

EQUITY IN ACTIVE LEARNING AND PEER-REVIEW IN DESIGNING INTERNATIONAL COMMERCIAL LAW PG UNITS[†]

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I INTRODUCTION

The present paper was given at the 4th Transnational Commercial Law Teachers Convention and represents an attempt to share learning and teaching theories in the context of program design. The emphasis of the paper is to share the experiences of developing a sustainable degree with ethical assessment which remains fruitful and enjoyable for students. It is an exercise in epistemology – of thinking about the knowledge itself and how we got to where we arrived at. It is thus not an academic paper of law, but one of teaching and learning in context, and the mindfulness required in program design in the commercial law space.

[†] Or 'How I Designed the Degree I Wanted to Teach and Tried to Make the Students Love it (and Like Me!).'

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II PROFESSIONAL COGNITIVE BEHAVIOUR: THINKING ABOUT WHAT WE DO...

Legal academics across the globe have been engaged in program design for as long as we have had programs to teach. However, over the last decade or so we have seen a big shift in the way universities are run, and as a consequence program design has developed into a more modern exercise of ensuring programs meet a host of different needs. It is not just a question of curriculum any longer, but one of quality assurance – through organisations such as TEQSA, AQF, the UK AQAA and others – and of student satisfaction, sustainable delivery, internal academic policies for assessment and ensuring sound pedagogical delivery. In short, program design now needs a number of boxes to be ticked. We sometimes do this intuitively, without much thought to the process, but in a recent experience after relocating to a new jurisdiction, new institution and new quality assurance rules, this author tried to be more mindful of the process in hand. Thinking about what we do when we teach, how we best ensure attractive programs which incorporate interactive Masters level teaching and ensure knowledge is tested and applied as well as independently explored. This can be referred to as a sort of metacognition of program design. John Flavell, who is credited with the term metacognition in 1976,¹ develops the concept further in his 1979 seminal paper,² where he divides metacognitive knowledge into three categories: knowledge of person variables, task variables and strategy variables. Metacognitive knowledge of program design can thus refer to the acquired knowledge about the cognitive processes of constructing a teaching program. This knowledge can be used to control or influence future cognitive processes in decision making. It is the authors hope that this paper provides sufficient metacognition on law program design to help influence thinking in others; not to copy what was done (although ‘imitation is the sincerest form of flattery’)³ but to be more mindful of the processes and considerations involved.

¹ John Hurley Flavell, ‘Metacognitive aspects of problem solving’ in Lauren Resnick (ed), *The Nature of Intelligence* (Lawrence Erlbaum, 1976) 231.

² John Hurley Flavell, ‘Metacognition and cognitive monitoring: A new area of cognitive-developmental inquiry’ (1979) 34 *American Psychologist* 906.

³ Quote from Rev. Charles Caleb Colton, *The Lacon: or Many Things in Few Words Addressed to Those who Think* (Longman et al, 1826) – interestingly subsequently amended or peppered by Oscar Wilde as: ‘Imitation is the sincerest form of flattery that mediocrity can pay to greatness.’, leading one to wonder if he considered himself mediocre since he was (at least partly) imitating Colton...

III CONTEXT AND BOX-TICKING

The degree this paper describes designing is the (relatively new) Master of International Commercial Law (hereinafter referred to as MICL) offered at University of Western Australia (hereinafter referred to as UWA). The push for new Masters Degrees arose following the Vice Chancellor's vision statement in the strategic plan for UWA,⁴ wherein he called for more specialised masters degrees to attract international students and meet market needs. And so, in 2013-2015, the Law School at UWA designed no less than 11 new Masters Degrees and Graduate Diplomas for coursework study.⁵ These degrees, including MICL, had a lot of boxes to tick, in two main categories:

- 1) Quality assurance:
 - Meeting the specifications of the Australian Tertiary Qualifications (AQF)⁶ requirements for level 9 degrees (as MICL is considered). The main milestone for AQF in monitoring degrees is learning outcomes, and mapping them with appropriate knowledge and application of skills.
 - Meeting the Tertiary Education Quality and Standards Agency (TEQSA)⁷ standards both present and future. Meeting specific thresholds for degree entrance, format and delivery is central to TEQSA.
 - Meeting international expectations for quality in teaching. These are not easily defined, but in Europe some harmonised rules for high quality tertiary education are developed through the ongoing Bologna Process⁸ springing from the Bologna Accords. This European process is not only relevant to Australian education as an example of harmonised European consent for good practice, it has been held out as a cornerstone of the Melbourne Curriculum model as good Australian practice.⁹

⁴ The University of Western Australia, *UWA 2020 Vision: Strategic Plan* <http://www.web.uwa.edu.au/_data/assets/pdf_file/0010/2538343/114085-VICCHA-StrategicPlan-v3.pdf>.

⁵ List of UWA Postgraduate coursework options available at The University of Western Australia, *Postgraduate Coursework* (14 June 2016) <<http://www.law.uwa.edu.au/courses/coursework>>.

⁶ For more on AQF see Australian Qualifications Framework <<http://www.aqf.edu.au/>>.

⁷ For more on TEQSA see Tertiary Education Quality and Standards Agency <<http://www.teqsa.gov.au>>.

⁸ For more on the Bologna Process in the European Higher Education Area, see European Higher Education Area <<http://www.ehea.info>>.

⁹ The University of Melbourne, *Report on Growing Esteem Consultation* (11 October 2005) <http://growingesteem.unimelb.edu.au/_data/assets/pdf_file/0007/86749/2005consultationreport.pdf>, describing the Melbourne Model as: '[i]nternationalising academic programs and aligning degree structures with the 'Bologna model''.

- Meeting the requirements of internal university policies.
- 2) Sustainability:
- Market research to ensure sufficient market interest was carried out independently by a market survey company for the relevant degrees, including MICL. The survey showed a number of potential student markets for students with very different backgrounds
 - Student satisfaction, to ensure good word-of-mouth publicity, is central to growing new degrees in today's international market.
 - Ensure sufficient available staff to offer degrees in future as well as at time of design.

In designing MICL, the above requirements highlighted a number of essential points and challenges. It was essential to address some key needs and find solutions to problems in relation to delivery and form of the program at the design stage. The key challenges faced were:

- Student Diversity: Teaching format for different backgrounds/needs
- Interactivity: Ensuring class participation
- Group work & Equity
- Peer Assessment
- Incorporation of oral advocacy skills

These are set out below.

IV STUDENT DIVERSITY: DESIGNING SOMETHING TO MAKE EVERYONE HAPPY

The need to build a program that bridges the needs and backgrounds of various different students was initially a serious concern. The considerations for a full time student on campus, for instance, are different to those for a part-time practitioner. While the latter is squeezing class attendance into a busy work schedule, the former needs a more immersive experience and more activities and challenges. Similarly, the different background of varied cohorts will result in different needs: International vs Domestic, Inexperienced vs Experienced, Lawyers vs non-lawyers, and differing cultural backgrounds on appropriate assessments and skills makes a unified classroom challenging. This challenge of student diversification was met on two fronts.

V DEALING WITH DIFFERENT BACKGROUNDS

The solution to this challenge was found in adaptability and finding common ground. All MICL students MUST complete a foundation unit (6 credits), which brings their basic contextual knowledge of International Commercial Law to the same level.¹⁰ ALL students must take this unit before they can undertake any others – it is thus taught twice a year to coincide with student intakes. Since the program is designed on a teaching ethos of pragmatic contextual application (more on this later), this will mean that the lawyers will combine their study of law with pragmatic application of business and the non-lawyers with a cognate business background will combine their business savvy with a basic understanding of legal concepts in the field. This core unit has proven popular with both lawyers and non-lawyers in setting a common basis for study, in introducing the forms of assessment and in shaping their expectations.

To ensure that the non-lawyers, or non-Australian lawyers, are able to catch up on the necessary skill-set of basic knowledge of the Australian legal system, as well as legal research and writing (for their independent research essays as their assessment, see below), an independent online study resource support page was developed for them. The resource page contains independent modules, which can be completed with online quizzes and exercises. Through the Blackboard interface, students can gain ‘medals’ for successful completion of modules. Each module is independent of the next, so students can target the training they need. The modules include: Basic Legal Terminology, Introduction to the Australian Legal System, Legal Research, Legal Writing 1 (Basic Skills), Legal Writing 2 (Referencing and Avoiding Plagiarism in Law) and Legal Writing 3 (Critical Legal Analysis).¹¹ In the teaching of the Foundation unit, reference is frequently made to the skill-sets represented in these pages, and students are urged to use them. Especially Legal Writing 2, which tests international students in referencing and citation, and ensures that there is no accidental plagiarism.

¹⁰ The University of Western Australia, *LAWS5250 Foundations of International Commercial Law* (21 October 2015) UWA Handbook
<<http://handbooks.uwa.edu.au/units/unitdetails?code=LAWS5250>>.

¹¹ A separate paper on the design of this legal resource is underway elsewhere, and is outside the scope of this paper.

To further ensure a very structured learning, as well as a shared basis of learning before progressing to optional modules, MICL was designed with four core modules that needed to be studied sequentially, each building on the next to progress contextual knowledge. The first module being Foundations of International Commercial Law, as explained above, the next International Sales, followed by Trade Financing and, finally, International Shipping. This structured sequential learning ensured that a common core of knowledge was gained before progression to optional study, in units like WTO Law, Comparative Law, Commercial Arbitration, etc were commenced.¹²

Finally, to ensure issues with non-English language speakers are minimal, it is important to note that UWA Law maintains rigorous English language requirements for entry.¹³ We prepare non-native English speakers for study here at pre-sessional English classes if they do not meet requirements, but they must meet a high standard to gain entry. This eases program design – especially in ensuring interactivity in class – as language skills can be presumed. Should students need further support, e.g. for a larger piece of research, the Central University skills support will step in.

VI TEACHING ETHOS AND LEARNING OUTCOMES

One of the most valuable opportunities presenting itself when designing an entire degree from scratch is the opportunity to make it a cohesive and consistent program, which builds on specific skills and tailors learning outcomes for individual units towards a shared target.

The AQF Level 9 targets for Masters degrees makes a number of assumptions. In summary, they prescribe that: '[g]raduates at this level will have specialised knowledge and skills for research, and/or professional practice and/or further learning' with the knowledge in question described as:

¹² This structure is currently under revision, with less core units and more elective elements preferred.

¹³ Information about English language competency requirements at UWA can be found at The University of Western Australia, *English language competence: undergraduate and postgraduate coursework*, Future Students <<http://www.studyat.uwa.edu.au/postgraduate-coursework/requirements/english>>. The requirements are currently the highest amongst the GO8 universities in Australia.

‘[g]raduates at this level will have advanced and integrated understanding of a complex body of knowledge in one or more disciplines or areas of practice’.¹⁴

Contextualising commercial regulation in commerce has long been a secret to success of understanding it. Clive Schmitthoff describes this pragmatism thus:

[An international commercial lawyer] ... cannot only be a man [or woman] learned in law. His [or her] antennae must be tuned to receive financial and monetary information; he [or she] must understand the fluctuation in the world markets whether they deal in commodities, securities, shipping, insurance or other goods and services; he [or she] must take account of the tax position, both national and international; he [or she] must appraise the political risks and the percetive of the shift in social power – in brief, in addition to being a man [or woman] of law, he [or she] must be an *Homme* [ou *Femme*] *D'affaires*.¹⁵

So, for MICL, achieving an advanced and integrated understanding of international commercial law, will depend on grasping some of the key aspects; i.e. describing certain basic principles of International Commercial Law, and integrating them into the curriculum of all core units. Distilled from Schmitthoff's ethos, these basic principles include:

- Understanding the bigger picture of trade
- Commercial Sense: appearance and intention
- Pragmatism; understanding the business which commercial law facilitates
- The role of party autonomy in commerce
- ‘Follow the Money’; commerce centers around it

To the commercial law teacher, these may be self-explanatory. But seldom do we take the time to integrate them visibly into the curriculum. In MICL they are drummed into students throughout the Foundations unit, and regularly repeated during the teaching of other units.

For instance, to transcend knowledge of shipping law beyond the regulation and into contextual understanding, students need to understand the nuts and bolts of what is being regulated. So before we plough on with shipping regulation, the Hague Visby Rules, indemnities and Bills of Lading, they need to be able to visualise the context. A very helpful BBC documentary entitled

¹⁴ Australian Qualifications Framework, *AQF levels* <<http://www.aqf.edu.au/aqf/in-detail/aqf-levels/>> at level 9.

¹⁵ Clive Schmitthoff, *Commercial Law in a Changing Economic Climate* (Sweet & Maxwell, 2nd ed, 1981) 15.

‘The Box that Changed Britain’¹⁶ is great for this – or even just a picture of the Emma Maersk, who is so large that a freight train pulling containers equal to her capacity would take about 17 hours to cross a railroad crossing. Teaching them THIS isn’t law – but it IS an essential context for the regulation they are about to learn – and without that knowledge they will never TRULY understand the information they are given, or see why it works in the greater scheme of things.

But a Master degree must do more than give students knowledge; it is also expected to result in demonstrable skill sets. Returning to the AQF, at level 9 they require: ‘[g]raduates at this level will have expert, specialised cognitive and technical skills in a body of knowledge or practice to independently: •analyse critically, reflect on and synthesise complex information, problems, concepts and theories; •research and apply established theories to a body of knowledge or practice; •interpret and transmit knowledge, skills and ideas to specialist and non-specialist audiences’ and this must be shown through an application of skills: ‘[g]raduates at this level will apply knowledge and skills to demonstrate autonomy, expert judgement, adaptability and responsibility as a practitioner or learner’.

To ensure these specialised analytical skills in interpretation and communication are regularly applied, a high level of interactivity is required in the classroom. Accordingly, MICL students are expected to participate actively in exercises which require them to perform a judgement or find and communicate information. Through mini-moots of dispute resolution, to drafting contracts, to constant questioning, they are encouraged to be inquisitive and apply skills. Every PPT is peppered with Class Discussions, tasks, exercises and interactive case studies. Roleplaying plays a central part in some of this. A special format for this is the open space discussion, conducted at the beginning of every day, where students are encouraged to convene 5-10 minute discussions about a topic from the preceding day which they want to learn more about, are not sure of, or simply wish to discuss more.

This highly interactive teaching ethos of Socratic and Inquisitive learning is ideally applied to class sizes of 20 or less. And with 2 yearly intakes, this is well suited for MICL, in its unique teaching format.

¹⁶ BBC Four, *The Box That Changed Britain* <<http://www.bbc.co.uk/programmes/booscpzn>>.

VII TEACHING FORMAT

Finding the right teaching format for MICL was a challenge, given the different needs from different types of students. While market surveys indicate practitioners prefer intensive one-week programs, campus students need more campus time and activity. The MICL degree is designed to appeal to both, so it needed to be flexible and accommodate both basic underlying needs.

The result is a combination of intensives and semester based units, with compulsory units being offered sequentially, on a 'Quasi-Intensive' basis. This compromise is a 2½ week intensive, structured as part of a sequential learning, and it proved very popular with both full time and working part time students. With specific gaps in the structured sequential learning timetable, full time students can easily fill the gaps between teaching with independent research, class preparation, group study or self-study. Part-time students can timetable four weeks of half-days of teaching into their work schedules with little issue.

One advantage in this format is the opportunity for sequential learning. Instead of having semester long units running in parallel, the units run sequentially in the quasi-intensive mode. This allows adaptability for both full time and part time students as well as the luxury of focus on one topic at a time, in depth. It affords the advantage of being able to build on pre-existing knowledge and maintain continuity of teaching.

Another advantage in the quasi-intensive format is student concentration. While students find it difficult to concentrate during a full day of teaching (never mind the person teaching them!), a half-day seems entirely appropriate for condensed learning with interactive inclusion.

So the typical format will be 8-10 teaching days of approximately four hours across 2 weeks, followed by a Monday of workshops surrounding the assessment (see below).

VIII EQUITY IN ASSESSMENT

Most MICL assessment is comprised of a 75% research essay (75% of the total mark) and an Oral Group Presentation (25% of the total mark). The reasons behind this are multiple. First of all, internal UWA policy requires a minimum of two forms of assessment. This is also in line with a balanced

multi-cultural approach. The two that were chosen are designed around the following principles and ethos.

A *Legal Research Essays*

Students' views on the best form of assessment are normally colored by two factors: their cultural expectations and their subjective abilities for performance. The latter may be influenced by the former, insofar as students who have no background of independent research degrees or assessment may struggle with this as a new skill set.

Nevertheless, historically, a Master degree has always entailed independent research, to allow the student to demonstrate independent proficiency and skill. While some institutions abroad are departing from this, and introducing unseen written examinations at Master level as the main form of assessment, the UWA Law School has chosen to maintain the tradition. Part of this reason is one of quality of learning. Another is to prepare Master students for independent legal research in the work place. Another again is the AQF expectation that independent research is part of the curriculum.

For the students unused to this form of assessment, the Legal Resource page, outlined above, hopes to alleviate this in part. As do the Essay Workshops, which are part of the Foundations unit, and every core unit developed. This workshop is intended to allow students to present their Oral Presentations (see below) and to showcase ideas for their research essay. This latter element is especially important in the Foundations unit, where many will be conducting their very first piece of legal analysis. While it is made clear that this is NOT a supervised piece of research, basic outlines and methodologies are discussed. Attendance is NOT compulsory for those who have a law background, but all who participate in the workshops have fed back that they find it a very welcome helping hand. And, interestingly, most students attend even if they do not need to, because they find the discussions of research issues and methods in critical analysis very helpful, regardless of background.

Another hotly debated issue is that of group work.

B Group Work

Group work is one of those teaching formats which ticks all the right boxes for quality assurance (AQF, TEQSA, Bologna, etc). It has the real world element of collaboration and it hones communication skills, assertiveness, compromise, etc. But any University teacher who has ever prescribed it, faces a number of (similar) issues with equity and shared marks. We can - loosely - divide the two categories of nightmare participants in group work into two categories:

- CONTROL FREAKS, here we find people who may be somewhat closed minded, who over-commit themselves to the group task and take (often unwanted) leadership without consultation. They over-influence a project, and the project often suffers because the ideas of others are not heard.
- SLACKERS, these are the unengaged, who may feel marginalised or just plain lazy, they can be too busy or too shy to assert themselves, and they end up being an underutilised resource.

In designing MICL, we set out to solve some of the problems of group work. Initial ideas included mark-adjustment software and student mediation for all groups. But while the latter was too labour intensive, and may create problems rather than solve them, the former was not ideal as it would depart from the real-world lesson of groups sharing a mark. However, we really wanted to include a shared group assessment with an oral advocacy element, to meet the teaching and learning criteria of high quality degrees.

It was at this point that our wonderful teaching intern put her knowledge of teaching and learning to the test.¹⁷ In addition to designing the learning outcomes for the Dispute Resolution Module, which she had been tasked with, she came up with a very satisfactory solution for ensuring equity in group marks. While it was originally intended for her own module, it was so successful that all MICL core units have adopted it.

¹⁷ This author is eternally grateful to Ms Dilyara Nigmatulina for her contributions in this field. She has shared her sources for the development of the system, and indicates that she was influenced by John Biggs and Catherine Tang, *Teaching for Quality Learning at University: What the Student Does* (Open University Press, 3rd ed, 2007); David Carless, Gordon Joughin and Ngar-Fun Liu, *How Assessment Supports Learning: Learning-oriented Assessment in Action* (Hong Kong University Press, 2006); and Dannelle Stevens and Antonia Levi, *Introduction to Rubrics: An Assessment Tool to Save Grading Time, Convey Effective Feedback, and Promote Student Learning* (Stylus Publishing, 2005).

In essence, the system is based on managing expectations, and knowledge of a double peer review, which is still simple to execute.

When student presentations are delivered in groups, they are subject to two peer reviews:

- The internal Group peer assessment. Each member of the group assesses the others, based on their input, commitment, reception of ideas from others, etc. on a scale of 1-5. They are told that if there are serious issues, we will conduct student mediation.
- Peer assessment from other students. While listening to the presentations, they are encouraged to rank aspects of their colleagues performances from 1-5, before submitting this to the teaching staff. A group is never shown its peer review, and it is made clear that it may or may not have any influence on the mark given.

These two exercises are clearly communicated to students at the allocation of their group and tasks – alongside the basic outline of why group work can be tricky and how not to be a slacker or a control freak... they are encouraged to be professional, and reminded that there are no excuses in a real work place.

Together, the two peer reviews ensure smoother group work and less issues with incompatible group members, and the peer review also ensures that students feel their opinion is valued, assessors don't miss any aspects of the presentation, and – finally – the class tends to listen more intently to a personation they are asked to peer review, so it acts as an enhancer of the presentations' value as teaching platforms in their own right.

One key to success is that students KNOW about this peer review in advance – they are far less likely to disappoint their group members and they want to impress their peers. Another key to success is that as students know they have a mediation forum to air their grievances, if there are any, they tend to communicate better – ultimately minimising discord. A third aspect is that in composing the groups, mindfulness is had towards personalities. The confidential form is submitted to the teaching staff only.

The result? To date there have been no problems in group work, in any MICL unit.

IX CONCLUSION

MICL was a joy to design and is a joy to teach. The statistics speak for themselves: student feedback scores in all MICL units have ranged between 3.8 and 4.0 (on a 4.0 scale) in the 1st year; and student perception of learning has expressed satisfaction with the assessment models (97.3% expressed extreme satisfaction, 2.7% expressed satisfaction).

While there is always room for improvement as we adapt the curriculum and continually update MICL, we think the first steps have been successful.

