

**CHANGING USE OF BUSINESS STRUCTURES:  
HAVE UNIVERSITY BUSINESS LAW TEACHERS FAILED TO REFLECT THIS IN THEIR TEACHING?**

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**ABSTRACT**

The use of business structures has changed over the last 20-years in Australia, with growing use of discretionary trusts and self-managed superannuation funds. Anecdotal evidence indicates that the business law curriculum within undergraduate Accounting degrees does not reflect this changing use. This article reports the results of a survey of business law teachers at Australian universities about the coverage of the law of the various business structures in undergraduate commerce degrees. Questions will be raised as to how adequately prepared accounting graduates are to deal with the different business structures they will confront in practice.

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## I INTRODUCTION

At times there have been criticisms of academia in terms of the currency of the theories taught as well as its relevance and reflectiveness of current practice.<sup>1</sup> There have been arguments that the work of academia, including accounting, can lack relevance to what is practised.<sup>2</sup> This relevance can relate to the research undertaken as well as the education curriculum.<sup>3</sup> O'Neil, Weber and Harris argue that it is important for tertiary accounting education to have content that is relevant and reflects current accounting practice.<sup>4</sup>

The study by Macdonald and Richardson found a lag between the content of the academic literature and the professional literature.<sup>5</sup> While on average it was 2.48 years, there was a wide range in the time lags.<sup>6</sup> Also they did find that this lag time had grown significantly from the mid-1980s to the end of the 1990s, from 0.9 years to over 6 years.<sup>7</sup> One of the reasons suggested for this lag was that academics were out of touch with practice.<sup>8</sup> Concerns continue to be raised, as Ahadiat questioned accounting faculties' continued emphasis on traditional accounting topics, contrary to the concerns of practitioners.<sup>9</sup>

Palm and Bisman have argued there can be a perception that accounting education is 'essentially stagnant'.<sup>10</sup> Palm and Bisman contend that this lethargy means that

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- <sup>1</sup> Richard Fleischman, 'Completing the Triangle: Taylorism and the Paradigms' (2000) 13(5) *Accounting, Auditing and Accountability Journal* 597.
  - <sup>2</sup> Mark Hirst, 'Accounting Education and Advanced Cost Management Systems' (1990) (December) *Australian Accountant* 59; Gary Siegel, and C S 'Bud' Kulesza, 'The Practice Analysis of Management Accounting' (1996) April *Management Accounting* 20; Ellen Heffes, 'Making Accounting Relevant and Attractive' (2001) 17(3) *Financial Executive* 49.
  - <sup>3</sup> American Institute of Certified Public Accountants (AICPA), *Schism Committee Report* (American Institute of Certified Public Accountants (AICPA, 1978); Gary Sundem, *The Accounting Education Change Commission: Its History and Impact* (Accounting Education Change Commission and American Accounting Association, 1999).
  - <sup>4</sup> Cherie O'Neil, Richard Weber and David Harris, 'Assessing the Impact of the AICPA Model Tax Curriculum on the First Tax Course Taught at AACSB-Accredited Institutions' (1999) 30(8) *The Tax Adviser* 596.
  - <sup>5</sup> Laura MacDonald and Alan Richardson, 'Does academic management accounting lag practice? A cliometric study' (2011) 16(4) *Accounting History* 365.
  - <sup>6</sup> *Ibid*, 373.
  - <sup>7</sup> *Ibid*, 375.
  - <sup>8</sup> H Thomas Johnson and Robert Kaplan, *Relevance Lost: The Rise and Fall of Management Accounting* (Harvard Business School Press, 1987).
  - <sup>9</sup> Nas Ahadiat, 'In Search of Practice-Based Topics for Management Accounting Education' (2008) 9(4) *Management Accounting Quarterly* 42.
  - <sup>10</sup> Chrisann Palm and Jayne Bisman, 'Benchmarking Introductory Accounting Curricula: Experience from Australia' (2010) 19(1&2) *Accounting Education: An international Journal* 179, 3 citing W Steve Albrecht and Robert Sack, *Accounting Education: Charting the Course through a Perilous Future* (AAA, 2000).; David Cooper, Jeff Everett and Dean Neu, 'Financial Scandals, accounting change and the role of accounting academics: a perspective from North America' (2005) 14(2) *European Accounting Review* 373; Michael Diamond, 'Accounting Education, research and practice: after Enron, where do we go?' (2005) 14(2) *European Accounting Review* 353; Sue Ravenscroft and Paul Williams, 'Rules, rogues, and risk assessors: academic responses to Enron and other accounting scandals' (2005) 14(2) *European Accounting Review* 363.

there can be a 'mismatch' between accounting education and the reality in which practitioners work.<sup>11</sup>

Ravenscroft and Williams, in their discussion about accounting education post-Enron in the United States, have argued that:

there are currently serious omissions from the accounting curriculum that need to be rectified, and that accounting students are miss-educated in certain critical areas. In these areas the tendency is to inculcate students with a convenient mythology rather than to educate.<sup>12</sup>

Similar concern has been reiterated in Australia, and even large accounting scandals appear to have had little impact on the curricula at universities.<sup>13</sup> While these concerns may relate to the accounting discipline generally in terms of accounting concepts, they may suggest an overall sluggishness of the accounting curricula in moving to reflect modern practices.

In a thought-provoking article in the American context, Friedman raises concerns about the current coverage of business structures at university law schools, in particular the increasingly prevalent new business structure, the Limited Liability Company ('LLC').<sup>14</sup> Friedman implies that academics have neglected to ensure that the curriculum (and textbooks) remain up-to-date by reflecting current business practices. At the time of his writing LLCs represented 45 per cent of new business structures, but this popularity was not similarly reflected in law schools' curriculum, publications or bar examinations. It was argued by Friedman that the delay by academia in teaching about LLCs in American law schools has 'created significant costs through suboptimal legal education'.<sup>15</sup> Friedman contends that the next generation of lawyers is being 'poorly served' and are 'leaving law school without an understanding of the details or the importance of LLCs'.<sup>16</sup>

In a similar vein, concerns are raised about the coverage of the law of trusts in the Australian university accounting curriculum, given the rise in the use of trusts and self-managed superannuation funds (SMSFs) in the commercial world. This concern is based, in part, on the large role accountants play in the ongoing compliance work and advisory work of the various business structures used in Australia. Cooper argues that 'one of the distinctive features of the Australian economy is the amount of economic activity undertaken using trusts, rather than

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<sup>11</sup> Ibid, 3.

<sup>12</sup> Sue Ravenscroft and Paul Williams, 'Accounting Education in the US post-Enron' (2004) 13 (Supplement 1) *Accounting Education: An international journal* 7, 8.

<sup>13</sup> Lee Parker, 'Corporate governance crisis down under: post-Enron accounting education and research inertia' (2005) 14(2) *European Accounting Review* 383.

<sup>14</sup> Howard Friedman, 'The Silent LLC Revolution — The Social Cost of Academic Neglect' (2004) 38(1) *Creighton Law Review* 35.

<sup>15</sup> Ibid, 81.

<sup>16</sup> Ibid, 81.

companies'.<sup>17</sup> Also over the last two decades there has been a staggering growth in SMSFs.

There is currently little empirical evidence and information about the business law curriculum in Australian business law and accounting schools. This article has two aims. First, it determines the extent to which accountants, as a profession, deal with or are involved with the various business structures used in the Australian commercial landscape. It is suggested that the accounting profession is the main profession associated with the compilation, management and auditing of the financial performance of business structures' activities.

Against this background, the question arises as to the extent to which the curriculum in Australian business degrees (major in accounting) adequately addresses the education needs of future accountants about the legal (and tax) issues surrounding the business structures used, in particular the growing utilisation of trusts and SMSFs. This article explores the extent to which Australian accounting students are taught about the law governing the various business structures. The article concludes that the legal curriculum of Australian commerce degrees has not kept up with Australian commercial practice in the use of the various business structures.

Aside from this introduction and the conclusion, the article is in four parts. The first part will discuss in broad terms concerns with academic curriculum per se. The second part outlines the utilisation of the different business structures in Australia and in particular highlights the prevalent use of trusts and SMSFs. The third part of the article considers the level of engagement that accountants have with the various business structures, including for example, their role in recommending a particular business structure to utilise and ongoing advice to business structures. In the fourth part of the article evidence will be outlined of the current amount of time devoted to the teaching of the law of business structures in Australian accounting degrees. Thereafter, recommendations will be canvassed before finally concluding.

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<sup>17</sup> Graeme Cooper, 'Reforming the Taxation of Trusts: Piecing together the Mosaic' (Paper presented at the Australasian Tax Teachers Association Conference, Sydney University, 16–18 January 2012), 1.

## II CONCERNS ABOUT ACADEMIC CURRICULA

O'Neil, Weber and Harris have argued that 'for tax education to be relevant the content must be relevant to accounting practice'.<sup>18</sup> We suggest that the tenor of this argument is relevant to all of the accounting curriculum, as it is essential for it to reflect current practice. For example, in terms of management accounting Johnson and Kaplan argued that American academia had been disengaged from industry practice through the larger part of the twentieth century.<sup>19</sup> This criticism was raised both in terms of teaching and text books. Johnson and Kaplan argued that due to outdated techniques, there was a reduction in the competitiveness of the United States.<sup>20</sup>

Concerns have been raised about the whether the curriculum taught at American universities adequately reflects business practices. Ravenscroft and Williams highlight how critical it is for accounting students to understand the role of the business structure, in particular the corporation, as 'modern societies ... are now completely dependent on them for our sustenance; their activity has pervasive effects'.<sup>21</sup> They argue that in terms of 'content', there needs to be consideration given to the historical concept of a corporation, the role of investors, as well as ethics and the role of accounting reports.<sup>22</sup> Also Friedman has questioned whether law schools, law professors, law publishers and bar examiners have neglected to alter curriculum to reflect the increasing use of a new business structure that is challenging the corporation, the LLC, in that jurisdiction.<sup>23</sup>

The Australian research into expectation gaps between accounting graduates and employers by Jackling and De Lange largely only considers graduate skills and does not unfortunately survey the content knowledge required.<sup>24</sup> In the research project funded by the Australian Learning and Teaching Council 'Accounting for the future: more than numbers' that considered the skill set for professional accounting graduates there was some consideration of 'content/technical' as opposed to graduate skills.<sup>25</sup> This research found that the most frequently mentioned technical skills were tax, debits and credits, auditing, understanding financial reports and preparing financial statements.<sup>26</sup> The report noted that 'employers expected rudimentary knowledge of technical skills and not much more....based on a solid framework of theoretical understanding gained at university'.<sup>27</sup> The report notes

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<sup>18</sup> O'Neil, Weber and Harris, above n 4, 600.

<sup>19</sup> Johnson and Kaplan, above n 8.

<sup>20</sup> Ibid.

<sup>21</sup> Ravenscroft and Williams, above n 12, 8.

<sup>22</sup> Ibid.

<sup>23</sup> Friedman, above n 14.

<sup>24</sup> Beverley Jackling and Paul De Lange, 'Do Accounting Graduates' Skills Meet The Expectations of Employers? A Matter of Convergence or Divergence' (2009) 18(4-5) *Accounting Education* 369.

<sup>25</sup> Phil Hancock et al, *Accounting for the future: more than numbers (Vol. 1: Final Report)* (Australian Learning and Teaching Council, 2009).

<sup>26</sup> Ibid, 51.

<sup>27</sup> Ibid, 51.

there were frequent comments about superannuation, tax and trusts and companies by employers, with a need for ongoing training.<sup>28</sup>

Prentice in America has argued for greater legal training for accountants,<sup>29</sup> which Gunz and McCutcheon have in part attributed to recent accounting scandals.<sup>30</sup> The focus for increased legal education is said to be needed because of the role that law plays in society, with business structures and in ethical decision making.<sup>31</sup>

Currently, the two main accounting professional bodies require graduates to complete the following business law courses in their undergraduate degrees: Introduction to Law, Law of Business Associations and Taxation Law.<sup>32</sup> Kocakulah et al. have argued that in the American context, 'business law education of accounting students is not as strong as the education of accounting students in other areas tested on the CPA examinations'.<sup>33</sup> Kocakulah et al. contend that one of the reasons for this is due to the minor involvement of accounting chairpersons in developing and establishing business law curriculum.<sup>34</sup> This is despite the fact that more than three-quarters of accounting chairpersons considered that there should be greater collaboration and discussion between business law and accounting academics as to the legal topics to be taught to accounting students.<sup>35</sup>

In terms of which areas of business law were seen as important by American accounting chairpersons three of the top eight areas concerned business structures (corporations ranked 3<sup>rd</sup>; LLCs and LLPs ranked 5<sup>th</sup> and sole proprietors and partnerships ranked 8<sup>th</sup>).<sup>36</sup> This would tend to indicate that in America the teaching of business structures is seen as an integral part of business law education for accountants. Other top ten topics were: (1) Accountants' liability; (2) Contracts; (3) Privileged communication and confidentiality; 6<sup>th</sup>: Securities regulation; 7<sup>th</sup>: Debtor-creditor relationships; 9<sup>th</sup>: Agency and 10<sup>th</sup>: Negotiable instruments.<sup>37</sup>

In terms of volume or time devoted to covering business structures in America, Kockakulah et al, (2008) questions whether there is adequate coverage of business structures for accounting students if there is only one chapter dedicated to the topic in the textbook.<sup>38</sup>

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<sup>28</sup> Ibid, 54 and 58.

<sup>29</sup> Robert Prentice, 'The case for education legally-aware accountants' (2001) 38(3) *American Business Law Journal* 597.

<sup>30</sup> Sally Gunz and John McCutcheon, 'The AICPA in crisis and how it impacts the business law dispute' (2002) 20(2) *Journal of Legal Studies Education* 203.

<sup>31</sup> Ibid.

<sup>32</sup> Note that the Institute of Chartered Accountants of Australia (ICAA) requires the three courses listed to be undertaken, but CPA Australia allows the Taxation Law course to be undertaken in a candidate's professional examination process.

<sup>33</sup> Mehmet Kocakulah, A David Austill and Brett Long, 'The Business Law Education of Accounting Students in the USA: The Accounting Chairperson's Perspective' (2008) 17(Supplement) *Accounting Education: An international journal* 17, 19–20.

<sup>34</sup> Ibid, 20.

<sup>35</sup> Ibid, 28.

<sup>36</sup> Ibid, 26.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid, 27.

### ***A Business Structures and Tax***

Concerns with the coverage of business structures have also been raised in respect of tax education of accountants. In respect of the American tax curriculum, studies by Schwartz and Stout<sup>39</sup> and Sage and Sage<sup>40</sup> found that there was a gap between what educators emphasised compared to what practitioners desired with educators spending more time on individual tax matters compared to corporate tax matters. The study by O'Neil, Weber and Harris into the tax curriculum found a continuation of the dominance of the focus on individual taxpayers.<sup>41</sup>

A UK study by Miller and Woods about the expectation gap between tax educators and tax professionals concluded that professional bodies can influence the content and structure of courses.<sup>42</sup> In New Zealand — a jurisdiction similar to Australia — Tan and Veal examined the content coverage of the first tax course in that country.<sup>43</sup> One of their findings was that practitioners thought more conceptual and technical ability was required in terms of trusts, while educators had lower requirements.<sup>44</sup> Indeed, one of the largest expectation gaps in conceptual knowledge between practitioners and educators concerned trusts, with practitioners wanting more.<sup>45</sup>

### **III BUSINESS STRUCTURE USE IN AUSTRALIA**

Morse observed that following the early 1900s the creation of new business structures remained substantially free from parliamentary activity,<sup>46</sup> although the regulatory and tax regime(s) applicable to these traditional business structures has altered.<sup>47</sup> After this period of inactivity, there has been considerable movement in recent years in Australia:

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<sup>39</sup> Bill Schwartz and David Stout, 'A Comparison of Practitioner and Educator Opinions on Tax Education Requirements for Undergraduate Accounting Majors' (1987) 2 *Issues in Accounting Education* 112.

<sup>40</sup> Judith Sage, and Lloyd Sage, 'CPA Firm Recruiters' Views of the Tax Curriculum as it Relates to the 150 Hour Requirement' (1987) 52(1) *South Dakota Business Review* 1.

<sup>41</sup> O'Neil, Weber and Harris, above n 4.

<sup>42</sup> Angharad Miller and Christine Woods, 'Undergraduate Tax Education: a comparison of Educators' and Employers' Perceptions in the UK' (2000) 9(3) *Accounting Education* 223.

<sup>43</sup> Lin Mei Tan and John Veal, 'Tax Knowledge for Undergraduate Accounting Majors: Conceptual v Technical' (2005) 3(1) *eJournal of Tax Research* 28.

<sup>44</sup> *Ibid*, 37.

<sup>45</sup> *Ibid*, 38.

<sup>46</sup> The United Kingdom offered businesses effectively four generic business forms: the sole trader, the general partnership, the limited partnership and the corporation. The limited partnership was the last to be introduced; by the *Limited Partnership Act 1907* (UK).

<sup>47</sup> Geoffrey Morse, 'Limited Liability Partnerships and Partnership Law Reform in the United Kingdom' in Joseph McCahery, Theo Raaijmakers and Erik Vermeulen (eds), *The Governance of Close Corporations and Partnerships: US and European Perspectives* (Oxford University Press, 2004). For example, Australia's regulatory laws governing corporations have been altered a number of times, with extensive reforms in the 1990s, which saw the introduction of the *First Corporate Law Simplification Act 1995* (Cth).

the trust form is pervasive and manifests itself in different ways and to differing effect in the large business segment, the small business environment and in the family / household sector.<sup>48</sup>

And, from another commentator:

Australia is a country of 22.3 million people so this means there is approximately one trust for 20 people and one company per 29 people.<sup>49</sup>

The ‘traditional business structures’ could be described as sole proprietors (or sole traders), general partnerships and corporations (and to a lesser extent limited partnerships). It is argued that these business structures, particularly general partnerships and corporations, that have dominated the academic consciousness in the design and delivery of accounting degrees. However, unlike other jurisdictions, Australian businesses have been utilising another form — the trust — for trading activities.<sup>50</sup> Also, SMSFs have increased in number due to the government’s push for self-funded retirement. Even though a SMSF is not a business operating entity but rather a retirement savings vehicle, we will refer to the SMSF within the framework below due to their growing utilisation and importance in Australia.<sup>51</sup>

The use of trusts varies from deceased estates, charitable foundations to active business and investment activities conducted by small and medium enterprises, retail collective investments (which can be listed on the stock exchange), funds management, and superannuation/pension funds.<sup>52</sup> Vann considers that there was a large scale shift from corporations to trusts in the mid-1970s based on trusts perceived superiority for tax and non-tax reasons.<sup>53</sup>

When considering income tax return data, of the 2,999,190 taxpayers in 2012 who indicated that they were conducting a business, 36 per cent were sole proprietors, 27 per cent corporations, 25 per cent trusts and 12 per cent partnerships: Table 1.

**Table 1: AUS: Lodgement of Tax Returns — Business**

Entity	2009-10	2010-11	2011-12
Individual (sole proprietor)	1,044,386	1,057,392	1,067,700
Company	779,250	788,985	817,855
Partnership	382,400	370,000	359,905

<sup>48</sup> Cooper, above n 17, 3.

<sup>49</sup> Richard Vann, ‘*Taxation of small business — Working paper*’ (University of Sydney, 2012), 20.

<sup>50</sup> Note that the trust is not a separate legal entity.

<sup>51</sup> For many small business owners, assets built-up in an operating entity is an indication that the entity is being used as a retirement savings vehicle. The tax rules effectively accept this (eg the presence of the \$500,000 lifetime exemption for capital gains in Subdivision 152-D of the ITAA 1997).

<sup>52</sup> Cooper, above n 17, 1.

<sup>53</sup> Vann, above n 49, 9.



Trust	702,080	729,620	753,730
<b>Total (excluding super)</b>	<b>2,908,116</b>	<b>2,945,997</b>	<b>2,999,190</b>
Self-managed super fund	373,195	391,165	424,360
APRA and other funds	4,500	4,100	3,695

Source: Australian Taxation Office, *Taxation Statistics 2012*, (Australian Taxation Office, 2014), Table 1. \*Limited partnerships are not recorded separately and are included in the corporation figure. In 2010 there were 386 limited partnerships with taxable income greater than \$0: Table 3.10, 26.

In terms of size, 99.6 per cent of sole proprietors have less than \$2 million in turnover: Table 2.

Excluding those taxpayers who have 'nil business income' and superannuation funds, of the businesses with less than \$10 million income (categorised by the Australian Taxation Office (ATO) as 'small'), 45 per cent are sole proprietors, 29 per cent corporations, 12 per cent partnerships and 13 per cent trusts. According to statistics for Australian Business Numbers, there are currently 2,684 limited partnerships registered with an Australian business number.<sup>54</sup> There appears to be decline in the number of partnerships, which is similar to overseas jurisdictions.<sup>55</sup> For taxpayers with business income greater than \$10 million, the corporation is the most popular (74 per cent), followed by trusts (19 per cent), partnerships (5 per cent) and sole proprietors (2 per cent).

**Table 2: AUS: Lodgement of Tax Returns — Size**

Entity size	Individuals	Companies	Super funds	Partnerships	Trusts	Total
Loss ( < \$0 )	1,400	1,790	35	275	735	<b>4,235</b>
Nil (ie not in business)	11,668,330	110,405	59,290	69,170	436,105	<b>12,343,300</b>
Micro ( > \$0 but < \$2M )	1,062,640	635,150	368,410	281,690	290,480	<b>2,638,375</b>

<sup>54</sup> At <[www.abr.business.gov.au/StatisticalSearchResult.aspx](http://www.abr.business.gov.au/StatisticalSearchResult.aspx)> 27 July 2012. Note that the formation, operation, etc, of limited partnerships is governed by state and territory law. The statistics available as to the number of limited partnerships in each jurisdiction are as follows: Queensland: 276 (unincorporated) and 10 (incorporated); New South Wales: 844 (unincorporated) and 119 (incorporated); Tasmania: 123; Australian Capital Territory: 1; Northern Territory: Zero; Other States: Western Australia, South Australia and Victoria do not have a central register of limited partnerships. Limited partnerships can be registered with a number of bodies, which keep different databases. Additionally, partnerships may be registered with more than one body. As such, it is not possible to obtain figures for these three states.

<sup>55</sup> Robert Hillman, 'Limited Liability and Externalization of Risk: A Comment on the Death of Partnership' (1992) 70 *Washington University Law Quarterly* 477.

Small ( >\$2M but <\$10M )	3,285	53,805	120	7,615	22,070	<b>86,900</b>
Medium ( >\$10M but < \$100M )	360	14,535	100	1,050	4,150	<b>20,200</b>
Large (>\$100M but < \$250M )	10	1,185	40	65	150	<b>1,450</b>
Very large (> \$250M )	0	1,010	60	40	35	<b>1,150</b>
<b>Total</b>	<b>12,736,030</b>	<b>817,885</b>	<b>428,055</b>	<b>359,905</b>	<b>753,730</b>	<b>15,095,605</b>

Source: Australian Taxation Office, *Taxation Statistics 201 2*, (Australian Taxation Office, 2014), Table 2.

With the figures above it needs to be highlighted that for corporations the numbers are inflated, as a number of business structures are deemed for tax purposes to be corporations (eg limited partnerships and public unit trusts). Also, a large number of trusts, such as superannuation funds, which are essentially a trust relationship, are not reported. In particular the number of SMSFs has grown with the push for self-funded retirement.

Table 3 sets out the number of SMSFs that are regulated by the ATO for compliance with prudential standards along with the smaller number of APRA-regulated small superannuation funds.

**Table 3: Number of SMSFs and APRA Regulated Small Superannuation Funds**

Entity	2009-10	2010-11	2011-12
Self-managed super fund	373,195	391,165	424,360
APRA and other funds	4,500	4,100	3,695

Source: Australian Taxation Office, *Taxation Statistics 201 2*, (Australian Taxation Office, 2014), Table 1. APRA and other funds: includes funds regulated by APRA, funds that nominated 'other' on their tax return, and non-regulated funds.

While the term 'trust' may seem to indicate a homogeneous business structure, there are in fact various types of trusts. Table 4 demonstrates the different types of trusts; discretionary trusts account for over three-quarters of them. Discretionary trusts as an alternative business structure are used in a variety of sectors:<sup>56</sup> 39 per cent are in the property industry, 29 per cent in finance, insurance, real estate and business services, and six per cent in each of retail trade and primary production.

<sup>56</sup> Coopers and Lybrand and the Property Council of Australia, *The taxation of trusts — Dispelling the Myth* (1997), available at <http://www.propertyoz.com.au/data/national/advoc/subs/971119tt.pdf>.

**Table 4: AUS: Types of trusts**

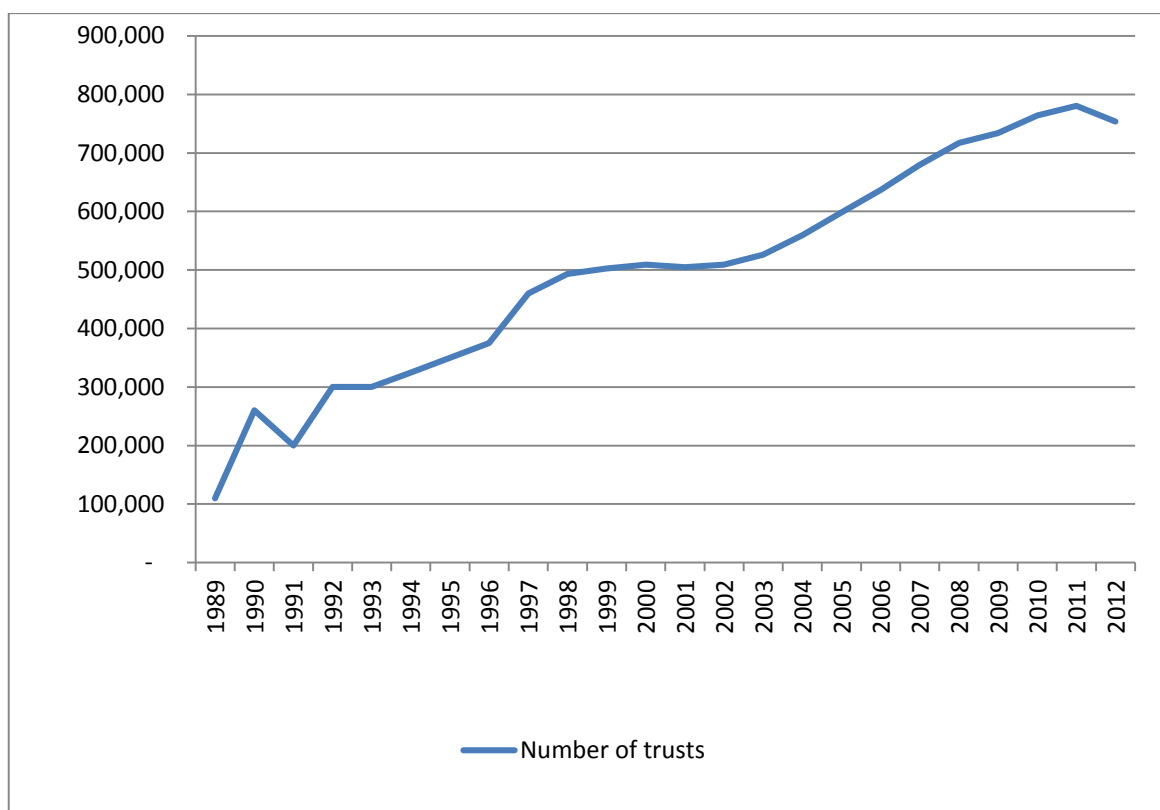
Type of Trust	2009–10	2010–11	2011–12
Discretionary trust-main source from investment	303,650	305,390	303,045
Discretionary trust-main source from service-management	41,050	40,850	38,865
Discretionary trust-main source from trading	244,890	249,190	244,575
Cash management unit trust	610	640	600
Hybrid trust	10,600	10,415	9,330
Fixed unit trust	86,035	86,900	83,900
Other fixed trust	18,085	18,640	17,785
Public unit trust-listed	410	380	345
Public unit trust-unlisted	5,085	4,885	3,535
Deceased estate	49,130	51,085	48,595
Other	4,560	11,970	3,160
<b>Total</b>	<b>764,105</b>	<b>780,345</b>	<b>753,735</b>

Source: Australian Taxation Office, *Taxation Statistics 201 2*, (Australian Taxation Office, 2014).

While the taxation of trusts has been described as a 'relatively sleepy backwater of tax law for almost 60 years' in the last 15 years there has been abundant activity.<sup>57</sup> The significant growth in the use of trusts from the late 1980's where there were around 100,000 to nearly 800,000 by 2012, around twenty years later, is demonstrated in Figure 1.<sup>58</sup>

<sup>57</sup> Cooper, above n 17, 5.

<sup>58</sup> Note the period of no growth between 1998 to 2001 correlates to the time of the government's proposed fundamental changes to the taxation of trusts which would have seen them taxed as corporations. These proposed reforms were subsequently discarded, which then saw the growth of trusts continue. See: Brett Freudenberg, 'Entity Taxation: The inconsistency between stated policy and actual application' (2005) 1(2) *Journal of the Australasian Tax Teachers Association* 458.



**Figure 1: AUS: Number of trusts**

Source: Board of Taxation, *Taxation of Discretionary Trusts: A Report to the Treasurer and the Minister for Revenue and Assistant Treasurer* (AGPS, 2002), 25 and Australian Taxation Office, *Taxation Statistics 201 2*, (Australian Taxation Office, 2014).

Consequently, these figures demonstrate that in Australia there is a variety of business structures used, with a growing utilisation of trusts and SMSFs, beyond the 'traditional' business structures of corporations, general partnerships and sole traders. However, to what extent do accountants interact with these business structures in their practice?

#### IV ROLE OF ACCOUNTANTS IN BUSINESS STRUCTURES

It is suggested that accountants play an important role in the utilisation of business structures throughout the life-cycle of a business, from: (1) formation to (2) operation and (3) dissolution.

The focus here is on public practice accountants advising clients that use the various entities to own and/or operate commercial activities. The three life stages of an entity are not discrete, and should not be seen as discrete. The reason is that once a choice of entity is made, that necessarily 'locks in' the rules applicable to that entity at the operation and dissolution (exit) stages. Accordingly, the formation stage must be seen as the most important. On the other hand, the restructure of an operating entity (such as from partnership to company) during the operating phase also highlights the overlap between the stages (for example, this is a formation in one sense). In light of this, we will divide the analysis into the three stages.

Within each stage, and for convenience, we will also create a further division of non-tax and tax. Like the stages of an entity, at times the non-tax and tax division also is not discrete and overlaps. For example, an accountant who is advising a trustee on the allocation of income (profits) of a discretionary trust and the timing of that allocation must be aware of the central terms of the relevant trust deed in order to be able to advise in a tax-effective manner.<sup>59</sup> A similar point can be made in regard to a company that has different classes of shares. In spite of this overlap, as far as practically possible, we will maintain this division.

### ***A Formation***

The choice of business structure or property-owning asset form will usually be a complex question that needs to take account of a range of tax and non-tax issues most relevant to the particular client and/or the client's family. It is very likely that more than one professional advisor will be involved in the provision of advice associated with such a decision. However, it is very unlikely that a client faced with a choice of business structure decision would seek out advice solely from a legal practitioner. Indeed, it is submitted that overwhelmingly, an accountant would be the first point of contact on this question, and at times, the only point of contact. However, it is likely that the accountant (on behalf of the client) may seek input from a legal advisor (legal practitioner) and from a tax advisor (who may be a legal practitioner or accountant). The advice itself could be fairly expensive. If drafting a constituent document for the entity is required (such as a trust deed), it is likely that this service must be obtained from a legal practitioner, and not an accountant.

Even where an accountant refers higher-level specialist advice to another professional, it is submitted that clients will still look to their accountant for an explanation of the specialist advice. This suggests that the accountant must appreciate, to an 'explainable extent', the specialist advice.

Studies from the United Kingdom demonstrate that accountants have an active and large role in small business advice about which business structure to utilise. In a United Kingdom study in the early 1990s, Hicks et al sought to investigate why small businesses chose to incorporate, what the role of advisors was in this decision, and what the consequences were of such decisions.<sup>60</sup> The role of accountants in assisting with incorporation was found to be great, as 70 per cent of corporations were formed by accountants, 13 per cent by company registration agents and only 12 per cent by solicitors.<sup>61</sup> Also, even though formal advice

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<sup>59</sup> There are a number of cases where a trustee has purported to make a distribution to a person who is not a beneficiary (object) of the relevant trust (see: *Hopkins & Anor v FCT* 2012 ATC 10-249, 14).

<sup>60</sup> Andrew Hicks, Robert Drury and Jeff Smallcombe, 'Alternative Company Structures for the Small Business.' in *ACCA Research Report No 42*, (Certified Accountants Educational Trust, 1995). The method adopted was a combination of extensive questionnaires followed by in-depth face-to-face interviews. This resulted in 152 completed responses from businesses and interviews with 30 advisors across England. In terms of business forms, 32 sole traders were represented, 30 partners and 90 directors of corporations. The advisors were 16 accountants, 10 lawyers and four business advisors.

<sup>61</sup> *Ibid*, 16.

occurred only in approximately one-third (36 per cent) of cases, 97 per cent of this advice was from accountants, with the remaining 3 per cent from solicitors.<sup>62</sup>

When it came to general partnerships, lawyers had a more prominent role; 85 per cent of these were drawn up by a solicitor and 15 per cent by an accountant.<sup>63</sup> The difference between corporations and general partnerships may have to do with reforms that make setting up a corporation relatively easy, so that no legal qualification is required to purchase a corporate shell. For sole traders, when formal advice was obtained, 50 per cent was from accountants and 30 per cent from solicitors.<sup>64</sup>

In another study it was found that the three most satisfactory sources of advice in terms of business structure advice was received from accountants (45.6 index score), business colleges (15.6) and solicitors (8.3).<sup>65</sup> Hicks et al concluded that the reason accountants were so heavily involved in the decision to incorporate (as well as the other business structures considered) could be due to 'the close involvement of accountants with small business, and their detailed knowledge of the financial and tax affairs of their clients'.<sup>66</sup> It is suggested that Australia could be similar, in relation to the accountant being dominant in the role of giving business structure advice, particularly when businesses are commencing.

The findings of an Australian study regarding entrepreneurship tends to support the use of accountants rather than lawyers for advice about the choices available for of business formation, as chartered accountants were found to be the most important type of paid consultant.<sup>67</sup> One finding was that 46 per cent of firms had retained an accountant, whereas only 17 per cent had retained a lawyer.<sup>68</sup> This is despite the fact that some of this formation advice could be considered legal advice, which accountants are not permitted to provide for a fee.

#### (a) *Non-tax*

In a recent study about what Australian accounting practitioners thought was the most important factor determining the choice of business structure, it was found that asset protection, which relates to, or encompasses such things as limitation of liability of investors and insurance against 'economic predators and gold-diggers', is the most important non-tax consideration.<sup>69</sup> This requires an appreciation of the liability exposure rules associated with each entity and 'entity owners'. While the

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<sup>62</sup> Ibid, 16.

<sup>63</sup> Ibid, 23.

<sup>64</sup> Ibid, 23.

<sup>65</sup> Alan Southern and James Meyrick, *Owner-Managed Business and their Tax: An interim report on the views of small businesses* (Houses of Parliament, 2004), 10.

<sup>66</sup> Hicks, Drury and Smallcombe, above n 60, 28.

<sup>67</sup> Per Davidsson, Paul Steffens and Scott Gordon, 'Comprehensive Australian Study of Entrepreneurial Emergence (CAUSEE): Design, Data Collection and Descriptive Results' in Kevin Hindle and Kim Klyver (eds), *Handbook of Research on New Venture Creation* (Edward Elgar, 2011), 24.

<sup>68</sup> Ibid, Table 6.

<sup>69</sup> Brett Freudenberg, 'Tax on my mind: Advisors' recommendations for choice of business form' (2013) 42(1) *Australian Tax Review* 33.

rules for sole traders and partnerships and companies<sup>70</sup> are fairly straightforward in most situations, this cannot be said for fixed/unit trusts and discretionary trusts.<sup>71</sup> Further, the rules in regard to protecting assets from inclusion in the property pool, among other things, on relationship breakdown, and the rules regarding 'clawback' for testator family provision claims are also not straightforward. Again such advice borders on legal advice, which clients should seek advice from a qualified legal practitioner.

Unless a client's accountant was able to narrow the range of services he/she offers clients, it is difficult to see how accountants can limit their involvement in regard to asset protection issues with clients completely, even if it is only as a conveyor of specialist advice. Accordingly, it is submitted that a skill set that does not include an appreciation of asset protection issues associated with each of the main entity types would be a substandard situation.

It is also submitted that control of the entity, or the operations of the entity, will feature highly. Clients who have produced wealth are very unlikely to want to give up control over wealth already created. A similar point could be made in regard to future income from current wealth. Control would usually be reflected in constituent documents of entities and/or by virtue of holding an 'office'. Again, and especially because of the link between control of an entity's operations and tax outcomes, the accountant would want to have a good appreciation of control mechanisms for the entity. Complying with the legal formalities associated with the successful establishment of each type of entity would also seem to be a required skill set at the formation stage of an entity (such as settlement sum for a trust).

#### (b) *Tax*

It is submitted that tax minimisation ranks close to asset protection where the choice of business structure is involved, and this is supported by a recent Australian empirical study.<sup>72</sup> Australia's income tax system does not provide a high degree of tax neutrality between the various business structures. The sole trader and the general law partnership provide for flow-through taxation. The trust vehicle and the company vehicle do not provide for full flow-through taxation even though look-through taxation can apply to profit distributions. The discretionary trust will generally be the most advantageous vehicle in terms of lowering income tax on a given amount of taxable income. In addition, the rules are not identical in terms of capital gains made by the various business structures.

It is clear that accountants are heavily involved in managing the tax affairs of their clients. Furthermore, subject to a particular provision, the tax law operates on the general law outcome of transactions and/or business structures. This suggests that

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<sup>70</sup> Companies that have discretionary dividend shares (often called dividend access shares) add a layer of complexity in terms of the limitation of liability issue.

<sup>71</sup> The rules surrounding a trustee's right of indemnity against trust assets and beneficiary assets, and the all-important rights of trust creditors to 'piggyback' on this right are the subject of a complex array of rules.

<sup>72</sup> Freudenberg, above n 69.

the required skill set for this task is not merely the tax rules that apply to the various entities. Rather, an appreciation of the non-tax rules associated with each entity and entity owner would also be required.

### **B Operation**

#### **(a) Non-tax**

At the operation stage of an entity's life, one would expect some or a number of regulatory reporting requirements to be met. For example, for companies there could be Australian Securities and Investments Commission (ASIC) returns and for SMSFs, there could be returns required to be lodged with the ATO, the regulator of SMSFs. Sole traders, general law partnerships and private trusts would not seem to have regulatory reporting obligations. The skill set associated with each reporting obligation will vary but the SMSF entity would have the most onerous requirements because of the need to comply with the superannuation supervisory laws in order to be able to access concessional income taxation treatment.

In Australia, concerns about the role of accountants and other service providers in dealing with governance documents involving trusts has been raised by Hor, highlighting that accountants may not have 'the expertise or experience to properly understand the trust deeds that they are reviewing'.<sup>73</sup> Hor notes that the involvement by accountants in amending a trust deed itself for a client may constitute the provision of 'legal advice, which it is illegal for an unqualified person to provide for a fee'.<sup>74</sup>

#### **(b) Tax**

Overwhelmingly, accountants are involved in tax return preparation for all types of entities. However, for many entities, accountants are also involved in the preparation of the tax returns of entity owners. Importantly, that role inevitably means accountants are involved in 'managing distributions' to entity owners in a tax effective way.

While a necessary appreciation of the tax rules is required for effective management of distributions, what is also required is an appreciation of the non-tax rules associated with the creation of the desired non-tax law entitlements of entity owners.

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<sup>73</sup> Brian Hor, 'Reviewing family trust deeds — it's not just about tax!' (2012, August) *Taxation in Australia* 90, 90.

<sup>74</sup> *Ibid*, 91.



### ***C Dissolution***<sup>75</sup>

#### **(a) *Non-tax***

The client would want to ensure the sale transaction is effective. And, the client would want to be assured about the status of continuing liabilities from the investment.

#### **(b) *Tax***

The different ways in which a client can realise or exit from an investment can give rise to different tax outcomes. Considerable tax advice is sought and obtained about this decision. The small business capital gains tax concessions provide an important and high-profile example of this. This also means that the accountant will want to be familiar with the non-tax rules applicable to each avenue of exit from an investment so that the tax law can operate as desired.

### **V SURVEY**

The research detailed in this part of the article explored the extent to which Australian undergraduate accounting students are taught about the various traditional business structures, as well as trusts (both unit and discretionary) and SMSFs. To some extent this study follows the methodology utilised by Thompson in his empirical study into the methods and content of basic Business Associations courses taught in American law schools.<sup>76</sup>

To address this research aim, a quantitative survey was implemented. A survey instrument was developed, with a focus on trying to elicit the time spent on teaching the various business structures, as well as the areas of content actually covered. The wording of the survey instrument was developed from pilot groups and feedback obtained. The final survey instrument consisted of a number of parts. The first part sought broad demographic detail about the Australian institution the academic worked at, which business law course was taught and the role of the person with that course. Another section then explored to what extent there was coverage of the business structures of sole proprietors, general partnerships, limited partnerships, corporations, unit trusts, discretionary trusts and SMSFs. Only participants who did have some exposure to teaching one or some of the business structures were then asked additional questions about course content. There were also questions about tutorial and assessment coverage of these business structures. There was also a question about the sources of influence about topic coverage in the course.

To facilitate data collection, searches of the internet were conducted of all 38 universities to consider which universities provided accounting degrees and which

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<sup>75</sup> This can also mean exiting the investment.

<sup>76</sup> Robert Thompson, 'The Basic Business Associations Course: An Empirical Study of Methods and Content' (1998) 48(3) *Journal of Legal Education* 438.

academic staff were involved in accounting degrees, and in particular the teaching of business law courses. Then a network of academics were emailed to request their participation in the survey. E-mail invitations with the link to the web survey were sent to the target population. In addition, the research was promoted through academic bodies such as the Australasian Tax Teachers Association and the Corporate Law Teachers Association with the link to complete the web based survey. Also the survey was completed by a small number of non-business law accounting academics from a number of Australian universities. This was done to give a sense as to whether the law of business structures was taught in other courses offered in the accounting degree. The other accounting courses surveyed included: Corporate Accounting; Accounting Principles; Financial Accounting; Auditing; Strategic Management Accounting; Management Accounting; Corporate Finance; Advanced Financial Accounting; Accounting; Accounting Information for Managers; Accounting in Organisations and Society and Financial Accounting Issues.

From this process, a total of 154 Australian academics commenced the survey with 138 completing it entirely, demonstrating 89 percent of usable survey responses. One hundred and ten of these survey respondents were those teaching in 'business law courses' and 28 were respondents teaching in other 'accounting courses'. The sample is well distributed in terms of universities across Australia — with participants from 36 Australian institutions.

### ***A Coverage in Lectures***

In terms of business law courses the survey specified seven specific types of courses likely to be taught, as well as the option for participants noting an 'other business law course'. Participants were asked to indicate which of their courses were mandatory within the accounting degree. Through this it became evident that five business law courses were generally mandatory (note it is likely that within each accounting degree there is only three or four mandatory business law courses, but there can be different names used to describe the course).

**Table 5** lists the five common mandatory courses, being:

- Introduction to Law/Foundations of Law ('Intro to Law');
- Introduction to Business Law ('Intro to Business Law');
- Law of Business Associations/Law of Commercial Associations ('Law of Business Associations');
- Company/Corporations Law — Introduction ('Company Law'); and
- Taxation Law — Introduction ('Tax Law').

Participants generally had a senior role with the course as the course convenor or lecturer in charge.

**Table 5: Mandatory Business Law Courses**

Course Name	Response Count	Is it a 'mandatory' course within the Accounting Degree?	What is your role with the course? (tick ALL that apply)		
			Course Convenor/ Lecturer in Charge/Overseer of Course	Lecturer	Tutor
	(Number)	(%)	(%)	(%)	(%)
Introduction to Law/Foundations of Law	25	92.3	69.2	53.8	73.1
Introduction to Business Law	40	89.2	64.9	54.1	62.2
Law of Business Associations/Law of Commercial Associations	22	81.8	77.3	54.5	59.1
Company/Corporations Law — Introduction	26	88.5	57.7	26.9	61.5
Taxation Law — Introduction	30	86.7	90.0	53.3	46.7

The other non-mandatory (elective) business law courses tended to be:

- Company/Corporations Law — Advanced ('Advanced Company Law');
- Taxation Law — Advanced ('Advanced Tax Law'); and

Other Business Law type course ('Other Business Law') (See Table 6).

**Table 6: Elective business law courses**

Course Name	Response Count	Is it a 'mandatory' course within the Accounting Degree?	What is your role with the course? (tick ALL that apply)		
			Course Convenor/ Lecturer in Charge/Overseer of Course	Lecturer	Tutor
	(Number)	(%)	(%)	(%)	(%)
Company/Corporations Law — Advanced	3	33.3	67	100	67
Taxation Law — Advanced	12	15.4	92	69	39
Other 'business law type courses'	18	15.8	74	68	37

To ascertain the extent of coverage of the law of the various business structures, participants were then asked to note the time spent in their courses discussing the various business structures in lectures and tutorials, as well as the percentage of assessment devoted to the various business structures. The results of these questions in relation to each of the business structures are reported in Tables 8 to 16 in the Appendix (which details each of the business structures with their coverage in mandatory law courses, elective law courses and accounting courses). Overall, the results illustrate that the business structure that has the greatest

emphasis consistently throughout lectures, tutorials and assessment is the company. The business structures with the next greatest coverage are the general partnership and sole trader. There is low coverage of discretionary trusts and limited partnerships. There is little consideration at all of unit trusts and SMSFs. Overall, these results are consistent with the overriding concern that there is largely an omission of trusts and SMSFs from the accounting curriculum in any meaningful detail. Below is a detailed analysis of the results in terms of each business structure in lectures, tutorials and assessment.

In regard to the coverage of sole traders in mandatory business law courses, one-third of courses covered sole traders for less than 5 minutes if at all, and nearly three-quarters of courses spent less than 30 minutes teaching about sole traders (Table 8). For the elective business law courses the coverage is similar. For the accounting courses surveyed on average less than 5 minutes or nothing was spent on sole traders in 61 per cent of courses, with 86 per cent of courses spending less than 30 minutes. Ten per cent of tax law courses spent greater than five hours on sole traders.

For general partnerships there appeared to be more coverage in the mandatory business law courses, with nearly 50 per cent of courses spending more than 30 minutes in lectures covering them. The course which on average had the greatest coverage was the Law of Business Associations course with 15 per cent having greater than five hours of coverage (Table 9). For the elective business law courses there was a smaller emphasis on general partnerships with nearly two-thirds spending less than 30 minutes in lectures on them. For accounting courses, three-quarters spent less than 5 minutes or no time in discussing the law of general partnerships.

Perhaps not surprisingly there appeared to be less coverage about the law of limited partnerships (Table 10). For the mandatory business law courses on average over three-quarters of courses spent no time or less than 5 minutes discussing them, and nearly 100 per cent spent less than 30 minutes. Again Law of Business Associations spent the greatest time discussing this business structure with 5 per cent of courses spending greater than five hours. For the elective business law courses nearly 90 per cent spent less than five minutes discussing limited partnerships. It was a similar position for the accounting courses (with 93 per cent spending less than 5 minutes).

From the survey results, the business structure that gains the greatest attention in terms of time spent is the law relating to companies (Table 11). On average over 70 per cent of the mandatory business law courses spent greater than 30 minutes, with 34 per cent spending greater than 5 hours discussing companies. The courses with the greatest emphasis on companies were the Law of Business Associations and Company Law courses, with three-quarters of both courses spending greater than five hours. The elective business law courses and the accounting courses also on average had greater coverage with nearly 20 per cent spending greater than five hours in discussing them.

For unit trusts, the study illustrates that nearly two-thirds of mandatory business law courses spend no time or less than five minutes discussing them (Table 12).

For the elective business law courses, the greatest coverage of the law of unit trusts is demonstrated by the Advanced Tax Law course, with about 70 per cent of Advanced Tax courses on average spending somewhere between 30 minutes and five hours discussing them. There is virtually no coverage of unit trusts in the accounting courses, as 93 per cent spend less than five or no minutes discussing them in lectures.

The coverage of discretionary trusts appears to be slightly greater than unit trusts, with approximately 45 per cent of mandatory business law courses spending greater than five minutes discussing them (Table 13). There were a small percentage (5 per cent) of courses (Law of Business Associations and Company Law) that spent greater than five hours discussing discretionary trusts. There was a large coverage of the law relating to discretionary trusts in the taxation courses as approximately 50 per cent of them spent somewhere between 30 minutes to five hours discussing them. For the elective business law courses, it was the Advanced Tax Course that had the greatest coverage of discretionary trusts with 75 per cent of courses spending between 30 minutes and five hours discussing them. There appeared to be barely a mention of discretionary trusts in the accounting courses, as 97 per cent spent less than five minutes discussing them.

The form that had the least coverage in the courses surveyed was the SMSF, as on average 93 per cent of mandatory business law courses spent no time or less than five minutes discussing them (Table 14). There was slightly greater coverage in the elective courses, especially Advanced Tax, with an average of 50 per cent of courses spending on average somewhere between 30 minutes and five hours discussing them. The accounting courses show scant coverage of the SMSF with 93 per cent spending no time or less than five minutes discussing them.

The responses from the sample of accounting courses would tend to indicate that the only business structure covered in any detail is the corporation, with some coverage of sole traders and general partnerships — but the other business structures are largely neglected. Consequently, it is only the coverage in business law courses that would expose accounting students to other business structures.

### ***B Coverage in Tutorials***

Participants were also asked to consider the time spent in tutorials discussing the various business structures. As might be expected the results are largely consistent with the coverage in the lectures. (Table 15)

In terms of tutorial time between 30 minutes to 2 hours, there is more likely to be discussion of the following business structures in the following mandatory business law courses:

- Sole Traders: Law of Business Associations (30 per cent), Tax Law (21 per cent), Intro to Law (14 per cent);
- General Partnerships: Law of Business Associations (60 per cent), Intro to Business Law (41 per cent), Intro to Law and Tax Law (36 per cent each);
- Limited Partnerships: Law of Business Associations (25 per cent), Intro to Law (9 per cent), Intro to Business Law (9 per cent);

- Corporations: Tax Law (39 per cent), Intro to Business Law (25 per cent), Law of Business Associations (25 per cent),<sup>77</sup>
- Unit Trusts: Law of Bus Associations (30 per cent), Intro to Law (9 per cent), Tax Law (7 per cent);
- Discretionary Trusts: Law of Business Associations (30 per cent), Tax Law (29 per cent), Intro to Law (9 per cent); and
- SMSFs: Tax Law (7 per cent), Intro to Business Law (6 per cent) and Intro to Law (5 per cent).

In terms of substantial coverage of the business structures in tutorials, few mandatory business law courses spent on average greater than five hours as demonstrated in the following:

- Sole Traders: Tax Law (11 per cent);
- General partnerships: no courses;
- Corporations: Intro to Law (14 per cent), Intro to Business Law (3 per cent), Law of Business Associations (60 per cent), Company Law (48 per cent);
- Unit Trusts: no courses;
- Discretionary Trusts: no courses; and
- SMSFs: no courses.

This demonstrates that of all business structures it is the corporation that will have the most substantial coverage in tutorials. On average none of the accounting courses spent greater than five hours in tutorials discussing any of the business structures, nor did the elective business law courses.

### ***C Coverage in Assessment***

To get a sense about whether accounting students are assessed on their knowledge and application about the law relating to the various business structures, the survey asked questions about the percentage of assessment attributable to the different business structures (Table 16). Apart from the mandatory courses listed below, two-thirds or more had less than 5 per cent of assessment dedicated to the relevant business structures:

- Sole Traders: Law of Business Associations and Tax Law;
- General Partnerships: Intro to Law, Intro to Business Law, Law of Business Associations and Tax Law;
- Limited Partnerships: no courses;
- Corporations: all courses;
- Unit Trusts: no courses;
- Discretionary Trusts: Tax Law; and
- SMSF: no courses.

Apart from the assessment of corporations, it can be seen for the accounting courses on average nearly 90 per cent or more of them have minimal (less than 5

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<sup>77</sup> The reason that Company Law does not feature in the top three is that there is on average more than 2 hours spent on corporations in the tutorials for company law.

per cent) of assessment of the business structures. Few of the mandatory law courses had substantial assessment directed towards business structures. On average only 10 per cent or more of the following courses had assessment 20 per cent or greater about business structures: (a) Sole Traders — Intro to Law, Tax Law; (b) General Partnerships — Intro to Law, Intro to Business Law, Law of Business Associations, Tax Law; (c) Limited Partnerships — no courses (d) Corporations — all courses; (e) Unit Trusts — no courses (f) Discretionary Trusts — Tax Law; and (g) SMSFs — no courses. These results reinforce the finding that the main focus is on corporations, and general partnerships.

### **D Input into Courses**

To gain an understanding about the design of the business law courses, participants were asked a number of questions about communication between business law academics and accounting academics, as well as with industry. Table 7 illustrates a split among business law academics as to whether there is communication between tax lecturers and other business law lecturers, with approximately 35 per cent either positive (agree or strongly agree) and 36 per cent negative (disagree or strongly disagree). Only a small percentage (14 per cent) of the accounting academics surveyed affirmed (agree or strongly agree) that there was communication between themselves and business law academics generally in terms of the content of their courses.

A strong response from both business law and accounting academics was present with regard to the input of industry into the development of their course, with 45 per cent and 50 per cent respectively agreeing or strongly agreeing that industry input was sought for their course.

**Table 7: Input into courses**

Questions	Strongly Disagree		Disagree		Neutral		Agree		Strongly Agree	
	Law	Acc	Law	Acc	Law	Acc	Law	Acc	Law	Acc
	(%)	(%)	(%)	(%)	(%)	(%)	(%)	(%)	(%)	(%)
There is communication between tax lecturers and other business law lecturers in terms of the content of their courses.	16		20		29		29		6	
There is communication between business law lecturers and accounting lecturers in terms of the content of their courses.		18		21		46		14		0
There is input from industry (practitioners) in the development of your course.	9	7	18	18	29	25	40	29	5	21

Key: Law = Business Law academics' responses; Acc = Accounting academics' responses



In comments at the end of the survey from business law academics in response to the question, 'describe the factors that influence the current content of your course' there was a strong influence of the requirements of the accounting professional bodies (ICAA and CPA Australia), as well as a few mentioning the Tax Practitioners Board — (50 per cent of responses of business law academics). There was also mention of ensuring that the course content was relevant to practice — approximately 25 per cent of responses of business law academics. Similarly the accounting academics also referred to the influence of the professional bodies (33 per cent of responses) and industry (15 per cent of responses). This would tend to suggest that any changes to the curriculum taught to accountants regarding business structures would need to have the backing and support of the professional bodies.

## **VI LIMITATIONS OF RESEARCH AND FUTURE RESEARCH**

It is acknowledged that this research has only a small sample size in terms of academics teaching in accounting courses. However, it is very unlikely that any or much substantive law in regard to entities is being taught within accounting departments at Australian universities. Also, a low number of respondents taught Company Law, Advanced, although this may mean that reported coverage of the law relating to companies could be under-reported in these results.

This research has established that the law of the business structures taught to commerce students does not reflect the types of business structures that qualified accountants are working with in the commercial world. The next stage of this research is really a *does it matter* question. In particular, the research requires an in-depth analysis as to whether disciplinary knowledge or vocational knowledge and related skill sets should be part of a university-level education for those seeking to enter a particular vocation. This has numerous aspects including the role of accreditation of university courses and the capacity for post-university education to deliver the required skill sets. Future research could explore the expectation gaps (if any) between educators and industry in terms of what the coverage of business structures should be in Accounting degrees. Also, given the growth of financial planning degrees, it would be interesting to explore the extent to which these degrees cover those business structures used for investment purposes, especially trusts and SMSFs. Further research could examine the actual content of degrees to see whether these align with reported coverage.

Future research could survey accounting practitioners (prospective employers of graduates) about what they consider the fundamental elements of trust law (regulation and tax) that they would want an accounting graduate to cover in their degree.

## VII CONCLUSION

Chua and Petty argue that if there is a lag in knowledge between academic teaching and practice, there is a great chance that what is being taught is irrelevant.<sup>78</sup> In 2011, Justice Michelle Gordon gave a speech that highlighted the issues about how best to teach tax law in the context of a law degree, noting that tax is a multi-faceted area that touches upon (potentially) so many areas of the law, society, politics and economy.<sup>79</sup> One area that Justice Gordon focused on was the area of trust law, particularly the case of *Bamford v Commissioner of Taxation*,<sup>80</sup> explaining that it would not be possible for a lawyer to advise the client 'without a detailed understanding of the law of trusts and the intended operation of the taxing act'.<sup>81</sup> While this speech focused on lawyers' education, this article raises concerns about the extent to which Australian accounting students are taught about the law of trusts in any meaningful way. We raise this concern not only in terms of understanding the interplay between the tax law and the law of trusts, but also more broadly in regard to the widespread commercial use of trusts and the central roles that accountants play with them. Commentators have raised concerns about the legal issues (and the complexity) that can arise due to the use of trusts in commercial operations.<sup>82</sup>

The results of this research demonstrate that the course Law of Business Associations is important in providing a platform for accounting students to learn about the law of the different business structures. Also, this research demonstrates the dominance of the focus on corporations in the Australian accounting curricula. While it is acknowledged that corporations are an important business structure for commercial operations, the trust also features prominently in Australia — especially for small and medium operations. Given the survey results, it is questioned whether there is adequate coverage of the law of trusts, including SMSF, which appears to be largely absent from the accounting curricula.

It is very likely that Australian accounting students need a better understanding and appreciation of the trust vehicle. While it is possible that their education continues while in practice, it is questionable whether this occurs in a systematic, comprehensive and coherent manner. It is important that the Australian accounting curricula reflects current industry practices, otherwise higher education providers may be failing the next generation of accounting practitioners.

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<sup>78</sup> Wai Chua and Richard Petty, 'Mimicry, Director Interlocks and the Interorganizational Diffusion of a Quality Strategy: A Note' (1999) 11 *Journal of Management Accounting Research* 93, 94.

<sup>79</sup> Michelle Gordon, 'Tax is more than numbers — but it is also more than tax' (Paper presented at the 23rd Australasian Tax Teachers' Association Conference, University of Melbourne, January 2011).

<sup>80</sup> *Bamford v Commissioner of Taxation* (2010) 240 CLR 481.

<sup>81</sup> Gordon, above n 79, 3.

<sup>82</sup> Nuncio D'Angelo, 'The trust: Evolution from guardian to risk-taker, and how a lagging insolvency law framework has left financiers and other stakeholders in peril' (2009) 20 *Journal of Banking and Finance Law and Practice* 279.

## APPENDIX

Table 8: Coverage of Sole Traders

Course Name	'Sole Traders/Sole Proprietors' in the LECTURES			
	Total Not Covered or < 5 mins (%)	Total > 5 mins but < 30 mins (%)	Total > 30 mins but < 5 hrs (%)	Total > 5 hrs (%)
Introduction to Law/Foundations of Law	38	27	31	4
Introduction to Business Law	46	43	11	0
Law of Business Associations/Law of Commercial Associations	27	41	27	5
Company/Corporations Law — Introduction	41	45	9	5
Taxation Law — Introduction	30	20	4	10
<b>Average for mandatory courses</b>	<b>36</b>	<b>35</b>	<b>24</b>	<b>5</b>
Company/Corporations Law — Advanced	67	33	0	0
Taxation Law — Advanced	25	0	75	0
Other 'business law type courses'	61	17	22	0
<b>Average for elective business law courses</b>	<b>51</b>	<b>17</b>	<b>32</b>	<b>0</b>
Accounting courses	61	25	14	0

**Table 9: Coverage of General Partnerships**

Course Name	'General (Law) Partnerships' in the LECTURES			
	Total Not Covered or < 5 mins (%)	Total > 5 mins but < 30 mins (%)	Total > 30 mins but < 5 hrs (%)	Total > 5 hrs (%)
Introduction to Law/Foundations of Law	28	12	52	8
Introduction to Business Law	31	23	43	3
Law of Business Associations/Law of Commercial Associations	10	25	50	15
Company/Corporations Law — Introduction	48	28	19	5
Taxation Law — Introduction	21	24	55	0
<b>Average for mandatory courses</b>	<b>27</b>	<b>23</b>	<b>44</b>	<b>6</b>
Company/Corporations Law — Advanced	33	67	0	0
Taxation Law — Advanced	0	8	92	0
Other 'business law type courses'	61	17	17	6
<b>Average for elective business law courses</b>	<b>31</b>	<b>31</b>	<b>36</b>	<b>2</b>
Accounting courses	79	14	7	0

**Table 10: Coverage of Limited Partnerships**

Course Name	'Limited Partnerships' in the LECTURES			
	Total Not Covered or < 5 mins (%)	Total > 5 mins but < 30 mins (%)	Total > 30 mins but < 5 hrs (%)	Total > 5 hrs (%)
Introduction to Law/Foundations of Law	71	21	8	0
Introduction to Business Law	82	12	6	0
Law of Business Associations/Law of Commercial Associations	65	20	10	5
Company/Corporations Law — Introduction	81	14	5	0
Taxation Law — Introduction	90	7	3	0
<b>Average for mandatory courses</b>	<b>78</b>	<b>15</b>	<b>6</b>	<b>1</b>
Company/Corporations Law — Advanced	100	0	0	0
Taxation Law — Advanced	75	25	0	0
Other 'business law type courses'	89	6	6	0
<b>Average for elective business law courses</b>	<b>88</b>	<b>10</b>	<b>2</b>	<b>0</b>
Accounting courses	93	3.5	3.5	0

**Table 11: Coverage of Corporations**

Course Name	'Corporations/Companies' in the LECTURES			
	Total Not Covered or < 5 mins (%)	Total > 5 mins but < 30 mins (%)	Total > 30 mins but < 5 hrs (%)	Total > 5 hrs (%)
Introduction to Law/Foundations of Law	35	9	43	13
Introduction to Business Law	32	24	38	6
Law of Business Associations/Law of Commercial Associations	5	5	15	75
Company/Corporations Law — Introduction	0	0	24	76
Taxation Law — Introduction	21	14	65	0
<b>Average for mandatory courses</b>	<b>19</b>	<b>10</b>	<b>37</b>	<b>34</b>
Company/Corporations Law — Advanced	33	0	67	0
Taxation Law — Advanced	0	0	83	17
Other 'business law type courses'	50	6	39	6
<b>Average for elective business law courses</b>	<b>28</b>	<b>2</b>	<b>63</b>	<b>7</b>
Accounting courses	46	11	25	18

**Table 12: Coverage of Unit Trusts**

Course Name	'Unit Trusts/Fixed Trusts' in the LECTURES			
	Total Not Covered or < 5 mins (%)	Total > 5 mins but < 30 mins (%)	Total > 30 mins but < 5 hrs (%)	Total > 5 hrs (%)
Introduction to Law/Foundations of Law	68	18	14	0
Introduction to Business Law	78	19	3	0
Law of Business Associations/Law of Commercial Associations	45	30	20	5
Company/Corporations Law — Introduction	67	28	5	0
Taxation Law — Introduction	48	35	17	0
<b>Average for mandatory courses</b>	<b>61</b>	<b>26</b>	<b>12</b>	<b>1</b>
Company/Corporations Law — Advanced	67	33	0	0
Taxation Law — Advanced	17	17	67	0
Other 'business law type courses'	83	0	17	0
<b>Average for elective business law courses</b>	<b>55</b>	<b>17</b>	<b>28</b>	<b>0</b>
Accounting courses	93	7	0	0

**Table 13: Coverage of Discretionary Trusts**

Course Name	'Discretionary Trusts' in the LECTURES			
	Total Not Covered or < 5 mins (%)	Total > 5 mins but < 30 mins (%)	Total > 30 mins but < 5 hrs (%)	Total > 5 hrs (%)
Introduction to Law/Foundations of Law	59	23	18	0
Introduction to Business Law	78	19	3	0
Law of Business Associations/Law of Commercial Associations	45	40	10	5
Company/Corporations Law — Introduction	76	19	0	5
Taxation Law — Introduction	24	24	52	0
<b>Average for mandatory courses</b>	<b>56</b>	<b>25</b>	<b>17</b>	<b>2.0</b>
Company/Corporations Law — Advanced	67	33	0	0
Taxation Law — Advanced	8	17	75	0
Other 'business law type courses'	89	6	6	0
<b>Average for elective business law courses</b>	<b>55</b>	<b>18</b>	<b>27</b>	<b>0</b>
Accounting courses	97	3	0	0



**Table 14: Coverage of SMSFs**

Course Name	'Self-Managed Superannuation Funds' in the LECTURES			
	Total Not Covered or < 5 mins (%)	Total > 5 mins but < 30 mins (%)	Total > 30 mins but < 5 hrs (%)	Total > 5 hrs (%)
Introduction to Law/Foundations of Law	91	0	9	0
Introduction to Business Law	97	0	3	0
Law of Business Associations/Law of Commercial Associations	95	5	0	0
Company/Corporations Law — Introduction	100	0	0	0
Taxation Law — Introduction	83	7	10	0
<b>Average for mandatory courses</b>	<b>93</b>	<b>2</b>	<b>5</b>	<b>0</b>
Company/Corporations Law — Advanced	100	0	0	0
Taxation Law — Advanced	33	17	50	0
Other 'business law type courses'	94	0	6	0
<b>Average for elective business law courses</b>	<b>76</b>	<b>6</b>	<b>18</b>	<b>0</b>
Accounting courses	93	0	7	0

*Totals in tables may not add up to 100% due to rounding.*

**Table 15: Coverage of business structures in tutorials**

Course Name	Sole Traders/ Sole Proprietors		General (Law) Partnership		Limited Partner- ships		Corporations/ Companies		Unit Trusts/ Fixed Trusts		Discretionary Trusts		SMSFs	
	Not covered or < 5 mins	30 mins to < 2 hrs	Not covered or < 5 mins	30 mins to < 2 hrs	Not covered or < 5 mins	30 mins to < 2 hrs	Not covered or < 5 mins	30 mins to < 2 hrs	Not covered or < 5 mins	30 mins to < 2 hrs	Not covered or < 5 mins	30 mins to < 2 hrs	Not covered or < 5 mins	30 mins to < 2 hrs
	(%)	(%)	(%)	(%)	(%)	(%)	(%)	(%)	(%)	(%)	(%)	(%)	(%)	(%)
Introduction to Law/Foundations of Law	50	14	32	36	68	9	41	23	73	9	68	9	91	5
Introduction to Business Law	56	9	41	41	72	9	44	25	84	6	78	6	94	6
Law of Business Associations/Law of Commercial Associations	25	30	15	60	45	25	10	25	60	30	55	30	100	0
Company/Corporations Law — Intro	76	5	71	0	76	5	33	5	81	5	90	5	100	0
Taxation Law — Introduction	39	21	32	36	82	0	29	39	71	7	29	29	82	7
Average for mandatory courses	49	16	38	35	69	10	31	23	74	11	64	16	93	4
Company/Corporations Law — Advanced	33	33	33	33	33	0	33	33	33	0	33	0	100	0
Taxation Law — Advanced	33	58	17	50	92	0	17	58	42	17	33	25	50	33
Other 'business law type courses'	78	11	78	11	83	6	61	17	83	6	94	0	100	0
Average for elective business law courses	48	34	43	31	69	2	37	36	53	7	54	8	83	11
Accounting courses	48	7	43		69	4	37	0	53	11	54	0	83	0

**Table 16: Coverage of business structures in assessment**

Course Name	Sole Traders/Sole Proprietors			General (Law) Partnerships			Limited Partnerships			Corporations/ Companies			Unit Trusts/ Fixed Trusts			Discretionary Trusts			SMSFs			
	0% < 5 %	5% < 20%	>20%	0% < 5 %	5% < 20%	>20%	% < 5 %	5% < 20%	>20%	0% < 5 %	5% < 20%	>20%	0% < 5 %	5% < 20%	>20%	0% < 5 %	5% < 20%	>20%	0% < 5 %	5% < 20%	>20%	
	(%)	(%)	(%)	(%)	(%)	(%)	(%)	(%)	(%)	(%)	(%)	(%)	(%)	(%)	(%)	(%)	(%)	(%)	(%)	(%)	(%)	(%)
Introduction to Law/Foundations of Law	77	9	14	36	50	14	86	9	5	50	27	23	86	14	0	86	9	5	91	5	5	
Introduction to Business Law	74	23	3	45	35	19	84	16	0	52	35	13	90	10	0	87	13	0	97	3	0	
Law of Business Associations/Law of Commercial Associations	58	42	0	37	42	21	89	11	0	11	11	79	79	21	0	74	26	0	100	0	0	
Company/Corporations Law — Introduction	71	29	0	67	33	0	81	19	0	14	14	71	90	10	0	86	14	0	100	0	0	
Taxation Law — Introduction	29	50	21	36	54	11	93	0	4	32	46	21	79	21	0	32	32	11	93	4	4	
Average for mandatory courses	62	31	8	44	43	13	87	11	2	32	27	42	85	15	0	73	19	3	96	2	2	
Company/Corporations Law — Advanced	33	67	0	33	67	0	67	33	0	33	0	67	100	0	0	100	0	0	100	0	0	
Taxation Law — Advanced	25	67	8	25	58	17	100	0	0	17	58	25	58	33	8	33	50	17	75	17	8	
Other 'business law type courses'	65	35	0	53	41	6	88	12	0	41	35	24	76	24	0	88	12	0	100	0	0	
Average for elective business law courses	41	56	3	37	55	8	85	15	0	30	31	38	78	19	3	74	21	5	92	6	3	
Accounting courses	89	11	0	93	7	0	100	0	0	68	18	14	100	0	0	100	0	0	100	0	0	