

‘WHAT’S ETHICS GOT TO DO WITH IT?’ REQUIRING STUDENTS TO BE COGNISANT OF ETHICAL PARAMETERS IN COMMERCIAL PRACTICE

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I. INTRODUCTION

If corporate failures and misconduct¹ are any indication, teachers of commercial law occupy an important gatekeeping role: that of exploring with their students conceptual and ethical questions about the role of commercial law in legal practice. However, my anecdotal experience of teaching postgraduate level students the Graduate Diploma in Legal Practice (GDLP) at the Australian National University (ANU) is that a significant number of students consider commercial law with a level of indifference and even aversion. My teaching experience also indicates that some students view legal ethics as a discrete area of study, separate from substantive areas of law such as commercial law – an experience supported by a review of literature in the Australian and US contexts.²

All GDLP students study commercial practice³ online, as part of a large simulation involving them in team-based transactional work. The GDLP is a practical legal training course undertaken by law graduates, the completion of which qualifies them to apply for admission as an Australian legal practitioner. In this context, the educators’ role as gatekeeper is twofold. The first is to engage and challenge students in an area in which many later find themselves employed and desiring further training. The second is to require students to be cognisant of the ethical dimensions of commercial law practice.

This paper explores the idea that commercial law teachers are gatekeepers in the GDLP. It explains the initiatives taken in the GDLP both to make the study of commercial practice

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1 Two prominent Australian examples relate to the collapse of HIH Insurance Group and the conduct of James Hardie Industries Group. The provisional liquidation of the Australian HIH Insurance Group on 15 March 2001 and formal winding-up orders on 27 August 2001, would be the ‘largest corporate failure Australia has endured to date’ if its ultimate shortfall was anywhere near the upper end of \$5.3 billion. James Hardie Industries Group accepted that the Medical Research and Compensation Fund, established by the Group to fund compensation claims by victims of asbestos-related diseases from its products, was underfunded to a ‘very significant degree’. Commonwealth, Royal Commission into HIH, *The Failure of HIH Insurance* (2003) vol 1, xiii; New South Wales, Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation, *Report* (2004), vol 1, 12.

2 Adrian Evans and John Howe, ‘Enhancing Corporate Accountability Through Contextual Ethical Exercises in Corporate Law Teaching’ (2007) 7 *Journal of Corporate Law Studies* 337, 349; Adrian Evans and Josephine Palermo, ‘Australian Law Students’ Perceptions of their Values: Interim Results in the First Year – 2001 – of a Three-Year Empirical Assessment’ (2002) 5 *Legal Ethics* 103, 104; Robert Granfield and Thomas Koenig, “‘It’s hard to be a human being and a lawyer’”: Young attorneys and the confrontation with ethical ambiguity in legal practice’ (2003) 105(2) *West Virginia Law Review* 495, 500.

3 The commercial practice unit includes the subdisciplines corporations law, taxation law, business structures, trusts, personal property securities, and vendor finance.

authentic and vibrant and to ensure that students understand and face the consequences of acting outside ethical parameters in their conduct as commercial lawyers.⁴

II. THE STUDY OF ETHICS IN LAW SCHOOL; COMMERCIAL LAWYERS AS GATEKEEPERS

Gatekeeping implies passage or movement between two or more places, with certain criteria governing when passage is appropriate.⁵

A. Literature Review

Law schools are open to the criticism that the study of legal ethics is not integrated into the theory and practice of subject areas. Evans and Howe highlight the fact that a ‘chronic and major problem with the teaching and learning of legal ethics’ at the Australian university level is the perception that ‘ethics is extraneous to and separable from success in legal practice.’⁶ Even in the wake of well-publicised corporate misbehaviour, law deans and the legal profession are not persuaded that ‘systematic problems are involved’, and the learning priorities of law schools remain unaffected.⁷ This view is consistent with the US context, where Granfield and Koenig observe that law schools are often criticised for their failure to make sufficient efforts to integrate ethical teaching into the overall curriculum.⁸ The report by the Carnegie Foundation for the Advancement of Teaching (‘the Carnegie report’) on law schools in the USA and Canada found that despite schools’ progress in making legal ethics a part of undergraduate curricula, they ‘fail to comprehend the focus on skill analyses with effective support’ for developing ethical skills.⁹

Croft observes that the ‘fencing-off’ of the study of ethics in US law schools results in the discussions of legal professional standards being insulated from the rest of the law school curriculum,¹⁰ and Granfield and Koenig say the effect is that ethical training is undermined by isolating the moral message within a single course.¹¹ The consequence is that ethical practice is deserted by US law schools, which are moving towards pure theory, and by law firms, which are moving towards pure commerce; the way to counter this is to integrate professional values and practical skills in legal education.¹² A body of critique in the literature points to the failure of US law schools to teach ethical behaviour because they have a ‘hidden curriculum that replaces the cultivation of ‘practical wisdom’ with an amoral emphasis on winning at all costs.’¹³ However, three American law schools have adopted innovative teaching approaches in response to the Carnegie Report. One of these law schools, the Indiana University Maurer School of Law (Bloomington), became the first US law school to move the legal ethics course

4 I use the term ‘commercial lawyer’ throughout this paper to refer to lawyers in law firm practices or consultancy firms, or who are sole practitioners, retained to represent clients in commercial matters. The term ‘commercial lawyer’ also refers to in-house lawyers employed inside business organisations. Some of the authors cited in this paper use the term ‘corporate lawyer’, which is another manner of categorising a commercial lawyer.

5 Stephen Behnke, ‘The supervisor as gatekeeper: Reflections on Ethics Standards 7.02, 7.04, 7.05, 7.06 and 10.01’ (2005) 36(5) *Monitor on Psychology* 90.

6 Evans and Howe, above n 2, 349–50.

7 Evans and Palermo, above n 2, 104–5.

8 Granfield and Koenig, above n 2, 499.

9 William M Sullivan et al, ‘Educating Lawyers: Preparation for the Profession of Law’ (Report, Carnegie Foundation for the Advancement of Teaching, 2007) 4, 6.

10 Colin Croft, ‘Reconceptualizing American Legal Professionalism: A Proposal for Deliberative Moral Community’ (1992) 67 *New York University Law Review* 1256, 1339, citing Walter H Bennett Jr, ‘Making Moral Lawyers: A Modest Proposal’ (1986) 36(1) *Catholic University Law Review* 45, 51.

11 Granfield and Koenig, above n 2, 500.

12 Harry T Edwards, ‘The Growing Disjunction Between Legal Education and the Legal Profession’ (1992) 91 *Michigan Law Review* 34, 34, cited in Granfield and Koenig, above n 2, 501.

13 Granfield and Koenig, above n 2, 501, citing Anthony T Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Belknap Press, 1995), 165–70; Sharon Dolovich, ‘Ethical Lawyering and the Possibility of Integrity’ (2002) 70 *Fordham Law Review* 1629, 1651.

into the core first year subjects¹⁴ with the purpose of sending a ‘clear and unambiguous signal ... that the ethical practice of law is a foundational value that will ... instill a deep appreciation for ethics and professional value, and equip our students with the perspective and judgment to eventually become leaders in the profession.’¹⁵

One theme arising from the literature is the importance of legal ethics teaching in securing greater corporate accountability (or preventing corporate misbehaviour) in the ‘interests of the wider community’ by encouraging law students to ‘confront and think about the ethics of their role as lawyers in the context of providing advice to corporations.’¹⁶ Parker and Evans refer to ‘ethically unreflective corporate lawyering’¹⁷ which can be traced not so much to the failure of personal ideals, but rather to ‘narrow legalistic training and culture’ that fails to equip corporate lawyers with the ability to recognise ethical issues that arise, let alone knowing how to put ‘ethics into action in real-life corporate contexts’.¹⁸ Not only is this detrimental to the corporate lawyer, but also is not in the interests of the corporate client as a whole.

While increasing law students’ awareness of legal ethics in the Australian corporate sphere is not a ‘panacea for the problem of corporate misbehaviour’, it seems that corporate lawyers’ ignorance of ethics ‘certainly plays a role in corporate misconduct’.¹⁹ This gives corporate law teachers a critical role to promote corporate accountability into the future, by ‘raising student awareness and understanding of the ethical challenges that they will confront in the practice of corporate law’.²⁰ In the US context, there is the need for law schools to strengthen ethical instruction more effectively, and by focusing on ‘contextual pressures such as growing commercialism’²¹ which could lead to lawyers succumbing more readily to the ‘pervasive materialism of the law firms’.²² Here service to the public interest is at the forefront of the importance of law schools creating ‘ethical graduates’ who can at least attempt to resist institutional pressures in practice.²³

Commercialism is not necessarily equivalent to financial profitability, as all lawyers are expected to be financially profitable in practice.²⁴ Commercial law provides the greatest source of income for many medium-to-large law firms in common law jurisdictions.²⁵ This assertion is supported by a survey conducted by the University of Technology, Sydney (UTS) of its practical legal training graduates, where (i) the highest percentage of respondents, 43.4 per cent, were employed in mid-to-large private law firms in their first legal job,²⁶ and (ii) commercial and corporate law was the most commonly selected area of legal practice (civil litigation came a close second) UTS graduates had worked in during their first legal job, with commercial and corporate law receiving a selected response rate of over 50 per cent.²⁷ An Australian Bureau of Statistics survey from 2009 confirms commercial practice is the largest source of fee income for solicitors.²⁸

14 Clark D Cunningham and Charlotte Alexander, ‘Developing Professional Judgment: Law School Innovations in Response to the Carnegie Foundation’s Critique of American Legal Education’, in Michael Robertson et al (eds), *The Ethics Project in Legal Education* (Routledge, 2011) Chapter 5, 1.

15 Ibid 19, citing Committee on Professionalism in the Curriculum, ‘Proposal for New One-L Legal Professions Course’ (Memorandum, Indiana University Maurer School of Law, 4 April 2007, 6, 10).

16 Evans and Howe, above n 2, 348.

17 In which the corporate lawyer avoids considering issues giving rise to ethical obligations: Christine Parker and Adrian Evans, *Inside Lawyers’ Ethics* (Cambridge University Press, 2010), 217.

18 Parker and Evans, above n 17, 217.

19 Evans and Howe, above n 2, 348.

20 Ibid.

21 Granfield and Koenig, above n 2, 498, 520.

22 Edwards, above n 12, 73 cited in Granfield and Koenig, above n 2, 520.

23 Ibid.

24 Barbara Robin Mescher, ‘The Business of Commercial Legal Advice and the Ethical Implications for Lawyers and Their Clients’ (2008) 81 *Journal of Business Ethics* 913, 914.

25 Ibid 914.

26 Maxine Evers, Bronwyn Olliffe and Robyn Pettit ‘Looking to the past to plan for the future: a decade of practical legal training’ (2011) 45(1) *The Law Teacher* 18, 25. Of the remainder of the respondents, 27.8% were employed in small private firms, 17.6% in government, 8% in corporate and 3.2% in community positions.

27 Ibid 27.

28 Australian Bureau of Statistics, *8667.0 – Legal Services, Australia, 2007-08* (24 June 2009) Australian Bureau of Statistics <<http://www.abs.gov.au>>.

Mescher seeks to draw a causal link between commercial law providing the greatest source of income for many law firms and the temptation for their lawyers to regard themselves as ‘businessmen rather than as professionals’.²⁹ This temptation is accentuated by the trend of law firms being increasingly managed like large business corporations.³⁰ Le Mire and Parker suggest that external firm lawyers are under increasing pressure to ‘behave unethically or illegally to preserve their relationships with their large commercial clients’³¹ or to be highly paid to give client advice they want to hear at the ‘expense of ethical considerations’.³² The pressure for lawyers to please individual managers, executives or business teams is accentuated by greater competition in the market for legal services and the demand from corporate clients for a closer relationship with lawyers.³³ The risk here is that lawyers give less consideration to their obligation to the corporation client as a whole – let alone to any duty to the law or public interest – lest the client take their business elsewhere in the event that the lawyer’s advice does not suit them.³⁴ The American Bar Association’s Report on the Commission on Professionalism noted that growing commercialism tempts lawyers to prioritise profit over ethical principles, resulting in lawyers becoming subservient to business interests, and pursuing profit before ideals of ‘public spiritedness’ and professionalism.³⁵

That is not to suggest the literature presupposes that commercial lawyers have an inherent lack ethical or moral opinions. Rather, for commercial lawyers, professional ethics or moral thinking is not always a part of their legal advice.³⁶ Parker and Evans even suggest that a commercial lawyer who expresses a moral opinion about their client’s (or employer’s) activities could jeopardise their career.³⁷ Cranston observes that the lawyer’s ability to maintain independence in a corporate client–lawyer relationship is difficult to achieve because the corporate client has sufficient money and influence to take its business elsewhere for legal advice suitable to its business objectives.³⁸

Certain commentators address the position of whether external lawyers (lawyers in law firms engaged by commercial clients) are more independent than in-house lawyers. Parker and Evans counters that external lawyers in the modern era are not necessarily more capable of giving ‘fearless, ethical advice to corporate clients’ if they thought their client was acting wrongfully, because they are almost as ‘financially dependent on, and closely involved in, their corporate clients’ businesses as in-house lawyers.’³⁹ This can lead to external lawyers identifying with their corporate clients just as strongly as in-house lawyers do. As another commentator puts it, ‘many commercial lawyers have so closely identified with their clients that their advice has diminished value because it lacks independence.’⁴⁰

Other commentators suggest that in-house lawyers can have a positive or negative influence on the professional behaviour of the corporate client’s external lawyers, whereby in-house lawyers heavily involved in the relationship between the corporate client and its external lawyers will encounter a ‘magnification of ethical influence in either positive or negative ways’.⁴¹ Le Mire and Parker highlight the evidence that large corporate clients with in-house

29 Mescher, above n 24, 914.

30 Parker and Evans, above n 17, 222.

31 Suzanne Le Mire and Christine Parker, ‘Keeping it In-House: Ethics in the Relationship between Large Law Firm Lawyers and their Corporate Clients through the Eyes of In-House Counsel’ (2008) 11(2) *Legal Ethics* 201, 202.

32 Mescher, above n 24, 914.

33 Parker and Evans, above n 17, 222, For example, a corporate lawyer being seconded to business units within corporate clients.

34 Ibid.

35 Granfield and Koenig, above n 2, 498 citing generally Deborah L Rhode, *In the Interests of Justice: Reforming the Legal Profession* (Oxford University Press, 2003) discussing Commission on Professionalism Report, ‘In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism’ (American Bar Association, 1986).

36 Mescher, above n 24, 923.

37 Parker and Evans, above n 17 212.

38 Ross Cranston ‘Legal Ethics and Professional Responsibility’ in Ross Cranston (ed) *Legal Ethics and Professional Responsibility* (Oxford University Press, 1996) 20 cited in Mescher, above n 24, 917.

39 Parker and Evans, above n 17, 212.

40 Mescher, above n 24, 914.

41 Le Mire and Parker, above n 31, 227.

legal departments have ‘very high ethical expectations of their external lawyers’, as the in-house counsel closely supervise and monitor external lawyers’ services, with a particular focus on ensuring that external lawyers ‘fulfil their ethical responsibilities to the corporate client’.⁴² Such responsibilities relate to avoiding conflicts of interest and ensuring transparent billing practices.⁴³

The literature is careful to stress that there is no research demonstrating that businesses in a general sense lack ethics, as business operators are capable of engaging in moral or ethical thinking.⁴⁴ However, lawyers are more than business people – they are professionals, and their display of professionalism means avoiding conflicts of interest between the interests of the professional and the client.⁴⁵ A lawyer assumes the role of a professional upon representing clients, even if what constitutes a profession cannot be defined comprehensively. Attempts to define ‘profession’ invariably include adoption of ethical standards governing the conduct of its members.⁴⁶ There is a distinction between lawyers acting as members of a profession and merely operating as another ‘profit oriented business or trade’,⁴⁷ and the suggestion is that commercial lawyers who identify themselves as business people rather than professionals find their ethical perspective being narrowed.⁴⁸ Corporate clients interested in maintaining an ethical approach to their business – or at least sustaining an ethical reputation – will seek to hire in-house counsel who prioritise ethics, and whose ethical standards are reflected in the external lawyers retained by the corporate client. The corollary is that corporate clients less interested in ethics hire in-house lawyers less likely to prioritise ethical issues, which could translate into equally low, or lower, ethical standards from external lawyers.⁴⁹

Granfield and Koenig report on a survey of selected young US attorneys which explored the relationship between ethical instruction in law schools and moral conflicts that they experienced at the beginning of their legal careers. Only three of the 40 attorneys interviewed characterised their ethics course as ‘valuable preparation for their legal careers’; the vast majority reported that their ethics course merely provided them with ‘formalistic instruction about the rules of professional responsibility, not with the tools necessary to resolve moral dilemmas’.⁵⁰ I am planning to conduct a survey of Australian early career lawyers in 2014 to explore similar questions. An earlier survey conducted by ANU in June 2012 of students at the beginning of their enrolment in the Professional Practice Core Course,⁵¹ the compulsory component of the GDLP, indicated that only 37.3 per cent of students thought their undergraduate experience ‘encouraged/developed ethical practice’.⁵²

The importance of integrating the teaching of legal ethics into commercial practice in the GDLP is highlighted by several points: lawyers in their first legal jobs identified commercial and corporate law as the most common area of legal practice worked on;⁵³ commercial practice is the largest source of fee income for solicitors;⁵⁴ and corporations law is arguably at the forefront of all legal practice in terms of gross revenue per lawyer and its critical impact on the sharing of social wealth.⁵⁵ I am not suggesting that legal ethics is not pervasive in other practice

42 Ibid 202.

43 Ibid.

44 Mescher, above n 24, 916.

45 Ibid 914.

46 Alvin B Rubin, ‘A Causerie of Lawyers’ Ethics in Negotiation’ (1975) 35 *Louisiana Law Review* 577, 577.

47 Roman Tomasic, ‘Corporate Collapse, Crime and Governance – Enron, Andersen and Beyond’ (2002) 14 *Australian Journal of Corporate Law* 183, 186.

48 Mescher, above n 24, 916.

49 Le Mire and Parker, above n 31, 227.

50 Granfield and Koenig, above n 2, 508.

51 The Professional Practice Core (PPC) is a compulsory, 18-week online course provided by ANU Legal Workshop which teaches students core subjects of Civil Litigation, Commercial Practice, Legal Ethics, Property Practice, Trust Accounting, and Practice Management.

52 Anneka Ferguson and Elizabeth Lee, ‘Desperately seeking ... relevant assessment? A case study on the potential for using online simulated group based learning to create sustainable assessment practices’ (2012) 22 *Legal Education Review* 121, 125.

53 Evers et al, n 26, 27.

54 Australian Bureau of Statistics, above n 28.

55 Evans and Howe, above n 2, 355.

areas, as legal ethics is relevant to all areas of legal practice. However, I note the comment of Mescher that commercial law is a major area,⁵⁶ and the observation of Parker and Evans that the ethics of commercial lawyers may be ‘more important’ than those of any other legal practice area, for the reasons previously stated.⁵⁷ The literature proposes a number of reasons to support this assertion, and they stem from the economic power of corporate clients. Parker and Evans wrote that corporate lawyers play an important role in ‘facilitating almost every economic activity in our society’ as they negotiate and draft business deals, advise on regulatory compliance and representations to be made in advertising campaigns, and advise on the settling of disputes.⁵⁸ Corporate lawyers therefore have great influence in the decisions of business corporations, which are themselves ‘powerful actors’ in society due to the ‘far-reaching impact’ that ‘their actions and activities can have on many people and on the natural environment’.⁵⁹ It follows that corporate misbehaviour, especially on a large scale, has far-reaching impact on the community and its economic well-being, in many cases resulting in personal hardship.

Mescher notes that when a major corporate scandal occurs, the role of professional advisers including commercial lawyers is examined.⁶⁰ A former chairman of the Australian Competition and Consumer Commission, a government authority which promotes and enforces competition and fair trading laws across Australia, noted that when ‘corporations break the law, it is often the lawyers who decide and advise on the schemes.’⁶¹ Legal advice to the HIH Insurance Group (‘HIH’) prior to its collapse in March 2001 sometimes fell short of what one would expect in the circumstances.⁶² One egregious example was of an external lawyer in a large Australian firm representing HIH not thinking about whether the law would be broken in a proposed business deal, because he was not asked to consider that question; subsequently the auditors questioned the deal and the Australian Securities and Investments Commission also saw it as problematic.⁶³ The collapse of HIH reverberated throughout the community, with consequences of the most serious kind.⁶⁴

In the context of American law teaching, Johnson regards law school as the gate through which students must pass if they wish to practise as lawyers.⁶⁵ We can explore this metaphor a little further, noting that in Australia the undergraduate or JD law degree is the first gate on the way to legal practice. For a large majority of law graduates, the second gate is the practical legal training program, the successful completion of which qualifies the student to gain passage admission to practise law.⁶⁶ To complete the metaphor, law teachers such as myself who teach

56 Mescher, above n 24, 213.

57 Parker and Evans, above n 17, 214.

58 Ibid.

59 Ibid.

60 Mescher, above n 24, 916.

61 Allan Fels, quoted in M Simons, ‘Justice Inc’, *Sunday Age* (Melbourne), 4 August 2012, Agenda 1, cited in Evans and Howe, above n 2, 346.

62 *The Failure of HIH Insurance*, above n 1, viii. The Royal Commissioner, Justice Neville Owen, noted that one occasion involved ‘the provision of advice in a situation where the potential for a conflict of interest was obvious’ and on another occasion the advice sought to explain how to effect an arrangement which would ‘get around’ certain Corporations Law provisions that otherwise prohibited the arrangement.

63 ‘I wasn’t asked if it was illegal’, *The Age* (Melbourne), 3 October 2002. <<http://www.smh.com.au/articles/2002/10/03/1033538683052.html>>.

64 *The Failure of HIH Insurance*, above n 1, xiv. For example about 1,000 HIH employees lost their jobs when HIH was provisionally liquidated, and hundreds more lost their jobs in the ensuing months; 200 permanently disabled people ceased receiving their regular payments from HIH; retirees who invested their superannuation or life savings in HIH shares to fund their retirement were left with nothing; thousands of holders of professional indemnity, public liability, home warranty and travel insurance policies found themselves uninsured for claims made by or against them; some non-profit organisations were forced to shut down because they could not find alternative insurance; home owners were left without compulsory home warranty insurance; and builders were unable to operate because they could not obtain Builders Warranty Insurance.

65 Lyman Johnson, ‘Corporate Law Professors as Gatekeepers’ (2009) 6(2) *University of St. Thomas Law Journal*, 447, 447.

66 In addition to the ANU, the following Australian universities offer practical legal training programs: the University of Newcastle; the University of Technology; Sydney; the University of Wollongong; the University of Western Sydney; Bond University; Griffith University; Queensland University of Technology; and the University of Tasmania. Australian non-tertiary institutions that offer practical legal training programs are: Leo Cussen Centre for Law; the College of Law; and the Law Society of South Australia.

in the professional legal training programs act as part of a team of gatekeepers into the legal profession.

Laby explores some of the complexities of the corporate lawyer gatekeeping role when he discusses the lawyer as a ‘prime example of a dependent gatekeeper’.⁶⁷ As lawyers have a primary duty to their clients,⁶⁸ tensions will arise when and if the commercial lawyer takes on the role of gatekeeper. Dependent gatekeepers will be ineffective since they face the choice of (1) acting as a weak monitor, exposing themselves to professional misconduct, but preserving the professional relationship with the client, or (2) alternatively acting as a robust monitor, limiting their exposure to professional misconduct, but possibly damaging the client relationship and weakening the fiduciary duty.⁶⁹ Laby is not suggesting that lawyers act with moral or ethical dereliction as a result of being a dependent gatekeeper, but that a lawyer attempting to be a gatekeeper inhibits his or her ability to be a vigorous advocate for their client, the primary goal of the lawyer.⁷⁰

This concept of the lawyer’s chief role being an ‘adversarial advocate’ for the client is much discussed.⁷¹ Australian commentators have noted that corporate lawyers face criticism for simply acting as an ‘advocate in chief, allowing their legal advice to be driven by the manner their corporate clients set out their business goals’.⁷² Suffice here to note that the literature on the role of corporate lawyer as gatekeeper throws into stark relief the importance of the corporate law *teacher’s* role. Many of my students will practise commercial law at some stage of their careers. If as commercial lawyers they are expected by the profession and society to act as gatekeepers, are we as law teachers adequately preparing them for the role of gatekeeper? In the following section, I explain how, as a commercial law teacher, I approach this gatekeeping role and the possible influence this has on students as they approach legal practice, whether it be as external lawyers or in-house lawyers.

Johnson aims to challenge law teachers (or teachers generally) who do not consciously assume the mantle of gatekeeper as part of their teaching duties, and who do not see their teaching responsibilities encompassing social responsibility. He writes that we should be mindful of the ‘social role’ entrusted to law teachers to shape our students’ ethical approach, and must endeavour to ‘discharge the role responsibly’.⁷³ Law teachers do more than teach, and teaching that incorporates a ‘descriptive account’ of institutional and individual goals can be wrongly understood by the student as a ‘prescriptive endorsement of self-serving conduct’.⁷⁴

The concerns discussed above led Evans and Howe to collaborate on an online, multimedia teaching and learning experience, Learning Legal Ethics in Context – Corporations Law (‘LLEC – Corporations Law’). This course was developed and taught at the law schools of Monash University and the University of Melbourne through a collaborative grant awarded in 2002. The course was taught at the undergraduate level, and was an optional assessable component of the subject Corporations Law taught at the two law schools. The rationale for its being optional was to give due consideration to the time pressures of the law students.⁷⁵

67 Arthur B Laby, ‘Differentiating Gatekeepers’ (2006) 1 *Brooklyn Journal of Corporate, Financial & Commercial Law* 119, 128.

68 Although ultimately Australian lawyers have a paramount duty as an officer of the relevant State or Territory Supreme Court: *Legal Profession Act 2006* (ACT) s 28(1); *Legal Profession Act 2004* (NSW) s 33(1); *Legal Profession Act* (NT) s 28(1); *Legal Profession Act 2008* (Qld) s 38(1); *Legal Practitioners Act 1981* (SA) s 23A; *Legal Profession Act 2007* (Tas) s 37(1); *Legal Profession Act 2004* (Vic) s 2.3.9(1); *Legal Profession Act 2008* (WA) s 29(1). The lawyer’s duty to the court is ‘paramount and must be performed, even if the client gives instructions to the contrary.’: *Giannerelli v Wraith* (1988) 165 CLR 543, 556 (Mason CJ) cited by Justice Kenneth Martin, ‘Between the Devil and the Deep Blue Sea: Conflict between the duty to the client and duty to the court’ (Speech delivered at the Bar Association of Queensland Annual Conference, Brisbane, 4 March 2012). <http://www.supremecourt.wa.gov.au/files/Bar_Assoc_of_QLD_Annual_Conf_March_2012_Ken_Martin_J.pdf>

69 Laby, above n 67, 134.

70 Ibid 143.

71 Parker and Evans, above n 17, 216.

72 Ibid.

73 Johnson, above n 65, 447.

74 Ibid 450.

75 Evans and Howe, above n 2, 339–41.

The objective of LLEC – Corporations Law was to transform two important legal subdisciplines, civil procedure and corporations law, by ‘integrating key concepts in legal ethics into the theory and practice of these practice areas.’⁷⁶ I endorse this aim, which is also an aim in the GDLP, as described further below.

There are several key differences between LLEC – Corporations Law and the GDLP’s integration of the teaching of legal ethics with commercial practice. First, the teaching in the GDLP is done at the postgraduate level. Secondly, the teaching of legal ethics integrated with commercial practice is a compulsory component of the GDLP. Thirdly, the study of civil litigation in the GDLP has not been brought into the integration of legal ethics with commercial practice.

III. GATEKEEPING IN THE GDLP

It is important first to provide the context in which I find myself as gatekeeper. The ANU College of Law places a particular emphasis on the themes of law reform and social justice.⁷⁷ I share this emphasis, and also agree with Johnson that law teachers should fulfil a ‘social role’⁷⁸ in challenging students to consider the ethical dimensions of legal practice. I convene commercial practice and my colleague Vivien Holmes convenes legal ethics. This occurs in the practical legal training program, formally known as the GDLP, at the ANU College of Law. The GDLP is primarily taught online and draws students from all states and territories in Australia, as well as students based around the world in countries such as the USA, UK, China (including Hong Kong), the Bahamas, Germany, Austria, the Netherlands, Canada, South Korea, Malaysia and the United Arab Emirates. Students who successfully complete the GDLP pass through the final gate in law school, and are qualified to apply to the court for admission.⁷⁹

Legal ethics and commercial practice are specifically taught within the GDLP’s Professional Practice Core (PPC), an adaptation of the ‘SIMulated Professional Learning Environment’ (SIMPLE) project developed by Professor Paul Maharg and his team at the University of Strathclyde.⁸⁰ The PPC is an 18-week compulsory unit of the GDLP which integrates the previously separate streams of Property Practice, Civil Procedure, Commercial Practice, Legal Ethics and Trust Accounts, along with Practice Management. The PPC is run twice a year.⁸¹

The essential features of the PPC are:

- throughout most of the PPC, students work in-role as junior lawyers in student firms of four;⁸²
- the student firms complete transactions based on real legal transactions;
- the transactions are conducted in an online simulated learning practice environment called the Virtual Office Space (VOS) run through the web platform;
- a parallel website called Wattle is where the students access key resources and other learning support, and can post questions to a convenor;
- students are mentored by practitioner-teachers (academic and casual staff who have been or are currently practising as lawyers) role-playing senior partners/associates in each firm. Practitioner-teachers are drawn from all Australian states and territories, with some even located outside of Australia.

⁷⁶ Ibid 340.

⁷⁷ Stephen Bottomley, *Dean’s Welcome*, (27 February 2013) Australian National University College of Law <<http://law.anu.edu.au/anu-college-law/deans-welcome>>.

⁷⁸ Johnson, above n 65, 448.

⁷⁹ In Australia students apply for admission in the state or territory Supreme Court.

⁸⁰ John Garvey and Paul Maharg, *Standardised Clients and SIMPLE (Simulated Professional Learning Environment): learning professionalism through simulated practice* (Slides presented at *Future Ed 2: Making Global Lawyers for the 21st Century*, Harvard Law School, October 2010) <<http://www.slideshare.net/paulmaharg/future-ed-2-making-global-lawyers-for-the-21st-century-scs-simple>>.

⁸¹ The PPC is one of four components that a student is required to complete in the GDLP. The other components are Becoming a Practitioner, Legal Practice Experience, and elective subjects.

⁸² Firms were grouped so that as much as possible all students in a firm would be physically in the same state or territory. However, due to the national and international geographical diversity of the PPC student enrolment, some firms had for example three students based in New South Wales, and one based in the USA.

Even though the VOS is in a law firm environment, students are taught skills that can be transferable to other legal settings such as in-house legal practice in the corporate, government or non-profit sector. Not all students who study the GDLP will enter legal practice, due to their own professional or personal priorities or because legal career options are limited due to factors such as geographical considerations or economic conditions.

I became the Commercial Practice Convenor in mid-2012 and through observation recognised that a sizeable segment of law students seemed averse to the study of commercial law. While research on Australian attitudes towards commercial practice does not appear in the literature, the British and American perspectives provide important and relevant insights. Sir Ross Cranston,⁸³ writing in 1992 as an academic before being elevated to the High Court of England and Wales, commented that ‘commercial law is comparatively dull’.⁸⁴ Douglas Litowitz, an American commercial law academic and attorney, wrote there is ‘a widely held belief that commercial law is boring and mechanical’.⁸⁵ As mentioned in the literature review, a survey indicated that lawyers in their first job selected commercial and corporate law as the most common area of legal practice worked on,⁸⁶ and this area of law is also the largest source of fee income for both solicitors and barristers.⁸⁷ Tellingly, lawyers in their first job designated Commercial and Corporate Law as the area where further training was most desirable.⁸⁸

These findings indicated that a significant proportion of students gain passage through the gate into a commercial and corporate legal career, yet find themselves not trained to their level of satisfaction.

In considering these findings and the anecdotal evidence about students’ attitudes to the study of commercial law, my overall objective was to enliven the study of commercial practice and create an authentic and vibrant learning environment by integrating the study of legal ethics. This approach happens to be consistent with one of the recommendations of the Carnegie Report, to ‘weave together disparate kinds of knowledge’ into the curriculum so ethical-social issues ‘come alive’⁸⁹ to the students.⁹⁰

One of the key and substantive steps I took was to integrate the study of Legal Ethics into Commercial Practice. I pondered a comment by Litowitz:

In the American context virtually without question, professors of commercial law eschew outside readings that might raise broader ethical and conceptual questions about the [Commercial] Code.⁹¹

I recognised that more students are enthusiastic about the study of Legal Ethics. Therefore I integrated its study into Commercial Practice to (1) engage and challenge students in Commercial Practice, the subject area in which many later find themselves employed, and for which they desire further training, and (2) broaden their ethical horizons, thus requiring them to be cognisant of the ethical parameters within Commercial Practice.

By integrating legal ethics with Commercial Practice, I aimed to change the way students approach, and become aware of, legal ethics as commercial lawyers. As indicated in the literature review, a major problem with the teaching and learning of legal ethics at the Australian (and US) university level is the perception that legal ethics is extraneous to, or ‘fenced-off’⁹² from, the study of substantive areas in the law school curriculum. It is possible that the assumption that this perception is shared by GDLP students is unfounded, and I intend to conduct qualitative

83 Sir Ross Cranston was born and educated in Australia.

84 Ross Cranston, *Commercial Law* (Dartmouth Publishing 2002).

85 Douglas Litowitz, *Perspectives on the Uniform Commercial Code* 2nd ed (Carolina Academic Press, 2007) ix.

86 Evers et al, above n 26, 27.

87 Australian Bureau of Statistics, [above](#) n 28.

88 Evers, above n 26, 28.

89 Sullivan et al, above n 9, 9–10.

90 One of the key differences between my approach and the Carnegie recommendation is that the integration of legal ethics into commercial practice within the GDLP is taught to students after they have completed their first law degree (LLB or JD), whereas the legal education surveyed in the Carnegie Report took place during the first law degree.

91 Litowitz above n 85, n 21.

92 Croft, above n 10, 1339.

research to explore this view.⁹³ As a commercial law teacher exercising a gatekeeper role, I seek to broaden my students' intellectual and ethical horizons⁹⁴ to counter any perception that legal ethics is extraneous to the study of commercial practice.

As demonstrated in the literature, legal ethical dilemmas can be a key element⁹⁵ of commercial transactions, from everyday transactions such as the sale of a small business or a commercial lease to large-scale corporate fraud or misconduct where the ethical standards of in-house and external lawyers have been strongly called into question by the courts or official inquiries. Accordingly, I structured a scenario where legal ethics and commercial practice intersect in a safe space, where students can think, consider and reflect upon their actions as lawyers. Through this, I signal to the students that a commercial transaction operates within ethical parameters, and that legal ethical dilemmas may arise and need to be managed in accordance with professional standards.

First, firms are required to advise their client, being a vendor or purchase of a small business, on the vendor's lawyer's professional duty to disclose certain sensitive commercial information⁹⁶ to the purchaser's lawyer under the state or territory professional conduct rules.⁹⁷ The disclosure of this commercial information could cause detriment to the vendor during negotiations for the sale of the small business. I was encouraged that most of the firms advised their clients that the vendor's lawyer had a duty to disclose.

In future iterations of commercial practice, I am seeking to determine the number of vendor firms and number of purchaser firms that advised that the vendor's lawyer had a duty to disclose, and whether vendor firms are less likely than purchaser firms to advise that the vendor's lawyer have a duty to disclose the sensitive confidential information.

Secondly, student firms are then given an opportunity to put into practice their study of fiduciary duty to their purchaser or vendor client in the context of oral negotiations for the sale of a small business. Due to the online and multimedia nature of the PPC, all negotiations were conducted through online applications⁹⁸ or by phone. It was not possible for negotiations to be conducted in person, due to the geographical diversity of the students. Each firm was required to designate at least one firm member to attend the negotiation, and any firm was free to send more than one member, or even all their members, to the negotiation even if this resulted in a firm outnumbering the opposite firm. One condition was that each firm was to contact the opposite firm at least one day before the negotiation, informing them of the firm members attending.⁹⁹ Firm members were not required to audio-record their negotiations but they were

93 ANU College of Law, *Student survey – Professional Practice Core: Semester 1, 2013*. This attitude was illustrated by a student studying Commercial Practice, whose end-of-course evaluation stated that having Legal Ethics 'mixed into commercial was confusing'. The student suggested that the study of Legal Ethics 'could have been done more effectively as a separate module'.

94 Johnson, above n 65, 447.

95 One example of an ethical dilemma in the commercial context is a lawyer's obligation to disclose to the other side information that is detrimental to their client.

96 The sensitive commercial information was the correct best use-by date of key ingredients in stock sold as part of the small business.

97 The professional duty was outlined in the Australian state and territory professional conduct rules. In South Australia, Queensland and Western Australia, the rules state that a solicitor or practitioner must be 'honest and courteous in all dealings in the course of legal practice' and 'avoid any compromise to their integrity and professional independence'. In New South Wales, Victoria, the Australian Capital Territory and the Northern Territory, the prelude to the rules on 'Relations with Other Practitioners' requires practitioners, in all their dealings with other practitioners to 'act with honesty, fairness and courtesy, and adhere faithfully to their undertakings, in order to transact lawfully and competently the business which they undertake for the clients in a manner that is consistent with the public interest.' *Legal Profession (Solicitors Rules) 2007* (ACT) prelude to rr 24-28; *Professional Conduct and Practice Rules 1995* (NSW) prelude to rr 25-31A; *Rules of Professional Conduct and Practice 2002* (NT) prelude to rr 18-23; *Australian Solicitors Conduct Rules* (Qld) r 4; *Australian Solicitors Conduct Rules* (SA) r 4; *Professional Conduct and Practice Rules 2005* (Vic) prelude to rr 21-25; *Legal Profession Conduct Rules 2010* (WA) rr 6(1)(b) and 6(1)(d). The *Rules of Practice 1994* (Tas) does not have an equivalent provision.

98 For example, Adobe Connect or Skype.

99 In the first two iterations of my convening of Commercial Practice (semester 2 in 2012 and semester 1 in 2013), I set each firm a limit of one person to attend the negotiation. In response to student feedback, I removed this limit in the third iteration (semester 2 in 2013).

required to provide a written report to their respective client outlining the negotiations and the outcomes of the negotiation points.

In the semester 2 iteration of commercial practice in 2013, the firms negotiated a suitable discount to the goodwill component of the total sale price of a café as a consequence of the following factors raised by their respective clients: (1) the four employees of the small business wanting to remain with the new owner; (2) rival chain cafés opening nearby; (3) the retirement of the producer of the special ingredients; (4) the correct best use-by date of the special ingredients in stock.

Each vendor firm and each purchaser firm was given instructions from their client, so that if the firms negotiate in accordance with instructions, they will reach a common discount to goodwill relating to the first three factors. Regarding the fourth factor, firms were given flexibility in the negotiation outcome, but with the proviso that the discount not exceed \$20,000. All firms were instructed that if they could not achieve agreement on any negotiation point, they would record ‘Subject to further negotiation’ in their negotiation report.

Each purchaser firm was instructed by their client, at the commencement of the negotiation, to ask the vendor firm to confirm the confidential information, being the correct best use by date of the special ingredients in stock. Each vendor firm was instructed by their client to disclose the correct best use-by date if asked by the purchaser firm, even if that firm had previously advised that there was no obligation under the professional conduct rules to disclose. All purchaser firms complied with their instructions, and all vendor firms responded in accordance with their instructions.

A small number of firms clearly exceeded the scope of their client’s instructions regarding the discount to goodwill by going above and beyond the scope of their client’s instructions. Apparently their commitment to the duty of loyalty to their client in the legal sense and their desire to please their client by maximise their client’s wealth, contributed to their overstepping their professional conduct rules. Most of these cases involved firms exceeding their client’s negotiation price limits. One justified their actions by claiming the outcome benefited their client, because the firm was able to drive a ‘hard bargain’ and negotiate a price to their client’s advantage, even if beyond their client’s instructions. This brings to the fore the comment of a former US judge who wrote, ‘the lawyer should not be free to negotiate an unconscionable result, however pleasing to his client, merely because it is possible’.¹⁰⁰ In the semester 1 iteration of commercial practice in 2013, there was even a vendor firm and purchaser firm that agreed, somewhat creatively, to ‘reverse engineer’ the secret ingredients for a cupcake business, even though this was without doubt outside the parameters of their respective client’s instructions and was possibly a breach of the intellectual property in the secret ingredients.

My intention as a gatekeeper is not to penalise students who breach their ethical duties but to open up a constructive dialogue with them. Students who have breached their ethical duties will of course, in the confines of VOS, be required to explain to their senior partner their actions, particularly why they breached the professional conduct rules. For this purpose, I play the role of the senior partner and explain the consequences of a breach of legal ethics and the impact it has on the firm and the client. The senior partner also uses this teaching moment as an opportunity to encourage students to reflect upon their role as legal professionals and the importance of giving due consideration to the role legal ethics plays in their decision making as commercial lawyers.

The corollary is that, if the senior partner did not take such action, students would risk picking up ‘wrongheaded ideas’¹⁰¹ which they could take with them as they proceed past the gate into the world of advising commercial clients. The implication is that I as a commercial law teacher/gatekeeper would be at the very least indirectly culpable, as what I teach or do not teach could have students entering the gate into practice with a ‘faulty outlook on certain baseline issues’.¹⁰² Of course, I seek to be realistic, as a student’s ethical outlook may be

100 Rubin, above n 46, 592.

101 Johnson, above n 65, 447.

102 Ibid.

pre-determined by numerous factors. However, as a gatekeeper, I am expected to at the very least signal to my students what their ethical obligations are as commercial lawyers.

IV. REFLECTIONS ON THE LAW TEACHER GATEKEEPING ROLE

It is possible I am overly ambitious in my goal to successfully instil in GDLP students the ethical parameters they will be subject to in commercial and corporate practice. This is particularly so as the intersection of the teaching of legal ethics and commercial practice occurs at an intensive pace in a three-week period. During this time students are under much pressure dealing with other course demands, family and work commitments (the majority of my students work full-time¹⁰³), and personal and financial pressures. Additionally, students are looking beyond the gate for employment opportunities in a market where never before have there been so many law graduates.¹⁰⁴ From the student's perspective, their participation in the Legal Ethics–Commercial Practice collaboration is but one of many hurdles to jump before getting through the gate towards legal practice.

I also recognise there are some limitations in the integration of legal ethics into the teaching of commercial practice in the GDLP. The first limitation is that the negotiations are not conducted face-to-face in the same physical space, despite my attempts for authenticity in the study of commercial practice. While it is open for this to occur if the vendor and purchaser lawyers are in the same geographical vicinity, students accept and utilise the online platform of the GDLP due to their own professional and personal commitments. The second limitation is that the vendor and purchaser firms cannot contact their respective clients during the negotiation. This is a deliberate technique on my part, because of the impracticalities of having a person acting as client, given that some firms negotiate at times when the client is unavailable due to their own work commitments. The third limitation is that a firm may feel a level of intimidation if they are outnumbered by members of the opposing firm during the negotiation. However, this is a reflection of real-life negotiations. The fourth limitation is that negotiations are not audio-recorded, and this has consequences for any verification if a firm objects to their opposing firm's professional conduct. I plan to give some thought to modifying the fourth limitation to allow for recording, although this could have practical issues if the web platform used does not allow for audio-recording.

Nevertheless, I aim to continue to produce a lively and authentic collaboration that seeks to encourage students to understand their legal obligations in the context of commercial practice, consider their role as legal professionals, and the responsibilities that they carry into legal practice should they choose to practice as lawyers.

I am planning qualitative research¹⁰⁵ to explore and evaluate the role of commercial law teachers as gatekeepers and the potential influence this has on students as they prepare for legal practice. This research will also seek to explore students' attitudes to the study of commercial practice, and whether this influences their study of legal ethics.

V. CONCLUSION

In accepting the challenge laid down by Johnson to assume the mantle of gatekeeper as part of my commercial practice teaching duties,¹⁰⁶ I recognise that increasing law students' awareness of legal ethics alone will not guarantee that they will be aware of legal dilemmas if they enter commercial practice in a law firm as an in-house counsel. However, I take heed of Evans and Howe, who state that commercial lawyers' ignorance of ethics 'certainly plays

103 Sixty percent of students in the semester 2, 2013 iteration of the PPC worked full-time, 15% worked part-time, and 4% had casual employment: ANU College of Law, *Student survey – Professional Practice Core: Semester 2, 2013*, 15.

104 For example in 1992 in Victoria two universities produced law graduates: the University of Melbourne and Monash University. In 2013 an additional four universities in Victoria produced law graduates: La Trobe University, Deakin University, RMIT University, and Victoria University.

105 Through focus groups of current PPC students, final year undergraduate law students and early career commercial lawyers.

106 Johnson, above n 65, 447.

a role in corporate misconduct’.¹⁰⁷ While commercial lawyers are but one of many influential participants in the corporate sphere, they face particular pressures to act unethically in order for their corporate client to achieve maximum profit, thus compromising their professional standards.¹⁰⁸ It is those standards that students are made aware of in their law studies, and it is in that environment that commercial law teachers, as gatekeepers, play an important role in raising students’ awareness and understanding of the ethical and moral dilemmas they will encounter in commercial practice.¹⁰⁹

107 Evans and Howe, above n 2, 348.

108 Le Mire and Parker, above n 31, 202.

109 Evans and Howe, above n 2, 348.

