does not accurately reflect the nuance of the rule at all. The essence of extracting the major premise is to identify the nuance of the rule and thereby to recognise its subtleties and contours, and this response achieves neither.[57]

Applying the idea of Professor Wells' 'second-order induction',[58] the major premises in the two flawed versions do not represent the achievement of 'success' in identifying the correct rule, as neither rule can *precisely* apply to the circumstances of an inbred Labrador that was the subject of abuse. The major premise in Version 1 is flawed as not all Labradors that were abused as pups or inbred will be vicious; Version 2 is flawed because not all Labradors are friendly since those that were abused as pups or inbred may not be friendly. In order to ascertain as best one can whether a Labrador will be vicious, one cannot legitimately assess the criteria discretely. To explain why not, one might proffer the following explanation in lay terms:

> On the one hand, it is a Labrador; on the other hand, it is the subject of inbreeding and also was abused as a pup. So, all things considered, is it likely to be vicious or not?

The benefit of adopting the Schemata Theory approach is that explaining the logical flaws of compartmentalising the various considerations this way will assist students to understand more intuitively the workings of induction, or rule evolution, without the impediment of an explanation that is too technical.

The *fourth* and *fifth* taxonomic tiers on the Revised Taxonomy — 'analysis' and 'evaluating' — are immediately engaged. 'Analysis' takes the form of recognising the various patterns or construction of the relevant 'cases', thereby providing students the knowledge of how to analyse similar problems.[59] 'Evaluation' is engaged in their having to confront the inconsistencies between one 'case' (which propounds that 'Labradors are friendly') with some other (in this case, say, 'Labradors that have been abused as pups or were the subject of inbreeding may be vicious'), and thus evaluate the veracity of their 'new' understanding of the rule. The achievement of the *sixth* taxonomic tier — to create a rule based on the 'new' understanding that has been achieved — is easiest to describe as it yields a tangible outcome: the creation of a satisfactory ultimate response (the respective 'satisfactory' major premises above).[60]

Such as it is, the major premise now finds expression in its 'correct' form but remains unpersuasive. The intended outcome is for the advocate, and the law student, to create a more compelling argument as a legal syllogism is necessarily created in the context of a contest between adversaries to a dispute.[61] The advocate must perform research into the questions of what will make a Labrador more or less likely to be vicious in the light of the desired conclusion.

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57 A person who was at best ambivalent towards dogs might feel predisposed towards providing an answer resembling Version 1.

58 Adopting Professor Well's language of second-order induction, above n 38, or of the recognition of *patterns or generalisations* to which I refer in Yin and Desierto, above n 4, 61. See also Edwards, above n 40, 17.

59 Burgess, above n 27.

60 For convenient reference, it is: *Labradors are generally, if not nearly always, friendly. Inbreeding and abuse as pups might, however, cause them to develop vicious tendencies.*

61 Gardner, above n 17.

This again, by parity of reasoning, engages each of the *fourth* to *sixth* tiers of cognition on the Revised Taxonomy.

For the advocate who was arguing that Shadow was likely to be vicious, the major premise might ultimately look something like the following (suspending disbelief):

> *Major Premise/rule*: Labradors are generally friendly dogs. Statistics, however, have shown that 'a great percentage' of those that have been abused as pups have a propensity as adult dogs to be vicious. Both the level of abuse and the 'percentage' are, admittedly, inconclusive … etc.
>
> The researches have shown likewise that inbreeding has the same effect. Some contend that whilst the offspring of siblings are almost bound to have this propensity, those born of other familial relationships are not so prone … etc.

Having created the major premise, the advocate and law student then applies the propositions above to the relevant facts in Shadow's case, this taking place in the minor premise.[62]

Case Study 2 — Who Gets the Baked Beans?

This exercise should be performed early in contract law studies, when 'offer and acceptance' are typically taught:

> Norman manages a large supermarket. There is one can of baked beans left on the shelf. He wants it for himself as he has not cooked dinner. Larry, a customer, brings it to Norman, who is working at the cashier's desk, and tenders the can. Norman says: 'Sorry, that's not for sale'. Larry replies: 'It's on the shelf, so that means it's for sale, doesn't it?'

Assuming the conclusion to be 'Norman/the supermarket is bound to sell the can of baked beans', set out the argument leading to this conclusion in correct syllogistic form. Confine your argument to: *is the display of the can of baked beans an offer.*[63]

First-year contract students will likely have a predisposition to the view that a display of goods in a retail shop may be an 'invitation to treat' not an 'offer' because of their having recently studied the principles in *Boots*[64] — a celebrated case that is authority for the view that, typically, a display of goods is an invitation to treat, not an offer. So, to them, the more plausible conclusion to the conundrum is: 'the display is an invitation to treat and not an offer', as it would be consistent with their likely superficial understanding of *Boots.*

The mandated conclusion will not fit within the general proposition that a display of goods is an invitation to treat. Expressed in the language of 'second-order induction',[65] this mandated conclusion would constitute 'a non-conforming case' to the rule: *a display of goods is an invitation to treat and not an offer*, with the result that the process of second-order induction has not been achieved (ie is 'false').[66]

The logical starting point to chart a syllogistic path to the mandated conclusion that the shop was bound, and could not refuse, to sell displayed goods like a can of baked beans is to define 'offer', of which one of several acceptable definitions is that it is a statement by which someone is prepared to be bound if acceptance is communicated to them.[67]

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62 Ie 'Shoehorns' them; Kalinowski, above n 16.

63 The situation has, in truth, been much modified by consumer protection laws. This direction compels the student to confront the most basic module in contract law, which will likely be their first substantive lesson.

64 *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401 ('*Boots*').

65 Wells, above n 38.

66 Wells, above n 38.

67 Eg *Levingston v Levingston* [2017] WASCA 91 ('*Levingston*'); *Crest Nicholson (Londinium) Ltd v Alaria Investments Ltd* [2010] EWCACiv 1331 at [25] ('*Crest Nicholson*').

The display in *Boots* was pharmaceutical goods whose sale could only be effected by a pharmacist. The upshot of a display being an invitation to treat is that the customer makes the 'offer', which the shop can accept or reject. On the other hand, a large supermarket arguably regards itself bound to sell commonplace items on display. Most are aware of the practice of insisting on being sold an item at the displayed price at a supermarket and familiar with the idea that if you present an item to the cashier and the scanned price is shown higher than the displayed price, you could insist on being sold the item at the price displayed.

The whole argument, expressed in its ultimate syllogistic/IRAC form will likely look something like the following:[68]

> *Issue:* Was the display of the can of baked beans in Norman's supermarket an offer?
>
> *Major premise/rule*: An offer is a statement that an offeror is prepared to be bound if acceptance is communicated whilst it (the offer) is alive — see *Levingston*.[69] Another definition is to ask if the offeree, having knowledge of the relevant circumstances, would understand that the offeror was making a proposal to which it intended to be bound, and, if 'yes', that proposal would be an 'offer' — see *Crest Nicholson*.[70]
>
> A display of goods is generally considered to be an invitation to treat and not an offer, this principle being underpinned by the rationalisation, and with the consequence, that it is the customer who makes an offer that the shop can either accept or reject — the *Boots* case.[71] *Boots* was a case of a retail chemist and there was a requirement that a registered pharmacist be present to handle the transaction.
>
> On the other hand, an advertisement might be regarded to be an offer if it was sufficiently certain and unequivocal. Such was the case in *Carlill*,[72] where the offeror's sincerity was found to be evident in their setting up a bank account to meet possible claims of people who had contracted influenza contrary to the offeror's claims that inhaling a smoke ball would prevent its onset.
>
> *Minor premise/application*: Two things differentiate the present case from *Boots*: the *first* is that the displayed item is a commonplace item, a can of baked beans that would not have to be sold under the supervision of anyone on behalf of the shop, unlike the chemical goods in *Boots.* The *second* is that the 'shop' is a contemporary supermarket and not a pharmacy.
>
> Contrary to *Boots*, it could be argued that the shop (supermarket) relinquished the right to refuse to sell to customers since a large shop like a supermarket arguably holds itself out as bound to sell at least common or household items that they have displayed and at the price they are displayed. This argument is fortified by the common experience that a customer considers themselves at liberty to insist on being sold commonplace items displayed in a large store at the displayed price. If so, then the display of the item would constitute an 'offer' under the respective definitions in *Levingston* and *Crest Nicholson.*
>
> A further distinguishing feature from *Boots* is that there is no analogous requirement in the present case for a registered pharmacist to handle the transaction. Such a requirement lends itself more readily to the argument that the shop could refuse to sell.
>
> The better argument is that the display of the can of baked beans is an offer.
>
> *Conclusion:* The displayed can of beans is an offer and Norman cannot refuse to sell to Larry.

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68 In the interests of realism, the names of the cases have been shortened, as this is the way students would be likely to set out their answers in class. The full names of the cases have been set out in footnotes for the benefit of the reader, though students would not ordinarily do so in class.

69 *Levingston*, above n 68.

70 *Crest Nicholson*, above n 68.

71 *Boots,* above n 65.

72 *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 ('*Carlill*').

Lest it be suggested that the answer is 'wrong', the reader is reminded that the correctness of the mandated conclusion is not the point of the exercise, merely that it be syllogistically *supportable*.

While this case study is self-evidently a far cry factually from Shadow the Labrador, the same generic mindset and pedagogical pathways are applied to achieve the intended outcome of traversing a syllogistic path to the mandated conclusion.

Second-order induction[73] has been achieved by the same analytic path of exploring the nuances of the rationales underpinning the relevant principles — in this case of an 'offer'.

The *fourth* taxonomic tier of 'analysis' is concomitantly engaged by exploring the patterns/contours of the underpinnings of an 'offer'. 'Evaluating', at the fifth taxonomic tier, is engaged by their being compelled to confront the inconsistency between the outcomes in *Carlill* and *Boots*. Then, having traversed each taxonomic tier, the 'creation' of the ultimate major premise above is the logical outcome of those processes.

The processes demands that students explore case law deeply, to 'ferret'[74] through it, but does not require them to perform any fresh research as the applicable principles are contained in cases that are all conventionally covered in early contract studies. This conforms with a precept of conventional case methodology that only a small number of cases are presented for study, being those that contain principles considered to be essential to the doctrine under consideration.[75]

Case Study 3 — Shadow Goes Missing[76]

Shadow the Labrador has run away. Michael, his owner, attaches 'flyers' to lamp posts in his locality, offering a reward of $500 for anyone who brings Shadow back. Norma knows Shadow, has seen the dog somewhere and sees Michael's flyer. Norma tells Michael: 'I know where Shadow is.' Michael says: 'I will pay you the $500 to find Shadow.' Norma says: 'Excellent, I will find Shadow.' Is Norma *bound* to find Shadow?

The mandated conclusion is: *Norma is bound to find Shadow.* The conclusion is obvious to an experienced lawyer, but personal experience suggests that first-year contract students struggle with it and find the conclusion initially implausible, something that lecturers unused to teaching first-year law students actually might find puzzling. The reason why first-year students perceive this conclusion to be implausible is that they theorise that Michael's offer led to a unilateral contract because they erroneously regarded the principles of *Carlill*[77] in relation to unilateral contracts to be applicable. *Carlill* is transported to the forefront of their consciousness because that case, like the question before them, invokes a 'reward' of some sort. They accordingly wrongly speculate that, by applying the principles of a unilateral contract in *Carlill*, Michael is bound to pay Norma the reward if she finds Shadow, but Norma is not *bound* to do so.

The answer that Norma is *not* bound to find Shadow is thus incorrect and betrays the fatal error of conflating the respective principles of a bilateral contract with executory obligations on the one hand, with the principles applicable to a unilateral contract on the other hand.

The mandated implausible conclusion is not only correct, but the only jurisprudentially supportable one. If one then converted the argument leading to the mandated conclusion to

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73 Wells, above n 38.

74 Anderson, above n 41.

75 Chang, above n 35; Wells, above n 38.

76 The facts are an adaptation of a case study we presented in our recent article: Kenneth Yin and Jennifer Moore 'Hypothetical Cases as a Pedagogical Tool in Contract Law Studies' (2017) 10 *Journal of the Australasian Law Teachers Association* 203, 208.

77 *Carlill*, above n 73.

the premises of a syllogism/IRAC, it would likely look something like the following, in stark outline:[78]

> *Issue:* Was an enforceable contract formed between Norma and Michael whereby Norma was bound to find Shadow?
>
> *Rule/Major premise*: A contract to be enforced conventionally demands the fact of agreement to be satisfied, and conventionally this is by an exchange of offer and acceptance — see eg *Marist Bros*.[79]
>
> An offer is a statement that an offeror is prepared to be bound to if acceptance is communicated whilst it (the offer) is alive — *Levingston*.[80]
>
> Acceptance brings about a meeting of the minds, and is an unqualified statement to be bound by the terms of the offer and there is nothing left to be negotiated — *Paal Wilson.*[81]
>
> A promise to be binding must be supported by consideration on the part of the offeree; consideration is something of value in the eyes of the law, either a promise or act — *AG for England.*[82]
>
> *Application/Minor premise:* Michael told Norma he would pay her $500 if she found Shadow. There is no suggestion of equivocality about his statement, or any question that he intended to be bound, such that the only supportable conclusion is that he made an offer in those terms.
>
> Norma, in response by saying 'excellent' followed by 'I will find Shadow', unequivocally accepted.
>
> Michael, by his promise to pay Norma $500, provided consideration to support Norma's promise to find Shadow and can prima facie enforce that promise.
>
> *Conclusion*: An enforceable contract was formed whereby Norma would find Shadow and she is bound to do so.

These arguments do not even engage the levels of jurisprudential sophistication demanded in the Baked Beans case study above, since, unlike the Baked Beans case study, the starkness of the premises is such that the processes of second-order induction are not even engaged. The nuances, or contours, of any individual bodies of doctrine (respectively, 'offer', 'acceptance' and 'consideration'), which are constituents of the ultimate, composite issue of whether a binding contract was made, are not even engaged. At its most pungent, a student who cannot resolve the issue would simply have missed the whole point of the question.

In order to resolve the 'issue', the students had to do no more than recognise that, based on the bland facts and unadorned legal principles, three incontrovertible conclusions should be drawn: Michael made an offer to pay Norma $500 to find Shadow; Norma accepted that offer; Norma's promise to find Shadow is supported by consideration on Michael's part. That ultimate conclusion finds expression in the mandated syllogistic conclusion: Norma is bound to find Shadow.

To achieve the mandated outcome, students need to engage with the sixth and highest tier of cognition on the Revised Taxonomy, 'creation'. The process of *forcing*[83] them to express the analytic path leading to the mandated syllogistic conclusion compels them to confront the rules

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78 It would be legitimate to break this down into sub-issues, addressing, separately, 'offer', 'acceptance' and 'consideration', and, in complex cases, would be more appropriate to do so. The present case is, however, straightforward and we have not troubled to do so.

79 *Marist Brothers Community Inc v The Shire of Harvey* (1991) 14 WAR 69.

80 *Levingston*, above n 68.

81 *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] AC 854.

82 *Attorney-General for England and Wales v The Queen* [2002] 2 NZLR 91.

83 Kalinowski, above n 16.

of offer, acceptance and consideration as a coherent whole and thereby to *create* the ultimate major premise in the form above. The starkness of the premises immediately demands a cogent understanding of the doctrine of contract formation as a coherent whole, failing which they will not succeed in charting a legitimate syllogistic path culminating in the mandated syllogistic conclusion.

III Conclusion

This paper commenced with the proposition that neither the credence of the belief bias effect, nor the idea that people are more likely to engage in logical thinking if they are confronted with an unbelievable syllogistic conclusion, is novel. Both ideas have long been accepted in contemporary psychology.

More surprising is the fact that, despite the apparent absence of controversy about these core concepts, there is limited evidence of their explicit adaptation as dedicated pedagogical tools in law studies. We suggest that their adaptation as a dedicated pedagogical tool in legal studies is particularly apt, given that problem-solving is very much part of the legal curriculum. Problem-solving in legal studies in turn demands that students demonstrate an ability to synthesise a legal rule and to apply that rule to the facts of the problem at hand, leading to a supportable conclusion. The suggested method here of directing students to plot an analytic path to a mandated, implausible syllogistic conclusion very much aligns with the acquisition of these skills.

Our experience as Australian law lecturers suggests there is a paucity of training in critical thinking in the law school curriculum, and we concur with Professor Hillary Burgess's observation that familiarity with syllogistic logic, including the skills of induction and deduction, be part of a practical method of harnessing the metacognitive benefits of logic.[84] The methods suggested in this paper are based on the fundamental proposition that compelling students to convert legal argumentation into their syllogistic form will lead to a closer understanding of doctrine as a whole. This can be achieved with relatively little interruption to the existing curriculum, as it draws on the assumption that, in any event, familiarity with IRAC, the formulaic problem-solving template, is an integral part of their training. The two examples provided above, respectively 'Who Gets the Baked Beans' and 'Shadow Goes Missing', were deliberately drawn from modules in early first-year studies, which would be covered in any conventional Australian first-year law curriculum, to show the relative ease with which the proposed method can be adopted.

84 Burgess, above n 27.