Legal Education Review

Volume 13 | Issue 1 Article 1

1-1-2002

Designing Learning Strategies for Competition Law - Finding a place for Context and Problem Based Learning

Vijaya Nagarajan
Macquarie University

Designing Learning Strategies for Competition Law – Finding a Place for Context and Problem Based Learning

VIJAYA NAGARAJAN*

INTRODUCTION

Competition law, the role of which has been rapidly expanding over the past decade, has become a popular subject in most law schools' curricula. However, unlike Consumer Protection law or Criminal law, students come to this subject with little notion of what it entails. Nevertheless, like those other subjects, Competition law has been the site of significant theoretical and empirical analysis.

This paper examines the manner in which two teaching strategies namely, teaching in context and problem based learning, can be used together in teaching Competition law. Although problem based learning and teaching in context have often been viewed as opposing teaching strategies[1] connected with different visions of legal education, this paper looks at how they can be effectively used together to enrich the learning experience at both the undergraduate and postgraduate levels. Problem based learning, which gained popularity in many disciplines, brings with it numerous benefits that can enhance law teaching. It is hugely popular with students and can be used effectively to gain a detailed understanding on how the legislation may be applied. However it has its limitations. The main limitation is that it can stress the doctrinally based, rule oriented approach to teaching law. This limitation can be addressed by incorporating context, which is aimed at querying the notion that legal rules are truly objective.[2] Competition law can be

taught in context by encouraging students to explore the sociological, political and economic underpinnings of the legislative approach. It promotes a critical awareness of the current legal system and the process of law reform.

This paper does two things. First it examines the factors which determine the design of the subject including the objectives of teaching competition law, the barriers faced by teachers and the composition of the student body. Secondly the paper looks specifically at two teaching strategies which can complement each other in meeting the stated objectives of legal education.

OBJECTIVES OF TEACHING COMPETITION LAW

Professor Goldring has pointed to two main objectives in legal education namely to understand the law and to appreciate how the law is, what it is.[3] Clearly the dominant force of economic rationalism of the last decade has also had its influence on legal education. Cuts in University funding have seen many reactions from law faculties. Whereas some faculties have responding by offering subjects focussing on legal practice in order to satisfy student demand,[4] many are adopting a policy of commercialisation and offering fee based courses to postgraduate students or to undergraduate students attending summer school. Other faculties are considering commercial sponsorship as a means of supplementing the Faculty's budget.[5] The demands of the student/client and the profession have become hard to ignore. This has influenced the way in which legal education is perceived and delivered.[6] The importance of understanding the aims and objectives of legal education and the manner in which this should be reflected in the content of the curriculum cannot be underestimated. This issue has been the source of some rich and varied discussion.[7] The importance of learning how the law has developed is recognized as important as is knowing how to apply the law to a given problem.[8]

For the purposes of my discussion I have relied on three specific objectives identified by Richard Johnstone, in studying the manner in which law teaching has developed in Australia.[9] They have been called firstly, cognitive and skills objectives; secondly objectives relating to values; and thirdly motivational objectives[10].

The cognitive and skills objective deals with the manner in

which legal education should develop basic knowledge and skills to equip students to be lawyers.[11] It involves teaching students the basic principles of the subject including the legislation and the case law. It also involves the ability to evaluate, synthesise and apply these legal principles to a particular problem. This is long been acknowledged as the main objective of most law schools.[12] This issue has resurfaced recently with the increasing number of Law Schools which are incorporating the Professional Legal Training necessary for practice, into their undergraduate programs.[13] The discussion which follows, proposes that this objective can be met with a lecture dealing with doctrinal examination of the law together with problem-based learning exercises which will enable students to apply and appreciate what they have learnt.

The second of the objectives relates to the values inherent in the legal system. This objective is aimed at encouraging students to "consider and explore the values explicitly and implicitly contained in the law and its practice". In short, students need to be able to "think like lawyers" and at the same time stand back and reflect on "how lawyers think".[14] This involves introducing students to different perspectives and theories which will enable them to reflect on the value-laden nature of competition law. Teaching competition law in context may encourage students to undertake such a critical examination. Indeed the role of the academic lawyer not only to carry out critical analysis of the law but also to influence decision making and reform is becoming more commonplace.[15] Encouraging and training students to engage in this process of inquiry should be one of the fundamental aims of the Law School's curriculum.

The third objective is motivational – which means to allow the student to learn about the law in any way they wish.[16] Much has been written about the different approaches to learning and to put it simply much of this literature distinguishes between the "surface" and the "deep" approach to learning. The surface approach has usually been described as the transmission of information to the student where the student absorbs and reproduces the information to fulfill the subject requirements.[17] In contrast the deep approach to learning is described as involving the student transforming the material and understanding its relevance in a wider context.[18] This surface/deep dichotomy is certainly relevant to legal education particularly given that the law degree is seen not just as a professional qualification but as a generalist degree[19] and the wide

appeal of the degree as a post graduate qualification undertaken by fee paying students from a variety of backgrounds. Often the block teaching mode of delivery is being embraced by legal academics in a pragmatic attempt to cater for the large demand for a legal qualification. In such an environment a student focused approach to teaching and assessment can assist "students to develop and change their conceptions to the subject".[20]

Thus the third objective is a process of engaging the student and being receptive to the manner in which they choose to learn. This is only possible by giving careful consideration to the learning strategies employed, the educational materials used and the assessment tasks that are set.[21] Further recognising the different needs of students[22] and meeting these needs can build an environment where these students can both inform and challenge each other, developing a joint responsibility for learning.[23]

THE BARRIERS TO EFFECTIVE TEACHING OF COMPETITION LAW

Competition law is not an easy subject to teach. There are two main barriers that must be addressed in teaching this, and probably a number of other commercially oriented subjects, such as Corporations Law[24] or Taxation Law.

The most significant complaint from students, which is expressed in the teaching evaluations, points to the extent of economics that they are required to know and the manner in which such theoretical knowledge can be translated to a real life event. Indeed the legislation, after the amendments made in 1995 as a consequence of the Hilmer Report,[25] has a firm basis on economic principles. Whereas the Australian Competition and Consumer Commission (ACCC) has based its decisions squarely on economic theory, the Courts which have encountered a growing body of literature on all aspects of competition regulation, usually from the United States, have been grappling with this economic theory.[26]

For example analysis of any merger application five years ago would have applied the structuralist analysis relying on the structure-conduct-performance model, whereas the same analysis today would call upon game theory to explain the consequences that may follow from the merger. Unlike the United States where Law and Economics is now part of the curriculum at many Law

schools[27] and economic analysis is applied to an increasing range of subjects, this is not paralleled in Australia.[28]

Although law and economic scholarship did get a toe-hold in Australia in the 1980s,[29] it does not appear to have flourished as one would have expected particularly in the undergraduate curriculum. In a survey undertaken by the author[30] it was found that only two Law Faculties offered a foundation subject concentrating on Law and Economics. Even more surprisingly it was found that no such subject was offered in the Faculties of Business or the Faculties of Economics.[31] However the majority of Law Faculties in Australia offered advanced elective subjects.[32] The strong influence of the economics tool kit[33] and its applicability to law, particularly Competition Law, cannot be denied.[34] Teachers of Competition Law have to address the question of how to introduce these complex concepts of law and economic scholarship to students, who may not have been exposed to such literature or analysis before, and how to do this in a speedy and engaging fashion.

The second main problem encountered, particularly in the early weeks of the semester, is that students find it difficult to engage with the subject matter because it is not relevant to their lives. What does a merger between two telecommunications companies have of interest or relevance to an undergraduate student? It has been stated that Australians, unlike their American counterparts, seem ambivalent about the value of fully fledged competition,[35] which is certainly well illustrated by the significant degree of press coverage given to the rural and regional sectors, which are facing deregulation of industries. This is further illustrated by the degree of attention paid by government to the concerns of rural and regional Australians. Students, faced with such diverse issues are ambivalent about competition law. There is a complex statute to come to grips with and the material dealt within it is constantly expanding.[36] The challenge becomes one of engaging students with the subject matter as early as possible so that they can participate in the discussions and assess the material.

THE STUDENT COMPOSITION – AN IMPORTANT CONSIDERATION IN DESIGNING LEARNING STRATEGIES

In considering the design of any subject attention must firstly be

directed at the composition of the student body. Although the discussion here is based on my experiences, it is likely that this is relevant to other universities.

Whereas there is a greater degree of uniformity among the post-graduate student population undertaking the Competition Law subjects, this is not so at the undergraduate levels. At the undergraduate level it would appear that there has been little change to the types of students pursuing legal education and it continues to attract the middle and upper middle classes.[37] Generally the undergraduate students fall into two main categories – business students and non business students.

First there are the business oriented students – who include mature age students, part-time students and students who have completed their first degrees. Often these students have a some knowledge of business and current affairs having undertaken a number of business subjects in their business degrees. They wish to link their learning to current discourses and events in the area. They also have a knowledge of economics which forms the basis of current commercial law rules. The views these students hold are often fixed with little reflection on regulatory theories which can explain these rules.[38] They are looking for content that will allow them to apply their subject matter to mergers and corporate collapses, prosecutions underway of corporate officers for price fixing or law reform proposals. These students want to undertake tasks that will involve the application of the statute and case law. They are in favour of learning the details of the legislation and applying it to "real life" scenarios. Although they are open to critical theories, they have to be easily applied to the given topic.

The second student category is the non-business student including Humanities, Communications and Science students as well as the straight Law students. This category also includes mature age students and part time students. These students are either doing a combined degree for example in Humanities and Law or have a fairly good grounding in Arts related subjects. They generally have little or no knowledge of business and are not well versed with the guiding economic rationale of the current regulatory framework or the terminology of competition law, which is presumed by the standard texts and the statute. They usually require greater guidance with these matters. However they are also much more critical of the economic rationale and are open to a

wider range of alternative theories in assessing competition law principles and practice. What they sometimes lack is a critical framework in which to express their concerns. Engaging these students with the subject matter and allowing their concerns to be voiced within an informed theoretical framework is the challenge posed by these students.

As alluded to earlier this is not so obvious at the postgraduate level. It appears that the introduction of fees for post graduate education has led to greater degree of uniformity among this student body.[39] The majority of these students opt to do the subject in order to enhance their careers. Usually they are from a commercial background working in law firms or in large corporations. They have a clear idea of why they are doing the subject and are usually confident and more than willing to enter into a learning partnership. It is important to learn early on what the specific backgrounds and interests of the students are. More often than not students are involved in a particular competition law issue in their workplace. Developing the materials in a manner to focus on these specific interests can be demanding as it may require a revision of the way in which one was going to teach the subject. However it has two main advantages – it creates a conducive environment for a learning and it involves the student body in this learning partnership.

WHAT IS "CONTEXT" AND WHY SHOULD WE BOTHER WITH IT?

Context has been used in numerous ways and has influenced legal education for well over two decades.[40] So it is most reasonable to ask, "what is context"? Although several meanings can be attributed to this term,[41] the following statement by Minow and Spelman is helpful:

> The call for context itself tacitly signals both that the selection of some context is unavoidable, if only by default, and that the selection of one context over another implies a preference for one set of analytic categories rather than another. Against the background assumptions of liberal political and legal theory that treat principles as universal and the individual self as the proper unit of analysis, a call for contextual interpretation may well defend switching from one set of analytic categories to another that may only seem more "contextual" because it emphasizes group-based traits of individuals. In the late twentieth century in the United States,

> those who urge contextual interpretation often point to the harmful effects of legacies of exclusion based on race, gender, class, or their group traits.[42]

This makes clear that there can be many contexts to any particular issue under discussion in competition law. They all involve an understanding of the values inherent in any rule and a critical examination of these values using another contextual backdrop – for developing the design of the subject.

The use of context contributes to the development of analytical skills in a student going toward achieving the second objective discussed earlier – that is that law teaching should encourage a critical questioning of the values inherent in laws. It allows students to consider how lawyers think. Being able to do so can allow the learner to appreciate the voices or values that are not considered in Competition Law. This allows the student to understand the process of law making and indeed to appreciate why the law is the way it is. And it encourages students to listen to other points of view, a valuable skill for lawyers to possess.

Traditionally such an analysis is not common in law schools. A survey of the main Competition Law texts books supports this claim.[43] As stated about Corporate Law, another supposed "black letter" law subject, perhaps this has been because of the growing scope and complexity of corporate law statutes or because of the technical nature of many corporate law concepts.[44]

FINDING THE RIGHT CONTEXT FOR COMPETITION LAW

Competition law in Australia is regulated by the *Trade Practices Act 1974*. Of significant influence to competition regulation over the recent past has been the Report by the Independent Committee of Inquiry into National Competition Policy (Hilmer Report) published in August 1993 which undertook a wide examination of competitive conduct by firms as well as governments. The report and consequent amendments to the Act are firmly based on neoclassical market economics, explicitly recognising that the object of the Act is to enhance the welfare of Australians through the promotion of competition. Efficiency of the firm is seen as the key. However it is abundantly clear that this is not the whole picture. Many other factors inform and shape

competition law and are essential to any meaningful analysis of the subject.

I have attempted to fulfil two objectives in teaching this subject. The first is to ensure that students become well acquainted with the basic principles of neo classical economic analysis so as to be able to tackle the statute, cases and literature in the area; and the second is to attempt to encourage students to consider the values which are inherent in the neo classical framework – to put the current competition law in context.

There is no doubt that students in this subject need a good grounding in the neo-classical economic analysis, to which the Chicago school[45] has made an enormous contribution. There is a vast amount of literature in this area and is incorporated in the main textbooks on Competition Law.[46] Supplementing this literature with extracts of the Hilmer Report is valuable in giving the material an Australian focus. However how much economics is enough to understand the legislation and the case law is a difficult question to answer. A recent study undertaken to identify the main economic concepts students should learn in a law and economics course gives us some valuable guidance about what are the most commonly encountered concepts.[47] Concepts such as opportunity cost, externalities, marginal analysis, equilibrium, Pareto optimality and Kaldor-Hicks rate highly and indeed form the core of microeconomic analysis. Students who encounter these concepts at an early stage are better able to deal with the material in the subject.[48]

The two main schools of thought that have dominated this debate are the Structuralist School[49] and the Chicago School. The Structuralist School contends that it is market structure that determines market conduct, the firm's performance as well as profitability. Thus any attempt to increase competition will involve a modification of the existing market structure. This view has been well accepted in the Australia as a starting point to any competition analysis.[50]

The views of the Chicago School are firmly based on the principles of market efficiency and a fundamental ability of markets to self regulate. The proponents argue that the basis for analysing competition/anti-trust issues should be to query the implications for static efficiency and consumer welfare of any conduct.[51] The Chicago School rejects the Structuralist approach

and argues that it is efficiency, not structural factors, which are important to a firm's profitability. In Australia although the structuralist approach still forms the basis the influence of the Chicago School cannot be underestimated. It has been rightly stated that there is an impression created by the proponents of this school that they represent economists as a whole.[52] Part of the reason why neo-classical economics has had a significant influence is that it appears to be scientific and promises to be value-free. It promises to solve difficult problems.[53] But it is not value free and does not offer solutions to all problems. Although there has been a shift away from the Chicago School during the late 1980s and 1990s in legal scholarship,[54] it nevertheless still appears to significantly influence the legislature in Australia.[55] It is in getting this message across and assisting students to develop a critical understanding of law and economics that context can be of assistance.

Teaching competition law in context is to teach the doctrinal rules alongside a wider social and political framework.[56] The choice of materials and critical perspectives that are adopted is not only dependent on the lecturer but also on the types of student in the class. The same set of materials will rarely accommodate the interests of all students. Likewise the contextual materials that are used, whether they are dealing with the gendered nature of competition law or the political focus of recent reforms, will all depend on the lecturer's particular focus. In this paper I have examined two such approaches to teaching Competition law in context – a feminist context and a historical context.

There is a good deal of feminist jurisprudence and literature dealing with competition law which can be used effectively, in the early weeks of the semester, to question the underpinnings of the neo-classical model.[57] The important role feminist jurisprudence can play in highlighting the inherent values underlying the terms "the rational investor", "the consumer", "the worker"[58] "the businessman"[59] or indeed the meaning of "public interest". It clearly demonstrates that law is not neutral and objective and may be questioned and queried.

One interesting example of how the feminist context can be used in competition law is illustrated by Professor Radin. In a discussion on the limits of universal commodification, Professor Radin asks whether there should be a free market for babies.[60] She questions Posner's analysis[61] that everything people value is

ownable and saleable[62] and proposes that there are contested commodities which defy free exchange. Using this analysis, students can consider whether the free market is indeed the most efficient way of allocating resources. They can also explore the types of commodities they believe are contested commodities – those which defy commodification and should not be subject to the free market. In this manner students can consider not only the values on which competition law is based but also their own values and those of fellow students. The discussion can be carried through to specific topics that are dealt with in the subject. The deregulation of government business enterprises is a sound topic for applying the analysis of both Professor Posner and Professor Radin. By doing so students are asked to think about whether such essential services or parts of these services could be viewed as contested commodities.

The second way of incorporating context is to examine the political nature of competition law. In an interesting and informative publication, which is more than 20 years old, and just a little younger than the *Trade Practices Act 1974*, a number of the socio-political issues which were the focus of the predecessors of the current Act are examined.[63] There has been some further consideration of the interests and values that were reinforced by these earlier Acts.[64] These readings provide a good inter-disciplinary introduction to the history of competition law.[65] I encourage students to explore the current political context by looking at the secondary boycott provisions in the Act. The history of the secondary boycott provisions illustrates the differences between the political parties in Australia. The tumultuous history of these provisions can only be explained by the views held by the two major political parties on the trade union movement. The current secondary boycott provisions introduced by the coalition government is based on the conservative agenda and neo classical economics. It forms part of a package of reforms introduced by the government in the areas of industrial relations, consumer protection and corproate law. Such an examination encourages students to think of the political context of competition law specifically and commercial law in general. This type of analysis applies equally to a study of the development of a global competition law.[66] Context in these cases allows students to appreciate the many dimensions to competition law but it also allows students to make important links between the different subjects they study including corporations law,

competition law, international trade law, consumer law, industrial law and alternate dispute resolution.

INCORPORATING PROBLEM BASED LEARNING IN COMPETITION LAW

Although I have used problem solving exercises for a number of years in teaching Law subjects it is only recently that I have formalised this method of learning and have incorporated it into the teaching of Competition law.[67]

Firstly, problem based learning needs to be defined and this is not an easy task.[68] Perhaps the best definition is provided by Boud and Felletti:

> While there are different versions of what constitutes PBL, it does not as is sometimes erroneously assumed, involve the addition of problem solving activities to otherwise discipline-centered curricula, but a way of conceiving of the curriculum which is centered around key problems in professional practice".[69]

Teaching law using problem based learning can consist of "case studies and individually directed learning as distinct from other modes of training such as small group exercises".[70] It can include giving students a fact situation (as closely approximately to a real life situation) which raises a number of legal issues and asking the students to advise on these issues.

However problem based learning is something more than simply asking students to transfer the information from a lecture to a given fact situation. It involves a good deal of thought in designing problems[71] which will allow the student to embark on a process of independent study whereby the student recognises the issues involved, undertakes the necessary research and analysis and applies the law. This will also allow students to assess his or her level of learning.

Problem based learning, which is now an integral part of education in many disciplines[72] has two main benefits. Firstly it can develop basic knowledge and skills to equip students for legal practice.[73] Secondly it enables students to take responsibility for learning and allows them to evaluate their own levels of learning.

However it also has numerous shortcomings. It places emphasis on what is needed, on the ability to gain propositional knowledge as required, and to put it to the most valuable use in a given

situation.[74] Problem based learning approaches ideally should not focus on one particular area of law as this is not realistic. Legal problems in the real world do not always come under subject headings as they do within a Law School. This is a problem that goes to the heart of the way we teach law. Perhaps the best way to address it is to make students aware of these limitations in the way we teach.

Problem based learning must avoid the premise that every disagreement has a solution which can be resolved by litigation. It should be recognised that one of the lawyers' main tasks is to avoid litigation[75] and this should be accommodated in the design of the problems. One way of doing so in competition law is to allow students to consider the possibility of embarking on a compliance program or applying for authorisation to the ACCC.

The most significant shortcoming of relying solely on problem based learning in the teaching of any subject is that it may ignore the contextual nature of law whereby the issues of history, culture, social organisation, politics and economics and law reform are insufficiently considered. However as recognised succinctly "nor does it, as does subject based learning, prejudge what is relevant subject mater; there is a sense (but this needs careful interpretation) in which problems select the subject-matter needed to deal with them".[76] Problem based learning alone cannot fulfil the objectives of identified earlier namely – "the development of a critical analysis and an appreciation of the historical and economic context in which the law operates". But problem based learning can constitute only one of the forms of the assessments and learning strategies used.[77] Indeed this issue is well commented on by Drinan[78] who sees that it may useful to confine the name problem based learning to a defined territory of learning purposes.[79] He argues however that use of the term "experimental learning" may be able to overcome some of the inherent constraints associated with the use of the term "problem-based".

Margetson has recognised that problem-based learning requires a much greater integration of knowing *that* with knowing *how*.[80] The issue of the multi-dimensional nature of law being ignored is indeed an important shortcoming of problem based learning. This can be to a large extent be overcome by teaching the subject in context. However there will have to be an ongoing dialogue with students in order to set the framework for learning. There are three

main of points to consider.

Asking the right question will be important if the learning is going to explore some of the multi-dimensional issues and a critical perspective. It is also important in enabling students to embark on independent study. Asking students to make an authorisation application for a price fixing agreement will enable them to embark on independent study. When considering an authorisation application students could also be asked to identify the factors will not be considered as a public benefit in such an application. Such a question will allow the student to explore the notion of values and commodification. A further question which asks students to explore the reasons for such a definition of public benefit can allow students to look at contextual issues within the answer.

De-briefing students adequately and as often as necessary will ensure that they are able to participate in the process of discovery of the answers to the problem. It will also enable the lecturer to engage in the development of the parameters of the subject whereby there will be an appreciation of the contextual nature of the law including the political, social and economic contexts and the overlap that this question may have with other areas of law. Such debriefing would be most effective on a one-to-one basis between the student and the lecturer.

Finally it is important that students be aware of the process of inquiry which would be suitable in tackling such problem based learning approaches. This can be done by assisting students with developing their research strategies and giving feedback on the answers.

CONCLUSION

It is clear that neither problem based learning nor teaching in context alone can accommodate the objectives of legal education. Whereas problem based learning may encourage independent thinking and prepare students for legal practice, it will not allow them to appreciate the values that are built into competition law. The introduction of in context can allow students to assess critically the values inherent in our legal systems and identify some alternative and creative ways of examining laws. Using these different learning strategies can facilitate a deep approach to learning by linking a complex chain of events to theoretical

knowledge.[81]

[*] Division of Law, Macquarie University. This article is a revised version of a paper presented at the ALTA Conference in the University of Canberra, 2-5 July 2000. I am grateful to Professor Jack Goldring for his helpful comments. However all responsibility for mistakes and omissions lies with me.
 (2002) 13 *Legal Educ Rev* 1.

[1] Whereas problem based learning has been popular in the practice based disciplines, such as Medicine, relying significantly on contexual materials has been popular in the humanities. For an introduction to the approaches to teaching law see D Boud & G Feletti (eds), *The Challenge of Problem Based Learning* (London: Kogan Page, 1997) 69.

[2] For an examination of the manner in which teaching in context has influenced legal education see M LeBrun & R Johnstone, *The Quiet Revolution: Improving Student Learning in Law* (Sydney: LBC, 1994) 8-10.

[3] J Goldring, The Future of Legal Education (1993-94) 11 *Journal of Professional Legal Education* 151, at 152-153.

[4] See V Brand, Decline in the reform of law teaching? The impact of policy reforms in tertiary education (1999) 10 *Legal Educ Rev* 109, at 121. Also see C McInnis & S Marginson, *Australian Law Schools After the Pearce Report* (Canberra: Government Printing Office, 1994) 21.

[5] V Brand, *id* at 120.

[6] *Id* at 121-127.

[7] *Supra* note 2, at 158-176.

[8] *Id*.

[9] R Johnstone, Rethinking the Teaching of Law, (1992) 3 *Legal Educ Rev* 17, at 22-28.

[10] *Id* at 26.

[11] *Id* at 22.

[12] On the importance of developing skills see R Woellner, Developing and Presenting a Skills Program in the LLB: A Discussion of Design and Operational Issues (1998) 16 *Journal of Professional Legal Education*, 87.

[13] Recently many universities have begun offering the professional legal training courses within the Faculty in some instances as part of the undergraduate program. An examination of the universities' web sites revealed that ANU, Monash University, Newcastle University, QUT, UTS, UWS and Wollongong University all offer such courses as a "one-stop" legal qualification.

[14] *Supra* note 9, at 26.

[15] See D Weisbrot, Competition, Cooperation and Legal Change (1993) *Legal Educ Rev* 1, at 22 and 26. See also R Symth, Law or Economics? An Empirical Investigation into the Influence of Economics on Australian Courts (2000) 28 *ABLR* 5 where the authors have carried out a study listing the articles or texts cited by the Federal Court and High Court of Australia.

[16] *Supra* note 2, at 27

[17] See N Entwistle, Recent research on student learning and the learning environment in J Tait & P Knight, *The Management of Independent Learning* (London: Kogan Page) 100.

[18] *Id* at 100-101.

[19] *Supra* note 4, at 110 and 127-132.

[20] K Trigwell, M. Posser & F Waterhouse, Relations between teacher's approach to learning and students' approach to learning (1999) 37 *Higher Education* 57, at 67.

[21] This paper, limits itself to dealing with the issues of teaching in context and the use of problem solving and does not detail the assessment tasks used or the

educational materials supplied. For the present purposes it should be noted however that the assessment tasks are flexible aimed at encouraging a deep approach to learning. See S Brown & P Knight, *Assessing Learners in Higher Education* (London: Kogan Page) 11.

[22] On the issue of students' needs and learning strategies see P Spiegelman, Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web, (1998) 38 *Journal of Legal Education* 243.

[23] *Supra* note 9, at 29. Also see D Harris & C Bell, *Evaluating and Assessing for Learning* (London: Kogan Page) 90 and P Ramsden, *Learning to Teach in Higher Education* (London: Routledge, 1992) 48 where the analysis refers to medicine and has equal application to the teaching of law.

[24] For a discussion of the challenges facing teachers of Corporations Law, see K Hall, Theory, Gender and Corporate Law (1998) 9 *Legal Educ Rev* 31, at 34-36; D Kingsford Smith, Studying Modern Corporations Law in Context (2000) 33 *The Law Teacher* 196; P Spender, Women and the Epistemology of Corporations Law (1995) 6 *Legal EducRev* 195.

[25] Australia, *Report by the Independent Committee of Inquiry* (Hilmer Report), August 1993 (Canberra: AGPS) xvi.

[26] See Smythe, *supra* note 15.

[27] See R Whaples, A Morriss & A Moorhouse, What Should Lawyers Know About Economics? (1998) 48 *Journal of Legal Education* 120. Here the authors found that the AALS directory listed 159 persons teaching at least one course in the area. Also see T Venkateswarlu, Law and Economics Course readings: a survey of North American universities (1997) 41 *American Economist* 89. Here the author surveys the inclusion of law and economics subjects in the Faculties of Economics in North American Universities and the manner in which such readings are designed to facilitate the application of economic tools in examining optimal laws.

[28] See A Duggan, Law and Economics in Australia (1989) 1 *Legal Educ Rev* 37, where the author points to the limited number of subjects involving law and economics. It is likely that there are many more such subjects today given the widespread acceptance of law and economics scholarship, illustrated by the Hilmer Committee Report and subsequent reforms and the CLERP program much of which has been enacted.

[29] See R Hunter, R Ingleby & R Johnstone, *Thinking About Law Perspectives on the History, Philosophy and Sociology of Law* (Sydney: Allen & Unwin, 1995) 63.

[30] I conducted a survey by examining the web sites of every Law Faculty of every university in Australia. Only two Law Faculties offered a subject primarily concerned with Law and Economics. It is assumed that a number of Law Faculties would deal with this school of thought in a first year foundation subject.

[31] The web sites of the Faculties of Business and Faculties of Economics were also examined in the survey. What was surprising was that there was no single subject dealing with Law and Economics being taught in either the Faculties of Business or Economics at either undergraduate or postgraduate levels in any Australian University. This is a sharp contrast to the experience in the United States where a survey of American Canadian Universities showed that such subjects had been increasingly added to the economics curriculum in the last four or five years. See T Venkateswarlu, Law and Economics Course readings: a survey of North American universities (1997) 41 *American Economist* 89.

[32] These elective subjects were undertaken in the third or later years of the law degree. They included Competition Law and Restrictive Trade Practices.

[33] See H Demsetz, The Primacy of Economics: An Explanation of the Comparative Success of Economics in the Social Sciences (1997) 35 *Economic Inquiry* 1. It is argued that the success of economics is attributable to the fact that it is more

definite than any of the other social sciences and that it has universal applicability in our decentralised economies.

[34] The use of microeconomic principles in analysing the efficiency of our legal rules has been widely accepted. This is illustrated not only by the reliance by legislators on these principles evidenced by the Corporate Law Economic Reform Program and the reforms to our competition and telecommunications laws but also large number of law and economics text books from the United States. For example see R Posner, *Economic Analysis of Law* (4th edition) (Boston: Little and Brown, 1992); M Polinsky, *An Introduction to Law and Economics* (2nd edition) (Boston: Little and Brown, 1989); R Cooter, *Law and Economics* (3rd edition) (Reading, Mass: Addison Wesley Longman, 2000); RP Malloy, *Law and Economics: A Comparative Approach to Theory and Practice* (St Paul, Minn: West Publishing Co, 1990); C Veljanovski, *The Economics of Law: An Introductory Text* (London: Institute of Economic Affairs, 1990), and GS Crespu, *Cases and Materials on Law and Economics* (St Paul, Minn: West Publishing Co, 1984).

[35] R Steinwall (ed), *25 Years of Competition Law* (Sydney: Butterworths, 2000) 146.

[36] For example see the inclusion of the Access Regime in the Act and the ever-expanding role of the ACCC which now includes regulating GST matters.

[37] On the composition of students at undergraduate level see J Goldring, An Updated Social Profile of students entering law courses (1986) 29(2) *Australian Universities Review* 38-44. Also see A Ziegert, Social Structure, Educational Attainment and Admission to Law School (1992) 3 *Legal Educ Rev* 154 and C McInnis & S Marginson, *Australian Law Schools after the 1987 Pearce Report* (Canberra: AGPS, 1994) 204.

[38] For example see A Ogus, *Regulation: Legal form and economic theory* (Oxford: Claredon Press, 1994) for an excellent analysis of how economic theories have influenced legislative reforms.

[39] See Higher Education Council *The Effects of the Introduction of Fee-paying Postgraduate Courses on Access for Designated Groups* (Canberra: AGPS, May 1997).

[40] For an examination of the manner in which teaching in context has influenced legal education see *supra* note 2. Also see B Horrigan, Teaching and Integrating Recent Developments in Corporate, Public and International Law and Practice, *Paper presented at the Corporate Law Teachers Association Annual Conference, 2001* (Victoria University, Melbourne, February 2001).

[41] For the three possible meanings which can be attributed to the term see M Minow & E Seplman, In Context, (1990) 63 *Southern California Law Review* 1597, at 1602-1606.

[42] *Id* at 1605-1606.

[43] The two main Competition Law textbooks including our own concentrate on the statutory provisions and their interpretation. The two main texts in the area are Steinwall et al, *Australian Competition Law* (Sydney: Butterworths, 2000) and S Corones, *Competition Law in Australia*, (Sydney: LBC, 1999).

[44] See Hall, *supra* note 24, at 31.

[45] For a brief overview on the Chicago School see Corones, *supra* note 43, at 12-13.

[46] For example see the discussion on neo classical economics in Steinwall et al, *supra* note 43, at 89-114.

[47] *Supra* note 27, at 121. This article also gives a list of readings that are recommended by the members of the American Law and Economics Association and the American Economic Association.

[48] Later they encounter more advanced economic concepts such as game theory. For a good description of how this theory can be applied see D Robertson, The regulatory assessment of mergers (and things like mergers) (2000) 7 *Competition*

and Consumer Law Journal 201, at 204-207.

[49] Also referred to as the Harvard School. See Corones, *supra* note 43, at 17.

[50] See Corones, *supra* note 43, at 18.

[51] See Steinwall, *supra note* 43, at 112.

[52] See S Bottomley & S Parker, *Law in Context* (Sydney: The Federation Press, 1997) at 279. However for a discussion of the second wave of law and economics see M Richardson & G Hadfield (eds) *The Second Wave of Law and Economics* (Sydney: The Federation Press, 1999).

[53] G Cooper, Inevitability and Use (1989) 1 *Legal Educ Rev* 28, at 30.

[54] See J Farrar, In Pursuit of an appropriate theoretical perspective and methodology for comparative corporate governance *Paper presented at the Corporate Law Teachers Association Conference*, Victoria University, February 2001 11.

[55] The recent reforms to Corporate Law and Competition Law are still largely influenced by the Chicago School.

[56] See W Twining, *Law in Context — Enlarging a Discipline* (Oxford: Clarendon Press, 1997) 49. See also S Bottomley & S Parker, *supra* note 52, at 10-12.

[57] For example see JM Radin, Market inalienability (1987) 100 *Harvard Law Review* 1849; JM Radin, *Contestable Commodities* (Cambridge, Mass: Harvard University Press, 1996); MA Ferber & JA Nelson (eds), *Beyond Economic Man: Feminist Theory and Economics* (Chicago: University of Chicago Press, 1993).

[58] See RJ Owens, Work and Gender in the Law Curriculum (1995) 6 *Legal Educ Rev* 183. See also N Naffine, *Law and the Sexes: Exploration in Feminist Jurisprudence* (Sydney: Allen & Unwin, 1990).

[59] Hall, *supra* note 24.

[60] Radin, *supra* note 57, at 131.

[61] Posner's contribution to Law and Economic scholarship has been enormous. See Posner R, Eonomic Analysis of Law, Little Brown, 1992, Also see Landes E and Posner R, The Economics of the Baby Shortage, (1978) 7 *Journal of Legal Studies* 323. It has been argued that Posner has moved away from the strict efficiency based analysis used in his earlier writings to a more pragmatic approach: see Farrar, *supra* note 54.

[62] Radin *supra* note 57, at 3

[63] A Hopkins, *Crime Law & Business – The Sociological Sources of Australian Monopoly Law* (Canberra: Australian Institute of Criminology, 1978) 1.

[64] For example see G Fleming & D Terwiel D, What effect did early Australian Antitrust legislation have on firm behaviour? Lessons from business history', (1999) 27 *Australian Business Law Review* 47 and G de Q Walker, *Australian Monopoly Law Issues of Law, Fact and Policy* (Melbourne: FW Cheshire, 1967) 3.

[65] For an introduction to the history of American antitrust see EM Fox & LA Sullivan, Antitrust Retrospective and Prospective: Where are we coming from? Where are we going?', (1987) 62 *New York University Law Review* 936.

[66] See P Drahos & J Braithwaite, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000).

[67] V Nagarajan & D Meltz, *Questions and Answers – Trade Practices Law* (Sydney: Butterworths, Sydney, 1999). I am responsible for six chapters, which deal with Restrictive Trade Practices.

[68] See J Drinan, The Limits of Problem-based Learning' in Boud & Feletti, *supra* note 1, chapter 32.

[69] See Boud & Felletti, *supra* note 1, at 14. Also see J Macfarlane & J Manwaring, Using Problem Based Learning to Teach First Year Contracts (1998) 16 *Journal of Professional Legal Education* 271.

[70] See K Winsor, Applying the Ideas of Problem-based Learning to Teaching the

Practice of Law, in Boud & Feletti, *supra* note 1, at 219.

[71] For the kinds of difficulties which can be encountered in PBL see MA Dahlgren, R Castensson & L Dahlgren, PBL from the Teachers' Perspective, (1998) 36 *Higher Education* 437, at 447.

[72] For a bibliography on the manner in which problem based learning has been employed in many areas see the Australian Problem Based Learning Network on http://www.newcastle.edu.au/centre/problarc/ research.html.

[73] See R Johnstone, *supra* note 9, at 23. Also see S Nathanson, Bridging the divide between traditional and professional legal education (1997) 15 *Journal of Professional Legal Education*, at 24.

[74] D Margetson, Why is Problem-based learning a challenge? in Boud & Feletti, *supra* note 1, at 38.

[75] See G Blasi, Teaching/Lawyering as an Intellectual Project, (1996) 14(1) *Journal of Professional Legal Education*, 65, 69. Also see A Hunt, The role and place of theory in legal education: Reflections on Foundationlism (1989) 9 *Legal Studies* 146, at 161.

[76] *Id*.

[77] Similar statements have been made in the context of the College of Law, which was considering problem-based learning. See K Winsor, Applying the Ideas of Problem-based Learning to Teaching the Practice of Law in Boud & Feletti, *supra* note 1, at 224-232.

[78] See J Drinan, The Limits of Problem-based Learning, in Boud & Feletti, *supra* note 1.

[79] *Id*, at 327.

[80] See D Margetson in Boud & Feletti, *supra* note 1, at 38.

[81] P Ramsden, *Learning to Teach in Higher Education* (London: Routledge, 1992) 48. The analysis here refers to medicine and has application to the teaching of law.