

# TEACHING TRANSACTIONAL LAW – A CASE STUDY FROM AUSTRALIA WITH REFERENCE TO THE US EXPERIENCE

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## *Abstract*

*This paper considers the international trend towards the development of a transactional law focus within law schools by examining a subject taught in an Australian law school as a case study and with reference to the US experience. Key questions under examination include whether there is more that law schools can do to make law graduates practice-ready or practice-aware and, if so, what law schools should do to achieve this objective. The findings from a student survey are consistent with much of the US experience in terms of revealing the benefits of making more of the conventional materials and incorporating a broader range of teaching methodologies. The findings are also consistent in terms of confirming the challenges that transactional law subjects present across the range of relevant issues, including the design of the conceptual framework, the selection of appropriate teaching materials and the management of student expectations around assessment. This paper concludes by arguing that law schools are ideally placed to meet the challenges in this regard; in particular, they are ideally placed to use substantive law as the primary context in which to explore the relevance and application of law from a transactional perspective, providing students with greater insights not just into legal principles and doctrine, but also into transactions skills and the broader commercial context in which transactional lawyers operate.*

## PART I: THE CONTEXT

### *A. The International Trend Towards Teaching Transactional Law*

Increasingly, the legal profession in Australia and overseas is expecting law schools to produce graduates who have made a well-informed decision to pursue commercial practice and who are prepared for the challenges involved. Law firms expect graduates to understand the role that transactional lawyers play in both a domestic and cross-border context, and also to have developed an awareness of some essential skills, including advising, drafting and negotiation.

There is an international trend towards the development of a transactional law focus within law schools. This trend has been referred to as the “transactional law movement” or the “practical skills reform movement.”<sup>1</sup> It is particularly

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evident in the United States, where law schools such as Emory and Columbia have established transactional law programs. A transactional law program is a natural complement to the clinical law programs that are also well-established in the US and have taken root in Australia. In these programs, students get involved in minor disputes and develop their experience in dealing with clients and disputes at law school clinics and community legal service centres.

The trend in the US goes back to 1989, when the American Bar Association established a taskforce to “narrow the gap” between law schools and the profession, which led to a report in 1992 known as the MacCrate Report.<sup>2</sup> This was in response to the perceived failing on the part of law schools to prepare students for legal practice. Following this, in 2007, the Carnegie Foundation in the US published a report entitled *Educating Lawyers: Preparation for the Profession of Law*.<sup>3</sup> In 2011, the Association of American Law Schools established a new section on Transactional Law and Skills. More recently, in 2014, the American Bar Association approved its Standards and Rules of Procedures for Approval of Law Schools.<sup>4</sup> These include Standards 303 and 304, which address experiential learning and simulation courses and respond to a trend that is now well-established in the US.<sup>5</sup>

To date, much of the research and thinking in relation to teaching transactional law has been published in the United States and the trend towards transactional law programs at law schools in other jurisdictions such as the UK,

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<sup>1</sup> For a detailed discussion of the literature surrounding the teaching of transactional law and practical skills in training in law schools, see Carl J. Circo, *Teaching Transactional Skills in Partnership with the Bar*, 9 BERKELEY BUS. L. J. 187, 217-31 (2011); Martin J. Katz, *Facilitating Better Law Teaching – Now*, 62 EMORY L.J. 823 (2013); Stephen M. Johnson, *Teaching for Tomorrow: Utilizing Technology to Implement the Reforms of MacCrate, Carnegie and Best Practices*, 92 NEB. L. REV. 46 (2013).

<sup>2</sup> AMERICAN BAR ASSOCIATION LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM (1992), available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2013\\_legal\\_education\\_and\\_professional\\_development\\_maccrate\\_report\).authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report).authcheckdam.pdf).

<sup>3</sup> WILLIAM M. SULLIVAN, ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW, (Carnegie Foundation for the Advancement of Teaching 2007), available at [http://www.albanylaw.edu/media/user/celt/educatinglawyers\\_summary.pdf](http://www.albanylaw.edu/media/user/celt/educatinglawyers_summary.pdf) (summarizing the Carnegie Report).

<sup>4</sup> AMERICAN BAR ASSOCIATION, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS (2014-2015).

<sup>5</sup> *Id.* at ch. 3.

Australia and Hong Kong has been less pronounced. This is not to say that extensive research has not been published in other jurisdictions on the challenges facing the legal profession in its endeavours to ensure that law graduates have the practical knowledge and skills necessary to enable them to perform an effective role in practice. However, there is much less research in this area that has been produced by teachers at *law schools* and in which the primary focus has been on what *law schools* can and should be doing to bridge the gap.<sup>6</sup>

There are at least two reasons that could be attributed to this. First, unlike the situation in other common law jurisdictions such as the UK, Australia and Hong Kong where graduates are required to complete both a professional training course and a period of work experience<sup>7</sup> before they qualify for admission, the states in the US have adopted bar examinations as the prerequisite for admission to practice and there is no “rigorous practice preparation between the law degree and bar admission.”<sup>8</sup> As a result, there is an expectation that once graduates have passed the bar examination, they should immediately be able to “hit the ground running” when they move into practice.<sup>9</sup> And because there is no required professional training course in the US to ease graduates into practice, the onus has been placed on law schools to do more to make graduates practice-ready or practice-aware.<sup>10</sup> A related factor that is likely to have had an impact is that US

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<sup>6</sup> The focus of this paper on some of the key published research in the US is not based on a conscious decision to disregard the research in other jurisdictions, but, instead, on a wish to engage with the US scholarship in this area and to highlight the extent to which the Australian experience is consistent with the US experience and can therefore draw on that experience for its own purposes, despite the differences in the legal education systems and pathways to qualification.

<sup>7</sup> The required work experience is usually between one and two years.

<sup>8</sup> Clark D. Cunningham, *Should American Law Schools Continue to Graduate Lawyers Whom Clients Consider Worthless?*, 70 MD. L. REV. 499, 504 (2011). The Law Society of Hong Kong published a consultation document in 2013 on the feasibility of implementing a common entrance examination for those wishing to be admitted as solicitors in Hong Kong.

<sup>9</sup> See Stephen J. Friedman, *Why Can't Law Students Be More like Lawyers?*, 37 U. TOL. L. REV. 81, 85 (2005) (arguing that law schools must bridge the gap between everyday realities and the practice of law or risk other institutions filling the gap); Therese H. Maynard, *Teaching Transactional Lawyers* 10 TENN. J. BUS. L. 23 (2009) (considering the values needed by a good business lawyer).

<sup>10</sup> For literature on this theme, see Celeste M. Hammond, *Borrowing from the B Schools: The Legal Case Study as Course Material for Transaction Oriented Elective Courses: A Response to the Challenges of the MacCrata Report and the Carnegie Foundation for Advancement of Teaching Report on Legal Education*, 11 TENN. J. BUS. L. 9 (2009); Kenneth N. Klee, *Teaching Transactional Law*, 27 CAL. BANKR. J. 295, 295-311 (2004) (reporting data from a transactional law education survey); Karl S. Okamoto, *Teaching Transactional Lawyering* 1 DREXEL L. REV. 69 (2009) (reporting on an innovative approach where practicing lawyers get involved in demonstrating how lawyers engage in transactional lawyering); William L. Reynolds, *Back to the Future in Law Schools*, 70 MD. L. REV. 451 (2011) (considering the call from law firms fro universities to prepare their graduates better for practice); Michael Woronoff, *What Law Schools Should Teach Future Transactional Lawyers: Perspectives from*

law firms, at least traditionally, have not had the same systemized training programs as their counterparts in the UK, Australia and Hong Kong.

Secondly, until relatively recently, the professional law degree in the UK, Australia and Hong Kong has been taught primarily at the undergraduate level and, as a result, has had a less vocational focus than is found in the graduate JD degrees that characterise the approach in the US.<sup>11</sup>

In recent years, however, the momentum towards teaching transactional law and clinical law subjects has begun to build in all jurisdictions. A number of reasons can be suggested for this. First, over the past two decades or so, the curricula at law schools have become broader: more public law subjects have been incorporated and, consequently, demand for private law subjects that were previously considered core for commercial practice, such as insolvency law, private international law and the law of negotiable instruments, has declined.<sup>12</sup> In the view of many commercial law firms, this has created a technical deficiency and has meant that graduates are less practice-ready than before, leading to increased expectations on law schools and professional training providers to bridge the gap. Secondly, the surge in the number of law schools and law graduates, supported by the abolition of quotas on admission to undergraduate degrees in jurisdictions such as Australia,<sup>13</sup> has led to a significant increase in competition for a decreasing number of graduate positions.<sup>14</sup> When combined with challenging economic circumstances in recent years and changes to the

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*Practice* (UCLA School of Law, Law-Econ Research, Paper No. 09-17, 2009), available at <http://ssrn.com/abstract=1430087> (noting that law graduates do not have the requisite skills or expertise to be immediately effective in practice); James A. Fanto, *When Those Who Do Teach: The Consequences of Law Firm Education for Business Law Education*, 34 GA. L. REV 839 (1999) (arguing that more needs to be done by business law professors to align the demand of law firms vis-à-vis skills of junior lawyers and the teaching of business law). Writers have also noted the refusal on the part of clients to pay for time that is spent by first or second year associates on their cases, as they are perceived as not adding any value. See Cunningham, *supra* note 8; Friedman, *supra* note 9. This is in line with a global trend towards requiring law firms to demonstrate the value that they have added and to justify the resources that they have committed to client matters.

<sup>11</sup> Melbourne Law School broke new ground in Australia when it moved to a graduate-only professional law degree in 2008. The University of Western Australia followed suit in 2012.

<sup>12</sup> See Reynolds, *supra* note 10, at 460.

<sup>13</sup> This is known in Australia as a demand-driven university admission system.

<sup>14</sup> Concerns about the surge in the number of law graduates recently led the Chief Justice of Victoria to voice concerns about the risk of a law degree becoming a generalized degree and to note that there were two mechanisms to control numbers: the introduction of a bar examination and the imposition of caps. The Hon. Marilyn Warren, Chief Justice of Victoria, *The Access to Justice Imperative: Rights, Rationalisation or Resolution at the Eleventh Fiat Justitia Lecture*, Monash University Law Chambers (Mar. 25 2014).

regulation and structure of law firms themselves,<sup>15</sup> this has created challenges for law graduates, even those with excellent results from the top law schools, in terms of securing positions in commercial law firms. In response, there is an increased pressure on law schools to help students identify career pathways and to prepare students accordingly.<sup>16</sup> Thirdly, the law schools themselves are facing increased competition as globalization and increased mobility on the part of students have broadened the range of options available to students and applying to one's local law school is no longer the only option that students consider.<sup>17</sup> The reputation and quality of clinical law and transactional law programs are thus important aspects of a law school's unique selling proposition. A key challenge in this regard, one that is explored in this paper, is how law schools can or should differentiate themselves from the professional legal training providers in preparing law students and graduates for practice.

One can also point to changes in the role of commercial lawyers and the need for lawyers to have a much broader range of skills than was provided thirty years ago. This is reflected in the extent to which the primary focus of internal law firm training programs has expanded from purely technical legal skills to include "workplace skills", such as drafting and negotiating, and also broader business skills, such as commercial awareness, as part of the move towards the use of competency models for professional development.<sup>18</sup> It is also reflected in the recruitment practices of law firms and the criteria that they apply when vetting applications from potential recruits.<sup>19</sup>

Another reason why there are increased expectations on law schools to make graduates practice-ready is that there is a limit to what the professional training or continuing legal education (CLE) programs can do. Although such programs have an important role to play in terms of increasing the quality and consistency of law graduates, by necessity they focus on the practical, "how to" aspects of practice and do not necessarily add to the ability of graduates to engage

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<sup>15</sup> See Friedman, *supra* note 9, at 85 (the "deep-running structural and economic trends in the legal profession have profoundly changed the landscape. . . . These trends have conspired to produce important changes that have made the traditional paradigm of legal education and training increasingly unrealistic.")

<sup>16</sup> See Circo, *supra* note 1, at 202. The increase in competition has led to the strengthening of career resources within law schools in Australia.

<sup>17</sup> Simultaneously, this has led to an increase in the number of international students, which in turn has driven the globalization of many law schools.

<sup>18</sup> Fanto, *supra* note 10, at 839 (arguing that "because law firm education shows how business law practice is changing, we in the academy should draw insights from it to help us better prepare our students for the practice that awaits them.")

<sup>19</sup> These recruitment practices include recruiting trainees through the clerkship programs and requiring applications to participate in simulated activities that are designed to test problem-solving and commercial awareness skills.

in critical analysis and to locate legal issues within the broader context. In addition, anecdotal evidence from both Australian and UK law firms suggests that even where they have been willing to outsource much of the professional training to external providers, they still see a need to tailor the courses for their purposes and to deliver some of the training in-house.<sup>20</sup>

Arguably, it is only at law school that students are able to obtain a theoretical and conceptual foundation for understanding law and the ways in which it is applied to resolve the myriad issues that arise in society and commerce, and to develop the analytical skills necessary to perform effectively as lawyers. Further, in principle at least, law schools are better able to marry the theory of law with the practical application of law as they are the primary centre of learning for substantive law and are staffed with professional educators for that purpose.<sup>21</sup> Consequently, to the extent that law schools can teach law within a transactional or clinical context and incorporate skills training into the substantive law curriculum, they are adding value to the legal profession and maximizing their potential to produce quality graduates.

Granted, much training still needs to be provided “on the job” and there is a limit to what law schools can do.<sup>22</sup> For a start, many law teachers, at least in Australia, do not have extensive experience in practice.<sup>23</sup> Secondly, the need to teach substantive law and to maintain the rigour necessary for an academic subject, including in terms of assessment, imposes practical constraints on the

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<sup>20</sup> In the experience of the writer, some law firms, particularly the larger law firms, have concerns about the tendency for practical training courses to create perceptions on the part of law graduates that learning skills is relatively straightforward, with the result that graduates fall into the trap of thinking that they know more than they do in reality. This is particularly relevant to skills such as drafting, where some law firms have a preference for in-house training programs to ensure that law graduates pick up the right habits and are inculcated in the style and approach of the law firm.

<sup>21</sup> See Woronoff, *supra* note 10, at 5-6; Fanto, *supra* note 10, at 843.

<sup>22</sup> See Fanto, *supra* note 10, at 843. Interestingly, although junior lawyers are constantly learning ‘on the job’, the active involvement of senior lawyers in this process has been replaced in recent years by the formal internal training programmes. Friedman, *supra* note 9, at 85 (noting that the demands of modern practice do not accommodate the previous “learning on the job” approach, indicating that the traditional methods of teaching law have become less effective).

<sup>23</sup> The difficulty of teaching transactional law and having teachers capable of teaching it has been recognized by a number of writers. See Debra P. Stark, *See Jane Graduate. Why Can't Jane Negotiate a Business Transaction?*, 73 ST. JOHN'S L. REV. 477, 482 (1999) (noting that the difficulty of teaching transactional law arises from the fact that many professors have limited experience on transactional matters); Victor Fleischer, *Deals: Bringing Corporate Transactions into the Law School Classroom*, 2002 COLUM. BUS. L. REV. 475 (2002) (examining the various models that can be used to teach transactional law). Other authors have highlighted the benefits of using guest lecturers or adjunct faculty. See Eric J. Gouvin, *Teaching Business Lawyering in Law Schools: A Candid Assessment of the Challenges and Some Suggestions for Moving Ahead*, 78 UMKC L. REV. 429, 446 (2009) (discussing different functions that guest lecturers can serve).

extent to which law schools can teach law and transactional skills within a transactional or clinical context and teach skills as part of substantive law.<sup>24</sup>

### B. *Impediments and Challenges*

If there is so much more that law schools can or should do, why has it taken so long, and what are the impediments, at least in Australia? One of the greatest impediments is the influence of tradition or convention on the design and delivery of law curricula. As many commentators have remarked, the conventional law school curriculum is very effective in teaching students to think like a law professor, a barrister or an appellate court judge and to develop the ability to write opinions and apply the law to a hypothetical set of facts.<sup>25</sup> In this context, the facts are reviewed primarily for the purpose of extracting the legal principles and determining how the dispute was resolved through the application of those legal principles. There may be some discussion about the factual background and how the dispute arose; however, the broader factual background is usually peripheral to the primary objective of understanding how the facts relate to the development and application of legal principles and is not a central focus in terms of exploring how the dispute arose and the roles of the non-party protagonists, such as the lawyers and other advisers. In this respect, writers have suggested limitations with the Socratic method in terms of teaching transactional skills, both in relation to understanding the broader context and also in relation to teaching methodology.<sup>26</sup> As Chomsky and Landsman note, “the standard emphasis on Socratic dialogue in the classroom creates a learning environment well designed for students who learn best through abstract conceptualization and reflective observation, but [is] ill-suited for those whose learning strengths are centred in concrete experience and active experimentation.”<sup>27</sup>

In addition, the focus has been more on the skills of the litigator over the transactional lawyer.<sup>28</sup> Although this approach is of critical importance for an

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<sup>24</sup> See Woronoff, *supra* note 10, at 11-12, 14 (noting time constraints and the limitations of transactional legal clinics).

<sup>25</sup> See Fleischer, *supra* note 23, at 4 (noting that although law school is supposed to teach students to think like a lawyer, it actually teaches students to think like a law professor).

<sup>26</sup> In the legal context, the Socratic method involves learning about doctrine through the critical analysis of conventional materials, such as case law, and questioning different points of view. See Hammond, *supra* note 10, at 9-10 (“Teaching law students substantive business law, transactional skills and professionalism in the context of a real transaction, rather than in the context of resolving a dispute, as the traditional appellate case focus does using the Socratic Method, offers students advantages in preparing for their professional role as problem solvers.”).

<sup>27</sup> Carol Chomsky & Maury Landsman, *Introducing Negotiation and Drafting into the Contracts Classroom*, 44 ST. LOUIS U. L.J. 1545, 1546 (2000).

<sup>28</sup> See Gouvin, *supra* note 23, 430-31; Okamoto, *supra* note 10; Tina L. Stark, *Thinking Like a Deal Lawyer* 54 J. LEGAL EDUC. 223 (2004); Chomsky & Landsman, *supra* note 27, at 1545; Circo, *supra*

understanding of the development of legal principles and doctrines, it is not so effective in teaching students how to think like commercial lawyers. In this sense, the focus has been on the ‘back end’ of a business relationship (i.e. the way in which the law is interpreted and applied in the context of resolving disputes) rather than the “front end” (i.e. the way in which the law is relevant to structuring transactions and to identifying and allocating risks between the parties to the transaction).

The design of transactional law subjects is also not without its challenges. First, there is a need to maintain academic rigour and to build on what law schools do best; namely, the teaching of substantive law and legal doctrine. Similarly, many writers<sup>29</sup> argue that the teaching of skills is most effective when taught within the context of a substantive area of law and when the primary focus is on the theories behind the relevant skills rather than the techniques themselves. This creates challenges in terms of how the theories behind the relevant skills should best be taught within the practical constraints of timing and resources.

Secondly, a transactional approach requires a lot of time and effort on the part of the teachers in designing and teaching law in a transactional context and assumes a certain level of practical experience on the part of the teacher. In particular, it requires teachers who are able to marry the theoretical or academic approach with the practical or experiential approach and law schools that are prepared to recognize the experience and skills of teachers in this regard for promotion and funding purposes.

Thirdly, teaching law in the broader context – as distinct from focussing purely on the development of legal principles and doctrine – creates challenges for assessment. The issues and themes that are potentially assessable are much broader than in conventional subjects, where the primary focus is on applying the law to hypothetical fact situations. As the feedback from the student survey in Deals reveals,<sup>30</sup> this can create a degree of anxiety on the part of students as they struggle to determine how much they are expected to know and how the relevant knowledge will be assessed.

Whatever the benefits of the clinical, transactional and experiential approaches to law teaching, there is no doubt that these approaches encourage, if not force, a re-assessment of how we define a law subject for the purposes of a law degree. Although this is a “brave new world” to law teachers in many jurisdictions, it is an appropriate response to the challenges of the modern legal profession and to the range of careers that a law graduate can pursue, both in the realm of transactional practice and beyond.

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note 1, at 188; Maynard, *supra* note 9, at 26; Daniel B. Bogart, *The Right Way to Teach Transactional Lawyers: Commercial Leasing and the Forgotten “Dirt Lawyer,”* 62 U. PITT. L. REV. 335, 335-36 (2001).

<sup>29</sup> See *infra* Part III for further discussion.

<sup>30</sup> See *infra* Part III for further discussion.

In his article outlining the thinking behind a transactional subject at Columbia Law School, Fleischer identifies three reasons or challenges why law schools have struggled - the lack of a conceptual framework; the lack of qualified teachers and the lack of quality teaching materials – and describes how the Deals program at Columbia Law School addresses these challenges.<sup>31</sup> This paper suggests some further ways of mitigating these challenges based on the experience from the subject Deals, and the proposition that it is possible for law schools to make more of what they do best; namely, teaching substantive law and legal analytical skills.<sup>32</sup>

Fleischer also considers the various conceptual models that might be employed in designing a transactional law subject; namely, (1) the continuing legal education (CLE) model, where a “presenter (usually an expert practitioner) describes a hypothetical transaction...describes each step of the transaction...[and] identifies possible ‘red flags’ or issues to be aware of...[an approach that is] best suited for someone who already has experience doing deals...[but not] the best way for a law student to get introduced to corporate transactions”; (2) the clinical model, where “[u]nder the supervision of clinical faculty, students represent real clients...[and] negotiate and draft relatively simple agreements like residential leases”; (3) the on-the-job model, where the bulk of the learning comes from actual work experience within law firms; and (4) the Deals model. Fleischer suggests that transactional law is best taught through the paradigm of the Deals model, under which an examination of lawyers as transaction cost engineers provides a conceptual framework within which transactional law and transactional skills can be taught.<sup>33</sup>

This paper explores the experience gained under what the author would suggest as a further model, where substantive law is taught from a transactional perspective by incorporating transactional elements into a capstone course that covers a range of areas, including contract law, property law and corporations law. Part II outlines a subject taught at the writer’s law school that adopts this model. Part III reports on the findings from a survey of students who took the subject in 2013. Part IV identifies some of the challenges and possible solutions, and Part V provides some concluding remarks on what all of this might mean for the future of legal education in Australia.

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<sup>31</sup> Fleischer, *supra* note 23, at 5 (pointing out that not all professors have industry experience in securities, M&A, tax or bankruptcy); *see also* Gouvin, *supra* note 23, 433-34, 439; Stark, *supra* note 23, at 481; Klee, *supra* note 10, at 10.

<sup>32</sup> See *infra* Part IV for further discussion.

<sup>33</sup> Fleischer, *supra* note 23, at 8-10. The concept of lawyers as transaction cost engineers was explored in the seminal article by Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing* 94 YALE L. J. 239 (1984).

## PART II: THE SUBJECT “DEALS”

I have now taught Deals for six years, beginning in 2009. Its name was unabashedly inspired by the ground-breaking subjects of the same name that have been taught for many years at Columbia Law School<sup>34</sup> and other law schools across the United States. Despite the pretensions that this name-borrowing might suggest, the subject that I have taught is more a conventional subject than a pure transactional subject that dissects a transaction from start to finish and embraces a broad range of perspectives that include economics and finance. Like conventional subjects, it maintains its focus on the substantive law and how legal concepts and principles become relevant in a transactional context.<sup>35</sup> However, one of the areas in which it differs from conventional substantive law subjects is that many of the topics are designed around a domestic business acquisition, which provides a unifying framework within which the relevant issues are examined. In addition, it examines the theories behind transaction skills and also the role of lawyers, and the challenges that they face, in a transactional context.

The prescribed materials in Deals are drawn from conventional sources, including case law, statutes, extracts from textbooks on Australian law and academic articles. In addition, non-legal materials such as business surveys and media reports are used to provide general, contextual information. As such, the approach is more in the nature of a course-pack than a casebook.

In terms of the teachers, 2013 was the first year in which a co-teacher, an adjunct member of faculty, was invited to teach certain topics. This was very helpful in terms of providing new ideas for teaching the topics and also designing new practical exercises for the skill topics such as drafting. As in previous years, a practitioner from one of the law firms was invited to deliver a guest lecture on “Deals in Practice.” This was also very helpful in terms of consolidating many of the concepts discussed in class and reinforcing the extent to which they were relevant in the context of real-life deals.

An outline of the subject and teaching methodology is contained in Schedule 1. A description of the areas that the subject covers, together with details of assessment and the use of technology, appears below.

### *A. Substantive Law*

Deals teaches law in the same way as any other law subject in terms of examining doctrine by reference to conventional materials such as case law, statutes and commentaries. The essential difference is that it reverses the approach adopted by other substantive law subjects. Instead of taking one area of law, such as contract law, and observing how the principles have developed

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<sup>34</sup> See Fleischer, *supra* note 23, for a description of the subject at Columbia Law School.

<sup>35</sup> The subject is perhaps similar to a basic business transaction course. See Gouvin, *supra* note 23, at 444; see also Klee, *supra* note 10, (surveying the transactional law education at US law schools and gathering data on subjects taught with a transactional emphasis). Klee’s survey confirmed the high demand for transactional courses at US law schools. *Id.*

across a broad range of cases and fact scenarios, I take one transaction – a business acquisition – and look at how the substantive law across a broad range of subject areas is relevant. These subject areas include contract law, property law, company law, torts and remedies.<sup>36</sup>

In essence, Deals takes certain core concepts that students have learned in their compulsory subjects and extends them further by looking at how they are applied in the context of a domestic business acquisition. The subject commences by providing an introduction to the commercial context in which an acquisition occurs and the commercial drivers and motivations behind an acquisition. It does this by examining a case study that involves a real-life business acquisition and asking students to think about the benefits and risks of the acquisition and the factors that the directors of the acquiring company would need to take into account in deciding whether to proceed with the acquisition.<sup>37</sup> The case study is supported by material that outlines the different types of acquisition from a theoretical perspective and the different issues and challenges that each type of acquisition involves.<sup>38</sup>

The subject then examines how an acquisition is structured and the differences, from both a legal perspective and a commercial perspective, between an asset purchase and a share sale. The examination of an asset purchase involves a consideration of the legal nature of contractual rights and the extent to which rights under contract are capable of being assigned and dealt with as proprietary rights or choses in action.<sup>39</sup> The examination of a share sale involves a consideration of the legal characterization of shares, including the rights that they confer and whether they are proprietary in nature. This is relevant to the question

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<sup>36</sup> See Reynolds, *supra* note 10 for a discussion about the importance of foundational subjects such as property and contract.

<sup>37</sup> See Hammond, *supra* note 10, for an analysis of the benefits of business case studies for transaction-oriented subjects.

<sup>38</sup> The different types of acquisitions are as follows: (1) horizontal acquisitions, where the acquirer and the target are in the same business; (2) vertical acquisitions, where the target is part of the supply or production chain and the acquirer wishes to achieve vertical integration between in, say, the supplier-customer relationship; (3) related acquisitions, where the acquirer and target are in similar or related businesses and economies of scope are possible through diversification and achieving a strategic fit between businesses; and (4) unrelated acquisitions. See RONALD J. GILSON & BERNARD S. BLACK, *THE LAW AND FINANCE OF CORPORATE ACQUISITIONS* (2d ed. 1995).

<sup>39</sup> For this purpose, the subject examines section 134 of the *Property Law Act 1958* (Vic), the equivalent of section 136 of the *Law of Property Act 1925* (UK), the predecessor of which was the *Judicature Act 1873* by reference to the following decisions: *Pacific Brands Sport and Leisure Pty. Ltd. v. Underworks Pty. Ltd.* [2005] FCA 288 and *Pacific Brands Sport & Leisure Pty. Ltd. (ACN 098 742 708) and Others v Underworks Pty. Ltd. (ACN 088 861 616)* (2006) 230 ALR 56.

as to whether, prior to completion, a purchaser of shares has equitable title to the shares and, if so, what remedies might be available to protect that interest.<sup>40</sup>

Following this is an examination of the various stages in an acquisition, including the legal status and effect of preliminary agreements and obligations to negotiate in good faith.<sup>41</sup> This leads into a discussion about various provisions in a share sale agreement, for which a template document is provided for reference purposes. The relevant issues include the legal status of representations, warranties and indemnities and the remedies that are available for misrepresentation and for misleading and deceptive conduct under section 18 of the *Australian Consumer Law 2010* (Cth).<sup>42</sup>

As noted above, the relevance of substantive law in the context of a business acquisition is one of three areas of focus in the subject. In this way, the subject serves as a capstone subject; namely, a subject where students can revise and reinforce concepts learned in their core subjects and gain insights into how those concepts are applied in a practical or transactional context.

### B. *Transaction Skills*

The second area of focus in Deals is transaction skills (drafting, negotiation and advisory skills). In line with the general approach adopted by the subject, theory and substantive law provide the primary context in which these areas are taught. In other words, we look at cases, we look at statutes and we look at academic commentaries. The objective is to give students a better awareness of the theory behind transaction skills and their relevance in a transactional context rather than to equip them comprehensively to apply these skills as if they were in practice.

The theory behind drafting skills is considered by reference to plain English (or plain language) principles and various cases in which drafting issues have been of critical importance.<sup>43</sup> The theory behind negotiation skills is considered by reference to various materials, including seminal work by Fisher and Ury, Freund and Salacuse.<sup>44</sup>

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<sup>40</sup> For an example of a case that examines the issues, see *Luxe Holding Ltd. v. Midland Resources Holding Ltd.* [2010] EWHC 1908 (Ch).

<sup>41</sup> Cases examined include *Coal Cliff Collieries Pty. Ltd. & anor v. Sijehama Pty. Ltd. & anor* (1991) 24 NSWLR 1 and *Walford v. Miles*, [1992] 2 AC 128.

<sup>42</sup> The successor to section 52 of the *Trade Practices Act 1974* (Cth).

<sup>43</sup> One of these cases is *Ener-G Holdings Plc v. Hormell* [2012] EWCA Civ 1059, in which the interpretation of the word “may” in the context of a notice clause was considered.

<sup>44</sup> ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN*, (New York: Penguin Books, 1983); JAMES C. FREUND, *SMART NEGOTIATING: HOW TO MAKE GOOD DEALS IN THE REAL WORLD* 175- 224 (New York: Simon and Schuster, 1992); JESWALD W. SALACUSE, *THE GLOBAL NEGOTIATOR : MAKING, MANAGING AND MENDING DEALS AROUND THE WORLD IN THE TWENTY-FIRST CENTURY* (New York: Palgrave Macmillan, 2003).

In addition to examining the theory behind drafting and negotiation skills, the subject examines the relevance of these skills within the context of a substantive law topic: restraint of trade (known as non-competition clauses or non-competes in the US). The law governing restraint of trade in Australia is found in both case law and statutes. This context provides an opportunity for students to examine the way in which case law interacts with statutes and also the way in which the drafting of commercial clauses is inevitably influenced by each of these sources of law.<sup>45</sup> Restraint of trade also provides an ideal context in which to examine the challenges that arise in negotiations and around which a simulated drafting and negotiation exercise can be designed. This is because there are a number of commercial factors that need to be taken into account in agreeing and drafting a restraint of trade clause in a business acquisition agreement, including the scope of the business that is subject to the restraint, the geographical area in which the restraint applies and the length of the restraint period. All of these factors lend themselves well to the design of a simulation scenario where a team acting for the buyer can engage in the drafting and negotiation process with a team acting for the seller and where briefing notes that are tailored for each team can be formulated in order to simulate a real-life deal.<sup>46</sup> In this way, a substantive area of law can be used for a range of purposes, including teaching the impact of the law on how deals are structured, the issues that need to be taken into account when lawyers draft, negotiate and advise on commercial clauses and also the challenges that this poses for lawyers when they perform their role in a transactional context.

Chomsky and Landsman have noted the benefits of negotiating contractual provisions, allowing students to become more aware of the “complexity of and interplay among substantive, writing and ‘people’ skills in the practice of law.” They have further noted that:

The primary lesson we learned from incorporating this exercise in class was that students can learn enormous amounts from any

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<sup>45</sup> The materials include *Geraghty v. Minter*, 142 CLR 177 (1979); *Peters (WA) Ltd. v. Petersville Ltd.*, 205 CLR 126 (2001); *Lloyd’s Ships Holdings Pty. Ltd. and Another v. Davros Pty. Ltd.*, 17 FCR 505 (1987), and the *Competition and Consumer Act 2010* (Cth), ss 4M, 51(2)(b), (d) & (e).

<sup>46</sup> The simulation is designed around the facts in the following case: *Levicom Int’l Holdings BV Anor .v Linklaters* [2009] EWHC 812 (Comm); *Levicom Int’l Holdings BV, Levicom Investments Curaco NV v. Linklaters* [2010] EWCA Civ 494. This case is an ideal case for teaching purposes as it touches on a number of issues that are relevant to the subject, including the duty of care that lawyers owe clients and the standard to which they are subject when they provide advice to clients, issues concerning the interpretation of a restraint of trade clause and the challenges that transactional lawyers face when they assist clients in complex cross-border deals. A similar exercise involving a non-compete clause has been used by Chomsky & Landsman, *supra* note 27, at 1547-48.

For a discussion of the benefits of client-based simulations in bringing the substantive law to life, see Carol R. Goforth, *Use of Simulations and Client-Based Exercises in the Basic Course*, 34 GA. L. REV. 851, 853 (2000).

such effort even if the problem itself is very simple and untested and only a small amount of time is devoted to the problem. While it is impossible to teach students how to negotiate and draft a contract in a single exercise and two days of conversation, our experience showed that it *is* possible to raise significant issues about lawyers' skills even under such constraints.<sup>47</sup>

### C. *The Role of Lawyers in a Transactional Context*

The third area of focus is the role of lawyers and the challenges that lawyers face when they assist clients in commercial transactions. For this purpose, the subject engages with the debate over how business lawyers create and add value.<sup>48</sup> It also examines a number of related issues, including the basis on which lawyers price their services and the rules of professional conduct that are applicable to lawyers, particularly in the context of their fiduciary duty (including the duty to avoid conflicts of interest) and the duty of confidentiality.

In addition to examining the issues as described above, this area also provides a conceptual framework in which to consider various issues and challenges arising out of the cases and materials covered in earlier topics. For example, the role of lawyers and the ways in which they add value can be considered by reference to their involvement in the various stages of a business acquisition, including drafting preliminary agreements, undertaking due diligence and drafting and negotiating a share sale agreement.

### D. *Assessment and the Use of Technology*

This subject endeavours to be innovative in relation to assessment. For example, the interim form of assessment requires students to advise a client on a legal issue in the context of a hypothetical transaction. The advice takes the form of a memorandum and is assessed not only by reference to the accuracy of the technical legal knowledge but also by reference to the way in which the written advice has been communicated to an informed lay-person (i.e. a client who is not legally qualified).<sup>49</sup> This is a challenge for many students, as the assessment tasks in conventional law subjects have traditionally allowed students to assume that the reader (i.e. the examiner) is a legal expert in the subject area and to tailor the terminology and expression accordingly. As a result, students need to think not just about whether they have interpreted and applied the law correctly, but also

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<sup>47</sup> Chomsky & Landsman, *supra* note 27, at 1559.

<sup>48</sup> The materials include Gilson, *supra* note 33, at 239-56, and Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486 (2007).

<sup>49</sup> The five assessment criteria are as follows: (1) Does the memorandum of advice demonstrate a good understanding of the legal issues? (2) Have the specific questions been answered? (3) Does the memorandum anticipate potential issues of concern to the client? (4) Does the memorandum consider the commercial context as well as the legal issues? (5) Has the advice been expressed in a clear and concise manner?

whether they have communicated their advice clearly and concisely to a lay-person – priorities that are of critical importance to a practitioner.

One other area of innovation is relevant in terms of the use of technology to reinforce concepts discussed in class and to prepare students for class exercises: the adoption of two interactive on-line skills modules entitled “Communications – Writing in Practice” and “Preparing for a Negotiation.” The first module is designed to reinforce the importance of advisory skills and to help students prepare for the interim assessment. It does this by providing a guide to writing skills that are required in practice, highlighting the need to use clear and concise language and identifying the relevance of style and format. The second module is designed to reinforce an understanding of negotiation theory and to help students prepare for the simulated deal exercise. It does so by outlining the purpose and structure of the simulation exercise and identifying tools to assist students to work effectively in negotiation teams. The modules were created using a variety of learning tools, including videos of lawyers providing practical advice, videos of the lecturer introducing the material, interactive exercises to develop an understanding of drafting skills and multiple-choice questions to reinforce important information. The interactive on-line skills modules were designed to be accessible via computers and mobile phones. In 2011, the first year in which the modules were employed, feedback was provided by 35 students (in the case of the first module) and 15 students (in the case of the second module) and included the following comments:

*“The module helped me clarify my structure of advice, and gave me some useful strategies to engage my client.”*

*“This module assisted in clarifying the assessment criteria.”*

*“I found the online modules very useful. On the whole I think these are a great initiative and recommend their greater distribution.”*

*“The module enabled me to recap the important points covered in class.”*

### **PART III: THE FINDINGS FROM THE 2013 STUDENT SURVEY**

The main objective of the 2013 student survey from which the findings below have been taken was to identify student expectations in relation to the subject and to determine the extent to which the subject met, or fell short of, those expectations. In particular, the survey attempted to elicit the key factors motivating students to take the subject and whether these factors were attributable to the subject’s relevance to career plans, the practical nature of the subject, or simply a desire to take a subject that was perceived to be different from other subjects.

At the outset, it is important to acknowledge the limitation of the student survey: it was informal in nature and makes no claim to being scientific or comprehensive. In addition, as with any survey, challenges arise in terms of how the survey questions are framed and interpreted. This inevitably involves definitional issues. For example, how do students interpret questions that focus

on the “practical” or “innovative” nature of the subject and what is their point of reference? At the very least, however, it is suggested that the findings from the student survey make for an interesting comparison with other subjects and also highlight some of the challenges that a transactional law subject faces. In particular, it is useful to note the extent to which the findings are consistent with the existing research in the US.

The questions that were used for the survey are set out in Schedule 2. These were contained in three questionnaires: one that was completed at the start of the subject; one that was completed at the end of each topic and one that was completed at the end of the subject. The questionnaires at the start and end of the subject were primarily aimed at measuring expectations; the questionnaire completed at the end of each topic was primarily aimed at measuring the perceived utility of each topic and the extent to which students considered that it was taught in an innovative and effective manner.

In addition, one of the purposes of the student survey was to determine the extent to which student considered that the subject was different, either in content or in the way in which it was taught, from their other subjects and, if so, why.

The subject in 2013 was taught intensively in two streams over a period of nine days: one stream comprised 11 students and the other comprised 13 students. The enrollment was relatively low as compared with the enrollment when the subject was taught throughout the semester.<sup>50</sup> Although the sample size was small, this proved useful for the purpose of facilitating student feedback as it replicated the ideal class size in terms of a subject of this nature. In addition, the classes were interactive, which encouraged continuous feedback from the students, all of whom completed the relevant parts of the student survey at the end of each class.

The following is an outline of some of the key findings. Many of the issues that underpin these findings resonate with the US experience. Schedule 3 contains selected findings in the form of pie-charts.

*All students enrolled in the subject for its practical focus and its relevance to future careers*

In response to the question “What was the primary reason for choosing Deals as one of your electives?”, 100% of the students chose either ‘the relevance of the subject to future career possibilities’ (43%) or ‘an interest in understanding how law applies in a practical/transactional context’ (57%). Interestingly, no students chose “a wish to try a subject that is different from other subjects,” suggesting that the novelty of the subject was not a factor in the decision of students to take the subject.

The practical focus was also reflected in the responses to the question “Are you hoping that this subject will be innovative and, if so, in what way?” The

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<sup>50</sup> When taught as a semester-long subject, Deals usually attracts up to 60 students.

majority of students chose “it will be practical in focus” (79%), with a small minority choosing “it will help to consolidate my understanding of concepts studied in previous subjects” (21%) and no students choosing “the teaching methodology will be different from other subjects.” Once again, this suggests that most students based their decision to take the subject on the expectation that it would provide insights into the practical relevance and application of law to commercial deals.

*A majority of students identified the practical nature of the subject as its most innovative aspect*

In the final feedback on the subject, 59% of students thought that the subject was innovative or different as a result of its practical nature.

*A majority of students identified drafting and restraint of trade as the most useful topics*

When asked in the final class to identify what the most useful topic was, 42% of students identified drafting and 26% of students identified the classes on restraint of trade as the most useful topic. As noted above, restraint of trade was the substantive context in which drafting was taught. When both drafting and restraint of trade are added together, over two-thirds of the students (68%) identified drafting skills and its related topic (restraint of trade) as the most useful topics. These findings support the proposition that skills can be effectively taught alongside and in the context of substantive law subjects, such as the law governing restraint of trade.<sup>51</sup>

*A majority of students identified the practical exercises and interactive class discussion as the most innovative aspects of the topics*

When the responses to this question were tallied across topics, 33% of students thought that a topic was innovative because it was practical or involved practical exercises and 6% thought that a topic was innovative because of its focus on aspects relevant to practice. On this basis, a total of 39% of students who thought that a topic was innovative attributed this to the practical exercises, the practical nature of the topic or the focus on things that were relevant to

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<sup>51</sup> See Bogart, *supra* note 28, at 354 (arguing that negotiation skills “can only be taught against the backdrop of a sophisticated (perhaps even expert) understanding of particular practices of law, and the substantive law that forms the bedrock for these practices”). The suggestion that transactional skills can be taught as part of a substantive law course has also been made by Stark, *supra* note 23, at 484-87. See also Robert C. Illig, *Teaching Transactional Skills Through Simulations in Upper-Level Courses: Three Exemplars*, 10 TENN. J. BUS. L. 15 (2009), which reports on the use of adjuncts to teach transactional skills in transactional practice labs. However, for a view on the challenges of incorporating transaction skills, see Woronoff, *supra* note 10, at 14-17, who advocates that the primary focus on substantive law should be maintained: “We should add new courses, which allow students to see how to practically apply substantive law they have already learned.”

practice.<sup>52</sup> Further, 15% of students thought that the interactive class discussion made a topic innovative, which goes to the issue of teaching methodology.

*A majority of students identified the practical focus of the subject and its relevance to commercial practice as the way in which the subject met expectations*

In response to the question as to how the subject met expectations, 50% of students identified its practical nature and 17% identified its relevance to commercial practice. This is consistent with the initial student feedback, provided at the very beginning of the subject, where 57% of students said that they took Deals to gain an understanding of how the law applies in a practical context.

*Students provided a range of responses to the question as to how the subject could be improved*

Student responses to the question as to how the subject could be improved included more explanation of commercial and financial terminology,<sup>53</sup> the greater use of practical simulated exercises, clearer relevance of the topic to the assessment (which highlights the challenge of managing expectations in relation to assessment) and more class discussion (which highlights the extent to which students appreciate the interactive teaching methodology).

A couple of other findings are of interest: some students thought that more case law could have been used and that less time could have been spent on concepts without clear answers. Although it may not be immediately apparent how to interpret these findings, it is suggested that they reflect the extent to which students are accustomed to, and comfortable with, conventional law subjects where the primary focus is on case law and the concepts and conclusions are relatively self-apparent and self-contained. In other words, students feel comfortable reading case law for the purpose of determining the doctrinal position but are less comfortable when examining concepts that involve value-judgments and issues that do not lend themselves to clear-cut answers. This, in turn, is likely to be related to concerns and anxiety over assessment.<sup>54</sup>

In addition, in relation to the simulated negotiation, some students indicated that they would have appreciated more time in which to prepare and to reflect on the exercise as a group. In addition, some students indicated that they

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<sup>52</sup> The benefits of practical activities have been identified by previous writers. See Robin A. Boyle, *How to Critique and Grade Contract Drafting Assignments*, 10 TENN. J. BUS. L. 297, 299 (2009); Goforth, *supra* note 46, at 852-53.

<sup>53</sup> The challenge of limited student understanding of commercial and financial terminology has been noted by Bogart, *supra* note 28, at 346: "The first thing a transactional lawyer in training generally should confront is an explanation of the basic definitions of terms of art." See also Gouvin, *supra* note 23, at 444.

<sup>54</sup> See *infra* Part IV.

would have benefited from having the lecturer observe, and provide feedback on, the negotiations. This is consistent with the research in the US.<sup>55</sup>

#### **PART IV: CHALLENGES AND POSSIBLE SOLUTIONS**

The findings suggest several challenges in relation to teaching transactional law subjects.

##### *What is a law subject?*

The findings suggest that there is a case for managing expectations generally around what studying law is all about. For example, of those students who responded that the drafting topic was not as expected, 100% responded that this was because the topic did not seem very legal. Further, 59% of students in the final feedback said Deals was “different” or “innovative” because it was practical, suggesting that students are inevitably influenced by the approach in core or conventional subjects in forming conceptions (and misconceptions) about what studying law is about.<sup>56</sup>

The findings suggest that for a lot of students, law is about learning terminology and concepts at an abstract level and not about understanding how the terminology and concepts become relevant at the practical level. Once again, this identifies a need to manage expectations and be clear about the objectives of the subject.

##### *Choice and use of materials*

The challenge of finding appropriate teaching material has been noted in the literature.<sup>57</sup> The findings from Deals suggest that this challenge may be partially overcome by making more of the conventional materials. This involves reviewing judgments not just to explore legal doctrine and how it was applied or developed within the context of the given facts, but also why the dispute arose in the first place, the commercial context and the role of the lawyers. It involves approaching the conventional materials with a broader focus, one that determines relevance by reference to the transactional aspects and not just the doctrinal aspects. This is consistent with the comments of Illig:

To my mind, the key to approaching the question of how to teach students to think like a dealmaker is to conceive of the discipline more as craft than science. We must read cases – if indeed it is cases that we read – not to identify or assess the law, but to ask

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<sup>55</sup> Chomsky & Landsman, *supra* note 27, at 1560.

<sup>56</sup> This is also consistent with the feedback from some students that they would have liked to have seen more case law in the subject. See further below in relation to assessment.

<sup>57</sup> See Fleischer, *supra* note 23, at 5.

questions like why did the parties end up in this mess? [A]nd how can we help our clients avoid this and other similar messes?<sup>58</sup>

An example of this is a case used in Deals to teach the substantive law issues that arise in connection with a business acquisition and the assignment of contractual rights.<sup>59</sup> The case is examined not just to highlight the technical legal issues, but also to highlight the drafting challenges that were relevant and the role of the lawyers when the deal was negotiated and, subsequently, when attempts were made to settle the dispute before trial.

It is therefore possible to make more of even the most conventional of teaching materials (namely, a case report) by examining the issues from a broader, transactional perspective. This involves examining not just how the facts were relevant for the purpose of determining the application and development of legal concepts and doctrines, but also how the facts throw light on other issues that are relevant from a transactional perspective. These issues include the following, all of which might be treated as supporting a “transactional approach” to the use of conventional substantive law materials:

- Deal type and structure
  - What type of deal did the dispute involve and are there any issues specific to that type of deal and the way in which it was structured?
  - Were the issues purely substantive or doctrinal in nature (e.g. a point of law such as breach of contract and the remedies for breach) or did they involve structural or process-related issues (e.g. a flaw or deficiency in the way in which the deal was structured, negotiated, documented or implemented)?
- Commercial context
  - What was the commercial context and to what extent was the commercial context a relevant factor in causing the dispute?
  - Why was the dispute not settled?
- Role of the lawyers and transaction skills
  - Was the conduct or role of the lawyers a relevant factor in the circumstances leading to the dispute? If so, what aspect was relevant? Was it the way in which the lawyers advised or applied their

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<sup>58</sup> Cited by Woronoff, *supra* note 10, at 15. The extent to which law teachers can make more of the conventional teaching materials is also noted by Stark, *supra* note 23, at 484-87.

<sup>59</sup> *Pacific Brands Sport & Leisure Pty. Ltd. v. Underworks Pty. Ltd.* [2005] FCA 288; *Pacific Brands Sport & Leisure Pty. Ltd. (ACN 098 742 708) and Others v. Underworks Pty. Ltd. (ACN 088 861 616)* (2006) 230 ALR 56 (appeal decision).

transaction skills? Was it the way in which the lawyers represented, or failed to represent, the interests of their clients?<sup>60</sup>

A similar approach could be adopted in relation to analyzing transactions documents. Stark has suggested a useful framework for this purpose based on the five business issues that need to be addressed in transactions: money, risk, control, standards and endgame.<sup>61</sup>

### *Teaching methodology*

The findings reinforce the benefits of an interactive, student-led teaching approach, where students are encouraged and expected to participate actively in the learning process and where they are expected to draw on the knowledge and connections from earlier subjects and to think critically about issues (often in circumstances in which there is no clear answer or no right or wrong answer). In this way, the process is a collaborative one in which teachers and students jointly examine issues and identify potential solutions.

The findings also indicate that students like examining case studies as a means of bringing the law and legal issues to life, and also hearing about the teachers' personal experience. The challenge of finding suitable teachers with the necessary experience has been noted in the literature, together with the benefits of collaborating with practicing lawyers to serve as adjunct faculty.<sup>62</sup> However, even limited practical experience might not be prohibitive if the course is appropriately structured and designed with accompanying teacher notes and course instructions.

### *Assessment*

There are challenges around assessment, a concern that is foremost in the minds of today's pragmatic law students. The broad focus of transactional law subjects, which incorporates not just black-letter law but also the broader commercial context, means that students inevitably experience some uncertainty and anxiety about how knowledge will be assessed and also what information will be relevant for this purpose.<sup>63</sup> The advantage with traditional law subjects is that

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<sup>60</sup> When cases are read from a transactional perspective, the lawyers are not just treated as the peripheral players or the observers; they are treated as key (albeit often silent) protagonists. There is also scope for considering the cross-border dimensions.

<sup>61</sup> Stark, *supra* note 28, at 229.

<sup>62</sup> The benefits of using adjunct faculty have been noted in Circo, *supra* note 1, at 194, 201; Fleischer, *supra* note 23, at 15-16; Gouvin, *supra* note 23, at 446, 449; Okamoto, *supra* note 10, at 75-78.

<sup>63</sup> In this regard, there is a case for considering how participation in the practical exercises could have been made part of the assessment. For a discussion of techniques for critiquing and grading contract drafting assignments, see Boyle, *supra* note 52; Sue Payne, *How to Critique and Grade Contract Drafting Assignments*, 10 TENN. J. BUS. L. 303 (2009). The challenges concerning assessment in transactional law subjects should be viewed in the context of challenges and trends in the

students know exactly how the subject will be assessed and what information will be relevant for assessment purposes.

Interestingly, the concerns about assessment were raised in the feedback on those topics that were the most transactional in focus (i.e. the role of the lawyer, drafting, negotiation and the review of the share sale agreement), highlighting the extent to which this presents a challenge for transactional law subjects.

## PART V: CONCLUSIONS AND FURTHER RESEARCH

As reflected in the US experience, the trend towards the development of a transactional focus within law schools has triggered a lively debate about several important issues. These include the purpose of legal education,<sup>64</sup> the definition of a “law subject,” the extent to which the focus of law schools should extend beyond substantive law and legal doctrine and also the role that law schools should perform in making graduates practice-ready or practice-aware. Very few people would deny that there is a gap between the academy and the profession; the critical question is how that gap should be bridged and whether there is more that law schools can and should do in this regard.

The literature from the US and the findings from the student survey in Deals indicate that there is a strong demand amongst law students for transactional law subjects. In large part, this is due to the need for students to equip themselves with the appropriate conceptual framework and terminology to enter the profession and deal with the challenges that this presents. As the responses to the student survey in Deals indicate, it is also due to the intrinsic interest that students have in understanding how law applies in a practical context.

The subject Deals, which has been the focus of this article, is perhaps more accurately described as a conventional law subject that teaches law from a transactional perspective than as a pure transactional subject that examines real-life transactions from a range of perspectives that transcend the legal perspective. It is therefore a relatively modest attempt to contribute to the debate. However, the findings from the student survey indicate that even this model is effective in giving students insights into the practical relevance and application of the legal concepts that they have studied and providing them with a capstone experience, one in which students can synthesize and integrate the disciplinary knowledge

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assessment of law courses generally. A new standard on formative and summative assessment was included in the American Bar Association Standards and Rules of Procedure for Approval of Law Schools 2014-2015.

<sup>64</sup> This is a lively point of debate, with some writers arguing that law schools should not step too far outside their traditional role. The comments of Friedman are particularly pertinent in this regard: “the *raison d’être* of legal education is to educate and train students to be *effective new lawyers*, not to teach them how to ‘think like lawyers’ or to give them...skills training.” See Friedman, *supra* note 9, at 82.

that they have developed in other subjects and apply it in a practical, professional context.<sup>65</sup>

The findings from the student survey are generally consistent with the US experience in a number of key respects. First, the findings confirm that transaction skills can be effectively taught within the context of substantive law and that there is more that can be made of the conventional materials for this purpose. The debate over whether substantive law is the best context in which skills can be taught continues.<sup>66</sup> Secondly, the findings confirm the benefits of employing a range of teaching methodologies, in addition to the conventional Socratic approach, to consolidate concepts discussed in class and to “bring the law to life.” These methodologies include the use of practical exercise, simulations and case studies, all of which serve as an experiential form of teaching that is often lacking in the law school curriculum. They might also include incorporating methodologies that law firms use internally for training purposes.<sup>67</sup> Thirdly, the findings confirm the benefits of using adjunct faculty and guest lecturers, not just as a means of supplementing the experience and skills set of the principal lecturer, but also as a means of enhancing the learning experience and encouraging a more interactive environment.<sup>68</sup>

Importantly, the findings from the student survey are consistent with the US experience in terms of confirming the challenges that transactional law subjects present across the range of relevant issues, including the design of the conceptual framework, the selection of appropriate teaching materials and the management of student expectations around assessment. There will always be scope for improving any law subject, and transactional law subjects are no exception. For Deals, this might include incorporating an ethics component into the subject, utilizing case studies more effectively and providing greater clarity around the use of commercial and financial terminology. There will also always be scope for undertaking further research to test the experience against the results that we are hoping to achieve.<sup>69</sup>

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<sup>65</sup> The idea of a capstone or “keystone” experiences has been addressed by who notes that a keystone can “serve to link the traditional doctrinal courses of the early years of law school with the ‘experiential’ and ‘skills’ courses that come in the upper years.” See Okamoto, *supra* note 10, at 4.

<sup>66</sup> For discussion about this question, see Woronoff, *supra* note 10; Circo, *supra* note 1; Reynolds, *supra* note 10. In particular, Bogart, *supra* note 28, at 338, argues persuasively that “good lawyers do not (and cannot) separate a knowledge of substantive law from successful practice skills.”

<sup>67</sup> See Fanto, *supra* note 10, at 849.

<sup>68</sup> See Gouvin, *supra* note 23, at 446; Okamoto, *supra* note 10, at 33.

<sup>69</sup> This could include conducting a survey of graduates who have taken Deals and gone into practice to determine the extent to which the subject really made a difference.

Irrespective of the larger question about how much more law schools can do to bridge the gap, the findings from the student survey in Deals suggest that they can certainly make more of what they already do. The imperative for this is clear as the expectations of the legal profession increase, as law students face increased competition for graduate places and as law schools themselves face increased competition from other education providers.<sup>70</sup> Encouragingly, law schools are ideally placed to meet the challenges in this regard; in particular, they are ideally placed to use substantive law as the primary context in which to explore the relevance and application of law from a transactional perspective, providing students with greater insights not just into legal principles and doctrine, but also into transaction skills and the broader commercial context in which transactional lawyers operate.

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<sup>70</sup> See Fanto, *supra* note 10, at 848; Friedman, *supra* note 9, at 81-82.

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**SCHEDULE 1 – OUTLINE OF TOPICS AND TEACHING METHODOLOGY IN DEALS**

<b>Week</b>	<b>Topics</b>	<b>Teaching methodology</b>
Week 1	Introduction to subject and methodology Case study	<ul style="list-style-type: none"> <li>• Lecture/PowerPoint</li> <li>• Facilitated discussion</li> </ul>
Week 2	Structuring an acquisition: <ul style="list-style-type: none"> <li>• Business sale or share sale?</li> <li>• Review of relevant principles studied in corporations law</li> <li>• Is a share a proprietary right?</li> </ul>	<ul style="list-style-type: none"> <li>• Lecture/PowerPoint</li> <li>• Student-led discussion of concepts studied in previous courses</li> </ul>
Week 3	Structuring an acquisition (cont.): <ul style="list-style-type: none"> <li>• The stages in an acquisition</li> <li>• Initial discussions and preliminary agreements</li> <li>• Outline of share sale agreement</li> </ul>	<ul style="list-style-type: none"> <li>• Lecture/PowerPoint</li> <li>• Facilitated discussion</li> <li>• Examination of share sale agreement on the screen</li> </ul>
	<i>Topics for interim assessment available</i>	<ul style="list-style-type: none"> <li>• Introduction to online skills modules</li> </ul>
Week 4	Review of share sale agreement: <ul style="list-style-type: none"> <li>• Transfer of shares</li> <li>• Representations, warranties and indemnities</li> </ul>	<ul style="list-style-type: none"> <li>• Lecture/PowerPoint</li> <li>• Facilitated discussion</li> <li>• Examination of relevant provisions on the screen</li> </ul>
Week 5	Review of share sale agreement (cont.) <ul style="list-style-type: none"> <li>• Restraint of trade</li> <li>• Selected provisions</li> </ul>	<ul style="list-style-type: none"> <li>• Lecture/PowerPoint</li> <li>• Facilitated discussion</li> <li>• Examination of relevant provisions on the screen</li> </ul>
Week 6	Transaction skills – drafting <ul style="list-style-type: none"> <li>• Drafting commercial agreements - objectives</li> <li>• Plain language drafting</li> <li>• Drafting exercises</li> </ul>	<ul style="list-style-type: none"> <li>• Lecture/ PowerPoint</li> <li>• Facilitated discussion</li> <li>• Examination of relevant provisions on the screen</li> <li>• Class exercise</li> </ul>

Week 7	<p>Transaction skills – negotiation</p> <ul style="list-style-type: none"> <li>• Negotiating commercial agreements - objectives</li> <li>• Negotiation theory</li> <li>• Negotiation exercises</li> </ul>	<ul style="list-style-type: none"> <li>• Lecture/ PowerPoint</li> <li>• Facilitated discussion</li> <li>• Facilitated and student-led discussions</li> </ul>
Week 8	<p>Deal simulation</p> <ul style="list-style-type: none"> <li>• Drafting and negotiation of a restraint of trade clause</li> </ul>	<ul style="list-style-type: none"> <li>• Simulated drafting and negotiation exercise – students review client instructions concerning a restraint of trade clause and negotiate in teams</li> </ul>
Week 9	<p>Review of deal simulation</p>	<ul style="list-style-type: none"> <li>• Facilitated and student-led discussions</li> </ul>
Week 10 - 11	<p>The role of lawyers</p> <ul style="list-style-type: none"> <li>• Conflicts and confidentiality</li> <li>• Duties and obligations in contract and tort</li> </ul>	<ul style="list-style-type: none"> <li>• Lecture/ PowerPoint</li> <li>• Facilitated discussion</li> <li>• Guest lecturer</li> </ul>
Week 12	<p>Review of course content &amp; preparation for exam</p>	<ul style="list-style-type: none"> <li>• Lecture/ PowerPoint</li> <li>• Facilitated discussion</li> <li>• Short-answer review test</li> </ul>

## SCHEDULE 2 - STUDENT QUESTIONNAIRES

### Start of subject:

About the subject generally (please circle the closest answer from the suggested answers below):

- What was the primary reason for choosing *Deals* as one of your electives?
  - The relevance of the subject to future career possibilities
  - An interest in understanding how law applies in a practical/transactional context
  - A wish to try a subject that is different from other subjects
- How are you hoping to benefit from the subject?
  - A better understanding of transactions will help to identify and enhance my career prospects
  - I will gain a better understanding of legal skills such as drafting and negotiating
  - I will gain a better understanding of the role that lawyers perform in a transactional context
  - The subject is different and will be an interesting change from other subjects
- Are you hoping that this subject will be innovative and, if so, in what way?
  - It will be practical in focus
  - It will help to consolidate my understanding of concepts studied in previous subjects
  - The teaching methodology will be different from other subjects
- Do you have any comments or suggestions that might be relevant to the above questions?

### For each topic:

In relation to the topic in this class:

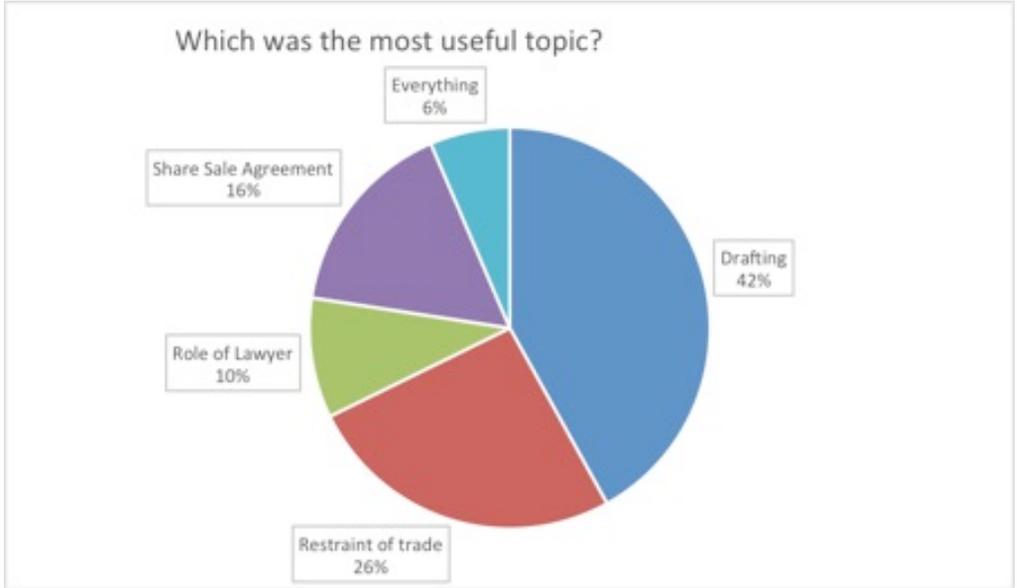
- Was the content as you expected? If not, why not?
- What did you find most useful about the topic and materials?
- Was the teaching methodology innovative in any way and, if so, how?
- Do you have any suggestions as to what should be included in the topic or how it might be taught more effectively?

### End of subject:

- In what ways did the subject meet your expectations?
- In what ways did the subject not meet your expectations?
- Do you think the subject was innovative or different from other law subjects in any ways? If so, in what ways was the subject innovative or different?
- What did you like most about the subject?
- What did you like least about the subject?
- In what ways do you think the subject could be improved or better structured to meet your expectations or needs?
- Which topic(s) did you find the most useful?

**SCHEDULE 3 – SELECTED FINDINGS FROM THE STUDENT SURVEY**

*Figure 1*



*Figure 2*

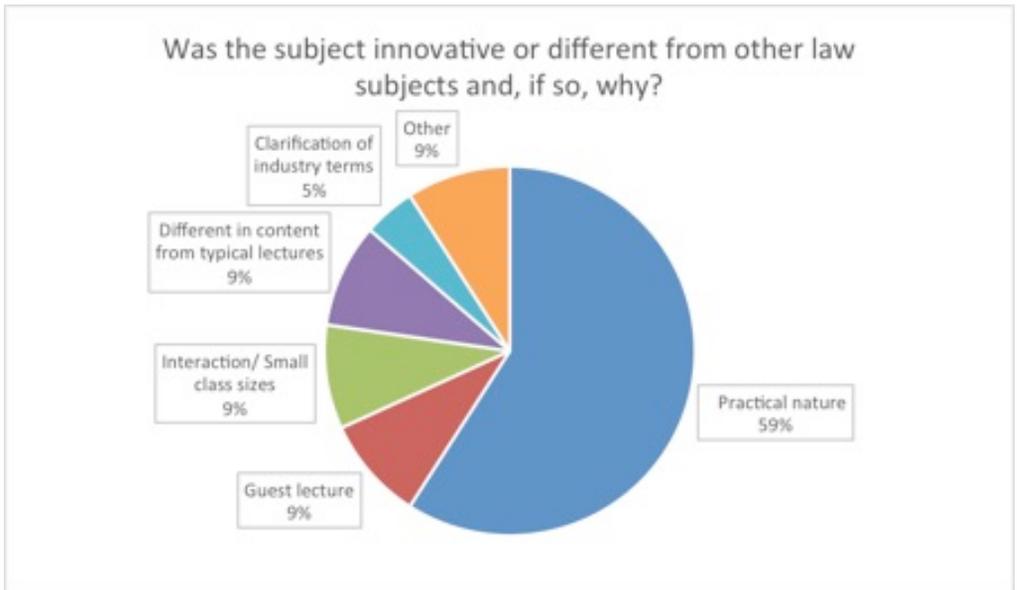


Figure 3

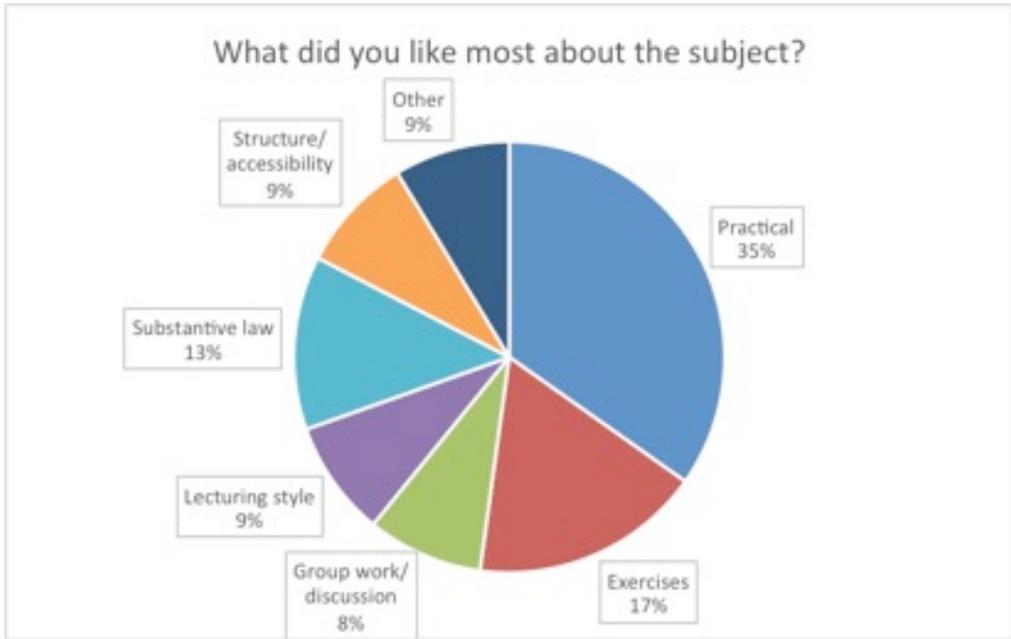


Figure 4

