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TEACHING CORPORATIONS LAW FROM A TRANSACTIONAL PERSPECTIVE AND THROUGH THE USE OF EXPERIENTIAL TECHNIQUES

ANDREW GODWIN*

I INTRODUCTION

Much has been written of the trend toward the development of a transactional law focus within the law school curriculum. Also referred to as the ‘transactional law movement’ or the ‘practice skills reform movement’, it is particularly evident in the United States.¹

The term ‘transactional law’ can embrace a variety of approaches and methodologies, ranging from the teaching of substantive law from a transactional perspective, where the focus is on how the substantive law regulates and supports business transactions, to the teaching of skills that transactional lawyers need to develop in order to perform their role effectively (e.g. advisory, drafting and negotiation skills). At the very least, however, teaching law from a transactional perspective involves an examination of how law and lawyers become relevant in the context of business transactions. The transaction provides the practical context in which the relevance of law is examined. In this sense, the law might be referred to as ‘applied law’ by contrast with ‘pure law’ (or doctrinal law) in the same sense that we refer to ‘applied physics’ as distinct from ‘pure physics’. Because of the relevance of the broader context, teaching law from a transactional perspective also involves looking at the commercial context in which transactions take place or the commercial motivations or drivers. Inevitably, it also involves a consideration of the role that

* The writer is Director of Transactional Law, Melbourne Law School, and is a member of a research team, led by Associate Professor Richard Wu, that is examining experiential learning and transactional law education. The writer is grateful to Richard Wu and colleagues at Melbourne Law School for their comments on this paper; Timothy Howse, Research Associate at Melbourne Law School, for his research and editorial assistance and the anonymous peer reviewers for their helpful comments. Research for this paper was fully supported by a Teaching Development Grant from the University of Hong Kong (Project No.10100537).

¹ For an overview of the literature in this area and suggestions as to why this trend is stronger in the United States than elsewhere, see A Godwin, ‘Teaching Transactional Law: A Case Study from Australia with Reference to the US Experience’ (2015) 16(2) *Transactions: The Tennessee Journal of Business Law* 343. Increasingly, law schools in the US are strengthening the focus on experiential education to the point where some schools devote the whole of the third year of a law degree to this approach.

transactional lawyers perform, including the professional and ethical challenges that arise in this context.²

Another way of putting this is that teaching law from a transactional perspective involves examining law through the prism of a transaction and from the perspective of a transactional lawyer. It involves learning law through transactions rather than learning transactions through law. Such an approach may be based on an examination of the law and legal concepts that are relevant to a transaction or a series of transaction across a broad range of areas such as contract law, property law, obligations and remedies. In this context, the emphasis is on breadth over the depth that would be possible in a single-area subject and is a useful approach for capstone subjects; namely, subjects that integrate previously acquired knowledge, skills and experiential learning and are designed to prepare students for their future careers.

Alternatively, a transactional law approach may be based on a single-area subject, such as corporations law, where transactional aspects and techniques are incorporated into the curriculum. This is the focus of this paper; namely, how a corporations law course might be taught from a transactional perspective and through the use of experiential techniques.³

In recent years, law schools around Australia have taken steps to strengthen the transactional focus within the curriculum in response to increased expectation in the workplace that law graduates understand the role that transactional lawyers play in both a domestic and cross-border context and develop an awareness of essential skills in areas such as advising, drafting and negotiation. Although much of the learning that is required for this purpose can be imparted through the conventional seminar-based approach, the use of experiential techniques can enhance the learning process by replicating the work undertaken by transactional lawyers and providing students with opportunities to experience and reflect on the role of transactional lawyers, the challenges that they confront in a transactional context and the skills that they need to develop in order to perform their role effectively. This paper contributes to the discourse in this area by examining various experiential techniques and suggesting ways in which they might be applied in a transactional context to teach corporations law.

² In particular, writers have noted the benefits of client-based problems and simulations for teaching ethical issues. See Anne M Tucker, 'Teaching LLCS by Design' (2014) 71 *Washington and Lee Law Review* 525, 527, where the writer points out the benefits of simulations in terms of cultivating students' ethical and professional identities. See also Carol Goforth, 'Use of Simulations and Client-Based Exercises in the Basic Course' (2000) 34 *Georgia Law Journal* 851, 853: 'I find that simulated exercises also offer an excellent opportunity to integrate ethical issues applicable to representation of business clients into the basic course.' See also Deborah Maranville, 'Re-vision Quest: A Law School Guide to Designing Experiential Learning Courses Involving Real Lawyering' (2012) 56 *New York Law School Law Review* 517, 525.

³ It is also interesting to review the literature that considers teaching the whole curriculum from a transactional perspective. For example, Cynthia Batt, 'A Practice Continuum: Integrating Experiential Education into the Curriculum' (2015) 7 *Elon Law Review* 119 considers how the whole curriculum can be redesigned as a 'continuum' that gets increasingly more transactional the further students are in to their degrees.

Teaching law from a transactional perspective requires students to gain an understanding of what transactional lawyers do and how they think and, in the case of simulations or other experiential learning techniques, to practise what transactional lawyers do in a virtual context. This does not call for any radical departures from the conventional manner in which law subjects are taught. However, it may involve radical departures from the conventional approach, particularly where students are required to participate in virtual transactions through the use of simulated exercises or simulated courses and other techniques such as client interviews and technology-based learning. The trend towards participation in virtual transactions has become particularly pronounced in courses that focus on skills such as drafting and negotiation.⁴ Even further along the spectrum are clinical law programs or business clinics in which students get involved in real deals for real clients.⁵

Unavoidably, single-area subjects such as corporations law must place their focus on teaching the substantive law and on providing students with an in-depth understanding of the doctrines and principles that arise in that regard. Although this necessarily means that an examination of the broader transactional context is less relevant (and less realistic) than in the case of a subject that is designed around a specific transaction or a specific skillset, it does not rule out the possibility of adopting simulations and other experiential learning techniques that strengthen the transactional aspects.

In fact, experience suggests that single-area subjects lend themselves well to the adoption of a blended approach where simulations and other experiential learning techniques are utilised for the purpose of teaching legal doctrine, and that various benefits flow from such an approach. These benefits include opportunities ‘for students to apply the law and practice the skills that were previously only discussed’ and also to transform the process of ‘deconstructing statutes from a passive endeavour to an active learning exercise where students [have] to understand and apply the statutes to achieve an assigned client objective’.⁶

Part II of this paper provides an overview of four experiential techniques: client-based problems, client interviews, drafting and negotiation simulations and what this writer refers to as ‘facilitated reflection’. Part III of this paper suggests ways in which experiential

⁴ For an example of a course that is designed around a cross-border business transaction, see Daniel Bradlow and Jay Finkelstein, ‘Training Students to be International Transactional Lawyers: Using an Extended Simulation to Educate Law Students About Business Transactions’ (2007) 1 *Journal of Business Entrepreneurship and Law* 67.

⁵ Clinics have been said to offer ‘the opportunity to understand what being a lawyer and practicing law is all about. The clinic structure allows students to draw upon and further develop their substantive knowledge, doctrinal reasoning, lawyering skills, ethical engagement and professional identity’: Lisa Bliss and Donald Peters, ‘Delivering Effective Education in In-House Clinics’ in Maranville et al (eds), *Building on Best Practices: Transforming Legal Education in a Changing World* (LexisNexis, 2015) 3.

⁶ Tucker, above n 2, 534. See Part III below for a suggestion as to how this might be applied to the teaching of corporations law in Australia.

learning techniques might be adopted or utilised more effectively for the purpose of teaching corporations law in Australia.⁷ Part IV provides some concluding observations.

II EXPERIENTIAL LEARNING

There are three tasks that figure prominently in the work that transactional lawyers undertake: (i) providing legal advice, including advice on how to structure transactions to comply with the legal requirements; (ii) drafting agreements; and (iii) negotiating deals and documents. In order to undertake this work effectively, transactional lawyers must have an understanding of the commercial context in which clients operate and the specific issues and problems that clients face.

Experiential learning provides students with insights into what transactional lawyers do by getting them involved in experiences that, so far as possible, replicate what transactional lawyers do in practice. As Tucker suggests, '[e]xperiential learning is intended to contextualize studying the law and equip students with lawyering skills required in practice.'⁸ Ferber explains that experiential learning occurs in a four-stage cycle, in which a learner (1) 'engages in concrete experience'; (2) 'engages in reflection and observation on that concrete experience'; (3) forms 'abstract principles, concepts and generalizations based on the reflective observations of the experience'; and (4) 'actively experiments with the implications of those principles, concepts or generalizations in new situations.'⁹

Techniques for experiential learning include the following: (i) the use of client-based problems; (ii) client interviews to teach advisory, communication and inter-personal skills; (iii) simulation exercises to teach skills such as drafting and negotiation; and (iv) facilitated reflection. The first three techniques are experiential in the sense that they replicate the work undertaken by transactional lawyers and provide students with opportunities to experience that work in a learning environment. The

⁷ It should be acknowledged that many of these techniques are already used to varying degrees in law schools around Australia, including in corporations law subjects, and that this paper does not undertake an empirical analysis of the benefits of experiential learning. Instead, it examines experiential techniques that might be adopted in a single-area subject, such as corporations law, and suggests a transactional context in which these techniques might be applied. For an empirical analysis of the benefits and challenges of teaching transactional law generally, see Godwin, above n 1.

⁸ Tucker, above n 2, 526.

⁹ Paul Ferber, 'Adult Learning Theory and Simulations: Designing Simulations to Educate Lawyers' (2002) 9 *Clinical Law Review* 417, quoting David A Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (Prentice-Hall, 1984). There is literature suggesting that a dichotomy exists between 'experiential learning' and 'experiential education'. Batt, above n 3, for example, suggests that experiential learning is something that is 'random and without design or intent', whereas experiential education 'is designed with specific learning objectives that students are expected to achieve.' See also Maranville et al, 'Incorporating Experiential Education throughout the Curriculum' in Maranville et al (eds), *Building on Best Practices: Transforming Legal Education in a Changing World* (LexisNexis, 2015).

fourth technique is experiential in the sense that it encourages students to reflect on the broader context in which the law and legal doctrine have developed and the relevance of transactions and transactional lawyers to that development. Each of these techniques is discussed below.

A Client-based problems

It is important to be aware of the difference between hypothetical problems, such as those that have traditionally been utilised in teaching substantive law subjects, and client-based problems. Hypothetical problems tend to be backward-looking; that is, they focus on a dispute and require students to look back at the actions of the parties and examine the way in which the dispute might be resolved through the application of the substantive law to the facts of the dispute.¹⁰ In addition, they tend to be closed-ended; that is, they confine the student's attention to a specific context (e.g. a legal principle as reflected in case law or a statutory provision) and to a limited range of possibilities within that context. The reason for this is that the purpose of such hypothetical questions is to test knowledge of law as developed in cases in which similar disputes have arisen. In other words, the conventional hypothetical questions take their cue from the case law instead of from transactions.

By way of example, a traditional hypothetical question in a corporations law subject might test knowledge of the law governing conflicts of interest by posing the following question:

X is a director and has failed to disclose a majority shareholding in a competing company to the other directors. Advise X on whether she is in breach of the duty of loyalty under the Corporations Act and liability for breach.

Such a question would require students to identify section 191 of the *Corporations Act*, to define a 'material personal interest' by reference to case law and to examine the statutory exceptions in determining potential liability for breach. In effect, the focus is on interpreting case law and statute and demonstrating knowledge of how the law might be applied to the given facts.

On the other hand, a client-based problem is forward-looking and open-ended. It requires the student to look forward to a goal that a client wants to achieve (such as the entering into of an activity or transaction) and invites the student to identify what issues might be relevant and what further information might be required in order to advise fully. For example, a client-based problem might ask the following:

¹⁰ For further comment on this point, see Constance Wagner, 'Training the Transactional Business Lawyer: Using the Business Associations Course as a Platform to Teach Practical Skills' (2014) 59 *Saint Louis University Law Journal* 1, 1, where the writer suggests that law schools mislead students by placing such a strong focus on case law analysis, leaving 'students with the misimpression that business law practice is primarily about litigation. In fact, business law practice is about preventing legal disputes from arising in the first place by proactive lawyering.'

X is about to be appointed a director and requires advice on whether she is required to make any disclosures in respect of her shareholding in other companies and what she needs to do in order to comply with any applicable requirements in this regard.

Such a question would require students to consider whether the shareholding constitutes a 'material personal interest' and to advise the client on the circumstances in which section 191 of the *Corporations Act* might apply. It would also encourage students to think more broadly about other applicable requirements, such as those in the company constitution, and the implications in terms of voting. It is forward-looking in the sense that it anticipates action rather than focusing on past action and is open-ended in the sense that the student needs to consider how the position might change depending on the circumstances, and what further information should be requested from the client in order to advise fully. In this way, it reflects the issues and questions that would arise in practice.¹¹

B Client Interviews

In line with the general approach of experiential learning as outlined above, the purpose of client interviews is to simulate the experience of communicating with, and advising, clients in real life. This technique can be utilised in different ways. This writer has trialled the technique in the subject *Deals*, where the focus was on testing students' knowledge of the law and their ability to explain technical concepts in language that is clear and comprehensible to an informed lay person. The exercise was based on a memorandum of advice that each student had prepared in response to client questions concerning a technical legal issue.

The technique has also been utilised more comprehensively to test a broad range of communication skills in the context of vocational legal education. This has involved the use of standardised clients, which Johnson defines as 'actors who are trained to portray clients in a simulation and to assess the advice and communications provided by student attorneys in their [counselling] sessions'.¹²

¹¹ The use of client-based problems is increasingly common in doctrinal law textbooks. A recent example in the US is Jerry L Anderson and Daniel B Bogart, *Property Law: Practice, Problems, and Perspective* (Aspen/Wolters Kluwer, 2014).

¹² Stephen Johnson, 'Teaching for Tomorrow: Utilizing Technology to Implement the Reforms of Macerate, Carnegie and Best Practices' (2013) 92 *Nebraska Law Review* 46, 73-4. For further discussion about standardised clients and relevant trials, see Karen Barton, Patricia McKellar and Paul Maharg, 'Authentic Fictions: Simulation, Professionalism and Legal Learning' (2007) 14 *Clinical Law Review* 143, 189 and Wilson W S Chow and Michael H K Ng, 'Standardized Clients in Asia: University of Hong Kong's Experience' in F Westwood and K Barton (eds), *Calling of Law: The Pivotal Role of Vocational Legal Education* (Ashgate Publishing, UK, 2014).

C Drafting and Negotiation Simulations

In response to recommendations in the McCrate Report of 1992 and the Carnegie Report of 2007¹³ and in line with trends generally, many law schools in the United States have adopted simulation techniques for the purpose of skills-based education. Inspired by research on experiential learning generally and the experience of other disciplines such as medicine,¹⁴ academics have promoted the benefits of simulation techniques across a range of courses, including clinical law programs.¹⁵ These techniques have been utilised in both doctrinal law subjects and also simulation-based courses.

Gouvin has described the difference between a doctrinal law course (also known as a 'problem course') and a simulation-based course as follows:

[T]he hypothetical in the simulation course drives the syllabus in an organic way as the hypothetical scenario unfolds. This is opposed to a problem course, where the problems do not drive the syllabus, but instead are there to illustrate and develop the issues set out in the syllabus.¹⁶

Katz notes that 'there are three curricular paths by which law schools can [provide more experiential education that integrates the teaching of doctrine, skills and professional identity]': (1) '[c]linics in which students directly represent actual clients under the supervision of faculty members'; (2) '[e]xternships or field placements, in which students work with practicing lawyers on real legal problems (and sometimes engage in direct representation of clients under the supervision of those lawyers, depending on the state's student practice laws)'; and (3) '[c]ourse simulations, in which students play the role of lawyers in simulated legal problems. These simulations may be small-scale, occupying only a few class periods or even a portion of a class period, or large-scale, with the

¹³ These reports called for the narrowing of the gap between law schools and the profession and reforms to prepare graduates better for legal practice. They observe that 'the bridge is too underdeveloped to safely carry across the tens of thousands of law graduates who enter the profession each year': Deborah Maranville, 'Re-vision Quest: A Law School Guide to Designing Experiential Learning Courses Involving Real Lawyering' (2012) 56 *New York Law School Law Review* 517, 524. Much has been written about how these gaps can be bridged: Alexa Z Chew and Katie R G Pyral, 'Bridging the Gap Between Law School and Law Practice' (2015) *The 25th Annual Festival of Legal Learning* 1.

¹⁴ See Paula Schaefer, 'Injecting Law Student Drama into the Classroom: Transforming An E-Discovery Class (Or Any Law School Class) With a Complex, Student-Generated Simulation' (2011) 12 *Nevada Law Journal* 130, 133, who notes that '[m]edical schools have used simulations with great success in training doctors: actors play the part of patients and interact with medical students, who practice interviewing and diagnosing'.

¹⁵ It has been suggested that simulation techniques be incorporated into clinical law programs to enhance 'skills transfer'. See David Binder and Paul Bergman, 'Taking Lawyering Skills Training Seriously' (2003) 10 *Clinical Law Review* 191.

¹⁶ Eric Gouvin, 'Symposium: Law, Entrepreneurship, and Economic Recovery' (2009) 78 *UMKC Law Review* 429, 442.

whole course being a simulation. Many legal writing courses include simulations.¹⁷

In line with the drivers behind the transactional law movement generally, the move towards experiential learning reflects concerns about the narrow focus of the conventional approach to legal education, which has been dominated by the analysis of appellate cases.¹⁸ By incorporating experiential learning into the core curriculum, it is argued, ‘the divide among “skills,” “theory,” or “substance” courses can be eliminated.’¹⁹ The move towards incorporating simulation and other experiential learning techniques has also been driven by requirements of the American Bar Association for ‘law schools to expand their simulation offerings.’²⁰ As noted by Batt, ‘ABA Standard 303 now requires that students complete at least six credits of experiential education, defined as a clinic, a field placement, or a simulation course; and ABA Standard 304 provides new definitions of clinical and simulation courses.’²¹ By contrast, although the admission rules in Australia require practical legal training for professional qualification and include skills within the prescribed competencies, they do not prescribe the use of experiential education in the academic requirements and only refer generally to ‘workplace experience’ in the context of practical legal training.²²

Ferber defines simulations as ‘an activity composed of three essential elements: (1) the performance of a lawyering task; (2) using a hypothetical situation which emulates reality; and (3) a “significant” (relative to the task to be performed) period of time to perform the task.’²³ Ferber suggests that the third element

distinguishes simulations from the hypothetical role play frequently used as part of the traditional Socratic method classroom. The teacher poses a hypothetical problem (or uses a problem in a casebook) and asks the students to put themselves in the position of an attorney for one party, or a judge, and make an argument to a court, give advice to a client, or decide a case. No matter how realistic a teacher may make the situation appear, the immediacy of performance removes a sense of reality and prevents the kind of learning which occurs when the time to perform mirrors the time a lawyer has for the

¹⁷ Martin Katz, ‘Facilitating Better Law Teaching: Now’ (2013) 62 *Emory Law Journal* 823, 830; Batt, above n 3.

¹⁸ James Moliterno, ‘Legal Education, Experiential Learning, and Professional Responsibility’ (1996) 38 *William and Mary Law Review* 71, 122. This conventional approach is commonly referred to in the US as the Langdellian method after Christopher Columbus Langdell, who was Dean of Harvard Law School from 1870 to 1895 and is credited as having introduced the case method to law teaching. See also Michelle Harner and Robert Rhee, ‘Deal Deconstructions, Case Studies, and Case Simulations: Toward Practice Readiness with New Pedagogies in Teaching Business and Transactional Law’ (2014) 3 *American University Law Review* 81, 82.

¹⁹ John O Sonsteng, ‘A Legal Education Renaissance: A Practical Approach for the Twenty-First Century’ (2007) 34 *William Mitchell Law Review* 303, 402.

²⁰ Ira Steven Nathenson, ‘Navigating the Uncharted Waters of Teaching Law with Online Simulations’ (2012) 38 *Ohio Northern University Law Review* 535, 536.

²¹ Batt, above n 3, 35.

²² See, for example, Law Admissions Consultative Committee, *Uniform Admission Rules 2014*.

²³ Ferber, above n 9, 418.

task. The immediacy of the in-class hypothetical prevents students from developing the process for doing tasks.²⁴

Ferber divides simulations into three categories: a simple simulation, which is ‘similar to a hypothetical role play but provides students with reflection and preparation time’;²⁵ a complex simulation, which ‘involves the creation of a partial world in which to set the learning experience’;²⁶ and an extended simulation, which ‘usually involves expanding a complex simulation... [and] can be used in any of the three major lawyering contexts: transaction planning, pre-action advice-giving, or dispute resolution’.²⁷

Noting that ‘simulations have their pedagogic roots in experiential learning theory’, Ferber explains that experiential learning is based on the fact that ‘people learn from their everyday life experience’ and ‘provides a foundation for an approach to learning as a lifelong process, inside and outside the classroom’.²⁸

The following have been identified as the benefits of simulations: the opportunity to integrate the teaching of doctrine, skills and professional identity, including ethical issues and responsibilities, into the law school curriculum;²⁹ higher levels of interest, enthusiasm and motivation than might otherwise be the case with the conventional approach;³⁰ the opportunity for students to engage in *ex ante* analysis and risk assessment;³¹ the illumination and synthesis of the doctrines in basic substantive law courses³² and the benefits that students derive from being exposed to ‘complex concepts through learning by doing’.³³ They have been likened to flight simulators, where the process

²⁴ Ibid 419.

²⁵ Ibid 419.

²⁶ Ibid 421. Ferber suggests that the difference between a simple simulation and a complex simulation is that ‘[u]nlike the simple simulation where all the facts directly relate to the learning point, [a complex simulation occurs where] the facts (and documents) expand the information base to provide a broader factual context.’

²⁷ Ibid 425-6.

²⁸ Ibid 428-9, suggests that ‘learning how to learn from experience is an integral part of professional life’ and that ‘[w]hile continuing legal education helps, learning from experience is particularly important for lawyers. Three years of legal education barely scratches the surface of what lawyers must learn to be competent professionals.’ See also Goforth, above n 2, 853: ‘[M]ost students need the exposure because they will not get it elsewhere while they are students.’

²⁹ Katz, above n 17, 833; Goforth, above n 2, 853; Kirsten Dauphinais, ‘Using an Interviewing, Counselling, Negotiating, and Drafting Simulation in the First Year Legal Writing Program’ (2013) 15 *Transactions: The Tennessee Journal of Business Law* 105, 111; Lisa Bliss and Donald Peters, ‘Delivering Effective Education in In-House Clinics’ in Maranville et al (eds), above n 9, 15.

³⁰ Binder and Bergman, above n 15, 215; Deborah Maranville, ‘Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning’ (2001) 51 *Journal of Legal Education* 51, 58; Batt, above n 3, 7.

³¹ Tucker, above n 2, 535.

³² Jay Feinman, ‘Simulations: An Introduction’ (1995) 45 *Journal of Legal Education* 469, citing Stacy Caplow, ‘Autopsy of a Murder: Using Simulation to Teach First Year Criminal Law’ (1989) 19 *New Mexico Law Review*, 139, 140.

³³ Sonsteng, above n 19, 417. Binford notes that ‘according to pedagogical research, practice by doing has the second-highest rate of long-term retention of any learning

can be tailored to student learning in ways that real cases in a clinic cannot. Teachers can omit the months of wait time between significant events in a case. And they can create facts that might not exist in a real case, allowing students to explore legal and ethical issues that might not arise in a particular case.³⁴

Various challenges have been identified with the use of simulations. For a start, simulated courses are very broad in scope and go much further than an examination of the substantive law. The substantive law can sometimes be overwhelmed by the broader context. In addition, teachers have less control and the process is less predictable because students are active participants in the learning process – a process in which the lecturers often act more like facilitators than like teachers.³⁵

There are also challenges relating to the practical constraints in terms of the limited time in which to cover the doctrinal issues and the cost and effort that is required to design and deliver simulation exercises and simulation-based courses.³⁶

Another challenge that has been identified is the extent to which simulations may ‘incorporate hidden assumptions that may not entirely reflect reality’ and the associated challenge of authenticity, namely, the risk that the effectiveness of the exercise is undermined by the realisation on the part of students that the exercise is not authentic.³⁷ Further challenges include the lack of practice experience on the part of teachers;³⁸ uncertainty and anxiety on the part of students in relation to assessment;³⁹ and the need for students to have a good understanding of the law, which limits many simulations to later-year students.⁴⁰ These challenges have led to experimentation involving the use of technology to deliver simulations.⁴¹

D *Facilitated Reflection*

Facilitated reflection is the process by which students, under the guidance and facilitation of the teacher, are invited in class to reflect on issues that relate to the broader context in which a dispute has arisen or a

method (seventy-five percent)’: Warren Binford, ‘How to Be the World’s Best Law Professor’ (2015) 64(4) *Journal of Legal Education* 1, 12.

³⁴ Katz, above n 17, 833.

³⁵ See Bradlow and Finkelstein, above n 4, 85.

³⁶ Maranville, above n 9, 61.

³⁷ See Sonsteng et al, above n 19. The challenges of authenticity is also explored in Barton, McKellar and Maharg, above n 12, 191, where the writers argue that it is possible to overcome this challenge ‘by defining authenticity as distributed intelligence within the world, and by using that intelligence in simulation and transactional learning.’

³⁸ See Katz, above n 17, 833, who argues that these problems can be easily overcome. For other references to this challenge, see Robert Illig, ‘Teaching Transactional Skills Through Simulations in Upper-Level Courses: Three Exemplars’ (2009) *Tennessee Journal of Business Law* 15, 17-8.

³⁹ See Godwin, above n 1.

⁴⁰ See Illig, above n 38, 18 and Johnson, above n 12, 74.

⁴¹ Johnson, above n 12, 74, examines the use of computerised simulations and suggests that ‘technology can play an important role in delivering realistic, rich simulations.’

particular concept or doctrine is examined. In the context of case law, for example, the process would involve 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 might include issues concerning the type of deal that the dispute involved and whether there were any issues specific to that type of deal and the way in which it was structured; the commercial context in which the dispute arose; why the dispute was not settled; and the role of the lawyers and other protagonists.

Wagner has expressed this as follows:

I often speak to my students about how a bad result in a case can be used as a learning experience. I call this the lawyer as planner approach. I ask my students to speculate about the cause of the breakdown in the relationship between the parties that led to the litigation. Was it due to poor drafting of the contract that could have been avoided if the lawyer had done a better job? Was the failure due to lack of identification of legal issues that should have been addressed? Was the problem caused by poor communication among the parties or with their lawyers? I ask my students to identify ways in which better communication, counseling or drafting could have avoided the litigation altogether or at least mitigated the risk that litigation would occur. If a contract clause is involved, I may request that they redraft the provision to correct the ambiguity or mistake that led to litigation. I also ask them to think about how they would plan to approach similar situations that might arise in their future practice in ways that would avoid litigation.⁴²

This point has also been emphasised by Maranville et al:

Teachers provide value during an experiential course in any of five primary ways: providing in-depth conceptual frameworks for individual skills, intensive supervision of student preparation and performance of work, specific feedback on simulated or real performances, and structuring opportunities for broader student reflection. During the experience, the teacher will choose from these options the ones that suit the structure of the course, with reflection being a priority in all types of experiential courses.⁴³

In many ways, facilitated reflection simply involves making more of the conventional materials to teach 'context' in addition to 'text'. 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.⁴⁴

⁴² Wagner, above n 10, 27.

⁴³ Deborah Maranville et al, 'Incorporating Experiential Education throughout the Curriculum' in Maranville et al, above n 5, 15.

⁴⁴ See Godwin, above n 1, 362, for a discussion of how teachers can make more of conventional materials by examining the issues from a broader, transactional perspective.

III TEACHING CORPORATIONS LAW FROM A TRANSACTIONAL PERSPECTIVE

In Australia, ‘corporations law’ or ‘company law’ is a compulsory teaching area identified by the Law Admissions Consultative Committee in the Uniform Admission Rules 2014 [Schedule 1]. It is a necessary academic requirement for students seeking admission in Victoria and New South Wales.⁴⁵

A typical curriculum for corporations law in Australia covers the following topics:

- 1 Introduction to Companies and the Regulatory Scheme
- 2 Incorporation and its Effects
- 3 Managing Companies
- 4 Duties and Liabilities of Directors and Officers
 - (a) Framework of Duties, Duty to act in Good Faith and Duty to act for a Proper Purpose
 - (b) Duty of Care
 - (c) Loyalty
- 5 Shareholder Actions
- 6 Corporate Liability
- 7 Share Capital
- 8 Introduction to Corporate Insolvency

Although many of the topics will require a seminar-based, Langdellian approach, there are various ways in which certain topics might be taught from a transactional perspective by adopting one or more of the techniques previously discussed. Some suggestions are set out below.

A Client-Based Problems

Many, if not all, of the topics in the curriculum could commence with client-based problems that are premised on an umbrella transactional scenario such as that set out below. This scenario concerns the incorporation of a joint venture company and would be a particularly useful scenario for the purpose of teaching the topic ‘managing companies’.⁴⁶

John Smith is the sole shareholder and director of a company (the “Company”). In order to expand the Company, John proposes to invite investment from two other shareholders: your client, a private equity company called ABC, which is proposing to acquire a 40% shareholding, and a company called XYZ, which will acquire a 20% shareholding. John Smith will hold the remaining 40%. The investment will be undertaken by a combination of the purchase of existing shares from John Smith and the subscription of new shares (i.e. an increase in capital).

⁴⁵ Uniform Admission Rules 2014 s 2. In the US, the subject ‘Business Associations’ is compulsory or strongly recommended in most law schools. See Wagner, above n 10, 21.

⁴⁶ See Tucker, above n 2, for a similar approach in relation to unincorporated business associations.

You are instructed that the investors and John Smith have agreed that the following arrangements will be included in the Shareholders' Agreement between the three parties:

- Each of ABC and John Smith will have the right to appoint 2 directors and XYZ will have the right to appoint 1 director.
- ABC will have the right to appoint one of its two directors as the Chair of the Board.
- The Chair will not have a casting vote.
- Resolutions in respect of certain matters will require a Special Majority of Directors (namely, at least four directors).
- Resolutions in respect of other matters will be made by the affirmative vote of a Simple Majority of Directors (namely, at least three directors).
- No Shareholder will be permitted to transfer its Shares except in the following circumstances:
 - Where it has offered the Shares first to the other shareholders.
 - Where it transfers its Shares to a member of the Shareholder Group of which it is a member.
 - As otherwise provided in the Shareholders' Agreement.
- A non-competition provision will be included in the Shareholders' Agreement.

Such an approach in respect of this topic would bring various issues into play, including the internal governance rules of the company, including the replaceable rules set out in the *Corporations Act* and, where applicable, the constitution of the company; the manner in which directors are appointed; the reason why the shareholders might enter into a shareholders' agreement and the relationship between that agreement and the constitution; and how the parties might negotiate and agree key issues such as whether the Chair should have a casting vote, on what basis new shares may be issued and whether a shareholder may transfer its shares to third parties.

The above issues could be taught by requiring students to answer questions such as the following:

Is it necessary for the Company to adopt a constitution?

If a constitution is adopted, which replaceable rules in the *Corporations Act* need to be displaced or modified to accommodate the instructions set out in Part of the Scenario?

How should any inconsistencies between the constitution and the shareholders' agreement be dealt with?

What are the procedures for adopting a constitution and how should this be reflected in the share purchase agreement and the share subscription agreement in order to protect the interests of ABC?

The answers could be prepared in the form of a client memorandum of advice, which could constitute part of the assessment in the subject (eg 30 per cent of the total marks in the subject) and could be completed in the first four weeks of the semester as an interim assessment. For the purpose of preparing the memorandum of advice, the students could be given a briefing pack (the 'Briefing Pack'), which would include extracts from the *Corporations Act* concerning replaceable rules and the constitution. It could also include references to in the relevant parts of the prescribed text and additional reading.

B *Client Interviews*

In place of, or in addition to, the memorandum of advice, the students could be asked to attend a client interview to explain the legal position and to answer standardised questions raised by the client. The following assessment criteria could be applied for the purpose of grading each student:

Understanding of the legal issues and the commercial context

- Does the student demonstrate a good understanding of the legal issues?
- How well does the student understand the practical implications of the advice and the commercial context in which the advice might be relevant?

Ability to provide oral advice

- Is the student able to provide an oral summary and explanation of the written advice in an authoritative and confident manner?

Communication skills

- How well does the student answer questions about the written advice?
- Is the student able to anticipate the concerns behind the questions and answer them fully and coherently?
- Is the student able to use language that is clear and comprehensible to an informed lay person?

The standardised questions could include technical legal questions as well as general, open-ended questions that are designed to test the student's ability to anticipate the concerns behind the client's questions and to answer them fully.

C *Drafting and Negotiation Simulations*

For the purpose of utilising simulations, the Briefing Pack provided to students could include sample clauses from a shareholders' agreement for an incorporated joint venture. This would provide a framework within which students could draft and negotiate certain provisions in accordance with the client's instructions.

A drafting simulation could be introduced to give students the opportunity to draft a document, such as a memorandum of understanding concerning the proposed investment, or clauses from the shareholder's agreement,⁴⁷ such as the matters requiring a resolution by a special majority of directors, the pre-emptive rights applicable on a transfer of shares or a non-competition clause. Similar to the memorandum of advice, the students could be given a set of client instructions, except that the instructions would differ depending on the party for which they were acting. In order to simulate the conditions for a real-life negotiation, the instructions could disclose the client's position on the relevant issues according to three categories: (1) best-case position; (2) bottom-line position; and (3) compromise positions.

By way of example, a non-competition clause lends itself well to a simulated negotiation because of the various elements that need to be agreed and the different positions that could be taken in relation to each element. The relevant elements that need to be agreed in order to make the clause work include the following: (1) the scope of the business to which the covenants apply; (2) the period during which the covenants apply; and (3) the geographical areas to which the covenants apply. Other elements include any applicable exceptions and any additional restrictions that might be agreed. A scenario could easily be designed based on different client instructions that incorporate the various positions of the relevant parties.

The scenario could build on the umbrella transactional scenario outlined above and involve negotiations between John Smith and the new shareholders in relation to the non-competition clause. Teams of two to three students could be allocated to represent each party in the tripartite negotiations, which would be particularly dynamic given the different interests and priorities of the parties. For example, John Smith, as a 40 per cent shareholder in the company, would have an interest in imposing the maximum restrictions on the ability of the other shareholders to compete with the company. On the other hand, ABC would want to negotiate exceptions to accommodate its private equity investment activities and XYZ would want to minimise the extent of the restrictions by virtue of the fact that it will only acquire a 20 per cent shareholding.

In order to ensure that students have a sufficient understanding of the law governing non-compete (or restraint of trade) clauses, extracts from, or references to, the relevant materials (ie case law, academic commentary and statute) could be included in the Briefing Pack.

D Facilitated Reflection

The technique of facilitated reflection could be adopted in class to enhance the teaching of cases in an Australian corporations law subject and to explore the issues from a transactional perspective. The benefits of

⁴⁷ Another transaction document that could be used for designing a simulated drafting and negotiation exercise is a debt restructuring agreement. This would be particularly useful for the purpose of teaching loan transactions and corporate insolvency.

facilitated reflection could be reinforced by incorporating a reflective writing component into the assessment for the subject. An example of a case that would easily lend itself to such an approach is *Re HIH Insurance Ltd (in prov liq); Australian Securities and Investment Commission v Adler*.⁴⁸ This case is commonly included in the curriculum to teach the duties of directors. In addition to breaches of the provisions concerning the duties of directors,⁴⁹ the case involved breaches of other provisions, including those governing the giving of financial benefit to a related party.⁵⁰ The related party aspect of this case is of particular interest from a transactional perspective as it touches on the nature of advice that the directors sought from the lawyers, the provision of misinformation to the lawyers and the inappropriate reliance on the legal advice by the directors to justify their improper transactions. By examining the broader context in which the related party provisions were breached, it is possible to reflect on the role of the transactional lawyer, the challenges that arise when clients instruct lawyers and the nature of the lawyer-client relationship generally.⁵¹

IV CONCLUSION

As shown by the trends in the US, law schools are increasingly being expected to produce graduates who are practice-aware, whether in the context of private practice, in-house practice or government practice, and who have developed an understanding of the skills that they need to develop in order to practise effectively in a transactional context, both domestic and cross-border.

This paper has discussed the use of experiential learning techniques to strengthen the transactional focus within the law school curriculum and has demonstrated how a transactional approach that incorporates experiential learning techniques might be applied to a single-area subject such as corporations law in Australia. These experiential learning techniques include client-based problems, client interviews, drafting and negotiation simulations and facilitated reflection. Although there are various challenges associated with such an approach, the literature in the US and elsewhere overwhelmingly highlights the benefits of incorporating experiential learning techniques into the curriculum and the relative ease with which this might be done. In addition, as argued by this paper, much can be achieved in this regard simply by broadening the context in which the doctrinal issues are taught and making more of the conventional materials.

⁴⁸ [2002] NSWSC 171.

⁴⁹ *Corporations Act 2010* ss 180-3.

⁵⁰ *Corporations Act 2010* ss 208 and 229.

⁵¹ This could include the ethical challenges that arise in this context.