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## Using Complexity Thinking to Inform Legal Education in a Post-Truth Environment

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# Australasian Law Academics Association Annual Conference 2019



NO ONE IS ILLEGAL

*'Real' Laws in the Post-Truth World*

Conference Program

Southern Cross University  
Gold Coast, 4 – 5 July 2019



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School of Law & Justice



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# Welcome

On behalf of the School of Law and Justice at Southern Cross University, welcome to this year's Australasian Law Academics Association (ALAA) Conference. We are delighted to host this year's conference and welcome all delegates – a wonderful group of law academics, scholars and lawyers from Australia, New Zealand, the South Pacific, Papua New Guinea and other parts of the world. This year's program offers an engaging and thought-provoking event.

'Real' Laws in the Post-Truth World and was chosen to engage and question emerging dialogues on 'post-truth' – their influence on policy and social debate, and how post-truth practices are shaping laws and how truth is and isn't part of legal and socio-legal dialogues. We intend this theme to provoke questions on whether we should and how we might reinscribe law in post-truth spaces, whether and how laws should be deconstructed, de-centred, and de-colonised, and whether or not our diversity can unite and guide us to reimagine our collective futures.

The Conference Committee is also proud to be this year's hosts as it signifies the formal launch of our renamed and restructured legal academic's association. As resolved at the 2018 ALTA AGM held during last year's wonderful Australasian Law Teachers Association Conference at Curtin University, ALTA is being relaunched as the Australasian Law Academics Association (ALAA). This conference, the very first ALAA conference, will continue to provide a supportive environment for law academics to present papers on their areas of their scholarship in teaching and research, as well as a great place to develop networks and friendships with other legal academics within Australasia. On behalf of SCU's Conference Committee, we trust all delegates will have an intellectually stimulating and enjoyable time at this year's conference. Thank you for joining us at this beautiful southern part of the Gold Coast.

**Professor William MacNeil**

The Honourable John Dowd Chair In Law  
Dean and Head, School of Law and Justice

**Associate Professor Jennifer Nielsen**

Chair, SCU Conference Committee

## ALAA 2019 Organising Committee

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## Acknowledgement of country

We acknowledge and pay respect to the Yugambah peoples on whose Land we work, meet and study. We recognise the significant role the past, present and future Elders play in the life of the University and the region. We are mindful that within and without the concrete and steel of buildings, the Land always was and always will be Aboriginal Land.

## Keynote Speakers

### Professor Irene Watson

Pro Vice Chancellor Aboriginal Leadership and Strategy,  
and Professor of Law with the School of Law, University of South Australia



#### Centering Aboriginal Law brings its own truth

The truth is First Nations Peoples were here first and have been here forever. We have our own laws which have sustained our ancient ways for thousands of years.

But this truth is not seen through a terra nullius lens.

For First Nations, 'post truth' began when we entered the Captain Cook times of history. Aboriginal truths were made invisible by colonialism, an invisibility that is maintained today.

In failing to acknowledge First Nations our laws and cultures have been denied existence, and if deemed to exist, they do so only to the extent they mirror neo-liberal agendas. As for example *native title law* and some other forms of 'Aboriginal *recognition*' which the colonisers have allowed.

In this paper, I will discuss some of the conundra which arise in this post.

*Professor Irene Watson belongs to the Tanganekald, Meintangk and Boandik First Nations Peoples of the Coorong and the south-east region of South Australia. Professor Irene Watson is the Pro Vice Chancellor Aboriginal Leadership and Strategy, and Professor of Law with the School of Law, University of South Australia, where her teaching and research focuses primarily on Indigenous Peoples in both domestic and international law. She has published extensively on colonialism and First Nations Law and has worked as a legal practitioner and an advocate within international fora. Recent publications include Aboriginal Peoples, Colonialism and International Law: Raw Law (Routledge, 2015) and Indigenous Peoples as Subjects in International Law (Routledge 2017).*



## Professor Jane Kelsey

Faculty of Law, The University of Auckland

### All Power to GAFA-A: Surrendering regulatory authority over Big Tech in the name of 'trade'

Every day we are - belatedly - coming to understand the power that Google, Apple, Facebook, Amazon and Ali-Baba have accumulated, free from regulation. They have become the arbiters of people's reality through search engines, digital market-places and pervasive surveillance. Consciously or otherwise, they manipulate elections and foreign policy, enable wars and civil uprisings. As corporations, employers and tax citizens, Big Tech operate in an ethical void that is enhanced by their global scale and mercurial identity. National and international law are increasingly disempowered, whether in the fields of employment, tax, competition, human rights and anti-discrimination, consumer protection, or privacy.

As calls for regulation grow, there is a stunning but little known paradox – our governments have been negotiating binding, enduring and enforceable international 'trade' rules that guarantee the Big Tech oligopolies will continue to operate in a largely regulation-free zone. Currently, Australia and New Zealand are spearheading moves to take the ground-breaking electronic commerce rules of the Trans-Pacific Partnership Agreement, literally designed by and for GAFA - to the world. Using some contemporary examples from Australia and New Zealand, this paper argues that our governments are surrendering the regulatory space that will be required to address the rapidly evolving challenges poses by the digital revolution in a 'post-truth' world.

*Professor Jane Kelsey specializes in international economic law at the University of Auckland, New Zealand, where she has taught since 1979. Jane critiques international trade and investment agreements as instruments for embedding neoliberalism, and actively monitors negotiations, most recently the Trans-Pacific Partnership Agreement and the Regional Comprehensive Economic Partnership. Since 2015, Jane has been analysing the implications of rapidly evolving texts on electronic commerce, especially for the global South. In addition to academic articles on these issues, she has written many technical reports, addressed international conferences, briefed governments and affected sectors, and run training workshops for government officials, legislators, trade unions, and civil society.*



## Plenary Panel: 'Decentring and decolonising imposed colonial law in a post-truth space'

### Marcelle Burns

Lecturer, School of Law

University of New England

Marcelle Burns is a Gomeri-Kamilaroi first nations' woman and lecturer at the School of Law, University of New England (UNE). She has over twenty years' experience in the field of Indigenous peoples and law, working as both as a lawyer and academic. Her legal professional experience includes working as a solicitor with the Aboriginal Legal Service (NSW/ACT) Limited, the Legal Aid Commission of NSW, and in private practice assisting in native title and land rights claims. As an academic she has contributed to developing Indigenous inclusive legal curriculum at UNE, Queensland University of Technology and Southern Cross University. Her main research interests include the recognition of First Nations in international and domestic laws, and the inclusion of Indigenous knowledges and cultural competency in legal education. From 2015-2018 she was the Project Leader for the Indigenous Cultural Competency for Legal Academics Program, funded by the Australian Government Department of Education of Training. Marcelle is also a member of the National Indigenous Research and Knowledges Network, the Australian Institute of Aboriginal and Torres Strait Islander Studies, the National Aboriginal and Torres Strait Islander Higher Education Consortium and the Friends of Myall Creek Memorial (Armidale Branch). Marcelle's contributions to Indigenous legal education, research and legal practice were recognised by her being awarded Southern Cross University's School of Law and Justice Alumnus of the Year in 2017. Her work on Indigenous cultural competency in law curricula was acknowledged by the UNE Faculty of Science, Agriculture, Business and Law Award for Excellence in Teaching and Learning Research in 2018.



### Eddie Cubillo

Senior Indigenous Fellow

Melbourne Law School

Eddie is an Aboriginal man with strong family links in both the urban and rural areas throughout the Northern Territory. His mother is of Larrakia/Wadjigam descent and his father is Central Arrente. Mr Cubillo's family has experienced the intergenerational effects of the policy of forced removal of children of mixed descent from their family and country.

He has developed a sound understanding of Aboriginal culture, society and politics and he has contributed to the needs of Aboriginal people as individuals and for the benefit of the community as a whole. His family background, combined with his community and cultural ties has brought him into contact with people of different backgrounds.

Mr Cubillo has over 25 years' experience working at the grass roots of Aboriginal affairs. In 2002 he was elected to the ATSIC Yilli Rreung Regional Council, and subsequently became the Chair of that Council. Mr Cubillo has also been a former Chair of both the North Australian Aboriginal Justice Agency (NAAJA) and the Aboriginal Justice Advisory Committee (NT).

In 2001 he obtained a Bachelor of Laws Degree and in 2002 he was admitted as a Solicitor of the Supreme Court of the Northern Territory. In 2009 Mr Cubillo completed a Masters of Laws (International Law and International Relations) at Flinders University.

In 2010 Mr Cubillo was appointed the Anti - Discrimination Commissioner of the Northern Territory and following his term, Mr Cubillo took on the role of Executive Officer with National Aboriginal & Torres Strait Islander Legal Service (NATSILS). As the Executive Officer he championed the rights of Indigenous Australians in a legal context. In 2015 Eddie was named the National Indigenous Legal Professional of the year and in 2016 attended Geneva on a UN Indigenous fellowship. Mr Cubillo worked for Queensland Aboriginal and Islander Health Council till 2017 where he then took up an opportunity to work on the Royal Commission into the Protection and Detention of Children in the Northern Territory as the Director of Community Engagement. He is currently undertaking a PhD with the University of Technology of Sydney and is working part-time at the University of Melbourne's Law School as a Senior Indigenous Fellow.



### Heron Loban

Senior Lecturer

Griffith Law School, Griffith University

Dr Heron Loban is a Senior Lecturer within the Griffith Law School, at Griffith University. Heron is a Torres Strait Islander with family ties to Mabuiag and Boigu Islands. She practised on Thursday Island as a solicitor for many years, firstly as a native title solicitor at the Torres Strait Regional Authority, and then as a solicitor in general practice at the Torres Strait and Northern Peninsula Legal Service. She has a strong research background in Indigenous justice issues particularly around consumer law. Heron has been on numerous advisory groups and boards of Indigenous not-for-profit corporations including currently Membership of the Domestic and Family Violence Council Aboriginal and Torres Strait Islander Advisory Group, Department of Premier and Cabinet (Queensland) and as a Chief Minister (NT) Appointed Director of Desert Knowledge Australia. In addition to her experience in legal practice in criminal law and native title, she has published numerous papers on the ongoing law and justice issues affecting Indigenous people in Australia.



### Annette Gainsford

Lecturer in Law and Justice and Indigenous Fellow

Centre for Law and Justice, Charles Sturt University

Annette Gainsford is a Wiradjuri woman from Bathurst, is a Lecturer in Law and Justice and an Indigenous Academic Fellow at Charles Sturt University. Annette has a background in social justice education with extensive experience in developing and maintaining collaborative community partnerships to enhance the design of tertiary curriculum and to advance outcomes for Indigenous students. Annette has a particular interest in the Indigenisation of curriculum and has worked on the embedding Indigenous cultural competency across the law, criminal justice, education and business disciplines. Annette's current PhD research focuses on the embedding on Indigenous knowledges in higher education which examines international case studies in law.



## Program

The conference is being held at Southern Cross University's Gold Coast Campus.

### Wednesday 3 July 2019

<p><b>ALAA Conference Welcome Reception / Registration</b>  <b>Book Launch:</b>                  'Indigenous Cultural Competency in Law' – Special Issue, Volume 28(2) <i>Legal Education Review</i> – Guest editor Marcelle Burns with Dr Kate Galloway, Editor-in-Chief                  To be launched by Her Honour Magistrate Jacqueline Payne, Brisbane Magistrates Court.</p>	<p>5pm – 7pm                  Venue: Building A, Level 4</p>
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### DAY 1 Thursday 4 July 2019 – All events will be held in Building A

8.00	<b>Registration, Tea and Coffee – Level 4</b>			
9.00	<b>Welcome and Conference Opening – Level 4</b>			
	Welcome to Country – Aunty Jackie McDonald Welcome to SCU – Dean Professor William MacNeil & Chair of the Conference Committee, Associate Professor Jennifer Nielsen			
9.30	<b>Plenary Session 1 – Level 4</b>			
	Professor Irene Watson, University of South Australia 'Centring Aboriginal Law Brings its Own Truth'			
10:30	<b>Morning tea – Level 4 Sponsored by Federation Press</b>			
11:00	<b>Plenary Session 2 – Level 4</b>			
	Plenary panel: Marcelle Burns, Eddie Cubillo, Dr Heron Loban, Annette Gainsford 'Decentring and decolonising imposed colonial law in a post-truth space'			
12:30	<b>Lunch – Level 4 Sponsored by Oxford University Press</b>			
1:30-3.00	<b>Concurrent session – 1.A Level 2 Break Out Rooms</b>			
	<p><b>Truth Telling</b>                  Chair: Marcelle Burns                  Room A220</p>	<p><b>Fictions and Truth</b>                  Chair: Dylan Asafo                  Room A204</p>	<p><b>Truth in Praxis</b>                  Chair: David Barker                  Room A213AB</p>	<p><b>Novel Legal Subjects</b>                  Chair: Bee Chen Goh                  Room A214</p>
	<p><b><i>Just Title, Terms and Reform</i></b>                  Gutting the Future Act                  Regime of the Native Title Act: Post Truth in the Federal Court.                  Richard H Bartlett</p>	<p><b><i>Decolonisation and Truth in the South Pacific</i></b>                  Fake News And Its Impact On Papua New Guinea's Democracy-An Overview                  On Recent Political Events Leading To The Formation Of A New Government                  Nicholas Mirou &amp; Glen Pumuye</p>	<p><b><i>Academics' Truths</i></b>                  Academic judgment in the court of public opinion and in the courts                  Patty Kamvounias</p>	<p><b><i>Novel Subjects &amp; Online Truths</i></b>                  Designing legal personhood                  Peta Spender</p>
	<p>An 'Other World of Meaning and Significance': Just Terms Compensation and Native Title                  Brendan Edgeworth</p>	<p>Decolonising The Law In Small Pacific Island States                  Jennifer Corrin</p>	<p>Peter Vincent Ridd v James Cook University: a loss for post-truth or for University Codes of Conduct?                  Pnina C Levine</p>	<p>Decentralised Autonomous Organisations (DAOs) as an emergent institution                  Alexandra Sims</p>
	<p>The Racially Discriminatory Treatment of Indigenous Australians: Time for Constitutional Reform                  Julie Cassidy</p>	<p>The definition of Indigenous in Fiji is outmoded                  Asilika Wise</p>	<p>The Imperative of the Law Teacher Well-Being in the Contemporary Neo-liberal University: Fitting our Own Oxygen Masks First                  Rachael Field, Colin James, Caroline Strevens</p>	<p>Protecting the Consumer by Fighting Fake and Manipulated Online Reviews                  Trish O'Sullivan</p>



	Framing the law question, the story of law in Australia Aidan Ricketts		Reflections on the lives and achievements of Michael Coper, David Weisbrot, Rosalind Croucher and Christopher Roper, four outstanding legal educators of the modern era of Australian Legal Education. David Barker AM	
3.00	<b>Afternoon tea – Level 4 Sponsored by Federation Press</b>			
3.30-5.00	<b>Concurrent session 1.B – Level 2 Break Out Rooms</b>			
	<b>Truth Telling</b> Chair: Narelle Bedford Room A220	<b>Truth in the Curriculum</b> Chair: Nick James Room A204	<b>Truth in Praxis</b> Chair: TBC Room A213AB	<b>Novel Subjects</b> Chair: William MacNeil Room A214
	<i>History, Truth Telling &amp; Voice</i> Martial Law and Indigenous Legal History: Incorporating Indigenous Histories into Law Curriculum Alison Gerard, Annette Gainsford	<i>Meaning, complexity, and critique</i> Using Complexity Thinking to Inform Post-Truth Legal Education Kylie Fletcher	<i>Truth, Ethics and Love</i> Reflections on processes for teaching legal reasoning on the post truth law student classroom Jennifer Mckay	<i>Theories &amp; Narratives of Justice and Law</i> Does Law Need a Theory of Truth? A Look at the New Haven School of Jurisprudence's Epistemology Tomas Fitzgerald
	Location, location, location – you don't have to be rich to pay more: Aboriginal and Torres Strait Islander consumers and remoteness Heron Loban	Practical legal education practice and integrity in the post-truth world Kristoffer Greaves	The Well-being of Students in Tertiary Education – The GDLP Experience. Michael Appleby	Micro narratives as real: doing doctrinal and empirical research through multifocal lenses of postmodernism and narrative jurisprudence in the post-Truth world Emma Babbage
	The road to constitutional reform: First Nations voice enshrined in the constitution and the Makarrata Commission Josh Apanui	Critical thinking in a 'post-truth' world George Raitt	Teaching Law in a Post-Truth World: What's love got to do with it? Christina Do, Aidan Ricciardo	Promethean Longing: Ridley Scott's Speculative Legalism William MacNeil
	How Best to Teach First Nations Legal Issues in a Post-Truth Era? Jeni Engel	True Falsity and the Dilemma of Teaching Law in a Post-Truth Era Jackie Mapulanga	The case for the resurrection of case-methodology as a dedicated pedagogy in Australian foundation legal studies – and an overdue salute to Langdell Ken K Yin	
5.00	<b>Close – Day 1</b>			
6.30 for 7.00	<b>Conference Dinner 6.30pm – 10.00 pm – Currumbin Wildlife Sanctuary – Launch of ALAA</b>			

## DAY 2 Friday 5 July 2019 – All events will be held in Building A

9.00	<b>Registration, Tea and Coffee – Level 4</b>			
9.30	<b>Plenary Session 2 Plenary Room Level 2 – Room A220</b>			
	Professor Jane Kelsey, University of Auckland 'All Power to GAFA-A: Surrendering regulatory authority over Big Tech in the name of "trade" '			
10.30	<b>Morning tea – Level 4</b>			
11.00-12.30	<b>Concurrent session 2.A -- Plenary Room Level 2 - Room A220</b>			
	<b>Truth Telling</b> Chair: Jennifer Corrin Room A220	<b>Truth in the curriculum</b> Chair: John Page Room A204	<b>Truth in Praxis</b> Chair: Helen Walsh Room A213AB	<b>Novel Subjects</b> Chair: Mandy Shircore Room A214
	<b>Pasifika Truths</b>  Real laws and real truths in South Pacific legal education Carolyn Penfold	<b>Teaching disruption – disrupting teaching</b>  Pushback and Progress – Practical lessons from embedding Indigenous Cultural Competence in CSU's LLB Alison Gerard	<b>Law Students</b>  A case study on supporting Indigenous Law Students Narelle Bedford	<b>Post-Truth Politics and Political Theory</b>  The Implied Freedom of Political Communication in a Post-truth World Daniel Goldsworthy
	Tax and Pasifika Communities: A burden or a blessing Liukovi Nacagilevu	Constructing a Subject-Specific Website to Construct Student Knowledge Jodie O'Leary	The Making of Lawyers: Expectations and Experiences of New Zealand Law Students Lynne Taylor	The executive as proxy for the legislature: a post-truth legal fiction? Tom Round
	An Emerging Right to Freedom of Expression of Racism? A Critical Race Theory Critique of the <i>Wall v Fairfax</i> decisions Dylan Asafo	The Shifting Sands of Property Law Teaching in Australian Law Schools Natalie Skead, Penny Carruthers, Kate Galloway	The Law Student Statement of Ideals: A Case Study in Professional Identity Trish Mundy, Karina Murray, Kate Tubridy, John Littrich	Political Commentary and Campaigning in the Post Truth Era - Are Defamation Laws the Answer? Mandy Shircore
	Her 'Whole' Self: A hypothetical navigation of intersectional discrimination toward Pasifika female professionals in Aotearoa New Zealand. Majella Aneru	The Implications of the FLIP Report for the future of Australian Legal Education. David Barker AM	'BigLaw or Bust': Challenging the Dominant Discourse in Law Student Employment Aspirations Nick James, Kana Nakano	'Post Truth' concerns – a bit of Legal Hypocrisy? Is 'Post Truth' as an inevitable response to Law's own 'Noble (or Ignoble) Lie'? Gay D Morgan
12.30	<b>Lunch – Level 4</b>			
	<b>12.45 pm – 1.45 pm ALAA AGM Plenary Room Level 2 - Room A220</b>			
2.00-3.00	<b>Concurrent session 2.B – Level 2 break out rooms</b>			
	<b>Truth Telling</b> Chair: Jennifer Nielsen Room A220	<b>Truth in the Curriculum</b> Chair: TBC Room A204	<b>Truth in Praxis</b> Chair: Tom Round Room A213AB	<b>Novel Subjects</b> Chair: John Page Room A214
	<b>Panel: Legal Fictions as the Law's Original 'Post-Truth' State</b> Kate Galloway, Melissa Castan, Dani Larkin	<b>Lessons for the Private Law Curriculum</b> The Duty to Advise on Revenue Law and Implications for Legal Education Anna Bunn, Nicole Wilson-Rogers, Leigh Smith	<b>Truth and Proof</b> Criminal Litigation and the Law of Evidence in the USP region in the Post-truth era: Challenges and Innovation Pita PKB Bulamainaivalu	<b>Panel: Student Evaluations - pedagogical tools, or weapons of choice?</b> John Page, Alessandro Pelizzon, Helen Walsh, Warwick Fisher, John Orr

		No Oral Modification clauses: a New Zealand perspective Marcus AP Roberts	Rethinking 'Real' Rape: 'No means no', 'Yes means yes', But whose Truth matters most? Simon H Bronitt	
		The 'arguable character of the law' – and the mantle of legal syllogism as giving expression to the evolution of doctrine within the Australian adversarial legal system Ken Yin	Beyond a balance of Probabilities: Using new forensic neuro-technologies to get to the 'truth' in criminal proceedings, and an assessment of the major legal and ethical implications for the Criminal Justice System. Robin R W Palmer	
3.00	Afternoon Tea – Level 4			
3.30-4.30	Concurrent session 2.C – Level 2 Break Out Rooms			
	<b>Truth Telling</b> Chair: Robin Woellner Room A220	<b>Truth in Praxis</b> Chair: Alexandra Sims Room A213AB	<b>Novel Subjects</b> Chair: TBC Room A214	
	<i>Market power and tax in post-truth times</i> Information gathering in the Post-Truth world Robin Woellner, Andrew J Maples	<i>Embedding 'Truth' in the Law Curriculum</i> "Real" Law in a World Without Lawyers: Does Legal Education Have a Future? John Hopkins	<i>Suppressing unrest, unruly and reckless behaviour</i> Calling out the troops: Recent developments Michael Head	
	Is the artists' resale royalty right based on 'fake news'? Jonathan Barrett	Embedding graduate attributes in the law school curriculum – a competency matrix approach. Katie Watson, Kevin Sobel-Read	Unruly airline passengers: high time for a legal rethink? Charles Giacco, Chrystal Zhang	
	Market power, opinion and the rule of law George Raitt	The search for meaning: Deconstructing fundamental interpretive concepts for first year law students Jackson M Walkden-Brown	No Bridge over 'Troubled Financial Waters' Matt Berkahn, Lindsay Trotman	
4.30	Conference Wrap Up and Close Day 2			
5.00 to 7.00	Farewell drinks Plenary Room - Level 4			

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# Conference Information

## Conference Venue

Southern Cross University, Gold Coast  
Southern Cross Drive  
Bilinga QLD 4225  
(Access via Terminal Drive, Gold Coast Airport)

Southern Cross University's Gold Coast campus is located at Coolangatta just 400m from North Kirra Beach and adjacent to the Gold Coast Airport. Views of the Pacific Ocean can be seen from many vantage points in the campus buildings.

The campus includes a student services hub, designed to provide a one-stop shop for student support and enquiries. The library offers stunning views of the ocean and Gold Coast hinterland. Other facilities include innovative learning spaces, health science laboratories, lecture theatres with live video broadcasting, computer labs and student lounges.

## Venue Map



[www.scu.edu.au](http://www.scu.edu.au)

CRICOS Provider: 01241G



## Wi-Fi Information

Username: Event@scu

Password: 'Welcome2019'

Please note the password is case sensitive

## Parking Information

Southern Cross University Gold Coast is based in Coolangatta just 400m from North Kirra Beach and adjacent to the Gold Coast Airport. There are 1,050 spaces surrounding the three buildings of the University and complimentary parking has been arranged for exhibitors and delegates.

In addition, there is street parking available within 15 minutes' walk of the Gold Coast campus, some of which have time limit restrictions. Please check street signage to ensure you are aware of any street parking restrictions. The conference will be held at Building A, levels 2 and 4.

## Registration Desk

Registration will be available during the Welcome Function from 5.00pm-7.00pm on Wednesday 4th July. The registration desk will be located in room A405 on Level 4 in Building A and will be available for the duration of the function.

The conference registration desk will be located room in A405 on Level 4 in Building A during Conference hours. It will be open for check-in and onsite registration from 08.00am to 5.00pm on Thursday 5th of July and Friday 6th July.

## Name Badges

Name badges and delegate bags will be provided at the Registration Desk. Admission to all sessions, morning and afternoon teas, lunches and welcome function is by name badge only. The Conference Dinner is a ticketed function.

## Mobile Phones

Delegates are advised that all phones must be off or on silent mode during sessions.

## Speaker Presentations

Speakers are asked to upload their presentations in the relevant room in which they are presenting during the breaks.

There will be a volunteer in each breakout room and in the main plenary room that will be able to assist speakers with uploading presentations.

It is important that presenters bring their presentation on a USB.



## Social Functions

### Welcome Reception

When: Wednesday, 4th July

Time: 5:00pm-7:00pm

Where: Room A405 on Level 4 in Building A, Southern Cross University

Cost: Included in Full Conference Registrations, Additional Tickets \$55pp

The Welcome Function provides the perfect opportunity to catch up with colleagues and discuss the exciting program ahead. Drinks and canapes will be provided on the evening with registration available for delegates to collect their name badges for the Conference.

### Conference Dinner & Launch of ALAA

When: Thursday, 5th July

Time: 6:00pm-10:00pm

Where: Currumbin Wildlife Sanctuary

Cost: \$110pp

The Conference Dinner will take place at Currumbin Wildlife Sanctuary. The evening will consist of fine dining with a three-course meal and beverages, as well as the celebrate the launch of ALAA. The Dinner will provide the opportunity to network with fellow delegates and mingle with some Australian wildlife.

A bus transfer to and from the Conference Dinner at Currumbin Wildlife Sanctuary will be available to all delegates staying at the Oaks Calypso or Mantra Twin Towers. This bus will depart at 5.50pm on Thursday 4th July, beginning pickup at Oaks Calypso. All guests are asked to be ready for departure by 5.35pm in their respective hotel foyers to prevent delays.

The bus will depart Currumbin Wildlife Sanctuary at 10.00pm at the conclusion of the Conference Dinner to drop hotel guests at the Oaks Calypso and Mantra Twin Towers. Delegates requiring the bus transfer are asked to be ready to depart by 9.55pm.

Oaks Calypso and Mantra Twin Towers are the only hotel venues the bus will be stopping at, if you require bus transportation to the dinner you will need to make your way to these venues prior to departure.

Parking will also be available at the venue for delegates driving to the dinner.

**Australasian Law Academics Association  
Annual Conference 2019**

4 – 5 July 2019

ABSTRACTS

## **Her 'Whole' Self: A hypothetical navigation of intersectional discrimination toward Pasifika female professionals in Aotearoa New Zealand.**

**Majella Aneru**<sup>1</sup>

*1. University of Auckland*

I will be exploring the issues of intersectional discrimination and pay inequity that Pasifika female professionals face in New Zealand. I will be doing this by journeying through a hypothetical situation of a Pasifika woman in the professional sector being discriminated against (both interpersonally and through pay) and what options she has in regard to bringing a claim. I will be critically analysing the current legal framework through an intersectionality lens, explaining that to address these particular issues, the Courts have to accept that Pasifika women are discriminated against on more than one ground of discrimination. It is simply not enough to address just race, or just gender.

## **The road to constitutional reform: First Nations voice enshrined in the constitution and the Makarrata Commission**

**Josh Apanui**<sup>1</sup>

*1. Griffith University, Nathan, QLD, Australia*

In 2011 the idea of Constitutional amendment for recognition of First Nations Peoples in the Constitution was on the federal governments agenda. It followed on from the decision by the government to form an Expert Panel to report on the recognition of First Nations in the Constitution. The Expert Panel submitted its final report twelve months from its establishment. However, successor governments have had different perspectives. For example, the Abbott government formed a Joint Select Committee to recognise Indigenous peoples in the Constitution.

In response to the inaction of parliament, in 2017 First Nations delegates gathered at the Uluru meeting place at Yulara on the traditional lands of the Anangu peoples Country, at the base of Uluru - formally known as the National Constitutional Convention. The First Nations representatives contributed to drafting, what is now known as the "Uluru Statement From The Heart". Its significance is that it was held at Uluru, a sacred place for First Nations and the heart of the nation; and, the processes which led to the Uluru Statement, was equally significant.

The Uluru Statement is a framework for the wishes of First Nations. Although complex in nature the Uluru Statement can be broken into three single words; which is Voice, Treaty, and Truth. Many view this moment as "the game changer". This presentation will outline, from a First Nations person's perspective, the significance of this process, the path the government and the law should take forward, and, consider a number of the constitutional issues, which are likely to form part of this ongoing discourse of constitutional recognition.

## **The Well-being of Students in Tertiary Education – The GDLP Experience.**

**Michael Appleby**<sup>1</sup>

*1. College of Law Sydney*

Current thinking about the well-being of Tertiary students, based on an existing body of research, suggests that students' well-being is supported by their having autonomous motivation, which is in turn supported by four elements, relationships, belonging, competence and autonomy (based on self-determination theory). In a Graduate Diploma of Legal Education students study doctrinal law, use the law, practice, and procedure in carrying out tasks whilst also undertaking legal work experience. This paper draws upon the research regarding well-being and explores the manner in which this form of education might support the well-being of students.

## **An Emerging Right to Freedom of Expression of Racism? A Critical Race Theory Critique of the Wall v Fairfax decisions**

**Dylan Asafo**<sup>1</sup>

*1. University of Auckland*

In adopting a Critical Race Theory lens, my paper provides a critique of the Human Rights Review Tribunal decision of *Wall v Fairfax*, and the latest High Court decision that upheld the Tribunal's decision on appeal.

In both decisions, it was held that negative depictions of Māori and Pasifika peoples in cartoons (published in response to a government programme to address child poverty) did not breach the hate speech provisions in section 61 the Human Rights Act 1993. This was on the grounds that the cartoons were protected by the freedom of expression as set out in section 14 of the New Zealand Bill of Rights Act 1990.

My central thesis is that these decisions indicate an emerging right to freedom of expression of racism to the detriment of Māori and Pasifika groups as well as other ethnic minorities in New Zealand. This thesis is outlined in three arguments.

Firstly, I argue that both decisions demonstrate a racialised misappropriation of the right to freedom of expression in the post-truth and 'fake news' era that result in the protection of white supremacist views. Secondly, I argue that both decisions demonstrate a racialised undermining of the right to be free from discrimination and hate speech in light of historical and ongoing hostility towards Māori, Pasifika and other ethnic minorities in New Zealand. Thirdly, I argue that both decisions illustrate racialised deficiencies in New Zealand's hate speech framework in the Human Rights Act 1993, which currently works to privilege the views and voices of White people and other intersecting majority groups and invalidate those of ethnic minorities and intersecting minority groups.

Accordingly, I argue that section 61 of the Human Rights Act 1993 ought to be amended to centre and privilege the views and voices of minorities who experience the harm created by alleged instances of hate speech. I also argue that there should be mandatory competency training for understanding racism in Aotearoa for members of the Human Rights Review Tribunal and the judiciary in order to eradicate discriminatory judicial reasoning in cases concerning Māori and Pasifika peoples.

## **Micro law narratives as 'real': doing doctrinal *and* empirical legal studies through lenses of postmodernism and narrative jurisprudence in the post-Truth world**

**Emma Babbage<sup>1</sup>**

*1. School of Law and Justice, Southern Cross University, Lismore, New South Wales, Australia*

Postmodernism and narrative jurisprudence provide lenses for legal researchers to de-centre any claims to singular legal Truth in making space for plural legal truths and possibilities. A combination of these lenses is supported by a philosophical frame of law as being plural and materialised by individuals in specific circumstances (Davies 2018). A postmodern approach views research as narrative (Packwood and Sikes 1996) and narrative jurisprudence views law as narrative (Friedrichs 1990). Sources of law narratives are limitless – be they, say, written legal doctrine, oral stories or biographies – so long as they are *about* law. In the Jean-Francois Lyotard (1979) postmodernist tradition, narratives are distinguished as being either grand narratives or micro narratives. Grand narratives are perhaps surreal abstractions, offering dream like beginnings, middles and endings for universal application. Yet micro narratives are perhaps realist specifications, offering individualised beginnings, middles and endings that applied – or perhaps could apply – to individuals in specific localities. This presentation will exemplify how wearing lenses of postmodernism and narrative jurisprudence enables legal researchers to do doctrinal *and* empirical legal studies in viewing micro law narratives as 'real'. I suggest, by example, how wearing these lenses enables me to employ traditional methods of doctrinal analysis in order to craft and interpret what I suspect any grand narrative of the reach of a particular law to be. I also show how wearing these lenses enables me to employ empirical methods of qualitative interviews in order to co-construct micro narratives told by research participants about how this law is and could be used in unique settings. I invite us to imagine our collective futures as legal researchers constructing research as pastiches of micro narratives which de-centre any purported grand narratives of law in favour of plural legal truths and possibilities in a post-Truth world.

## **Reflections on the lives and achievements of Michael Coper, David Weisbrot, Rosalind Croucher and Christopher Roper, four outstanding legal educators of the modern era of Australian Legal Education.**

**David Barker AM<sup>1</sup>**

*1. AustLII/Law Faculty UTS, Sydney, NSW, Australia*

This paper is the culmination of a topic covered in two previous ALTA (ALAA) Conferences in respect of which the presenter has reviewed the achievements of a selected group of eight legal educators who, in his view, have provided both inspiration and leadership in Australian legal education from the time of first European settlement in 1788 until 1989. This current paper reviews the achievements of a final four outstanding legal educators who, it is argued, have stood out amongst their peers across the last three decades from 1989 onwards. In selecting Michael Coper, David Weisbrot, Rosalind Croucher and Christopher Roper, there is an acknowledgement that they would be generally accepted by the legal community as being worthy candidates to be regarded as having had a major influence on modern Australian legal education. In this final paper the presenter considers the challenges which faced these final four law academics in a drastically changed legal education setting which has transformed law schools from their early role as small entities within universities that trained legal practitioners to institutions with vastly more complex present-day functions. have included an emphasis on students developing legal skills rather than merely accumulating knowledge, and growing participation in high-level postgraduate research. These developments have taken place in a period of Australian legal education commencing in 1989 and heralding what became known as the 'Third Wave' law schools or an 'Avalanche of Law Schools', acting as precursor to an unprecedented and unexpected expansion of law schools in Australia.

## The Implications of the FLIP Report for the future of Australian Legal Education

David Barker AM<sup>1</sup>

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'Disruption to the practice of law naturally has ramifications for the education of current and future law students, as well as an impact on the continuing education of the profession.' - Quote from The Law Society of New South Wales' 2017 Commission of Inquiry - FLIP - The Future of Law and Innovation in the Profession.

This paper examines the conduct and outcomes of the Law Society of New South Wales FLIP Report on the future of Australian legal education. The Commission heard evidence from almost all the New South Wales law schools, current students, recent graduates, PLT and CLE providers together with members of the legal profession. Its Report obviously had important implications for both the perception of the current standing of Australian legal education as it is currently viewed by the legal community and the identification by the Report of the skills and knowledge necessary for success in future legal practice. This paper also takes account of the FLIP Report's views as to the extent to which these skills and knowledge are currently being taught as well as any identified gaps, potential opportunities for improvement and the need for further research which might arise in the future.

## Is the artists' resale royalty right based on 'fake news'?

Jonathan Barrett<sup>1</sup>

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Australia confers quasi-tax privileges on qualifying artists through its resale royalty right ('RRR') scheme. *Droit de suite* (right to follow), as an RRR is better known, aims to equalise the financial positions of visual artists, who produce one copy of an artistic work, and other creators, such as writers and composers, who may earn royalties by licensing multiple reproductions of their works. As legend has it, French *droit de suite* legislation – the first of its kind – was motivated by an anecdote about the impoverished family of the celebrated artist Jean-François Millet, while collectors reaped huge profits from reselling his iconic works. In the early 1970s, a similar narrative about the resold works of Robert Rauschenberg inspired RRR initiatives in the United States. Contemporary support for RRRs might also be based on a myth that *droit de suite* generally helps artists who cannot exploit their works through copyright, particularly Indigenous artists.

Since economists typically consider *droit de suite* to be a tax – although describing it as tax-like is more plausible – it is reasonable to apply traditional tax criteria in analysing an RRR. Approaching from perspectives of equity and economic efficiency, this paper investigates whether *droit de suite* was and continues to be based on myth or, in contemporary parlance, 'fake news'. Conversely, the paper considers whether traditional tax criteria, as applied to an RRR, are scientific: perhaps, the myths really do provide more compelling grounds for *droit de suite*.

## Gutting the Future Act Regime of the Native Title Act: Post Truth in the Federal Court

Richard H Bartlett<sup>1</sup>

1. *School of Law, University of Western Australia, Perth, Western Australia, Australia*

### Gutting the Future Act Regime of the Native Title Act: Post Truth in the Federal Court.

The paper examines the concept of post-truth in a decision of the Full Court of the Federal Court of Australia which has the effect of wholly undermining a fundamental structure of the Native Title Act : the future act regime .

Post truth is taken to entail a subjective understanding of truth and reality based on a misunderstanding and misinformation as to the subject, preconceptions or prejudice.

Post truth in the decision is explored by an examination of:

- the tying of the reasoning to the particular history of the judge with respect to the principles involved in the case, which principles have been based on misunderstanding and misinformation,
- the pattern of native title decisions by the judge, contrary to the claims of native title holders, which have been overruled by the High Court , suggesting a preconception or prejudice as to the meaning and significance of native title and the Native Title Act,
- the reasoning which entails a complete rejection of any reasonable or objective construction of the purpose and objects of the provisions respecting the future act regime of the Native Title Act.

## A case study on supporting Indigenous Law Students

**Narelle Bedford**<sup>1</sup>

*1. Bond University, Gold Coast, QUEENSLAND, Australia*

As a small, regional university Bond University has an impressive record on its rate of Indigenous law students who complete their law studies. Supporting Indigenous Law students through from enrollment to completion presents challenges and also opportunities for enhanced engagement. A case study will be presented featuring some of the successful strategies implemented in the Faculty of Law at Bond.

## No Bridge over 'Troubled Financial Waters'

**Matt Berkahn**<sup>1</sup>, **Lindsay Trotman**<sup>1</sup>

*1. Massey University, Turitea, PALMERSTON NORTH, New Zealand*

Section 135 of the Companies Act 1993 (NZ) imposes a duty on directors. It is a duty not to agree to the business of the company being carried on, or to cause or allow the business of the company to be carried on, in a manner likely to create a substantial risk of serious loss to the company's creditors. If this duty is breached, liability can be imposed on directors for that breach. As the duty is owed to the company, any liability for its breach is ordinarily owed to the company. Allegations of breach typically arise after a liquidator has been appointed, the typical allegor being the company and the liquidators. The beneficiaries of a successful claim are the unsecured creditors of the company. The conduct that s 135 prohibits is colloquially called 'reckless trading'. In February 2013, the Mainzeal group of companies collapsed leaving a deficiency on liquidation to unsecured creditors of approximately \$110 million. The collapsed companies, at the instigation of the liquidators, sued the former directors alleging, in the main, a breach by them of s 135. This claim succeeded and the directors were ordered to pay \$36 million to one of the collapsed companies. This is arguably New Zealand's biggest reckless trading case to date and the decision has sent ripples through the commercial world. The decision has implications for directors, insurers, liquidators and litigation funders. This paper explores the judgment in the case and considers those implications.

## Rethinking 'Real' Rape: 'No means no', 'Yes means yes', But whose Truth matters most?

**Simon H Bronitt**<sup>1</sup>

*1. University of Sydney Law School, Sydney, NSW, Australia*

This paper explores the perennial question about consent and fault in rape law, and whether the modern law's demand for greater authenticity in free agreement and voluntary consent significantly reframes either individual or community understandings of what constitutes 'real' rape. The paper explores these issues through the fraud and mistakes in rape cases, where beliefs, whether reasonable or not, are often at the core of the issue of consent and fault (knowledge, recklessness). The battle at the heart of the rape trial is the differing perceptions of the implicated subjects (the 'He/She/They say(s)/think(s)' problem) which is conditioned by attitudes toward gender, race and sexuality etc, as well as the particular identity and experience of both the person who is accused and alleging rape. Borrowing from Carol Smart, the paper concludes that 'Law's Truth' - which is constructed in the shadow of the law through police, prosecutorial and defence forensic practice - constitutes and contests the boundaries of 'real' rape.

## Criminal Litigation and the Law of Evidence in the USP region in the Post-truth era: Challenges and Innovation

**Pita PKB Bulamainivalu**<sup>1</sup>

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As a former Public Prosecutor I have observed that in Criminal litigation in Fiji for instance, the Law of Evidence in particular in conjunction with other relevant laws at play can present various challenges and to a certain extent perhaps facilitate the achievement of 'the truth' be it the guilt of the accused or otherwise. My presentation shall basically focus on certain procedural and substantive aspects of real law to demonstrate as to the extent in which real laws in the USP region can either be a hindrance or positively facilitate the attainment of 'the truth' in the so called Post-truth era of criminal litigation. The USP region is comprised of twelve (12) jurisdictions, however in my presentation I shall endeavour to focus on at least three (3) jurisdictions and Fiji being the principal jurisdiction as I practised extensively in as a Public Prosecutor for the Office of the Director of Public Prosecutions for about thirteen (13) years. A glaring example to the point made is that of the Law on Corroboration which in Fiji has been heavily relaxed thus enabling vulnerable victims of sexual offences especially females to provide with ease credible and authentic testimonies, while in other USP jurisdictions like Kiribati the strict requirements on Corroboration remains which in my view is a major hindrance and heavily biased against females in terms of the pursuit to secure the absolute truth in the Post-truth era of criminal litigation. Apart from the Law on Corroboration there are several other aspects of real laws be it as a matter of practice or law still provide major challenges towards the endeavour to secure the absolute truth and my presentation shall also discuss certain innovative ways to lawfully circumvent such dilemma.



## The Duty to Advise on Revenue Law and Implications for Legal Education

**Anna Bunn<sup>1</sup>, Nicole Wilson-Rogers<sup>2</sup>, Leigh Smith<sup>1</sup>**

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2. UWA Law School, University of Western Australia, Perth, Western Australia, Australia

Revenue law is often viewed as a specialist discipline only relevant to solicitors who choose to specialise in this area. However, despite this perception, and depending upon their speciality, other solicitors may need to have a workable knowledge of Australian revenue law.

Revenue law issues arise in diverse areas of legal practice; consequently, it is important to consider whether those training our future lawyers do enough to build competency and capacity in the area. In answering that question we explore the current framework regulating the provision of revenue law advice in Australia, and briefly outline the duty of non-tax specialist solicitors to advise on revenue law. We then provide an analysis of the extent to which revenue law is taught in Western Australian law schools, and propose an investigation of the extent to which other Australian law degrees and legal training courses teach revenue law. The outcome of that investigation will indicate whether there is a need for legal education providers to place greater emphasis on revenue law, in order to build the competence of graduates in this area.

## The Racially Discriminatory Treatment of Indigenous Australians: Time for Constitutional Reform

**Julie Cassidy<sup>1</sup>**

1. University of Auckland, Botany Downs, AUCKLAND, New Zealand

2017 marked the 50<sup>th</sup> anniversary of the 1967 referendum, that saw, *inter alia*, s 127 removed from the Commonwealth Constitution Act 1901. The effect of the removal of s 127 was that the Indigenous peoples of Australia were recognised as being Australian persons for the purposes of censuses. June 2017 marked the 25<sup>th</sup> anniversary of the landmark decision *Mabo v Queensland* acknowledging, *inter alia*, the pre-existence of Indigenous Australians, thereby overturning 200 years of jurisprudence to the contrary. However, 2017 also had an insidious anniversary. It marked a decade since the implementation of the Northern Territory Intervention.

While the discussion focuses particularly on the Howard era because of its retrograde impact in reversing the positive trend toward self-determination, it is important to remember the racial discrimination did not end with the demise of his government. Despite promises by the subsequent federal Labor government(s), the racially discriminatory legislation remains operative. The subsequent Liberal government, under the leadership of then Prime Minister Tony Abbott, embraced the most sinister aspects of the Howard policy, but took it to new heights. While Indigenous policy under the then Prime Minister Malcolm Turnbull was initially uncertain, his rhetoric can now be tested against his recent actions, including the enactment of the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth). The currently Prime Minister's track record on Indigenous affairs is abhorrent.

The paper reflects on the calls for constitutional reform to, *inter alia*, prohibit such blatant racially discriminatory policies and to finally recognise Australia's First Nations. It concludes by lamenting that once again the momentum seems to have been lost. Why cannot we provide constitutional protection from racial discrimination? Why cannot we finally recognise Australia was not *terra nullius*? Constitutional reform is well overdue.

## Decolonising The Law In Small Pacific Island States

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Since independence, Pacific Island countries ('PICs') have been empowered to pass their own legislation, and to repeal foreign legislation, kept in force as a transitional measure. However, only three PICs have enacted a wholesale repeal of introduced Acts. In many other PICs English Acts of 'general application' remain in force. Further, whilst courts in PICs are mandated to reject English common law decisions which are unsuitable for local circumstances, there has been little progress with the development of a distinct jurisprudence. In addition to being developed out of context, foreign laws have been imposed on pre-existing systems of custom and culture with which they are sometimes out of harmony. This reliance on foreign legislation and case law, as opposed to the development of laws that respond to the needs of Pacific peoples, has a colonial flavour. This paper argues that it is time to patriate statute law in the Pacific and to develop a regional jurisprudence more fitting to local circumstances. Whilst lack of resources makes recourse to laws from other countries an attractive option, rejection of the wholesale application of foreign laws, frozen in time at a date determined by colonial history, is a necessary component of true independence.

## Teaching Law in a Post-Truth World: What's love got to do with it?

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Research has indicated that an 'engaging lecturer' is a leading contributory factor that motivates students to attend class, in particular lectures. Whilst there is extensive academic literature written on the subject, there are no set universal characteristics that guarantee theyin

at a lecturer will be engaging. A lecturer's effectiveness can vary depending on the discipline, subject matter and the preferences and personality of the academic, and ultimately students.

This paper explores the concept of effective legal teaching and the characteristics and approaches that make an engaging legal educator. The paper provides a brief overview of the academic literature on effective legal teaching and then considers the views of four legal educators, whose teaching practices have gained national recognition through the receipt of an Australian Awards for University Teaching. To obtain the legal educators' views on effective legal teaching, they participated in standardised oral interviews – the same open-ended questions were asked of the four interviewees.

Although students learn the law in pursuit of knowledge and objective truth, their understanding and perceptions of the law are framed by their emotions. In light of the academic literature and common responses from the legal academics interviewed, it is contended that whilst in a post-truth world technical knowledge is essential, a personable and caring nature towards students is also an essential characteristic that makes an effective legal academic.

## An 'Other World of Meaning and Significance': Just Terms Compensation and Native Title

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This paper analyses the recent unanimous High Court decision in *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7. Arguably the court's most important native title pronouncement since *Wik Peoples v Queensland*, the ruling has established for the first time clear criteria for quantifying the compensation payable where native title is, according to the *Native Title Act*, subject to "loss, diminution, impairment or other effect": s 51(1). In a significant development, unlike *Wik*, and indeed the *Mabo (No 2)* decision before it, all nine judges who heard the case were in complete agreement as to the amount of compensation that justice required for non-economic loss, the most contentious, and as it turned out, most valuable, component of the Indigenous plaintiffs' claim. The analysis in this paper will commence with an overview of the litigation and proceed to draw out implications of the decision for native title claims generally. In doing so, it charts the transition of judicial understandings of Indigenous title, shifting from the *Milirrpum v Nabalco* notion of an Indigenous spiritualism subordinated to land, to the *Mabo (No 2)* sense of a unitary title over land, then to the *Ward* idea of native title as a 'bundle of rights', thereafter to the *Akiba* formulation of native title as 'underlying title' to, ultimately, the *Griffiths*' notion of 'cultural rights' over land. It will attempt to assess the adequacy of these various formulations. Finally, it will seek to locate the decision in the context of the broader development of native title law within the Australian legal system.

## How Best to Teach First Nations Legal Issues in a Post-Truth Era?

Jeni Engel<sup>1</sup>

1. UNSW Law, UNSW, NSW, Australia

### How Best to Teach First Nations Legal Issues in a Post-Truth Era?

An essential component of legal education entails skilling students to examine contentious social and political issues through a critical lens. One such issue that is normally taught in the early stage of legal education is the history wars, coupled with the on-going effects of colonisation on First Nations peoples.

Considering the call for 'Voice, Treaty, Truth' in the wake of the Uluru Statement, this paper will argue that, in a post-truth era, it is increasingly important for legal educators to engage conscientiously and as authentically as possible with 'Truth' when teaching in this space. It will also explore possibilities of ways to achieve this effectively, taking into account First Nations students' voices as reported in recent studies (Schwartz (2018) and Carter et al (2018)).

Finally, this paper will argue that adopting characteristics of Ings' (2017) 'disobedient' teacher, who values students and endeavours to bring out their potential in order to effect change and improvement, provides a means to remain constructively engaged in legal education, especially when facing the challenges of teaching controversial social and political issues a post-truth milieu.

## The Imperative of the Law Teacher Well-Being in the Contemporary Neo-liberal University: Fitting our Own Oxygen Masks First

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Legal academics who interface with students have a potentially positive role to play in addressing the high levels of psychological distress that law students have been shown to experience in contemporary legal education. For example, through intentionally designing law curricula to promote law student well-being. However, there is a paucity of research on the well-being of legal academics and their capacity to support student well-being. Indeed, few studies have explored the particular stressors experienced by legal academics in the contemporary neo-liberal university, or how legal academics perceive their own well-being. This paper presents the results of national surveys of UK and Australian legal academics conducted in 2015 and 2017, asks for audience contribution in unpacking the identified stressors, and encourages the development of a 'to-do' list for advocacy within law schools for the better support of legal academic well-being.

## Does Law Need a Theory of Truth? A Look at the New Haven School of Jurisprudence's Epistemology

Tomas Fitzgerald<sup>1</sup>

1. University of Notre Dame Australia, Palmyra, WA, Australia

Standard accounts of epistemology proceed on the basis that knowledge is the possession of a justified true belief.(1) Gettier problems - cases in which a subject holds a justified, true belief that does not seem to be knowledge - present a challenge for such an account.(2) Foundationalist and non-foundationalist theories of epistemology offer attempts to account for Gettier problems in different ways.(3) Beside these, a third alternative to Gettier problems exists. Pragmatists, such as James, Dewey and Rorty reject standard accounts of epistemology altogether.(4) Pragmatism has been unpopular in legal theory. This unpopularity is compounded by pragmatism's historical links with the perennially controversial American Legal Realists.(5) Yet there is much to recommend pragmatism to legal theorists. It offers unique and pragmatic, in the vernacular sense, solutions to problems in legal theory. Moreover, there is a fully articulated and radically pragmatist system of legal theory ready-made – Lasswell and McDougal's New Haven School of Jurisprudence.

This paper will outline how the pragmatist rejection of epistemology resolves the challenge of Gettier problems. It will trace the influence of the early pragmatists on American Legal Realism; particularly Holmes, Llewellyn and Frank. It will then suggest, following Lasswell and McDougal, that the American Legal Realists crucially mis-read Dewey, and that the New Haven School of Jurisprudence corrects this misconception.

This paper will argue that adopting the New Haven School account of legal theory permits us to continue to do legal theory in spite of intractable debates about the truth of certain normative claims. This theoretical approach offers a path forward for scholars and policymakers in areas where basic normative claims are contested, in particular in international law. Adopting such an approach will permit legal theorists to do away with the need for a theory of truth and the persistent problems which adopting such a theory necessarily entails.

(1) Matthias Steup, Epistemology in Edward N. Zalta (ed),The Stanford Encyclopedia of Philosophy (Metaphysics Research Lab, Stanford University 2017)

(2) Edmund Gettier, 'Is Justified True Belief Knowledge?' (1963) 23 Analysis 121–123

(3) Steup, above n 1, [3.1]

(4) William James, 'Pragmatism's Conception of Truth' (1907) 4 The Journal of Philosophy, Psychology and Scientific Methods 141–155; John Dewey, The Quest for Certainty: A Study of the Relation of Knowledge and Action (Capricorn, 1960); Richard Rorty, Philosophy and the Mirror of Nature(Princeton University Press, 2009)

(5) Harold D. Lasswell and Myres S. McDougal, Jurisprudence for A Free Society: Studies in Law, Science and Policy, Vol. 1 (New Haven Press/Kluwer Law, 1992) 130, 250 and 255

## Using Complexity Thinking to Inform Post-Truth Legal Education

Kylie Fletcher<sup>1</sup>

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The complexity of our environments and dealings is, perhaps, more obvious to us in a so-called 'post-truth' world. Some traditionally held 'truths' may indeed be 'untruths'. We are, more often than before, called upon to question traditional messengers of 'truth'. It is no longer sufficient to rely on the status quo as a source of 'truth'. What is a 'truth' to one, might not be to another. The collective 'truth' might be distinguished from the individual 'truth'. Our systems of law and legal education are not immune to these issues.

The field of complexity thinking is a means for legal educators to better understand their operating environment in a post-truth context. This paper discusses complexity thinking and its increasing prominence, including in education scholarship. It provides an overview of this scholarship and applies it to legal education. It suggests how complexity thinking might inform the law school curriculum to better respond to the challenges of a post-truth world.

This research is being completed as part of the author's Doctor of Philosophy. Consequently, this research is supported by an Australian Government Training Scholarship.

## Legal Fictions as the Law's Original 'Post-Truth' State

Kate Galloway<sup>1</sup>, Melissa Castan<sup>2</sup>, Dani Larkin<sup>1</sup>

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The law is deeply concerned with the management of information including obligations to reveal information, to keep it secret, and in litigation in particular, to locate information as truth. The law thus creates, and through its power enforces, its own truth. While this occurs inevitably through court processes, it takes place also in the substantive law through frequent recourse to legal fictions: assertions accepted as true for legal purposes, but which may be untrue or unproven. Through legal fictions and its counterpart legal artifice, the common law has always operated outside 'truth'. For these purposes, we contend that the law has been 'post-truth' all along, with consequences for the centralisation of power in the colonial state.

In this panel discussion, we draw together the legal fiction of terra nullius and the legal artifice of universal subjecthood in three, related contexts, to illustrate the implication of the law in ignoring truth in the interests of power. In particular, we establish how the law has overlooked truth to serve, and continue to serve, the personal and political interests of the coloniser through shoring up sovereignty, property, and political rights. We end on a hopeful note, suggesting that in addressing the reality of a post-truth world, the common law must itself finally jettison the colonial relics that are the State's founding fictions.

## Pushback and Progress – Practical lessons from embedding Indigenous Cultural Competence in CSU's LLB

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This paper reflects on the embedding of Indigenous cultural competence in curriculum and pedagogy in the Bachelor of Laws at Charles Sturt University. It examines four areas: relationship building with Elders; knowledge and scholarship of the capstone subject Community Law and Practice; the place of critical reflexivity as scholars/teachers/researchers and legal professionals; and pedagogical approaches to teaching, sharing, providing evidence and listening to student voices. We highlight strategies for getting comfortable with discomfort, and conflict, and how to effectively manage pushback and progress.

Authors: Kim Bailey, Annette Gainsford, Alison Gerard

## Martial Law and Indigenous Legal History: Incorporating Indigenous Histories into Law Curriculum

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On 14 August 1824, Governor Brisbane declared war on the Wiradyuri people with the proclamation of martial law in Bathurst. The proclamation officially ended on 11 December 1824, but the effects of this war continue to resonate with the Wiradyuri Elders to this day, who still carry the oral histories of this conflict. During this war, many hundreds of people were killed with losses of the Wiradyuri people far outweighing the deaths of non-Aboriginal people. This paper critically analyses the existing literature and oral artifacts on the proclamation of martial law in Bathurst and what it can offer Indigenous legal histories relevant to LLB curriculum.

## Unruly airline passengers: high time for a legal rethink?

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Although not necessarily engaging in an act of terrorism or sabotage, unruly passengers nonetheless constitute a danger to the safety of an aircraft, its crew and other passengers aboard.

Unruly behaviour includes demeanour, intoxication, disobeying crew directions, disorderly and offensive conduct aboard a civilian passenger aircraft.

Particularly in recent times, there have been numerous instances of reported unruly passenger behaviour among airline passengers globally, including within Australian skies and/or aboard Australian registered passenger aircraft.

Despite usually being committed by a small minority of passengers, the incidents of unruly passenger behaviour have disproportionate consequences.

Such incidents not only impact upon the crew and other passengers aboard the particular aircraft involved, but they also affect other airline passengers and crew, as well as airport personnel.

Regrettably, due to a less than uniform approach among nations in dealing with the perpetrators of unruly behaviour aboard aircraft, the prosecution of such perpetrators has oftentimes been inconsistent and not entirely effectual.

This paper seeks to analyse the nature and effectiveness of the legal instruments within international aviation law in respect of unruly passengers.

## The Implied Freedom of Political Communication in a Post-truth World

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Post-truth dialogues pose inescapable challenges for the law, as this emerging paradigm represents a, '...rejection of fact-based reasoning as a means to advance the interests of powerful actors who can exploit their existing informational advantages for political or economic gain.'<sup>[1]</sup> This raises acute issues relating to freedom of information and communication, blurring and often conflating the distinction between fact and opinion. This represents a fundamental challenge to democratic and political process.

In Australia, the implied constitutional freedom of political communication protects communications that enable citizens to be sufficiently informed in the exercise of their democratic right to vote. But what communications constitute information and misinformation in this context? This guarantee operates to consider the constitutional validity of laws curtailing political communication. Specifically, the second limb of the *Lange* test considers whether the impugned law, purportedly restricting political communication, is nevertheless reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government.<sup>[2]</sup> As such, this article considers the intersection of laws seeking to regulate post-truth dialogues with the *Lange* test.

Would laws seeking to mandate truthful and factual political communication - conversely restricting fake news and other so-called post-truth dialogues - be constitutional? Or would the constitutional guarantee extend to protect fake news and alternative facts as part of a broader interpretation of the freedom to unfettered political communication? The intersection of post-truth realities and legislative responses to the same, considered against the constitutional framework guaranteeing freedom of political communication, represents a fascinating conceptual question as post-truth dialogues come more and more to characterise modern political discourse.

[1] Sarah Haan, 'The Post-Truth First Amendment' (Washington & Lee Public Legal Studies Research Paper Series Accepted Paper No. 18(13), 6 July 2018).

[2] *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

## Practical legal education practice and integrity in the post-truth world

**Kristoffer Greaves<sup>1</sup>**

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This presentation begins with the proposal that prescribed practical legal education is a field contested by a variety of players with divergent interests. The espoused purposes of prescribed practical legal education are briefly revisited to provide context for what follows. Using concepts of "best practice" and "good operating practice" as a catalyst for discussion, the author problematises the consequences of these divergent interests for authentic, integrated, and evidence-based approaches to practical legal education practice in reductive post-truth contexts. Strategic considerations for future advances in prescribed practical legal education are also discussed.

## Calling out the troops: Recent developments

Michael Head<sup>1</sup>

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There is a growing tendency globally to deploy or legitimise the deployment of the military to suppress domestic unrest. This presentation will examine the political and legal implications of the mobilisation of troops on the streets of France to deal with 'yellow vest' protests, the British government's threat to call out troops in the event of a Brexit crisis, the Trump administration's dispatch of troops to repel refugees on the Mexican border and the revamped military call-out legislation pushed through the Australian parliament last year. In each instance, the moves have been accompanied by scare-mongering propaganda and false official claims to justify the internal use of military force.

## "Real" Law in a World Without Lawyers: Does Legal Education Have a Future?

John Hopkins<sup>1</sup>

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Lawyers are not popular, as Shakespeare's most famous and much-repeated quote makes clear. However, the changing nature of law means that the extortions of Dick Butcher to "kill all the lawyers" may no longer be necessary. The increasing cost of legal advice and the excessive formality of the legal system has left the way open for alternative ways to undertaking the "law jobs", without the need of lawyers. From Blockchain to "Alternative" Dispute Resolution, the way appears open for a legal system without the need for the high priests of the legal profession to navigate it. If current trends continue, the much maligned profession may die out, all on its own. Given that the profession is facing such an existentialist threat, what does the future hold for legal academia?

This paper argues that the legal academy's future is assured but very different from its recent past. Successful Law Schools will be those that shrug off their isolationist exceptionalism and embrace a multi-disciplinary future. In effect, the changing relationship between law and society will drive legal education back to its academic roots. The future of legal academia is the study of law, not the training of lawyers.

## 'BigLaw or Bust': Challenging the Dominant Discourse in Law Student Employment Aspirations

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Upon graduation from law school, law students are presented with a wide range of employment options, both within the legal profession (large law firm, mid-tier law firm, small law firm, in-house counsel, community sector, government sector, barrister, etc) and beyond the profession. Yet while at law school, this plurality of employment options is frequently perceived and discussed as a simple duality: succeeding at law school by being hired by a large law firm, or settling for an alternative position. This paper examines the tension between the discourse of 'biglaw or bust' and alternative career aspiration discourses, identifies the social and historical contingencies that have led to the dominance of the 'biglaw or bust' discourse, and proposes some strategies for challenging that dominance. These strategies go beyond broadening the scope of law school careers guides, employer presentations etc, and extend to identifying and questioning the ways the 'biglaw or bust' narrative is reinforced by popular culture, by law school marketing materials, and by law school curriculum and assessment practices.

## Academic judgment in the court of public opinion and in the courts

Patty Kamvounias<sup>1</sup>

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A student submits an assignment that fails to satisfy the stated assessment criteria and is awarded a fail grade. The assignment is re-marked and the fail grade remains unchanged. Although disappointing for the student, this is not an uncommon occurrence in a university environment. What is uncommon, is for a student to go outside the university to challenge the fail grade. In late 2017, a disappointed student took his fail grade to, inter alia, the Victorian Ombudsman and the Australian Human Rights Commission. He also sought judicial review and the matter reached the Supreme Court of Victoria Court of Appeal in April 2019. The litigation also attracted the attention of the media. This paper provides an analysis of the recent legal proceedings against Monash University and other case law dealing with student challenges to academic decisions. The paper also considers how this recent case was covered by the media and how despite the media and court attention, there are questions that remain unanswered.



## **Peter Vincent Ridd v James Cook University: a loss for post-truth or for University Codes of Conduct?**

**Pnina C Levine**<sup>1</sup>

*1. Curtin University, Perth, WA, Australia*

Professor Ridd's recent victory in the Federal Court against James Cook University has garnered much attention, with Professor Ridd being seen as a champion of free speech and academic freedom. Others might view him as an advocate for truth in a post-truth world. However, a closer look at the case reveals that it may have significantly more far reaching consequences for universities. This presentation will explore these consequences. In particular, it is arguable that the case may render University Codes of Conduct superfluous in the event that they limit any rights provided to University staff members by university Enterprise Agreements.

## **Location, location, location – you don't have to be rich to pay more: Aboriginal and Torres Strait Islander consumers and remoteness**

**Heron Loban**<sup>1</sup>

*1. Griffith University, Nathan, QLD, Australia*

Discreteness and remoteness have emerged as recurring issues in the consumer protection literature in respect of Aboriginal and Torres Strait Islander people. A series of cases litigated by the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC) over a twenty-year period reveal a majority of the Aboriginal and Torres Strait Islander people involved in the litigated consumer contracts were living in remote Aboriginal and Torres Strait Islander communities at the time the transaction occurred. With the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry now concluded, this theme has not changed. In fact, Commissioner Hayne dedicated an entire case study chapter on 'remote communities' in Volume 2 of his Interim Report. This paper looks in detail at the case studies published by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry in the Interim Report and the ongoing role that 'remoteness' plays in the experience of Aboriginal and Torres Strait Islander people and consumer protection.

## **Promethean Longing: Ridley Scott's Speculative Legalism**

**William MacNeil**<sup>1</sup>

*1. Southern Cross University, NSW, Australia*

This paper will argue that Ridley Scott's much anticipated return to the Alien series Prometheus, speculates materially, indeed realistically, on the nature of creation (in the character of android, David), evolution (in the monstrous Medlab "birth" of the alien spore) and extinction (as intended for humanity by their creators, "the Engineers"), as well as the "missing link" between the three (ironically, in the high heteronormativity of the Holloway-Shaw coupling), all the while articulating a new natural law that reposes the question of origins and ends. In executing what this paper calls a "theogonic turn"—of origins and ends, of purpose and meaning—Scott's film discloses as profoundly jurigenerative the real Promethean longing animating its storyline and, quite possibly, the Alien saga as a whole: that is, for nothing less than a speculative legalism.

## **True Falsity and the Dilemma of Teaching Law in a Post-Truth Era**

**Jackie Mapulanga**<sup>1</sup>

*1. Curtin University, Perth, WA, Australia*

In order for the teaching of law to be truly successful and have the desired effect of not only imparting knowledge but also helping future lawyers to apply reason and discernment in the type of information they will use and apply as future lawyers, it is imperative that the law lecturer of today has a good understanding of the dilemma of teaching in a post-truth era. Law lecturers must now adapt their teaching and begin to employ tools aimed at curbing the circulation of falsehoods and presenting the 'real law' to students. Another consideration to take into account is that the majority of millennials tend to rely on the news which they feel sounds right.

The current problem of post-truth era or the era of fake news has been described as something that is 'more than just an isolated event or a buzzword to be easily dismissed; it is the expression of a larger and fundamental shift within the technological and political underpinnings of mediated communication in modern democracies.'<sup>[1]</sup>

This paper contends that post-truth era challenges will require the implementation of proactive measures which will include some type of verification techniques within the curriculum framework which would integrate some type of verification practices. The measures employed would aim to reengage with students on a level which considers the politics of the post-truth era. The author will advocate for some type of reinscription of the law so that it is not 'watered down' but remains relevant in a post-truth era.

[1] Jana Laura Egelhofer & Sophie Lecheler, 'Fake News as a Two-Dimensional Phenomenon: A Framework and Research Agenda', *Annals of the International Communication Association* (2019) Vol. 43 (2), 97-116 at 97.

## Reflections on processes for teaching legal reasoning on the post truth law student classroom

Jennifer McKay<sup>1</sup>

1. Unisa, Adelaide, SA, Australia

This paper uses as a case study the teaching of environmental and natural resources law to law students. Students are asked to select a topic and undertake a professional presentation for 20 minutes on a topic or one they propose. Many of the topics are contentious but the law students need to understand their ethical obligations and the law in order to give professional advice to their potential clients. The clients could be proponents of mines or activist groups or individuals affected by an action. No matter the client, the students need to appreciate now, that many aspects of the Australian Solicitors' Conduct rules could apply and use this experience to learn how to do this. The students are also evaluated on their respectful reflections on another presentation on another topic.

The author discusses the approach she uses of teaching the law, ethics and modelling no partisanship in the classroom. She can give examples of excellent presentations and comments and will go through the assessment rubric she developed.

The author is an accredited Peer reviewer of teaching at UniSA

## Fake News And Its Impact On Papua New Guinea's Democracy-An Overview On Recent Political Events Leading To The Formation Of A New Government

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1. University of Papua New Guinea, Port Moresby, NATIONAL CAPITAL DISTRICT, Papua New Guinea

On Thursday the 29 of May 2019, the 7<sup>th</sup> Prime Minister for PNG resigned and a new Prime Minister was elected into office. Under the dynamics of the PNG Constitution an 18 month grace period is given to the government to implement its set policies after the return of the writs following the national general elections

In May 2019 the grace period for the PNG Prime Minister Peter O'Neill lapsed and members who have lost confidence in him can vote him out. In the May session of Parliament, two factions comprising elected members of the house were formed to muster the majority number of members to remove the sitting PM and form the new government.

Public dissemination of news by mass media outlets including other social media platforms predominantly Facebook played an important role in keeping the public informed. Many pages and group links administered by the government supporters and opposition supporters were created to report on which Members of Parliament had moved camps.

Most of this news was speculations however for many on social media platforms this served as their truth. Fake and misleading news was perpetuated to gauge public support for the opposing camps. Given such actions citizens were presented with a dilemma on what was a viable and credible source including the right to rebut false and misleading news statements

Over the period of the previous government there were many calls by prominent individuals to regulate Facebook. This led to the enactment of the *Cybercrime Act*.

This paper seeks to present the current effect fake news is having on the public perception in PNG especially on vital issues on democracy.

## 'Post Truth' concerns – a bit of Legal Hypocrisy? Is 'Post Truth' as an inevitable response to Law's own 'Noble (or Ignoble) Lie'?

Gay D Morgan<sup>1</sup>

1. Te Piringa - Faculty of Law, University of Waikato, Hamilton, Waikato Region, New Zealand

Plato's response to shortcomings in the functioning of the Athenian democracy was his proposed Republic, grounded in and dependent upon his 'Noble Lie' for its legitimacy and efficacy. While the particulars of his lie were determined by his historical context, the idea that a 'Noble Lie' is necessary for a stable and satisfactorily functioning government is a free-standing notion.

This paper explores whether Law has always been a 'Post Truth' arena, but prefers to reserve the legitimate jurisdiction of systematic deception as privilege to itself. It also questions whether Law's seemingly intrinsic 'post-truth'-ness is both paradigmatically and pragmatically necessary for its effectiveness, at the Constitutional or at all levels. If this is so, the paper queries whether the broader 'post-truth' phenomena is driven, at least in part, by the fraying of the plausibility or credibility of Law's own 'Noble Lies.' If such a lie is, as Plato thought, necessary for the effective functioning of a society and legal system, does its exposure undo the same?

This paper proposes to address two related ideas. The first is whether the current western democracies are functional 'Noble Lies' in themselves. Meir Dan-Cohen's ideas around and analysis of the 'acoustic separation' present in criminal law will be used as a tool for analysis of a 'Noble Lie' arising from similar and perhaps unavoidable 'acoustic separation' in public and constitutional law, and indeed in all law. The second is whether such a 'Noble Lie' is both essential to, and undoes the very concept of, self-governing democracies. The paper will conclude with consideration of whether the exposure of the particular operative 'Noble Lie' as a lie is fatal both to the moral authority of truth and to a functional democracy.

Paper could fit in either Legal Philosophy (Jurisprudence & Legal History) or Constitutional (Public Law) Groups

## The Law Student Statement of Ideals: A Case Study in Professional Identity

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1. *University of Wollongong, Wollongong, NEW SOUTH WALES, Australia*

In 2017, the School of Law at the University of Wollongong introduced a *Law Student Pledge* to the incoming first year student cohort. Introduced as part of Orientation week activities, the Pledge was designed as an important symbolic message to students that their career as a legal professional starts from the day they begin their law studies. It invited them to commit to core values, attitudes and practices that are seen as important to developing a positive legal professional identity and meeting the standards expected of them as future lawyers. These values included a commitment to the UOW Student Charter, the highest standard of academic integrity, and to generally pursuing their studies to the best of their ability. Students were invited to show their commitment by signing this Pledge in their first weeks of law school. Reinforcement of the pledge occurred in subsequent follow up with students across the year, with particular linkage made to the legal ethics and professional responsibility subject studied in second semester of first year. As part of the evaluation and review process, in 2018 the *Pledge* was redesigned as the *Law Student Statement of Ideals*.

This paper reports on the introduction and learnings gained through adopting the *Law Student Statement of Ideals* for newly commencing law students at UOW and considers the findings from a number of focus groups held with first year students over 2017 and 2018. In particular, it reflects on the impact, benefits and challenges of adopting the Pledge and assesses the effects on shaping students' attitudes and understanding of their developing professional identity as future "lawyers".

## Tax and Pasifika Communities: A burden or a blessing

Liukovi Nacagilevu<sup>1</sup>

1. *University of Auckland*

Tax is one of the government's primary sources of income. The focus of this paper is to initiate a conversation on the inequitable impact of tax on lower socio-economic communities.

Thesis argument;

The structure of the NZ tax system appears to be neutral. However, Pasifika people bear a disproportionate tax burden in comparison to other ethnic groups in NZ, allowing the inequality gap to persist. Therefore, the neutrality is an illusion because the underlying operations of the law are racist.

Part I discusses that Pasifika are in the lowest socioeconomic classes based on income. The two tax systems at the heart of the discussion are the Income Tax and the GST systems. The idea is to achieve vertical equity; however, when both systems are operating the impact on Pasifika people is a regressive tax system.

Part II critiques that law from a Critical Race Theory perspective. Oliver Wendell Holmes' said, "Taxes are what we pay for civilized society." Are we in a civilised society if Pasifika people are vulnerable to inequality and poverty? This paper argues that social welfare may not only be the viable solution. Tax reforms need to be a topic in conversation to level the disproportionate impact.

## Constructing a Subject-Specific Website to Construct Student Knowledge

Jodie O'Leary<sup>1</sup>

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Evidence is accumulating that students are seeking a rethinking of learning and teaching through an improved use of education technology. Blended learning environments are becoming the norm. Students say they learn most in blended learning environments and there is evidence that technology engages students (Dahlstrom, 2012). Rather than rethinking learning and teaching, many applications of information and communication technology (ICT) simply replicate traditional content-focused learning models. Such use of ICT may be criticised as it is not really using the potential of technology in terms of active learning, where students construct their learning rather than purely consuming it. It is unclear whether students nevertheless find any advantages to such uses. In fact it has been said that a wider range of research should be undertaken to 'gather data to explore good practice in blended learning' (Partridge, Ponting, & McCay, 2011).

I developed a Weebly site for my Criminal Law subject in the Faculty of Law at Bond University. Originally this site was developed due to the non-linear nature of the subject and the need to demonstrate the way that the subject matter is interrelated. It was developed initially purely for content delivery, however my hypothesis is that given the need for students to navigate their way around the site and construct their own understanding that it does provide some active learning.

This article explores from archival data – TEVAL results, information that was provided to me as part of a Teaching Award nomination, and Google Analytics data whether students found the site useful and particularly whether they did in fact find the site interactive and whether it encouraged them to construct their own knowledge.

## Protecting the Consumer by Fighting Fake and Manipulated Online Reviews

**Trish O'Sullivan<sup>1</sup>**

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One of the benefits of the online business environment for consumers is the ability to freely access reviews of goods and services prior to purchase. However, the consumer's heavy reliance on online reviews makes them particularly vulnerable to fake or manipulated reviews. Consumer protection regulation must be wide enough to fight novel ways of falsifying and manipulating online reviews. This paper reviews the Federal Court of Australia's decision, in *ACCC v Meriton Property Services Pty Ltd* (No. 2) [2018] FCA 1125, which imposed a three million dollar fine, on an accommodation provider, for manipulating the 'Trip Advisor' review process in a way that breached the misleading and deceptive conduct provisions in the Australian Consumer Law ("ACL"). In an earlier decision on the case, the Court found that the manipulation of reviews, by filtering the guests who were given the opportunity to provide a review to 'Trip Advisor', was "conduct" covered by the misleading and deceptive provisions in the ACL. The FCA took a broad approach to the definition of "conduct" and confirmed that there is no need to point to a misrepresentation when determining if conduct is misleading or deceptive. This decision shows that if a robust approach is taken by the Courts, the fight against fake and manipulated reviews can be won. The regulation of misleading and deceptive conduct in Australia and New Zealand is very similar. The decision provides useful guidance on applying the New Zealand Fair Trading Act 1986 ("FTA") to online reviews. The New Zealand courts have struggled to let go of the notion that misleading or deceptive conduct prohibited by the FTA must amount to a misrepresentation. The author suggests that that the Australian decision may help to encourage the New Zealand courts to abandon the misrepresentation requirement completely.

## Student evaluations: pedagogical tools, or weapons of choice?

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In this paper, we survey the recent literature of teaching surveys in the university sector, in so doing identifying the diverse issues that this literature reveals, and contextualising its general findings to the teaching practices of a regional Australian law school.

We posit that teaching surveys and analogous evaluation regimes are more often used as a blunt instrument than a nuanced pedagogical tool. Excessively subjective and simplistically reducible, our case studies of student surveys corroborate the general tenor of the literature, namely that there is 'little evidence that study findings are being used to change or improve the student learning experience.'<sup>1</sup> Rather, these increasingly streamlined evaluative surveys provide online opportunities to take the subjective 'pulse' of student satisfaction, momentary snapshots that sometimes provide great heat, but shed little light.

We submit that teaching surveys need to be seen in context, as part of a wider and more pedagogically informed measure of 'good' teaching. While it seems unlikely that such surveys will disappear overnight from the armoury of university administrators, we argue that their continuing validity requires the teaching evaluation to be itself evaluated, with the first priority being the paring back of its survey questions to only those factors capable of objective and verifiable measurement.

1. L. Alderman et al, 'Student feedback systems in higher education: a focused literature review and environmental scan' (2012) 18(3) *Quality in Higher Education* 261, 264.

## Beyond a balance of Probabilities: Using new forensic neuro-technologies to get to the 'truth' in criminal proceedings, and an assessment of the major legal and ethical implications for the Criminal Justice System.

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*1. University of Canterbury, Riccarton, CHRISTCHURCH, New Zealand*

For hundreds of years the method for determining the 'truth' in criminal trials has remained the same. This entails an assessment of the relevant probabilities of competing versions to ultimately select the most probable version as the 'true' version. Injustices resulting from this unscientific approach to truth-finding are well-documented, and any assistance to ameliorate this situation that may be provided by scientific advancements should be welcomed. A clear example of this is the use of DNA testing and screening in criminal investigations and trials.

An exciting new development is the increasing worldwide trend towards the adoption of brain-based neuro-technology in criminal investigations, even though such adaptations typically face stiff resistance from the traditionally conservative legal establishment. However, in striving for the 'truth', and in keeping with the theme of the ALCA 2019 Conference ("Real Laws in a Post-truth World"), it is clear the law and legal systems worldwide will have to adapt or be reformed to accommodate new forensic neuro-technologies.

The focus of this paper is two-fold: first, an overview of the emerging forensic neuro-technologies such as the forensic application of fMRI brain-scanning (functional magnetic resonance Imaging) and the EEG-based forensic brainwave analysis (FBA) technologies, and second, a consideration of the legal and ethical implications of the use of these technologies.

The FBA technologies compared are the Classification Concealed Comparison Test (CIT); the Complex Trial Protocol (CTP), and the Brain Electrical Oscillation Signature Profiling system (BEOS). These FBA systems have also been the subject of a three-year (2017 to 2019) FBA verification project in New Zealand, of which the presenter is the lead investigator.

Against this background, a number of procedural aspects of applying FBA technology in the criminal justice system are considered, including ethical and human rights concerns; investigative protocols; and evidentiary aspects (especially expert evidence criteria).

## **Real laws and real truths in South Pacific legal education**

**Carolyn Penfold<sup>1</sup>**

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The conference theme; *'Real' Laws in the Post-Truth World*, suggests there may be such a thing as 'real' law, and real 'truth'. My research into legal education in the South Pacific suggests that in this environment there are various perceptions of real law, and various real truths, depending on whose perspective we're looking at, and why, and when.

Upon the 'creation' of South Pacific states for example, the departing powers (British and French), the urban, educated, local elites, and numerous disparate local communities, may have differed in their views of what 'real law' was, and what it should be. Likewise, in USP law teaching, university leaders, national governments, OS trained local lawyers, foreign lawyers and educators, and local communities may have varied perceptions of why, what, and how legal education should be done. Hence while rightly disparaging 'post-truth' discourse which ignores facts, manipulates information, and picks and chooses reality, it is important nonetheless to remember that 'multiple truths' may still be valid.

My research into South Pacific legal education suggests that perceptions of real law and real truth may be disparate, complex, and sometimes conflicting, but represent differing experiences and views rather than dishonesty or cynicism. This conference presentation will highlight some of the complexities uncovered by research undertaken in Solomon Islands and Vanuatu between 2011 and 2017. Eighty lawyers from government, private practice, NGOs, education, and others working closely with them participated in this project, and shared their views on local law, legal developments, legal education, and the experiences of lawyers in local environments.

This presentation aims to share and discuss some of this research data, focusing particularly on the fuzziness, complexity and contradictions arising from it. In doing so, the difficulty of pinning down 'real' law or truth in the South Pacific environment will be highlighted.

## **Market power, opinion and the rule of law**

**George Raitt<sup>1</sup>**

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*The author's forthcoming book, The Metaphysics of Market Power: The Zero-Sum Competition and Market Manipulation Approach (Hart Publishing, Oxford, anticipated in May 2019, see <https://www.bloomsburyprofessional.com/uk/the-metaphysics-of-market-power-9781509928095/>) is a detailed study of leading Australian case law on misuse of market power, with a Foreword written by the Honourable Robert French, AC.*

It is judicially recognised that legal opinions on market power and its misuse may reasonably differ (*Queensland Wire* (1989), per Deane, J). The Full Federal Court in *Pfizer* (2018) accepts the statement by Dowsett, J (dissenting in *Baxter* (2008)) that when one competitor injures another by attracting away sales, 'the effect of [such] conduct upon competition is not to be equated with its effect upon competitors, however the latter effect may be relevant to the former'. There is no 'bright-line test' to distinguish these effects, and the matter remains one on which opinions may differ.

This presentation argues that the ongoing debate about market power in Australia and overseas, and the forensic problem of distinguishing normal competitive conduct from misuse of market power, arises from 'polycentricity': the diverse and often conflicting policy objectives of competition law. It has been said that courts lack the institutional and constitutional competence to engage in polycentric decision-making (eg judicial and extra-judicial writings of Robert French, 'The Role of the Courts' (2001), *AGL* (2003)). This paper proposes an alternative 'unicentric' theory of liability for misuse of market power to satisfy rule of law concerns which have been noted in the competition law literature, more so in the EU than in Australia.



## Critical thinking in a 'post-truth' world

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1. Monash University, Kew, VICTORIA, Australia

The author's article 'Can they do that? Critical thinking when your wagon train is surrounded' is published in the *Alternative Law Journal* (2019) 44(1) 68-72 (<https://doi.org/10.1177/1037969X18798910>).

Increasingly in popular debate it is said that everyone is entitled to their opinion, which must be respected. Social media provide platforms for everyone who has an opinion to ventilate it. Yet our legal system relies on legal thinkers having highly developed skills in applied legal reasoning and critical thinking; and a system of appellate courts with a court of final appeal to conclusively resolve controversies. Law students of the post-millennial generation seem inclined to uncritically accept legal opinions set out in decided cases and the legal literature. This presentation discusses approaches to teaching critical thinking which encourage students to develop 'healthy disrespect for authority' and 'normative engagement'.

## Framing the law question, the story of law in Australia

Aidan Ricketts<sup>1</sup>

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How we frame legal history for first year law students matters. The questions we pose define the parameters of the discussions that follow. Legal education is not value neutral and the journey we take law students on, is very much influenced by where we start that journey. So where does the law story start in Australia? Does it start on this continent 60 000 or more years ago or does it start in ancient Greece, Europe or England. The answer may seem obvious but like so many answers it depends on the framing of the question.

This paper aims to conduct a simple desktop survey of introductory law texts currently available for first year law teachers in Australia and to critically examine the way the story of law in Australia is framed and presented in those texts. Following a presentation of key outcomes of the desktop survey the paper will critically reflect upon the framing choices being made in first year legal education and the possible implications for how such framing may be setting powerful 'initial conditions' in the threshold construction of legal knowledge for first year students.

## No Oral Modification clauses: a New Zealand perspective

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The Supreme Court decision of *Rock Advertising Ltd v MWB* recently reaffirmed the effectiveness of No Oral Modification (NoM) Clauses in written contracts in the United Kingdom. In doing so, it overturned a stream of case law that had denied NoM clauses any effect beyond presenting an evidentiary burden to those parties seeking to rely on an oral modification. This stream of case law was finding favour with a number of New Zealand judges in recent years and so a question to be asked is: will *Rock Advertising* be rejected or ignored halfway around the world? And should it be?

Alternatively, if *Rock Advertising* is to be followed in New Zealand, which of that case's approaches is most compelling? While the plurality judgment delivered by Lord Sumption is clear and certain, does it adequately address the conceptual difficulties identified in treating a NoM clause as overriding a latter agreement of the parties?

This presentation will discuss the current New Zealand position to NoM clauses and will critique the way in which it seems as if *stare decisis* has become an optional extra in this area of law. In discussing NoM clauses in New Zealand, this presentation will also look at how these clauses could be affected by the Unfair Contractual Terms provision in the Fair Trading Act 1986 and will place NoM clauses within the wider New Zealand approach to contractual variations.

## The executive as proxy for the legislature: a post-truth legal fiction?

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Liberal democracies typically allow wide latitude for the executive to make interim decisions as a proxy for the legislature. Democratic accountability and deliberation is supposed to be ensured by judicially enforceable mechanisms, both as to process (disallowance of subordinate legislation in Australia, Senate confirmation of appointments in the USA) and as to substance (whether the delegated or interim decision is duly authorised by legislative Act). However, in two recent cases the High Court of Australia has shied away from giving teeth to these institutional/ structural values. I contrast the Perrett ("same in substance") and Wilkie (marriage survey) rulings with those of the US Supreme Court in *NLRB v Noel Canning* and the UK Supreme Court in *R (Gina Miller) v Minister for Brexit* to ask whether the rationale that the executive is acting as a standing proxy for the legislature is a convenient legal fiction that amounts to a legal "post-truth".



## Political Commentary and Campaigning in the Post Truth Era - Are Defamation Laws the Answer?

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The recent Federal election provided no shortage of "fake news", outrageous political advertising, campaigning and media manipulation. Many have claimed that these factors played a decisive part in the unexpected result. With media outlets such as News Corp having such influence in Australian politics, can defamation laws in Australia provide a suitable mechanism to reframe our political reporting?

This paper considers the historical and contemporary use of defamation laws in Australia in the political arena. It looks at the defences developed and raised by the media and questions whether political commentary in Australia is hindered or enhanced by resort to Australia's relatively strict defamation laws.

## Decentralised Autonomous Organisations (DAOs) as an emergent institution

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Decentralised autonomous organisations (DAOs) offer a tantalising prospect for radically changing how organisations are structured and how they operate. DAOs have been described as entirely new and could not have been conceptualised prior to the advent of blockchain technology. Yet they build upon theories, practices and technology including, code is law, the commons, teal organisations, futarchy, liquid democracy, game theory, as well as open source software, distributed computing and public key infrastructure. DAOs decentralise decision making and disrupt governance: participants in the DAO's ecosystem generate and make the decisions, not managers or directors (or occasionally shareholders) or a small cadre of committee members. The participants in the DAO's ecosystem are also the DAO's owners, thus breaking down the division between capital and labour and potentially reducing inequality. Other novel features abound, including the ability not only to exit easily, but also to "fork" the DAO's blockchain and create a new DAO that competes with the original DAO. DAOs have the potential to remove, or at least greatly decrease, many issues inherent in firms and institutions generally: people do not always follow the rules; people do not always agree what the rules are; and even if the rules are enforced it is either expensive or impossible or both to restore people and property to their pre breach state. Another feature of DAOs are their tokens (a form of cryptocurrency), which are a vital component of their operation.

## The Shifting Sands of Property Law Teaching in Australian Law Schools

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In the past 10 years we have witnessed a seismic shift in the practice of law in Australia. This shift is largely the result of the growing impact of digital technology on both the substantive content of law and the delivery of legal services. Legal education has been somewhat slow to respond. While there may have been considerable focus on integrating technology into how we teach, including an increase in the online delivery of content most commonly in the form of blended learning models, the review and revision of the substantive content of what we are teaching has lagged behind. Indeed, the first substantial review of the Priestley 11 commenced late in 2018, 26 years after their initial articulation.

In this paper we report on a longitudinal study of Property Law teaching in Australia. In doing so, we explore the changes to both the substance and mode of delivery of this prescribed area of knowledge in the past 10 years, and provide some commentary on further changes that are needed to ensure Australian law graduates are adequately equipped with relevant knowledge and skills in this important area.

## Designing legal personhood

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There has been a renewed interest in examining legal personhood to articulate rights and liability frameworks for novel legal subjects such as AI and rivers. Maitland described legal persons as "right and duty bearing units". Legal personality is treated as monolithic - an entity is either a legal person or it is not - but the actual empirical ways that the law personifies subjects is far more nuanced. For example, there is considerable uncertainty about the relationship between legal personality and capacity.

Is legal personality merely functional, operating as an anchor for right and duty bearing units? Alternatively, legal personality may be conceived of as a licensing system whereby the conferral of legal personality is contingent upon the satisfaction of various conditions set by the state.

This paper will examine the conceptual framework that has been developed for synthetic legal persons such as the state and the corporation and then consider its extension to natural systems, exemplified by rivers.

## The Making of Lawyers: Expectations and Experiences of New Zealand Law Students

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This paper reports key findings of a longitudinal study of the law school and work force expectations and experiences of a self-selected cohort of students who first enrolled in law school in 2014 at the Universities of Auckland, Canterbury, Waikato and Victoria University of Wellington. Five waves of data have now been collected from these students over the period 2014--2018. The cohort's law school experiences are presented and grouped according to factors that higher education literature on student engagement links with quality learning and teaching or as otherwise affecting students' learning and teaching experiences. Reported findings include students' motivations and values associated with the study of law (their reasons for enrolling in a law degree, their commitment to pursuing a legal career and their intended legal careers) and their academic engagement and outcomes (their classroom and self-study experiences, their relationships with their teachers and peers, and their actual and anticipated assessment outcomes). The workplace experiences of the first of the cohort to graduate are also reported.

## The search for meaning: Deconstructing fundamental interpretive concepts for first year law students

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One of the most challenging aspects of teaching first year law students how to interpret statutes is explaining and contrasting the core concepts underlying interpretative criteria – that is, *meaning*, *intent*, *text*, *context*, *purpose* and *ambiguity*. Defining these concepts clearly and comprehensively is exceptionally difficult, primarily because of the interesting and myriad ways in which they interact and overlap in the interpretative process. Judicial and academic explanations of the fundamental terminology are often confusing and contradictory. The purpose of this presentation is to highlight how and why these exceptionally important concepts are so often misunderstood and the impact that this predicament is having on the ability of first year law students to fully comprehend and engage with the interpretative process. Critical examination of the classic formulations of principle espoused by judges and the central interpretive rules laid down in Interpretation Acts will serve to emphasise that our students are being led astray far too often, and that learning outcomes and activities that emphasise the precise nature of, and relationship between, the core concepts is the only way to steer them back on course.

## Embedding graduate attributes in the law school curriculum – a competency matrix approach

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It has long been recognised that the law curriculum must include more than just subject matter content. Australian law schools are increasingly seeking to address employability issues in addition to the existing Priestly 11 and professional practice requirements. Although the need to focus on explicitly providing opportunities to develop specific skills, attitudes and attributes is not a new challenge, there are limited resources regarding how to implement this goal. This paper outlines the stages, hurdles and strategies involved in developing a program to embed graduate competencies in the law school curriculum at Newcastle Law School.

As part of a major project to embed graduate skills and attributes in the curriculum for the Bachelor of Laws and Juris Doctor programs, Newcastle Law School recently developed and implemented a competency matrix. The aim of the competency matrix is to enable the Law School to confidently assure graduates and employers of graduates that all students have reached a minimum level of competence in every graduate skill and attribute. This not only enhances immediate employability within the graduate cohort but also improves long-term adaptability and ability to engage and contribute as citizens. The competency matrix likewise provides students themselves with a roadmap for the development of their skills, with ongoing feedback about their progress. In this way, the curriculum simultaneously opens up opportunities for students to pursue courses specifically for purposes of skills development rather than for content alone.

The process of developing this matrix involved a series of phases and included input from a wide range of stakeholders. This paper identifies seven implementation phases and also outlines some practical implementation strategies to address stakeholder buy-in, enhance cooperation and collaborative practice and harness the delivery of a matrix project to enhance motivation and collegiality among teaching staff.

## The definition of "indigenous peoples" of Fiji

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My topic of interest is on the definition of "indigenous peoples". I will look at the following:

- What is the definition of indigenous internationally and in Fiji?
- How is this determined?
- What is the position of those like myself who are of mixed race?
- Compare with other countries, mainly New Zealand and Canada.

I will look at the definition of indigenous in the context of Fiji;

I will analyse how the definition of 'indigenous' employed by Fiji is different from the international legal concept. I will also discuss the 'vola ni kawa bula' and the rights of those who are on that register.

I will compare the Fiji concept of indigenous with New Zealand, and Canada. I will also discuss the above in terms of the development of International law with regards to indigenous people's rights and whether or not Fiji should reconsider the current definition of 'Indigenous' that it employs as it is non-inclusive and discriminatory.

## Information gathering in the Post-Truth world

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The effective operation of any taxing regime depends ultimately upon the revenue authority being able to obtain timely and reliable information about a taxpayer's relevant activities (both domestic and, increasingly offshore) which it needs in order to establish their tax liability.

While most taxpayers (try to) comply fully with their tax obligations, in the Post-Truth world especially, a minority do not. Regulators therefore need an effective information gathering system to identify non-compliant taxpayers and obtain details of their transactions.

Various countries take different approaches to the task of gathering such information, and this paper compares the effectiveness of access powers available to three regulators: the Australian Tax Office (ATO), New Zealand (NZ) Inland Revenue and Her Majesty's Revenue and Customs (HMRC) in the United Kingdom (UK).

Modern technology provides revenue authorities with a vast mass of "mineable" electronic data from a wide range of sources which can be analysed quickly and accurately by computers. It is therefore not surprising that the powers available to revenue officials in the three jurisdictions share a number of similarities - for example, in relation to access to electronic storage devices and providing codes and passwords needed to access and decrypt data.

However, there are also some significant differences between the various jurisdictions - for example, in relation to the power to remove and retain hard copy and electronic documents in order to examine them forensically; access private dwellings, and other areas.

In discussing such issues, the paper highlights areas where one jurisdiction might usefully adopt or adapt elements from another system in order to improve the effectiveness of its own access powers.

## The 'arguable character of the law' – and the mantle of legal syllogism as giving expression to the evolution of doctrine within the Australian adversarial legal system

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Central to *stare decisis* is the idea that doctrine evolves on a case-by-case basis, with some commentators propounding that *stare decisis* is underlined by the precept that the content of law depends on argumentation, the 'arguable character of law'.

These proponents argue that reasoning in the tradition of *stare decisis* is driven by logic, and that syllogism is the classic means of deductive reasoning, the vessel providing structure to the cycles of induction and deduction within judicial jurisprudence. Further, that whilst syllogism does not exhaust legal reasoning, the syllogistic form provides the framework for all legal arguments, promoting the appearance of dispassionate justice by the application of reasoned judgment, 'justification'.

Detractors of syllogism contend that presenting legal argument in the form of syllogism provides little guidance to the veracity of inferences, since rules of logic do not apply to norms and value judgements, and that the syllogistic form does not explain the bases for judicial choices. Nevertheless, even detractors generally concede that syllogism gives structure to legal reasoning, some acknowledging syllogism could furnish *schemata*, namely logical and formal patterns, to underpin its more fundamental logical framework.

IRAC fundamentally is the legal variant of syllogism. Whilst IRAC is conventionally presented as the formulaic problem solving template in foundation legal studies, the Australian legal studies curriculum pays limited attention to its mastery, going little further than an application of its superficial template.

This paper posits that it would benefit law lecturers to be familiar with the role syllogism plays in the evolution and application of common law doctrine, *stare decisis*. This would serve two related objectives: *first* to come closer to an understanding of *stare decisis* itself; *secondly*, to understand and apply more effectively the legal syllogism, IRAC, in legal reasoning.

## The case for the resurrection of case-methodology as a dedicated pedagogy in Australian foundation legal studies – and an overdue salute to Langdell

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Historically, the development of a dedicated method of case-law analysis, eponymously 'case methodology', is attributed to Professor Columbus. A fundamental skill, central to Langdellian case methodology, is the ability to identify the underpinning rationales in judicial reasoning.

Case methodology is oft-criticised as ignoring the reality of legal practice because the short, coherent passages in case law do not give expression to authentic legal disputes, and that confining the study of cases to those considered fundamental to the doctrine under consideration gave a limited view of the law.

Nonetheless, even detractors of case methodology generally acknowledge that it is a skill integral to the mastery of doctrine, whilst proponents assert that it is an essential skill, and counsel the need to master it early in legal studies.

The stark notion that understanding cases is central to mastery of legal doctrine finds expression within the typical Australian foundation legal studies curriculum, which contains numerous exercises relating to this ability, such as the writing of a case-note and the identification of *ratio decidendi*. Case methodology itself has however been largely abandoned; no Australian foundation legal studies text in common use explicitly explores its workings as a dedicated pedagogy.

We propound that it would be beneficial for law lecturers to appreciate the fundamentals of identifying the rationales that underpin legal reasoning, and apply these methods in their teaching. To that end, we distil here the rudiments of case analysis and offer a version which lends itself to ready integration within the Australian legal studies curriculum, modelled not only on the ingredients of the fundamental Langdellian prototype itself, also the precepts of *stare decisis*.

