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LEGAL EDUCATION XMOOCS — A MIRAGE IN THE AUSTRALIAN REGULATORY ENVIRONMENT?

STEPHEN COLBRAN,* SCOTT BEATTIE** AND ANTHONY
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I INTRODUCTION

The information revolution has changed the way that we access information, share knowledge and how we learn. It has transformed some parts of society such as the news and entertainment media, yet the internet has had surprisingly little impact on the core business of Australian tertiary legal education in law and in other disciplines. By and large the regular semester cycle of lectures, tutorials and assessment has not faced the same disruptions as other sectors of society. Learning innovations such as the xMOOC (Massive Open Online Course) has been a game-changer in many educational fields internationally, but in Australia there have only been tentative experiments in the format partially due to the strict regulatory environment that threatens to transform the promise of the xMOOC to a mere mirage on the horizon.

There are variations in MOOC designs. This article focusses on the most common form of MOOC — the xMOOC, which focusses on transmission of information from teacher to student.¹

A cautious approach to regulation has many benefits and the de-regulation of the Australian vocational education sector has demonstrated the dangers of predatory and exploitative practices.² However, the Australian tertiary education regulatory framework exceeds the ambit of regulating the business of education providers and overly restricts the educational delivery format in a way that foregrounds twentieth century teaching models and discourages innovation. This is particularly an issue in legal education where rapid

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¹ See Anthony William Bates, *Teaching in the Digital Age* <<https://opentextbc.ca/teachinginadigitalage/chapter/section-7-4-design-models-for-moocs/>>.

² Senate Education and Employment References Committee, Parliament of Australia, *The Operation, Regulation and Funding of Private Vocational Education and Training (VET) Providers in Australia* (15 October 2015).

changes in the profession, heightened prospects of automation³ and the need to embrace new regulatory technologies may, in part, be addressed by more flexible modes of delivery. The legal jobs of the near future may be very different from those we see today.

This paper examines the importance of the MOOC and similar innovations for Australian legal education and highlights key hurdles placed by the national regulatory scheme as well as those imposed by those bodies responsible for admission. While total deregulation is not an advocated solution, a revision of the legislation and guidelines to embrace 21st century learning would enable Australian educators to innovate within a prudently governed sector.

II THE PROMISE OF THE xMOOC

While an xMOOC is offered online, it is more than just an online offering of a standard unit of study. Massive Open Online Courses (MOOC) are courses that are generally offered online, for free, with learning materials that may be modified, reused and distributed to others with an aim to reach massive communities.⁴ These communities may exist within a jurisdictional boundary or depending upon the content and design of an xMOOC, across multiple jurisdictions. For legal education xMOOCs present the opportunity to provide both low-cost entry to legal education, and also the ability to compartmentalize and share new learning opportunities. A full Bachelor of Laws in MOOC mode would be an ambitious undertaking, if at all possible or desirable, but used wisely, individual MOOCs can effectively supplement existing educational offerings, both in the context of an LLB, Juris Doctor and for continuing legal education for the broader profession.

There are several characteristics of xMOOC identified by the literature.⁵ Typically xMOOCs constitute online courses consisting of

³ Committee for Economic Development of Australia (CEDA), *Australia's Future Workforce?* (16 June 2015); Richard Susskind, *Tomorrow's Lawyers – An Introduction to Your Future* (Oxford University Press, 2013); Richard Susskind, and Daniel Susskind, *The Future of the Professions – How Technology Will Transform the Work of Human Experts* (Oxford University Press, 2015); Darryl Ross Mountain, 'An Update and Reconsideration of Chrissy Burns' "Online Legal Services-A Revolution that Failed?" (2010) 1(3) *European Journal of Law and Technology*, Article 3.

⁴ Stephen Carson and Jan Philipp Schmidt, 'Online Higher Education for the Masses', *University World News* (online), 27 May 2012 <<http://www.universityworldnews.com/article.php?story=20120525135513146#.T8H2dTU44zo.mailto>>; Inge de Waard, *MOOCGuide* <<http://moocguide.wikispaces.com/1.+History+of+MOOC%27s>>; The term MOOC is said to be mentioned by two separate individuals: Bryan Alexander, 'Connectivism Course Draws Night, or Behold the MOOC' on *Infocult* (10 July 2008) <<http://infocult.typepad.com/infocult/2008/07/connectivism-course-draws-night-or-behold-the-mooc.html>>; Dave Cormier, 'The CCK08 MOOC – Connectivism Course, 1/4 Way' on Dave Cormier, *Dave's Educational Blog* (2 October 2008) <<http://davecormier.com/edblog/2008/10/02/the-ckk08-mooc-connectivism-course-14-way/>>; and this label was loosely posted to a course (CCK08) which was organised by George Siemens and Stephen Downes.

⁵ Carson and Schmidt, above n 4.

free open content,⁶ video lectures and supporting resources with short inbuilt formative computer-marked quizzes, little if any discussion moderation, learning analytics and reflective exercises. Content is often truncated into smaller chunks as a method of assisting conceptual understanding and memory retention. Frequent automated formative assessment also reinforces knowledge acquisition and retention. Many MOOCs also allow for summative assessment, typically for a fee where students seek to attain certification. These microcredentials can potentially be cashed in for credit towards a qualification.⁷ While many xMOOCs are heavily automated, advanced systems known as cMOOCs seek to develop peer-to-peer or social networks linking students, staff and alumni — with attendant benefits to each group in the ebb and flow of lifelong learning opportunities. More advanced xMOOCs can cater for jurisdictional variations in content and context.

There are no pre-requisites⁸ for entry into xMOOCs and participation is voluntary.⁹ Relaxation of constraints such as course offerings in defined time frames with defined start and end points enables students to look forward and back through MOOC content to support their current learning needs and spread their learning over different timeframes. Alumni from xMOOC offerings can also re-examine later content offerings of the same xMOOC as a form of current learning. Interactions between users involve informal question and answer systems enabling peer-to-peer interactions between learners with differing levels of experience.

A legal education xMOOC may be perceived as a free public good with high visibility.¹⁰ As legal academics make learning resources publicly available, there is an opportunity for learning communities, not directly enrolled in University courses, to collaborate and learn together about aspects of the law. Publicly funded resources produced by Universities may become more publicly available, rather than hidden behind paywalls and learning management systems.¹¹

⁶ Judy Kay et al, 'MOOCs: So Many Learners, So Much Potential ...' (2013) 28(3) *IEEE Intelligent Systems* 70.

⁷ Oliver Beverley and Kay Souter, 'Imagining the Future of Assessment: For Evidence, For Credit and For Payment' (Paper presented at Electric Dreams, 30th Ascilite Conference, Sydney, 1–4 December 2013).

⁸ Tharindu Rekha Liyanagunawardena, Andrew Alexander Adams, and Shirley Ann Williams, 'MOOCs: A Systematic Study of the Published Literature 2008–2012' (2013) 14(3) *International Review of Research in Open and Distance Learning* 202, 204; Alexander McAuley et al, *The MOOC Model for Digital Practice* (2010) <https://oerknowledgecloud.org/sites/oerknowledgecloud.org/files/MOOC_Final.pdf>.

⁹ Liyanagunawardena, Adams and Williams, above n 8.

¹⁰ Stephen Chrisomalis, *Michael Sandel, MOOCs, and the Public Good: On the Justice of Justice* (10 June 2013) *Glossographia* <<https://glossographia.wordpress.com/2013/06/10/michael-sandel-moocs-and-the-public-good-on-the-justice-of-justice/>>.

¹¹ Sara Osuna-Acedo et al, 'Intercreativity and Interculturality in the Virtual Learning Environments of the ECO MOOC Project' in Mohamed Jemni, Kinshuk and Mohamed Koutheair Khribi (eds), *Open Education: From OERS to MOOCs* (Springer, 2015) 161, 164.

xMOOCs provide an opportunity for people to participate informally in an online course using the open educational resources a university or other provider makes available for a particular subject or course.

There may be advantages for law schools engaging with xMOOCs, such as community engagement and impact, marketing to a wider segment of potential students, raising awareness of their scholarship, demonstrating the quality of their learning environment and providing a platform for continuing education to practicing legal professionals.

A MOOC is certainly not a one size fits all solution. In the United States where online learning is more prevalent, students generally mix online learning (which may include MOOCs and other online courses) with more conventional studies, frequently taking one online unit along with on-campus studies.¹² Various international providers offer MOOCs on a continuum between totally free knowledge sharing and for-profit training organisations. MOOCs are part of a broader shift toward open knowledge and open education that has challenged learning institutions as the main source of knowledge and has created plural forms of learning.

One of the key challenges raised by xMOOCs is the conceptual separation of learning from credentialisation of learning.¹³ Generally these elements are bundled together as part of the tertiary educational package, but the xMOOC and other aspects of open learning demonstrate that learning can occur in many different places and the role of education institutions is to validate that learning and provide credentials that recognise credible evidence of learning. In this way for example, a law school could create a portfolio unit which credentialises into the law degree the badges earned by students who successfully complete xMOOCs.

Among the suggested benefits of the xMOOC are the liberalisation of access to education, reduction of cost to the learner, flexibility for personalised learning (such as control over pacing) and extending the engagement of the institution with the broader community.¹⁴ While MOOCs may not have led to large-scale global democratisation of education or broad access for the disadvantaged, they have enabled those who benefit from self-directed learning to enact career change and otherwise draw on learning opportunities.¹⁵

For legal education, the xMOOC could form part of a pathway into formal legal studies for responsible learners who seek career change or a pathway for high school students to learn about the law and what formal legal qualifications hold as a career. The format will not

¹² David L Clinefelter and Carol B Aslanian, *Online College Students 2016: Comprehensive Data on Demands and Preferences* (Learning House, 2016).

¹³ Educause, *What Campus Leaders Need to Know about MOOCs* (20 December 2012) <<https://library.educause.edu/resources/2012/12/what-campus-leaders-need-to-know-about-moocs>>.

¹⁴ Fiona M Hollands and Devayani Tirthali, 'MOOCs: Expectations and Reality' (Report, Center for Benefit Cost Studies of Education, Teachers College, Columbia University, 2014).

¹⁵ Chen Zhenghao et al, 'Who's Benefiting from MOOCs, and Why', *Harvard Business Review* (online), 22 September 2015 <<https://hbr.org/2015/09/whos-benefiting-from-moocs-and-why>>.

necessarily ever replace structured learning experiences especially for novice learners or those who need extensive scaffolding, but it may be a way of introducing potential students who are not yet ready for the commitment of full enrolment or who are temporarily unable to study within the conventional classroom environment and timelines.

There are also individuals who work in fields that require legal knowledge skills, but not a full Priestley 11 compliant law degree,¹⁶ and the MOOC may be the format to learn those important knowledge skills and, if desired by the learner, to credentialise that learning as part of a digitally badged credential, a short course, or unit of study. There are increasing numbers of self represented litigants in the legal system¹⁷ and specifically tailored xMOOCs might provide assistance to them and to other individuals and organisations that cannot afford professional legal services and are unable to access legal aid. xMOOCs may also provide partial support for litigants taking advantage of unbundled legal services.

The xMOOC format provides options and allows for a diversity of relationships between the individual and the institution. A learner may begin by studying a free xMOOC, pay a fee to have that learning assessed and turned into credentials and may eventually enrol in a degree program receiving credit for their prior xMOOC studies. Both sides of the relationship may benefit from a more tentative initial engagement and this may well be a way of providing an entry point to legal education for those who traditionally have been unable to access it or those who require small tentative steps before committing to a degree.

xMOOCs have been widely criticised and are not necessarily a good fit for every learner, although the same could be said for any learning model. Completion rates are lower than university units of study, but even these statistics can be used to challenge the way in which we emphasise ‘course completion’ as validation of learning, rather than interrogate learner needs and the best way to meet them. Not all learners desire certification, some may be seeking information or skills to solve a particular problem rather than aiming for overall completion and can do so without the risk of incurring massive student fees. In their four-year review of open online courses, HarvardX and MitX surveyed students regarding their intentions (to browse, audit or complete) and matched completion rates against these

¹⁶ The Law Admissions Consultative Committee defines eleven areas of knowledge that are required for admission to practice in Australia. Law Admissions Consultative Committee, *Prescribed Academic Areas of Knowledge* (December 2016) <https://www.lawcouncil.asn.au/files/web-pdf/LACC%20docs/249520754_1_LACC%20-%20Prescribed%20Academic%20Areas%20of%20Knowledge%20%28Revised%20December%202016%29.pdf>.

¹⁷ Productivity Commission, *Access to Justice Arrangements* (2014).

intentions, finding that of the 54 per cent who intended to complete a course, 30 per cent actually earn certificates.¹⁸

Law schools possess a wealth of expertise and experience that is tied to the credentialing of legal professionals who can be admitted to practice. The xMOOC can provide a platform for sharing learning materials as law becomes increasingly specialised and rapidly changing and can be an incubator for developing online teaching capacity more broadly.¹⁹ There is no reason why several law courses could not combine together to produce shared xMOOC resources. It is not necessary for all law schools to reinvent the wheel in producing similar materials for the same subject across Australia. This is wasteful of government higher education funding.

Even as these benefits have become apparent in the international field, Australia has been slow to embrace xMOOCs and law schools, bound by the Priestley 11 admission framework and federal regulations, have not extensively explored the format. There are many complex reasons for this, but one notable hurdle is placed by the definitions under the legislation and regulation of higher education. The next section will examine the overall structure of the commonwealth Higher Education regulation before analysing the impact for domestic and international learners.

III REGULATION OF THE HIGHER EDUCATION BUSINESS MODEL

This section examines the Australian Higher Education regulatory system with a focus on the control of the degree business model, the regulation of international students and TEQSA quality issues. These restrictions pertain to all institutions seeking to develop new educational strategies, not just legal educators, but the specific impact on legal education is discussed where relevant.

The present higher education framework is built around the traditional degree model and presumes the features and risks of a three or four-year degree program to be the core regulatory objective. This amount of oversight is particularly important for fee paying degree programs where attrition is costly for students, universities and government, but is less relevant to innovative educational models that displace these costs such as xMOOCs, where low cost, diversity and the freedom to come and go are strengths.

The Australian higher education regulatory environment does not prevent xMOOC content being incorporated into law programs undertaken by students in existing higher education Commonwealth supported places or being made available in its entirety online. The issue is not one concerning quality in terms of meeting Threshold Learning Standards as regulated by TEQSA.²⁰ The key problem arises

¹⁸ Isaac Chuang and Andrew Ho, 'HarvardX and MitX: Four Years of Open Online Courses' (Report, MIT Office of Digital Learning and Research Committee for the Vice Provost for Advances in Learning at Harvard University, 23 December 2016).

¹⁹ Stephen Colbran and Anthony Gilding, 'MOOCs and the Rise of Online Legal Education' (2014) 63 *Journal of Legal Education* 405.

²⁰ *Higher Education Support Act 2003* (Cth) s 19-15.

with respect to administrative data requirements for all courses including xMOOCs, assessment practices, and, until the 2014 Federal Budget (which partially deregulated fees commencing 1 January 2016), there were problems granting credit towards a degree for free, or for discounted, online xMOOC courses for domestic students and international students studying in Australia under a student visa.

The administrative and data requirements for compliance with the *Higher Education Support Act 2003* (Cth) (HESA)²¹ and associated rules and guidelines have set dates limiting the flexible open offerings of an xMOOC. For example, there are census dates for student enrolments, deadlines to set fees, deadlines for scheduling courses for the following year. All of these processes limit flexibility and competitiveness in xMOOC offerings nationally and internationally, where xMOOCs are a course within a program. Any procedural hurdles that require extensive lead-time often result in inefficiency, a lack of flexibility, an increase in compliance and associated costs without necessarily improving quality.

A Commonwealth Supported Domestic Students

Once a person resident in Australia enrolls in a university, they become a student subject to the Department of Education, HESA,²² *Higher Education Support Act Guidelines 2003* (Cth)²³ and university rules for the course in which they are enrolled. This is the situation for most domestic law students. Until the changes in the 2014 Commonwealth Budget, universities who are HESA Table A providers (Commonwealth Funded Institutions), including all public universities, were not permitted to charge fees to undergraduate domestic students seeking an award as these students were commonwealth supported. Fee arrangements were locked.²⁴ This effectively prevented universities charging undergraduate commonwealth supported domestic students' fees for any course including an xMOOC. While many xMOOCs are free to access, many will require payment of a fee to complete assessment and formalise any connected credential. This funding restriction remained until 1 January 2016.

The 2014 Federal Budget²⁵ announced that:

Universities will be able to set their own tuition fees for the courses they offer. This gives universities autonomy and freedom to improve educational quality. \$1 of every \$5 of additional revenue raised by higher education providers from fees will be used to set up Commonwealth Scholarships ... Universities and colleges [are] free to pursue their goals and cater to their communities in cities, towns and regional locations across Australia, and online.

²¹ Ibid s 169-25.

²² Ibid s 90-1.

²³ Ibid s 87-5.

²⁴ Ibid s 19-85.

²⁵ Commonwealth, *Budget 2014–15 – Higher Education* (2014).

Fees will unlikely fall below the base Commonwealth Supported contribution that must be charged if a MOOC forms a unit within a Commonwealth supported law degree. While in 2016, this saw a 20 per cent reduction, universities have been deregulated only on the upside of additional student fee charges. Ironically, the Budget also recognised that '[e]xcessive regulation is constraining diversity, innovation and quality in the sector.'²⁶ However, despite the rhetoric, relatively little appears to have been done to reduce the regulatory burden.

Even under the pre-2014 Federal Budget, fees may be charged to undergraduate single non-award courses, not undertaken as part of a program of study. These fees must comply with the HESA rules on tuition fees and cannot be lower than those charged to Commonwealth Supported Students. This effectively prescribes a minimum fee for an xMOOC designed for undergraduate single non-award courses, such as law, being the same as that charged to Commonwealth Supported Students.

The post-budget position deregulates fees commencing on 1 January 2016, presumably allowing lower fee xMOOCs as part of an Australian tertiary degree for domestic Commonwealth Supported Students. One university had already found a path around the pre-Budget fee constraints. UNE used an interposed non-university entity *UneOpen* to run their non-award xMOOCs. The completed xMOOC then leads to advanced standing towards a degree provided a student has successfully completed a challenge exam. It would seem, using the UNE model, that there may be nothing preventing a heavily discounted or even free non-award course being offered as a loss leader using any of the funding options mentioned above. If discounted fees or no fees were charged by an Australian University Table A²⁷ provider for an xMOOC for credit in a program, this appears consistent with the new regulatory requirements removing prescribed minimum fees, but this demonstrates the problem where institutions are required to step outside of regulatory structures to create effective workarounds. This has the potential to destabilise the university funding model and may drive universities toward more automated assessment practices that may provide less value for students.

Under both the pre- and post-Budget arrangements, there do not appear to be any restrictions on xMOOC pricing for full-fee paying *postgraduate* students, who may be a significant audience for law xMOOCs. Established adult learners who are seeking career transition are a key audience for law schools and they may also be those who would benefit from additional flexibility in study options.

The fee rules as applied to xMOOCs do not strengthen Australia's knowledge base or assist in spreading that contribution nationally or internationally. The pre-Budget cost restrictions on xMOOCs did not support students undertaking higher education. The post-Budget costs structures are only potentially 20 per cent better if the minimum

²⁶ Ibid 3.

²⁷ *Higher Education Support Act 2003* (Cth) s 16-15.

Commonwealth contribution is charged to students and potentially significantly worse if universities charge additional fees greater than 20 per cent. While this appears to be the case for domestic students, the situation is much worse for international students studying domestically.

IV IMPACT OF REGULATION ON THE FINANCING OF A MOOC

One major impediment to the broader adoption of xMOOCs is concern over the underlying financial model. There are many potential options for funding a law xMOOC ranging from public funding, through various sponsorship models to direct revenue charging. xMOOCs are notoriously difficult to capitalise on under current regulatory models. The following section considers various funding options many of which may be able to be used in conjunction with one another.

One model for public universities whose primary source of income is Commonwealth Supported Students is public funding for xMOOCs.²⁸ Universities may cross-subsidise free or low cost xMOOCs from Commonwealth supported income. This model can be used as a teaser for students to get engaged with higher education with a percentage taking up offers for paid follow up certified coursework²⁹ or perhaps an on-campus experience. This ‘try before you buy’ model has considerable marketing advantages particularly where potential students are unfamiliar with what higher education offers. Other variants of this approach include xMOOCs as a feeder or stepping stone course to paid enrolment.³⁰ An xMOOC may take the form of a preparatory course for higher education, examples include study skills, ELICOS³¹ courses as a prelude to paid enrolment. Another advantage of these approaches is their public outreach. Public universities offering open access to selected xMOOC courses build community engagement and public profile.

Other sources of income may further supplement or replace cross-subsidisation of publicly funded xMOOCs. These sources range from philanthropic grants, crowd funding, gifts and endowments³² through to partnership or channel arrangements with publishers who may

²⁸ Claire McCann, ‘Key Questions on the Obama Administration’s 2014 Education Budget Request’ (Issue Brief, New America Foundation, 10 April 2013); Chrysanthos Dellarocas and Marshall Van Alstyne, ‘Money Models for MooCs’ (2013) 56(8) *Communications of the ACM* 25, 26.

²⁹ Katherine Mangan, ‘eCornell Offers a MOOC That Steers Students to a Paid Follow-Up’, *Chronicle of Higher Education* (online), 8 January 2013 <<https://www.chronicle.com/blogs/wiredcampus/ecornell-to-offer-mooc-that-steers-students-to-for-credit-follow-up/41433>>.

³⁰ B J Zirger, ‘Can MOOCs be Profitable?’ (2013) 12(5) *BizEd* 56.

³¹ English Language Intensive Courses for Overseas Students.

³² Michael A Cusumano, ‘Are the Costs of “Free” Too High in Online Education?’ (2013) 56(4) *Communications of the ACM* 26.

provide cross-subsidisation from book sales³³ and employers who may pay for data or introductions to top students³⁴ or brand awareness. Advertising and sponsorship³⁵ are further potential sources of funding to support an xMOOC.

xMOOCs may be a direct source of income in themselves, particularly if enrolment is large and cost is low.³⁶ More common variants of this model include differentiated or freemium services whereby participants get the basics free, but are required to pay for more — for example, charging for assessment, personal instruction, certification.³⁷ *Coursera* has free access to xMOOCs for participants to view content with fees paid for certification of assessment submitted for grading. Another example is a bait and hook strategy, whereby a free platform is provided for students, but a subscription service is created for premium customers in employment. Continual professional education is an obvious candidate for this approach. There can also be an open source contributory model for content, with enterprise clients paying professional subscription fees.

Another way for universities to reduce the cost of an xMOOC is a collaborative model whereby several providers collaborate to create and administer an xMOOC environment and courses available on that platform, which often happens with the provider *edX*. Syndication rights are another source of income that can arise from a collaborative cost sharing and distribution model.

In the Australian context the differentiated services model has been tried in a legal MOOC offered by *UneOpen* — Rural Legal Practice.³⁸ The University of New England (UNE) based in Armidale, Australia, owns *UneOpen*. While subject content was free, premium services were offered at a price. One-on-one video tutorials cost \$150 per hour. Group video tutorials (minimum four, maximum 10 participants) cost \$35 per person, per hour. A student may select a challenge exam, pay a fee of \$495, pass and obtain credit through advanced standing into a UNE law degree.

CQUniversity has adopted the approach of free open access to the complete content of an accredited law degree. The materials are freely available on *iTunesU* and Google Education Suite for anyone to view. This is an example of a MOOC being used as a public good and a form of advertising raising awareness of a program offering. While

³³ Jennifer Howard, 'Can MOOC's Help Sell Textbooks?', *Chronicle of Higher Education* (online), 17 September 2012 <<https://www.chronicle.com/article/Can-MOOCs-Help-Sell/134446>>.

³⁴ Jeffrey R Young, 'Providers of Free MOOC's Now Charge Employers for Access to Student Data', *Chronicle of Higher Education* (online), 4 December 2012 <<https://www.chronicle.com/article/Providers-of-Free-MOOCs-Now/136117>>.

³⁵ Dellarocas and Van Alstyne, above n 28, 27.

³⁶ Alisha Azevedo, 'UC Online Strives to Compete in an Era of Free Courses', *Chronicle of Higher Education* (online), 1 October 2012 <<https://www.chronicle.com/article/UC-Online-Faces-Challenges-in/134778>>; Dellarocas and Van Alstyne, above n 28, 26.

³⁷ Dellarocas and Van Alstyne, above n 28, 25.

³⁸ An example of this approach is *UneOPEN*, *How does uneOpen work?* (2013) <https://www.uneopen.com/app/about/a_id/17>.

incorporating many elements of an xMOOC the CQUniversity approach does allow for certification and does not provide the value-added services which UNE provided at a price.

Apart from these examples, Australia up to this point has been very limited in its offering of legal MOOCs. One reason for this may be that many of the funding options have been limited if not prohibited by Australian regulation that limits innovation in business models. Lawton et al observe:

There is an explosion of business model experimentation to integrate MOOCs into degree courses. The goal, for both MOOC platforms and universities, is revenue: developing ways of awarding credit for a fee. The ‘open’ part of massive open online courses may survive but only alongside fee-paying, credit-bearing options. The options will attract different constituencies (and the credit-bearing one will probably need a new acronym). MOOCs may evolve into full degrees offered with university partners. The encroachment of online experimentation at universities will impact on academic jobs and there will be resistance from teaching unions and students.³⁹

Michael Cusumano identifies negative network effects of free xMOOCs. He suggests, that while universities offer free courses or inexpensive extension school classes as part of their non-profit mission, supported by foundations that contribute money to such efforts (which they did for MIT’s *Open Courseware*) it is a real possibility that the not-so-elite will be unable to survive the new environment.⁴⁰ Analogies may readily be made to the demise of many software companies in the face of free competitors and dominant larger brands. It is wise to remember that the marginal cost of delivering a digital product is essentially zero.⁴¹ Richard James, Pro-Vice Chancellor of Engagement and Participation at Melbourne University fears that ‘Massive Open Online Courses are likely to drive part of the student market away from “long haul” degree programs as students instead build a set of skills-focused credentials from different providers’.⁴² While this may not be in the best interests of universities it may be in the best interests of employees, employers and society in general.⁴³

³⁹ William Lawton et al, ‘Horizon Scanning: What Will Higher Education Look Like in 2020?’ (Report, Observatory on Borderless Higher Education, 25 September 2013) 8.

⁴⁰ Cusumano, above n 32, 27.

⁴¹ Ibid.

⁴² Andrew Trounson, ‘MOOCs Will Drive Students Away From Degrees’, *The Australian* (online), 2 November 2012 <<https://www.theaustralian.com.au/higher-education/moocs-to-drive-part-of-market-away-from-full-degrees/news-story/34c1bef7b534728868b2af3808bcc7b5>>.

⁴³ The social benefits of MOOCs, along with the threats to the conventional university business model have been discussed in the education media and online. Carl Straumsheim, *MicroMasters on a Global Scale* (20 September 2016) Inside Higher Ed <<https://www.insidehighered.com/news/2016/09/20/mooc-based-masters-degree-initiative-expands-globally>>; Stuart M Butler, *How Google and Coursera May Upend the Traditional College Degree* (23 February 2015) Brookings

A solid business plan is essential. xMOOCs have a different, more intensive development model than many other units may have, but can provide shared resources to enhance teaching for other groups of students including those in traditional degree programs,⁴⁴ or be shared across universities. These new business models may also lead to anxiety and resentment amongst law academics who are already affected by shrinking resources and increased workloads. Anxiety may arise out of a fear of redundancy as universities may no longer need so many academics to produce the online resources. Academics with low levels of digital literacy become less valuable. Fewer academics surrounded by more effective development teams may produce higher quality learning resources and outcomes for students.⁴⁵ Existing law schools that refuse to adapt may fear losing students as their relative costs make them uncompetitive.

Internationally, different MOOC models are being developed with a view to innovation in delivery and funding models. In Australia, this process has been constrained by funding regulations that often result in innovation being shoe-horned within existing business and delivery models.

V INTERNATIONAL STUDENTS — DOMESTIC AND ABROAD

International students are not yet a key area of concern for most Australian law schools, but globalised business, developing information technologies and changes to the legal profession may soon create demand, particularly in training for workers in offshore document processing centres and for those whose careers span the globe.

A International Students Studying Domestically on a Student Visa

International students resident and studying in Australia on a student visa are subject to the *Education Services for Overseas Students Act 2000* (Cth) (the *ESOS Act*). The ESOS requirements are also potentially becoming important to domestic students as proposed standards include many of their features. Educational institutions registered under ESOS and listed on the Department of Education administered Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS)⁴⁶ may enrol overseas students to study in Australia on a student visa.⁴⁷ These institutions are also governed by

<<https://www.brookings.edu/blog/techtank/2015/02/23/how-google-and-coursera-may-upend-the-traditional-college-degree/>>.

⁴⁴ Katy Devitt, 'How MOOCs are Changing the Game for Higher Education: An Inside Look at the AdelaideX Project' (Paper presented at the Online & e-Learning Summit Asia, Kuala Lumpur, Malaysia, 18–20 October 2016).

⁴⁵ Open Universities and Open Universities Australia have support staff to assist with the production of online learning materials.

⁴⁶ Created under the *Education Services for Overseas Students Act 2000* (Cth) s 10.

⁴⁷ See Australian Government, Department of Education and Training, *ESOS Legislative Framework* <<https://internationaleducation.gov.au/Regulatory-Information/Pages/Regulatoryinformation.aspx>>.

the *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007* (2007 Code)⁴⁸ and the *Higher Education Provider Guidelines 2012*.⁴⁹ A course will not be registered on CRICOS unless undertaken on a full-time basis and meeting the relevant Australian Qualifications Framework requirements or those of any other appropriate quality or accreditation framework, if an appropriate framework exists.⁵⁰

The ESOS framework principally comprises the *ESOS Act*, the *Education Services for Overseas Students Regulations 2000* (the *ESOS Regulations*), the *Education Services for Overseas Students (Registration Charges) Act 1997* (the *ESOS Charges Act*) and the National Code. The ESOS framework is supported by the *Migration Act 1958* and the *Migration Regulations 1994* and various state and territory legislation relevant to the education of overseas students.

The *ESOS Act* and the *ESOS Regulations* set out the rules and regulations for the registration of providers, obligations on registered providers, the operation of the ESOS Assurance Fund, enforcement of the ESOS legislative framework and the establishment of the National Code. The *ESOS Charges Act* specifies the registration charges applying to CRICOS registered providers. The National Code gives these rules and regulations a practical application by providing nationally consistent standards for the registration and conduct of registered providers and the conduct of persons who deliver educational services on behalf of registered providers. The National Code is a legislative instrument. It is legally enforceable and breaches of the National Code by registered providers can result in sanctions being imposed on providers' registration under the *ESOS Act*.⁵¹

The legislation distinguishes between the concept of *distance learning* and that of *online learning*.⁵² 'Distance learning' is defined as study in which the teacher and overseas student are separated in time or space throughout the duration of the unit of study. Distance learning differs from online learning in that the study may be undertaken through written correspondence and exchange of hard copy materials. In contrast, 'online learning' is study in which the teacher and overseas student communicate mainly through electronic technologies for the unit.

Courses delivered entirely by online or distance learning such as an xMOOC cannot be registered on CRICOS.⁵³ Courses with a distance or online component can only be registered on CRICOS where the designated authority is satisfied that these courses meet the

⁴⁸ See Australian Government, Department of Education, Employment and Workplace Relations, *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007* (Commonwealth of Australia, 2007).

⁴⁹ *Higher Education Provider Guidelines 2012* (Cth).

⁵⁰ 2007 Code s C.7.1.

⁵¹ The text of this paragraph is directly taken from the 2007 Code ss A.7.2–A.7.3

⁵² 2007 Code, app A.

⁵³ *Ibid* s C.9.

minimum requirements as specified in Standard 9.⁵⁴ Standard 9 allows international students to study up to 25 per cent of their total course through online or distance learning. The percentages appear to relate to the duration of the mode of instruction (face-to-face as distinct from distance or online), rather than the content of courses. Hence international students studying domestically can be taught face-to-face using supporting xMOOC materials, but not by a course in the form of an xMOOC. It is not entirely clear why an international student is treated differently to a domestic student with respect to online or distance learning. It may have to do with immersion, English language development, prevention of work visa breaches etc rather than any pedagogical reason. In any case, there is no solid empirical evidence that would support the exclusion of the xMOOC model.

Potentially the cost of educating international students studying on a student visa will increase relative to domestic students as more xMOOC content and online components are incorporated into courses and programs for domestic students. While domestic students can take advantage of this, CRICOS requirements may prevent access to this material by international students. Separate program streams may become necessary for domestic and international students, with the relative costs of international program relatively increasing.

A CRICOS registered provider such as an Australian university who uses an xMOOC from another provider may need to advise the designated authority in writing of all providers to be involved in providing a registered course, the role played by each provider in the delivery of the course.⁵⁵ There are also restrictions on the maximum number of students a provider can teach⁵⁶ further reducing potential scale advantages associated with xMOOCs.

The 2007 Code contains 15 standards, which must be met, covering issues such as pre-enrolment engagement of students, care for and services to students, students as consumers, complaints and appeals, the student visa programme, completion within the expected duration of study and monitoring course progress, attendance, course credit, deferral, suspension and cancelling enrolment, staff capacity, educational resources and premises, and finally changes to registered providers' ownership or management.

An international student can complete part of their course in Australia and then return to their home country to complete the remainder by an xMOOC provided the student relinquishes their Australian student visa. If they retain their visa the student can only complete a maximum of 25 per cent of their course online, but none of the courses can take the form of an xMOOC.

The *Higher Education Provider Guidelines 2012* apply to the HESA and govern the fees for international students on a student visa studying in Australia or taking up to 25 per cent of their course by distance. The 2014 indicative rates are published on the Federal

⁵⁴ Ibid.

⁵⁵ Ibid s D.10.2.

⁵⁶ Ibid s C.12.1.

Government's higher education website.⁵⁷ International students studying in Australia under another visa category, such as working, defence, and diplomatic, are not subject to the HESA requirements.

B International Students Studying Outside Australia Without a Student Visa

The rise of international outsourcing firms makes the education of international students, located in their own country, a new priority for legal education. International students resident in their home country and studying an Australian qualification via an xMOOC are not subject to ESOS or HESA and no CRICOS code is required.⁵⁸ While a CRICOS code is not required, there are guidelines from ESOS and national protocols (particularly around marketing, obligations to students, ethical conduct etc) that still apply and the offering is still regulated via TEQSA. Despite this, the regulatory environment is less strict than offering a comparable program to international students in Australia. There are still minimum fees that universities are obliged to charge, but they are far less than those that apply in Australia.⁵⁹

Providers may seek to circumvent these requirements by selling or licensing some component of their academic product to a separate offshore entity to deliver. For example, instead of taking the first year of their Bachelor of Business at an Australian university, students are encouraged to take a diploma at a foreign business college with that Australian university's content delivered under a licensing agreement with the college. Such approaches are very common in South East Asia — Singapore in particular. Offshore operations of Australian providers in that part of the world often consist of students undertaking a Diploma or Advanced Diploma at a private college where the content is effectively licensed from an Australian university. To complete their degree, the student then transfers to the Australian university. This approach has the twin advantage of allowing the Australian university to avoid regulatory issues that still apply to offshore operations (the students are not enrolled with the university

⁵⁷ Australian Government, Department of Industry, Innovation and Science, *Boosting Innovation and Science* (6 July 2018) <<https://www.industry.gov.au/strategies-for-the-future/boosting-innovation-and-science>>.

⁵⁸ The 2007 Code specifically states the definition of distance learning as being '[s]tudy in which the teacher and overseas student are separated in time or space throughout the duration of the unit of study (including online learning), but does not include study where the student is resident in his or her home country or another country offshore and does not hold a student visa. Distance learning differs from online learning in that the study may be undertaken through written correspondence and exchange of hard copy materials.' Online learning is defined by the 2007 Code as '[s]tudy in which the teacher and overseas student communicate mainly through electronic technologies for the unit. For the purpose of the National Code, permissible online learning does not include study where the student is resident in his or her home country or another country, does not hold a student visa and is undertaking a unit of study with a registered provider which is located in Australia.'

⁵⁹ The 2014 rates are accessible at Australian Government, Department of Industry, Innovation and Science, above n 57.

itself until their second or third year so the university regulatory environment does not apply until that stage) and also as a risk management strategy.

It is possible to offer an xMOOC offshore at a discounted rate — either as a standalone offering or in conjunction with an offshore partner. For example, a university may look at offering a limited range of courses highlighting their expertise in specific subject areas and making those available to anyone who wanted to access them. Melbourne University offers a few postgraduate, full-fee courses for credit back into niche postgraduate programs (via a very expensive assessment/transfer process). It is unlikely this approach will be applied to a full degree program via MOOCs. Melbourne University runs a ‘semester online’ activity. Since administrative systems are expensive to set up in Australia, universities tend to use the systems of their overseas provider wherever possible.

The operations of most Australian law schools do not extend to international students studying outside Australia. Online law schools have more flexibility to offer such international students, whether they be ex patriots overseas, or otherwise to study an Australian law degree. As we will examine later, there are perhaps unintended restrictions placed by admission bodies on recognising such qualifications. Such prospects remain unexplored.

VI MOOCs AND TEQSA

Beyond the regulation of fees and business models, the Australian regulations also govern other aspects of quality in a manner that presumes the on-site degree program to be the default model of higher education. Both the Australian Qualifications Framework and the *Tertiary Education Quality and Standards Agency Act 2011* (Cth) (*TEQSA Act*) will apply to providers offering regulated Higher Education Awards solely or jointly with another entity.⁶⁰ Such awards include Australian Higher Education Awards and overseas higher education awards, if those awards relate to courses of study provided at Australian premises.⁶¹ Hence the framework applies to domestic students, international students studying in Australia under a visa and to students studying outside Australia, who are seeking an Australian Tertiary Qualification under the Australian Qualifications Framework. TEQSA assessments apply to eLearning and MOOCs.⁶² The *TEQSA*

⁶⁰ TEQSA s 5. According to s 5 higher education award means: (a) a diploma, advanced diploma, associate degree, bachelor degree, graduate certificate, graduate diploma, masters degree or doctoral degree; or (b) a qualification covered by level 5, 6, 7, 8, 9 or 10 of the Australian Qualifications Framework; or (c) an award of a similar kind, or represented as being of a similar kind, to any of the above awards, other than an award offered or conferred for the completion of a vocational education and training course.

⁶¹ TEQSA s 4.

⁶² Australian Government, Tertiary Education Quality and Standards Agency, *Information Sheet: eLearning and Compliance with the Threshold Standards* (1 March 2013) <<https://www.teqsa.gov.au/latest-news/publications/information-sheet-elearning-and-compliance-threshold-standards>>.

Act in s 5 provides a very broad definition of providing a course of study that includes an xMOOC.⁶³

The six objects in s 3 of the *TEQSA Act* reinforce the objects of s 2 of the HESA. Object 3(b) has considerable implications for xMOOCs and seeks to regulate higher education using a standards-based quality framework and principles relating to regulatory necessity, risk and proportionality. In considering Object 3(b) it is important to note that TEQSA has a risk management system and extensive powers to impose other conditions on registrations⁶⁴ and accreditation.⁶⁵ There are mandatory standards associated with registration all of which would need to be complied with for an xMOOC-based program. For example, the Threshold Learning Standards (TLO)⁶⁶ statement for law addresses curriculum content and minimum learning outcomes expected of graduates of the Bachelor of Laws and Juris Doctor, but does not prescribe the suitability or otherwise of learning and teaching activities to develop, support or achieve the academic standards.⁶⁷

The *TEQSA Act* is robust enough to support xMOOCs, but that cannot be said for the current *Higher Education Standards Framework (Threshold Standards) 2015* (Cth)⁶⁸ which contains various provisions inconsistent with offering inexpensive MOOCs, even though one of the underlying principles of the review states, '[d]iversity of educational offerings and different types of educational provider are not inhibited, and the Standards will be applicable to any mode(s) of delivery or participation.'⁶⁹ These Standards may set appropriate safeguards for students committed to a costly three or four year degree program but make less sense in the context of free or low cost xMOOCs.

Orientation and transition arrangements for xMOOCs are generally minimal and limited to collection of information for marketing purposes to assist with recruitment into existing online or on campus programs. Standard 1.3 requires that students are assisted towards a successful transition into higher education through orientation. Specific strategies supporting transition are identified as including

⁶³ Section 5: An entity may provide a course of study by one or more of the following means: (a) a lecture, class or examination on campus or other premises; (b) a postal or other like service; (c) a computer adapted for communicating by way of the internet or another communications network; (d) a television receiver adapted to allow the viewer to transmit information by way of a cable television network or other communications network; (e) a telephone; and (f) any other electronic device.

⁶⁴ TEQSA s 32.

⁶⁵ *Ibid* s 53.

⁶⁶ Sally Kift, Mark Israel and Rachael Field, *Learning and Teaching Academic Standards Project: Bachelor of Laws – Learning and Teaching Academic Standards Statement December 2010* (Australian Learning and Teaching Council, 2010) <<https://cald.asn.au/wp-content/uploads/2017/11/KiftetalLTASStandardsStatement2010.pdf>>.

⁶⁷ *Ibid*.

⁶⁸ Made under TEQSA s 58(1).

⁶⁹ Higher Education Standards Panel, 'Proposed Higher Education Standards Framework' (Call for Comment No 3, Higher Education Standards Panel, 23 April 2014) 3.

assessing the preparedness of and potential risks for individual students and cohorts during transition, undertaking early assessment or review that provides formative feedback on academic progress and is able to identify needs for additional support, and providing access to informed advice and timely referral to academic or other support. Some of these elements may be incorporated into an electronic orientation program, such as automated testing to stream students according to ability and formative testing of concepts, but it is far more onerous to provide referral to academic advice. Whilst these supporting services are provided in more traditional online education they are generally not provided in xMOOCs.

Part of the orientation and transition process may involve credit transfers. It may be difficult for students to gain transfer credit for xMOOCs undertaken in other MOOC programs, particularly xMOOC programs from overseas not subjected to the same standards.

Wellbeing and safety is another area where standalone xMOOCs do not easily fit the regulatory framework. Standard 2.3 requires that students are informed of and have appropriate access to advocacy support, for example in relation to the higher education provider's academic and procedural rules and a range of personal support services adequate to meet the needs of the student body, such as counselling, health, welfare, accommodation and career services, provided by appropriately qualified personnel. This standard also includes access to emergency services, financial and legal advice, and advocacy. There are also extensive requirements for student grievance and complaints procedures in Standard 2.4, in effect making the requirements of the *ESOS National Code 2007* applicable to all students. This extensive, costly regime is difficult to support in a low cost xMOOC environment where students come and go as they please.

Standard 6.1.3 provides that as appropriate to its scale and scope, the higher education provider has student representation within its deliberative and decision-making processes and encourages students to participate in these processes. These provisions have no concept of the minimalistic support typically associated with free or inexpensive xMOOCs. They are designed for a high quality, high cost solution and do not cater for the fluid nature of xMOOC participation.

Standard 2.1 Facilities and Infrastructure includes a provision that the learning environment supports academic and social interactions among students outside of formal teaching. The last component suggests that some form of social networking may need to be associated with an xMOOC environment.

Standard 1.1 requires that the provider ensures that students have adequate prior knowledge and skills to undertake the course of study successfully, and that the higher education provider identifies and adequately meets the varying learning needs of all its students including: ongoing academic language and learning support. It is difficult for an xMOOC environment to meet the second element as it in effect requires a complete ELICOS diagnostic and training system. The Standards place an emphasis on early assessment, informed access and timely referral.

Standard 1.3.4 requires that the higher education provider has effective mechanisms to identify and support students who are at risk of not progressing academically. In a MOOC environment this standard may be met through learning analytic algorithms identifying and triggering remedial materials. xMOOCs have high numbers of casual viewers who look at the content but have no desire to progress academically. Having to provide assistance to students who have no intention to complete the course and are in effect transient may impose a very high regulatory burden.

The *Higher Education Standards Framework (Threshold Standards) 2011* (Cth) are designed for a high quality and expensive higher educational system. No doubt Australian tertiary institutions will meet the standards required, though this may exclude them competing in lower cost mass education markets of the future operating on a lower cost base than the Commonwealth Supported fee structure. This may stifle innovation or equity initiatives using legal education MOOCs to provide a pathway into study for students who are otherwise unable to access conventional programs, whether due to location, lack of flexibility and cost.

VII IMPACT OF LEGAL REGULATORY BODIES ON xMOOCs

Law Admission Boards play a central role in determining whether a law qualification will meet admission standards and in turn whether a law qualification will continue to exist. A law qualification not leading to admission is of little marketable value. Presently it is uncertain whether a law qualification including xMOOCs or being made up entirely of xMOOCs would meet admission requirements. In fairness to Law Admission Bodies, these issues may never have previously been considered for coverage in the rules.

The Law Admissions Consultative Committee (LACC), an advisory body to the Council of Chief Justices, whilst having no legislative basis, wields considerable influence over state and territory admission boards.⁷⁰ The LACC Model Admission Rules August 2015 (revised December 2016) Rule 4(1) states that:

In considering whether to approve a course or institution for the purposes of rule 2(1) or rule 3(2)(a), the Authority must take into account any appraisal criteria for such courses or institutions endorsed by the LACC and may have regard to any other matter it considers material.

LACC influences the duration, content, and mode of delivery of law degrees, has created draft accreditation standards for Australian law courses and has control over recognition of legal qualifications of foreign lawyers.

The LACC Statement on Duration of Law Courses (February 2013) states in part:

⁷⁰ Law Admissions Consultative Committee, *Charter* (2010) <https://www.lawcouncil.asn.au/files/web-pdf/LACC%20docs/212391469_2_LACC%20Charter%202010.pdf>.

The Uniform Admission Rules and the Admission Rules of several jurisdictions require an applicant for admission to the legal profession to have successfully completed an academic course in law "which includes the equivalent of three years' full-time study of law" and also includes the 11 prescribed academic areas of knowledge.

The body responsible for assessing and accrediting academic courses preparing applicants for admission to the legal profession in each jurisdiction (the Admitting Authority) considers that the requirement refers to three calendar years. A law course that can be completed in fewer than three years may be accredited, however, if the relevant law school satisfies the Admitting Authority that the course is, indeed, the equivalent of a three calendar year full-time course undertaken at the relevant law school, in terms of the breadth and depth of its content, the teaching methods to be employed and the assessment criteria and methodology.

While a series of xMOOCs could be argued to satisfy an equivalent of three years study of law matching the required breadth and depth of content, the equivalency in teaching methods to be employed and the assessment criteria and methodology is extremely restrictive and perpetuates existing teaching practice.

xMOOCs often employ different teaching methods, such as flipped classrooms and self-paced learning not common in Australian law schools. Assessment criteria and methodology is often more restrictive with xMOOCs, which tend to automate assessment using multi-choice examinations, mix and match exercises and reflective exercises. xMOOCs often use peer rather than instructor moderated assessment strategies.

The LACC Prescribed Academic Areas of Knowledge (Revised December 2016) combined with the LACC Statement on Statutory Interpretation mandates 12 areas to be covered in accredited law qualifications. This in itself is not an impediment to xMOOCs as the relevant content knowledge can readily be covered.

More troubling issues are found in the purposes of the LACC Draft Accreditation Standards for Australian Law Courses, which are:

- (a) to assist an Admitting Authority, when accrediting, monitoring, reviewing or re-accrediting a law course, to determine whether that law course will provide for a student to acquire and demonstrate appropriate understanding and competence in each element of a prescribed area of knowledge, and in each element of the LACC *Statement on Statutory Interpretation*; and
- (b) to provide clear, tangible guidance about what evidence is required to satisfy each standard relating to –
 - (i) the nature of a law course;
 - (ii) the duration of a law course;
 - (iii) the content of a law course;
 - (iv) teaching a prescribed area of knowledge; and
 - (v) assessment of a student's understanding and competence.

The explanatory note to teaching a prescribed area of knowledge states:

A student needs to acquire both understanding and competence in each element of each prescribed area of knowledge and in each element of the LACC *Statement on Statutory Interpretation*. Admitting Authorities consider that this will not occur unless the teaching methods demonstrably require active learning, whereby students engage in critical analysis of the knowledge they acquire; test their knowledge by applying it to factual situations; are required to produce solutions supported by legal arguments; and reflect on the process they have followed. **Admitting Authorities consider that synchronous direct interaction between students and teachers remains the primary reliable means of achieving these results.**

The last sentence, highlighted in bold, directly undermines the use of xMOOCs and carries assumptions about the best methods of education which are contrary to the reported educational literature. The sentence:

- Ignores the fact that asynchronous interaction between students and teachers and other students is a highly effective means of education.
- Ignores interactions between students such as peer review.
- Ignores many important aspects of the flipped classroom where teachers act as facilitators and the real learning arises with student interactions.
- Ignores major educational theories such as constructionism.
- Ignores advances in automated simulations. Simulations can now approach reality, with realistic virtual environments and learning pathways which exist in the absence of any synchronous direct interaction between students and teachers or the need for such interaction. The interaction is between the student, groups of students and the simulation. Never versions of such approaches incorporate artificial intelligence engines.
- Ignores the potential of expert systems — this is another form of potentially teacherless interaction.
- Ignores numerous examples of teaching software developed since the 1960s.⁷¹
- Undermines the application of research into alternative methods of delivery which do not involve synchronous direct interaction between students and teachers.
- Perpetuates expensive, exclusive approaches to legal education and creates barriers to entry.
- Presents no evidence to support the proposition that synchronous direct interaction between students and teachers is the primary reliable means of achieving anything. So much depends on the quality of the teacher and the role that they play.

⁷¹ Center for Computer-Assisted Legal Instruction <<https://www.cali.org>>.

The problem is further exacerbated by rule 4.5(b)(iii) which describes how a law school can show it has met this standard –

- (iii) the program of instruction primarily comprises either or both of –
 - (A) in-person instruction and learning; and
 - (B) instruction and learning involving direct interaction between teacher and student, and enables students to acquire and demonstrate appropriate understanding and competence in each element of each prescribed area of knowledge and in each element of the LACC *Statement on Statutory Interpretation*.

Rule 4.5(b)(iii) is inconsistent with the concept of an xMOOC.

On another front, the LACC Uniform Principles for Assessing Qualifications of Overseas Applicants for Admission to the Australian Legal Profession August 2015 (Revised June and October 2017) are predicated on the basis of an overseas applicant seeking recognition of foreign qualifications. The Principles do not easily cater for an overseas applicant who has completed an accredited Australian law qualification studied via the Internet from the applicant's home jurisdiction. The added expense of such applicants attempting to meet these requirements is a considerable barrier to entry. It is also not clear that an Australian online provider can offer an accredited Australian law degree online, whether or not incorporating MOOCs, to students studying in their foreign home country. The Admission rules are unclear on this issue despite one of LACCs functions being 'to have regard to the desirability that policies and procedures relating to admission be consistent with Australia's participation in the international demand for professional legal services'.⁷²

While universities may be contemplating the development of MOOCs for either undergraduate and/or continuing education, it is possible a non-university provider could provide the suitable education and/or training for admission to practice.

In the legal context, Roper⁷³ suggests '[t]his being so, it is, in fact, feasible that a law school could meet all of the standards proposed later in this report but be, in effect, 'bypassed' by the law admitting authorities insofar as a person could present themselves for admission to practice with:

an assemblage of courses completed other than in the law school of the university, in whole or partially, in the required areas of knowledge, and/or a tertiary academic course in law, but with a number of the courses of study in the required areas of knowledge having been completed outside the institution offering that tertiary academic course, possibly in a private non-university institution.⁷⁴

⁷² Law Admissions Consultative Committee, above n 71, sub-cl 2.2(c).

⁷³ Christopher Roper, *Standards for Australian Law Schools: Final Report* (Report, Council of Australian Law Deans, March 2008) <https://cald.asn.au/wp-content/uploads/2017/11/CALDStandardsforAustralianLawSchoolsProjectRoper_ReportMarch20081.pdf>.

⁷⁴ *Ibid.* Roper also notes, '[i]n addition, there are the examinations conducted by the Legal Practitioners Admission Board in New South Wales, and the courses of study offered by the Law Extension Committee of the University of Sydney for those

In practice this could lead to substantial changes to legal education, potentially allowing law firms and others to enter the legal education market. In turn this might drive down the costs of legal education and other barriers to entry. Changes to the admissions model like this could destabilise the Australian legal education institutions yet might lead to more inclusive access and other benefits to the community.

In the light of the LACC Draft Accreditation Standards for Australian Law Courses, Roper's comments are premature. Rule 4.1 defines the nature of a law course as a tertiary academic course in law, conducted in Australia, whether or not it leads to a degree in law. The explanatory note states that the qualification must be a degree or another similar qualification in law, awarded upon successful completion of a tertiary academic course. Further a law course is 'a tertiary academic course' for the purposes of these Standards if it is either –

- (i) provided by a self-accrediting provider on the National Register of Higher Education Providers; or
- (ii) is currently accredited by TEQSA as leading to a regulated higher education award.

The LACC rules do not currently envisage law firms and others providing qualifications in law, let alone law courses structured around a series of MOOCs. Prospects of Australian online degrees and PLT courses offered to overseas students using xMOOCs being accredited for admission purposes is also not currently covered by the rules. The barriers to entry to the profession remain intact and the benefits of xMOOCs continue to remain illusory in the Australia context.

VIII IMPACT OF JURISDICTION ON MOOCS

The broader the jurisdictional coverage of a particular subject the greater the potential application and complexity of an xMOOC. Hence subjects such as corporations law and family law based on Commonwealth legislation are readily adaptable to xMOOCs. Similarly, common law subjects such as contract and torts can easily be dealt with in an xMOOC as in many respects the common law principles are universal. Even subjects with jurisdictional boundaries and state-based legislation such as civil procedure and evidence can be catered for by xMOOCs that have inbuilt pathways recognising jurisdictional variations. The greater the jurisdictional variations, the greater the level of abstraction to general principles in an xMOOC, or limitation of the xMOOC audience, or alternatively a more complex

intending to undertake those examinations. They represent an additional route to admission to practice in New South Wales. The proposals in this report do not seek to encompass those examinations and courses, although the standards should desirably also extend to them.'

xMOOC design that alters depending on the jurisdiction of the user. Jurisdictional limitations can be overcome by clever MOOC designs in much the same way that expert systems overcome jurisdictional variations in assembling documents. Will kits represent older examples of the same concept.

IX REGULATION, INNOVATION AND THE UNBUNDLING OF FUTURE LEGAL EDUCATION

The legal profession is changing rapidly and it is increasingly difficult to predict the shape of future employment for today's students as new technologies demand new legal skills and capabilities.⁷⁵ In particular the outsourcing of legal processing and documentation to offshore centres, already widespread in the financial world, means that jobs for law graduates are going to be very different from the past.⁷⁶ Legal education is going to change, but it needs to do so within a regulatory framework that encourages innovation and one which does not presume 20th century teaching models to be the only model. Online legal education is already a successful model⁷⁷ and the potential role of xMOOCs is yet to be determined in the legal education context.

Educational forecasters predict that the *unbundling* of education is an inevitability and that it will change everything. The present degree options represent bundles of knowledge, skills and aptitudes that were developed in the pre-internet era, for a time of less rapid change and more stable career paths. University services are also bundled together, from the core aspects of teaching and assessment, through to facilities and support services, administration, subsidised catering, car parks, gyms and on-campus events.

Some education commentators have argued that higher education has reached a crisis point where the escalating costs of the standard degree 'product' is in stark contrast to decreasing levels of satisfaction from employers and graduates.⁷⁸ This is an international and cross-disciplinary challenge, the 20th century model of learning is struggling to maintain relevance in 21st century employment and legal education is no different.⁷⁹

Education pundits have predicted disruptive innovation through the 'unbundling' of the education product,⁸⁰ the separation of

⁷⁵ Susskind, above n 3.

⁷⁶ Mark Ross, 'Legal Process Outsourcing: Redefining the Legal Services Delivery Model' in Kai Jacob, Dierk Schindler and Roger Strathausen (eds), *Liquid Legal: Transforming Legal into a Business Savvy, Information Enabled and Performance Driven Industry* (Springer, 2016) 77.

⁷⁷ Stephen Colbran and Anthony Gilding, 'E-Learning in Australian Law Schools' (2013) 23 *Legal Education Review* 201.

⁷⁸ Audrey Watters, 'Unbundling and Unmooring: Technology and the Higher Ed Tsunami' (2012) 47(5) *Educause Review* 60.

⁷⁹ Susskind, above n 3.

⁸⁰ 'The Trends Report: 10 Key Shifts in Higher Education', *Chronicle of Higher Education* (online), 9 March 2015 <<https://www.chronicle.com/specialreport/The-Trends-Report-10-Key/7>>; 'The Trends Report: 10 Key Shifts in Higher

education services of course management, content delivery, assessment and credentialing that are now grouped together⁸¹ and the opening up of the education market to more flexible credentials delivered by different providers and in the workplace.

The bundling of products in a degree program *can* provide better value and easier choice but this can also be deceptive where the complexity of the bundle reduces the transparency around it and the bundle includes many services that the consumer does not use or necessarily desire.⁸² Purdue University President Mitch Daniels argues that ‘[h]igher education has to get past the “take our word for it” era. Increasingly, people aren’t’.⁸³ The high costs of tertiary education are being scrutinised against the actual outcomes provided to graduates.

MOOCs have been at the forefront of these changes and the institutions that have offered them possess the experience and confidence to develop new delivery models. The *MicroMasters* model allows learners to aggregate credit from authorised MOOC and other online units and has had some success overseas.⁸⁴ In Australia the model is being offered by the University of Adelaide (in partnership with edX), along with ANU, University of Queensland and Curtin University.⁸⁵ While the overly strict regulation of xMOOCs has not prevented these innovators from developing these new markets outside of law degrees leading to admission, the overly cautious approach has been a brake on innovation generally.

xMOOCs are not *necessarily* going to be a part of the unbundled education future, but the format does allow institutions to make initial forays into learning innovation at low risk. Key elements of unbundling are predicted to be the separation of key functions of marketing and admissions, course development, course delivery, assessment and credentialing.⁸⁶ Other elements that might be unbundled and re-bundled include coaching, mentoring, learning communities, personal learning plans, badges, employer connections, alumni engagement and each of these elements connections to learning materials and teaching.⁸⁷

Education’, *Chronicle of Higher Education* (online), 29 February 2016 <<https://www.chronicle.com/specialreport/The-Trends-Report-10-Key/32>>.

⁸¹ Ryan Craig and Allison Williams, ‘Data, Technology, and the Great Unbundling of Higher Education’ (2015) 50(5) *Educause Review* 11.

⁸² Jose Ferreira, ‘The Unbundling of Higher Education’ on *Knewton Blog* (26 February 2014) <<https://www.knewton.com/resources/blog/higher-education/unbundling-higher-education/>>.

⁸³ Kate Bachelder, ‘How to Save American Colleges’, *Wall Street Journal* (online), 24 April 2015 <<https://www.wsj.com/articles/how-to-save-american-colleges-1429913861>>.

⁸⁴ ‘How edX MicroMasters Might Transform Higher Education and the Workforce of the Future’, *eCampus News* (online), 1 November 2016 <<https://www.ecampusnews.com/advertorial/edx-micromasters-might-transform-higher-education-workforce-future/>>.

⁸⁵ ‘MOOCs of the Morning’, *Campus Morning Mail* (online), 16 January 2017.

⁸⁶ Andrew Norton, *The Unbundling and Re-bundling of Higher Education* (Grattan Institute, 2013).

⁸⁷ Michael Horn, ‘Unbundling and Re-bundling in Higher Education’, *Forbes* (online), 10 July 2014

While some see the unbundling of education as inevitable as the disruptive innovation in the music industry, broadcast television or in services such as *Uber* or *Lift*, others see the traditional degree as resistant to change. In ‘Higher Education is Not a Mixtape’, Derek Newton argues that the economics of tertiary education are tied to the prestige of the organisation (at least for students in elite institutions) and that universities need to cross-subsidise non-viable programs with the profits of the more popular ones.⁸⁸

While the law is a prestigious discipline, it may not be averse to unbundling. Legal education has its foundations in vocational learning and the concept of unbundling is not new to legal education where practical learning training and clerkships are separated from university qualifications. In 1975, legal scholar William K S Wang published ‘The Unbundling of Higher Education’⁸⁹ in which he argued that the technological innovations of the day would readily allow unbundling of legal education and, further, that the bundled provision of educational services were potentially a breach of United States antitrust laws. Wang argues that the bundled components were impartation of information, accreditation (assessment), coercion (motivating students to complete) and club membership (prestige).

Unbundling and re-bundling offers opportunities of scale particularly where similar course materials are replicated from institution to institution. In Australia around 60 per cent of undergraduate courses offer content substantially similar to other courses and this can be higher in degrees certified for professional bodies such as law.⁹⁰ Disruptive innovation tends to create rapid changes and the Australian regulations do not permit some simple areas of innovation that would lay the foundations of change in a prudent manner. The regulator’s focus on traditional ideas of content coverage and seat time rather than graduate competency makes institutional change difficult. Independent providers such as programming ‘bootcamp’ schools and industry bodies such as the United States National Association of Manufacturers have been able to act on new forms of credentialing.⁹¹ As legal education changes and becomes more globalised this may mean that international providers have a head start or that new approaches to credentials may emerge from professional and industry stakeholders rather than the universities. Australian law schools run the risk of being left out of the conversation.

<<https://www.forbes.com/sites/michaelhorn/2014/07/10/unbundling-and-re-bundling-in-higher-education/#71663a853ec1>>.

⁸⁸ Derek Newton, ‘Higher Education is Not a Mixtape’, *The Atlantic* (online), 27 January 2015 <<https://www.theatlantic.com/education/archive/2015/01/higher-education-is-not-a-mixtape/384845/>>.

⁸⁹ William K S Wang, ‘The Unbundling of Higher Education’ (1975) *Duke Law Journal* 53.

⁹⁰ Horn, above n 88, 82.

⁹¹ Paul J LeBlanc, ‘Higher Education 2.0 and the Next Few Hundred Years; or, How to Create a New Higher Education Ecosystem’ (2015) 50(3) *Educause Review* 56.

X CONCLUSION

MOOC technologies do not yet offer a viable substitute for the current Bachelor of Laws or Juris Doctor models. The mass delivery models are best suited to delivery of information-based content. While this may potentially address the Priestley 11 prescribed areas of knowledge, assessment technologies are insufficient for the delivery of clinical and professional skills required under the national learning standards.⁹² There is not yet a suitable way of assessing, for example, advocacy or interviewing skills in an xMOOC context.

This is not to say that the next generation of simulations and artificial intelligence will not provide new options for teaching and assessing diverse legal skills, but at present, capacity to do this is limited. At present, xMOOCs have a delineated role in legal education, best used where they can be tailored for learning outcomes that match the delivery technology such as individual knowledge skills. xMOOCs can feature in any law subject that is not devoted to practical skill development. Hence xMOOCs could be used to teach any Priestley 11 subject such as contract law, criminal law, torts law, civil procedure, evidence etc. These core foundational knowledge units are ripe for use of MOOCs. Subjects such as legal research, advocacy, negotiation are not well suited to MOOCs due to their reliance on practical skill development. It is from these foundations and experiments with xMOOCs that expertise may be developed that will equip law schools to meet emerging challenges.

It may also be that law, as a conservative discipline strongly controlled by admission authorities, is among the last professions to embrace these changes. Current LACC rules may not have been designed with xMOOCs in mind, whether delivered nationally or internationally, nor perhaps the underlying educational techniques that they employ. This position needs to be reconsidered.

The rapid changes occurring in the legal profession may encourage the opposite — that legal education may be on the forefront of change. Instead of a single core law ‘product’, there may be a diversity of shorter focussed qualifications that address emerging legal careers and which may allow a learner to build toward the current generalist Bachelor of Laws or Juris Doctor bundles. Legal outsourcing may require a lean, focussed qualification that can be delivered both nationally and internationally. Additionally, the first generation of digital natives are approaching their 40s and this will see generational changes in the profile and attitudes of senior lawyers and admission authorities.

The future of legal education may be imposed from outside the profession — including expert systems reinforced by automation and networks, coupled with the use of big data. The future jobs for lawyers

⁹² Kift, Israel and Field, above n 67.

and their educational needs will continue to challenge existing regulatory principles.

Learning institutions will need to be agile in order to adapt to these changes. If Australian law schools are unable to do so, either because of regulatory restrictions or lack of experience in new educational models, this need will be filled by international universities and private training organisations. xMOOCs are still a mirage in the Australian regulatory environment. They offer a tantalising prospect for open mass education but remain elusive amidst the continual haze of regulatory barriers, mandatory data recording timeframes, industrial relations, and professional and institutional conservatism. This must change in the face of the pressure for more open, cheaper, flexible and accessible modes of delivery.

The national standards safeguard Australia's international reputation, ensuring consistency in quality, integrity of registered providers together with providing appropriate consumer protection. With some modification national standards and law admission requirements can also facilitate a pure or blended xMOOC environment, with components of overall course structure using xMOOCs, at substantially lower cost in a more deregulated market. The current Australian regulatory framework inhibits new models of open mass education at reduced fees, thereby reducing competition and the potential for Australia to realise the true potential of xMOOCs and disruptive innovation in education. As international competition builds, Australia will be placed in an increasing unfavourable position to compete in new markets for open mass education.