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## Competitive Mooting as Clinical Legal Education: Can Real Benefits be Derived from an Unreal Experience?

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# Competitive Mooting as Clinical Legal Education: Can Real Benefits be Derived from an Unreal Experience?

## **Cover Page Footnote**

The author has drawn on her own experience in coaching more than 20 moot teams for national and international competitions over the past 8 years, and having judged in national and international moot competitions. The author would like to thank Lachlan Hopwood for his valuable research assistance in the production of this article, as well as the two anonymous reviewers for their valuable comments.

**Competitive Mooting as Clinical Legal Education: Can Real Benefits be Derived from an Unreal Experience?**

## **Abstract**

Competitive mooting is very popular among Australian law schools and Australian law students perform very well in mooting competitions. This paper argues that competitive mooting, although it involves hypothetical scenarios and is often somewhat removed from what most legal practitioners will realistically be involved with in daily practice, nevertheless offers an invaluable educational experience at law school. Although competitive mooting does not fall within the narrow definition of clinical legal education (because of its lack of realism, and it being a simulation exercise), it nevertheless shares the benefits of experiential learning pedagogy with clinical legal education. In addition, the unique educational benefits produced by the intense and challenging experiences in competitive mooting accord well with the changing landscape of the legal profession, and the perceived shift in the role of a law degree, from a professional qualification to a valuable companion degree.

## **Key Words**

mooting, experiential, learning, pedagogy, simulation

## 1. Introduction

“There is nothing better than mooting to test your oral advocacy and problem solving skills, build your confidence and make sure you can perform under pressure. These skills .... are incredibly transferrable into everyday life, and hopefully one day into careers as international legal professionals.”

(Bondies win accolades, 2016)

These comments made by a student who had recently successfully completed a moot competition are typical of how law students experience moot competition. In the interview the student also highlighted other benefits she derived from the moot, noting in particular the ‘huge learning curve’, and the ‘massive challenge to go from zero knowledge to arguing [their] case in front of humanitarian law experts in court’ (Bondies win accolades, 2016).

But how does competitive mooting rate as an educational experience from a pedagogical perspective? In order to answer this question, this article analyses the educational value of competitive mooting as a form of experiential learning, comparing it with clinical legal education.

Clinical legal education is sometimes held to be the gold standard of legal education, specifically because of the involvement of real clients and real cases. Clinical legal education therefore delivers significant pedagogical benefits and prepares students for legal practice. This article however challenges an overly narrow measure of the value of legal education as being ‘preparation for legal practice’, and concludes that even in the absence of ‘real clients’ and ‘real cases’, competitive mooting delivers excellent educational outcomes not only for legal practice in its current form, but also for future developments in legal practice as well as other career options.

The article commences with a discussion of competitive mooting, and indicates the value that Australian universities attach to competitive mooting based predominantly on their participation in moot competitions, the provision of subject credit for competitive moots, and the availability of a mooting or advocacy subject. The article analyses the different educational benefits and challenges of competitive moots against the backdrop of clinical legal education and experiential learning. It concludes by challenging the prevailing paradigm that the value of legal education is to be judged by the extent to which it prepares students ‘for legal practice’, and the assumption that only a ‘real’ or ‘realistic’ experience can provide such a benefit. The article concludes that competitive mooting provides many educational benefits, and that these desirable educational outcomes are particularly valuable in the changing landscape of the legal profession, which is said to be in the midst of large-scale disruption. These benefits also accord well with desirable employability graduate outcomes for law graduates. Because of the transferability of the learning outcomes of competitive mooting, its place in legal education is justifiable, notwithstanding changes in the profiles and expectations of law students. The article concludes with some thoughts on ways in which the potential pedagogical benefits of competitive mooting may be enhanced, and notes that empirical research will be commenced in order to further the findings of this study.

## 2. Competitive Mooting

### A. *Defining mooting and competitive mooting*

Mooting is a practical legal exercise that mimics court or arbitration proceedings. It has been described as ‘a discussion of a hypothetical case as an academic exercise’ (Wolski, 2009, p. 43) and as ‘a specific form of simulation’ (Wolski, 2009, p. 46), ‘which enables students to practise and develop a range of skills ... by performing them rather than just learning about them’ (Wolski, 2009, p. 46). Law students learn through presenting the legal arguments in front of experts acting as competition judges or arbitrators, who interrupt and ask questions during the presentation of

arguments (Butler & Gygar, 2012, p. 118). Moots are frequently used as a form of assessment at law school (see Wolski, 2009, p. 61), as an in-class moot in a subject.

The focus of this article is on competitive mooting, where students voluntarily participate in externally organised moot competitions as selected team members. In this capacity they officially represent their universities in national and international moot competitions.

In a moot competition the participating teams of students are provided with a hypothetical factual case that raises complex factual and legal issues. The facts will often involve an appeal of a fictional decision of a lower court, although some moot competitions entail disputes in front of arbitral tribunals or courts with original jurisdiction. The teams are required to analyse and develop a deep knowledge and understanding of the facts of the case (see Butler & Gygar, 2012; Risse, 2013, p. 90-91). These are often complex and technical. Most competitions invite clarification questions from participants and the answers to clarification questions compiled by the organisers often add significant facts to already voluminous factual problems (for example, in the Willem C. Vis International Commercial Arbitration Moot Competition of 2016 (the Vis Moot), an additional 11 pages of facts were added to the original 53 pages) (Twenty Third Annual Willem C. Vis International Commercial Arbitration Moot, Problem, 2016).

Teams research the relevant law and develop legal arguments for both parties to the dispute. These are first set out in written memoranda or pleadings that are similar to written submissions prepared by counsel representing the parties in litigation or arbitration. Many competitions include competitions for the best written submissions. In some competitions, such as the Phillip C. Jessup International Law Moot competition (Jessup) and the ICC Moot Court competition (ICC Moot), written submissions for all parties are prepared and submitted simultaneously. In other competitions, teams submit submissions for the claimant/appellant/applicant, and a few weeks later respond to submissions of other teams provided to them by the organisers (for example the Vis Moot).

Before the orals rounds, and depending on the rules of the competition, teams generally exchange written submissions with the teams they are scheduled to meet in the oral rounds. In most instances teams are required to swap sides, and present oral arguments for all parties to the dispute, albeit at different times and against different teams before different competition judges. The moot competition culminates with teams presenting arguments orally in front of one or more competition judge(s) in a number of competition rounds, an exciting and stressful experience.

The oral part of the competition normally involves a number of 'preliminary rounds', in which all teams moot against a selection of other teams in accordance with the competition draw or schedule. Only the top teams progress to the elimination rounds of the competition. At this point the competition changes pace, and the excitement and stress builds even more, because progress in the competition through elimination rounds is generally based on knockout with the winning team proceeding to the next round. The top two teams (or top three teams, in the case of the ICC Moot) moot in the prestigious final round of the competition. The rules of each competition determine the relevant process.

A unique characteristic of a moot that distinguishes it from other oral advocacy such as debates, public speaking or oral presentations, is that moot judges will frequently interrupt participating students in the role of counsel with questions, requests for further information and clarification, and will actively (sometimes aggressively) challenge the arguments presented by participating students. This contributes greatly to the mooting experience which has been described as 'a powerful mixture of fear and elation' (Lynch, 1996, p. 88). The objective is for participating students to engage and have 'a conversation' with the bench (see Cassimatis & Billings, 2016, p. 5, 33; Butler & Gygar, 2012, Chapter 5). Often participating students will not have the opportunity to present prepared submissions but will be taken completely off their

prepared path and have to largely rely on their knowledge of not just their submissions but the research underpinning their submissions to fruitfully and successfully persuade the judge(s) of their legal arguments – it is not possible to prepare and learn ‘a script’ (see Risse, 2013; Cassimatis & Billings, 2016, p. 39). Competition judges are often practitioners, including barristers, retired judges and arbitrators, as well as academics, and in international competitions judges come from a range of jurisdictions (see Butler & Gygar, 2012; Risse, 2013; Cassimatis & Billings, 2016).

The rules of moot competitions are set by the different competition organisers; these introduce many idiosyncrasies into the competition (including the length and style of written submissions and the size of teams). The moot problem is also crafted by or for the organisers. Moot competitions vary in difficulty levels with some like Jessup, the WTO Moot and the Maritime Moot being only suited to students at an advanced stage in their degrees.

Participation in moot competitions poses many challenges to students (see generally Butler & Gygar, 2012; Cassimatis & Billings, 2016), including:

- the legal and factual complexity of the moot problem;
- time constraints and challenges (moot competitions often conflict with set law school times for classes, assessments and exams);
- the volume of work required demanding personal sacrifices (including moot preparation over university holidays);
- the demands of independent research in areas of law that are new to the students, often without prior instruction or class work in the particular area;
- the extent of knowledge and understanding required to be able to deal with unpredictable questions from unknown competition judges in a competition environment;
- working as a team over a prolonged period of time (ranging from 6 weeks to more than 6 months);
- travelling to competitions and competing in unknown and foreign places;
- funding concerns if the law school does not provide or arrange funding;
- personal financial and emotional investment into the competition beyond the usual investment in studying;
- cultural and language difference in international competitions; and
- pressures to preserve their university’s reputation.

Overcoming these challenges are an important part of the experiential learning and individual development of the students involved in competitive mooting, as will be discussed below.

Australian law schools are enthusiastic participants in both domestic and international moot competitions, and Australian universities perform exceptionally well in international moot competitions. Mooting (not just competitive mooting) is also a ‘common feature of the law school curriculum’ (Wolski, 2009, p. 41; see also Keyes & Whincop, 1997, p. 12). In 2008 ‘moots [were] offered within the curriculum in virtually all law schools [in Australia]’ (Wolski, 2009, p. 61), most commonly as electives (Wolski, 2009, p. 61), but sometimes on a compulsory basis e.g. at Griffith and La Trobe Universities (Fraser, et al., 2013, p. 134).

The three tables below demonstrate the significance of competitive mooting in Australian law schools. Table 1 indicates the importance of mooting at Australian universities, based on whether the university allows subject credit for students participating in external moot competitions, whether the university offers a ‘mooting’ or ‘advocacy-style’ subject, and whether the university’s website provides information on mooting at that university, drawing on publically available information on the university’s website. It will be noted that Australian universities make a significant investment into mooting. Tables 2 and 3 provide an overview of domestic and international moot competitions popular among Australian universities.

**Table 1**  
*Mooting at Australian Universities<sup>1</sup>*

<b>Name of university/law school</b>	<b>Does the law school devote meaningful space to mootng on its webpage (e.g. a separate mootng page or library guides)?</b>	<b>Does the law school state on its website that it gives subject credit for (some) competitive moots?</b>	<b>Does the law school state on its website that it offers a specialised subject on mootng or advocacy generally?</b>
Australian Catholic University	Yes	No specific information available	No specific information available
Australian National University	Yes	Yes	Yes
Bond University	Yes	Yes	Yes
Central Queensland University	Limited information available	No specific information available	Yes
Charles Darwin University	Yes	Yes	No specific information available
Charles Sturt University	No specific information available	No specific information available	No specific information available
Curtin University	Limited information available	Yes	No specific information available
Deakin University	Yes	Yes	No specific information available
Edith Cowan University	Limited information available	Yes	No specific information available
Flinders University	No specific information available	No specific information available	Yes
Griffith University	Limited information available	Yes	Yes
James Cook University	No specific information available	Yes	No specific information available
La Trobe University	Yes	Yes	Yes
Macquarie University	No specific information available	Yes	Yes
Monash University	Yes	Yes	Yes
Murdoch University	Yes	Yes	Yes
Queensland University of Technology	Yes	Yes	Yes
RMIT University	Limited information available	No specific information available	Yes
Southern Cross University	No specific information available	No specific information available	Yes
Swinburne University of Technology	No specific information available	No specific information available	No specific information available
University of Adelaide	Limited information available	Yes	Yes
University of Canberra	Yes	Yes	Yes
University of Melbourne	Yes	Yes	Yes
University of New England	Little information available	No information available	In a slightly different form yes: 'Advanced Research, Writing and Advocacy'
University of New South Wales	Yes	Yes	Yes

University of Newcastle	Little information available	Yes	Yes
University of Notre Dame	Little information available	Yes	Yes
University of Queensland	Yes	Yes	Yes
University of South Australia	No specific information available	Yes	Yes
University of Southern Queensland	Limited information available	No specific information available	Yes
University of Sydney	Little information available	Yes	Yes
University of Tasmania	Yes	Yes	Yes, mandatory
University of Technology Sydney	Yes	Yes	Yes
University of the Sunshine Coast	Yes	No specific information available	Yes
University of Western Australia	Yes	Yes	Yes
University of Western Sydney	Yes	Yes	Yes
University of Wollongong	No specific information available	Yes	Yes
Victoria University	Yes	Yes	Yes

**Table 2***Selected Moot Competitions Popular Among Australian Universities: Domestic Moot Competitions<sup>2</sup>*

<b>Name or the competition</b>	<b>Years Active</b>	<b>Number of teams participating</b>	<b>Host</b>	<b>Written Submissions Length</b>
Aboriginal and Torres Strait Islanders Students' Moot	Since 2015	3 (2016)	Allens Linklaters, Ashurst, North Quarter Lane Chambers and the Indigenous Lawyers Association of Queensland Inc.	3 pages X 2 (submissions for both sides required) plus 1 page of authorities
Administrative Appeals Tribunal Moot Competition	Since 2005	24 (2015)	Administrative Appeals Tribunal; Australia-wide	10 pages (double-spaced) with new submissions written each round
ALSA Championship Moot	Since 1976	30 (2016) Every ALSA member is invited	Australian Law Students' Association (ALSA)	Not available
Australia and New Zealand Air Law Moot	Since 2014	4 (2015)	Organised by Victoria University's College of Law & Justice; Hosting venue changes annually	25 pages X 2 (submissions for both sides required)
Australian-New Zealand Interschool Moot on Animal Law	Since 2014	12 (2016)	Organised by The Animal Law Institute; Hosting venue changes annually	4 pages X 2 (submissions for both sides required)
Baker & McKenzie National Women's Moot	Since 2011	17 (2016)	Sydney University	3 pages X 2 (submissions for both sides required)

Castan Centre Human Rights Moot	2006-present	14 (2016)	Monash University	Not available
Phillip C. Jessup International Law Moot (Australian National Rounds)	First Australian regional rounds were 1977	15 (2016)	Canberra (ANU)	11,400 words X 2 (submissions for both sides required)
Nowicki Carbone Personal Injury Moot	Since at least 2014 (information not clear)	Unknown (Victorian Unis)	RMIT Law Student Society	Not available
QUT Torts Moot Competition	Since 2002	15 (2016)	QUT	4 pages X 2 (submissions for both sides required)
ALSA Red Cross International Humanitarian Moot	Since 2001	14 (2016) Every ALSA member is invited	Hosted at the ALSA Conference	3 pages X 2 (submissions for both sides required)
Sir Harry Gibbs Constitutional Law Moot	Since 2015 in present form	19 teams (2016)	Melbourne University Law Student Society	10 pages X 2 (submissions for both sides required)
The Hon. Michael Kirby Contract Law Moot Competition	Since 2011	36 teams from 22 Universities (2016)	Victoria University	15 pages X 2, followed by 4 X 2 page outlines (submissions for both sides required)

**Table 3**

*Selected moot competitions popular among Australian universities: International Moot Competitions<sup>3</sup>*

<b>Name of the competition</b>	<b>When established?</b>	<b>How many teams in the international rounds?</b>	<b>Where is it held?</b>	<b>Australian winners</b>	<b>Written Submissions' Length</b>
Phillip C. Jessup International Law Moot	960 (International rounds started in 1968)	More than 550 (2016); final round numbers vary. Based on 1 team for every 10 entrants from each jurisdiction following national rounds progress to the international finals	Washington	University of Sydney 4X	11,400 words (pleadings of 9,000 words) X 2 (submissions for both sides required)
Willem C. Vis International Commercial Arbitration Moot Competition	1993	333 (2016)	Vienna	Deakin University and University of Queensland 2X each	35 pages X 2 (submissions for both sides required)
Willem C. Vis (East) International Commercial Arbitration Moot Competition	2003	116 (2016)	Hong Kong	Bond University, University of Canberra, Deakin University and Griffith University 1X each	35 pages X 2 (submissions for both sides required)

ELSA World Trade Organisation Moot	2002	90 (2016)	Geneva	University of Melbourne 3X	30 pages X 2 (submissions for both sides required)
International Maritime Law Arbitration Moot	2000	26 (2016)	Varies	University of Queensland 7X	25 pages X 2 (submissions for both sides required)
ICC Moot Court Competition	2007	60 (2016) in the international rounds		Bond University 2X	10,000 words X 3 (submissions for all three sides required)
Price Media Law Moot	2008	37 (2016) (in the final rounds)	Oxford		5,000 words X 2 (submissions for both sides required)
Foreign Direct Investment Arbitration Moot	2008	106 (2016)	Varies	Murdoch University 2X	16,000 words X 2 (submissions for both sides required)
Oxford Intellectual Property Law Moot	2004	48 (2016)	Oxford	QUT 3X	3,000 words X 2 (submissions for both sides required)

Moot competitions are very prestigious, as evidenced by the media coverage of universities winning moot competitions, and universities are rightfully proud of the achievements of their students, often publishing the good news on social media and the university website.

### 3. Clinical legal education

#### A. *What is clinical legal education?*

Clinical legal education can be defined as ‘a legal practice-based method of legal education in which students assume the role of a lawyer and are required to take on the responsibility under supervision, for providing legal services to real clients’ (Dickson, 2004, p. 41). It includes ‘[a]ny law school course or program in which law students participate in the representation of actual clients under the supervision of a lawyer/teacher’ (Bloch, 1982, p. 326; Cantatore, 2015, p. 149.) What distinguishes clinical legal education is ‘that the work is real (*my emphasis*) and that the students (under supervision) assume personal professional responsibility for the work outcome’ (Dickson, 2004, p. 41).

It is therefore immediately evident that competitive mootting does **not** fall within this definition of clinical legal education.

“Clinical” pedagogy is highly acclaimed as a superior form of legal education. It is contrasted to “doctrinal” pedagogy, which involves ‘privileging legal doctrine by locating it at the core of the legal curriculum and by emphasising its intellectual rigour, academic value and social importance’ (James, 2004, p. 147). ‘Students [learn] from teachers, textbooks and printed judicial opinions’ (Ross Hyams, 1995, as quoted in Spencer & Atkinson, 2015, p. 122). Doctrinal teaching is therefore considered ‘conventional’, and is ‘classroom-based’ (Mitchell, et al., 2011, p. 69).

In 1987 the influential Pearce Report criticised the shortcomings of the doctrinal methods of teaching (see Pearce, et al., 1987) and concluded that legal education must be reoriented ‘around what lawyers need to be able to do’ (*my emphasis*) rather than remaining ‘anchored around outmoded notions of what lawyers need to know’ (Pearce, et al., para 2.21). In 2012, Butler and Mansted noted that the persistent gap between ‘analytical knowledge’ and ‘practical know-how’ still needed to be addressed (Butler & Mansted, 2012, p. 288).

## B. Clinical legal education and experiential education: Differences and similarities

The definitional boundaries of 'clinical legal education' are not always clear, and often 'clinical legal education' is used synonymously with 'experiential' or 'practical' learning, 'problem-based' learning, work-integrated learning and/or teaching through the use of simulations. For example, Corker's definition of clinical legal education involves both 'real' and 'simulated' experiences (Corker, 2005; see Cantatore, 2015, p. 149). Corker states that clinical legal education 'involves an intensive small group learning experience in which each student takes responsibility for legal and related work for a client (whether real or simulated) in collaboration with a supervisor. The student takes the opportunity to reflect on matters including their interactions with the client, their colleagues and their supervisor as well as the ethical aspects and impact of the law and legal processes' (Griffith University, as quoted by Corker, 2005, p. 5; Cantatore, 2015, p. 150). Corker's focus is therefore more on the experiential and reflective component of clinical legal education rather than its real life aspects. Competitive mooting does **not** quite fit into that description.

Clinical legal education is however a form of experiential learning – an approach to learning that **is** also evident in competitive mooting. Typically, experiential learning is defined as learning by 'doing, reflecting, applying and evaluating' (Wolski, 2009, p. 51), and involves the four stages of experiential learning identified by Kolb in a 'sequential, recurring four-stage cycle' (Wolski, 2009, p. 51, See Kolb, 1984). The four stages include concrete experience, reflective observation, abstract conceptualisation and active experimentation (Wolski, 2009, p. 51; See also Gunsalus and Beckett, 2008, p. 441). In essence, knowledge is gained from the experience itself, and not through doctrinal instruction, thereby supporting 'a more participative, learner-centered approach' (Lynch, 1996, p. 79). A range of activities at law school are classified as experiential learning, including clinical placements, internships, simulations or role-plays, and even study-tour based learning (see Mitchell, et al., 2011, p. 76). It is suggested that competitive moots, as essentially simulation exercises, also fall into this category.

Simulations have been considered to be 'an integral part of experiential learning' (Wolski, 2009, p. 52). Competitive mooting is also a good example of a simulation exercise. Wolski (2009) credits simulation exercises for offering significant benefits including stimulating a 'deep approach to the learning of law in both its theoretical and practical dimensions' (p. 52), encouraging the students to take responsibility for their own learning (p. 52), enhancing the motivation to learn (p. 53), and fostering the skills 'needed for the transfer of learning and for lifelong learning' (p. 52). Simulation exercises also rank highly in adult learning theory as they 'advance real learning through the integration of theory, practice and self-discovery' (Gunsalus & Beckett, 2008, p. 441). It also involves some of the best aspects of problem-based learning as students tackle a hypothetical problem in a process of 'discovery learning', using their own initiative, and without prior instruction (see Lynch, 1996, p. 79). Students are however guided and assisted by a teacher but not 'lectured or taught' (Lynch, 1996, p. 79).

## 4. Competitive mooting in legal education

The value of mooting in legal education has been widely accepted (Cassimatis & Billings, 2016, p. 11). In fact, the early history of mooting already point to its pedagogical value in legal education, when in the 14<sup>th</sup> Century in England, mooting was the original form of legal education to train barristers. Aspiring barristers mooted after dinner in front of senior barristers (Lynch, 1996, p. 68-69). Mooting was revived as a training tool in the late 1800s influenced by Holdsworth's scepticism about doctrinal education, and his views that 'reading and summarising texts did not teach a student how to be 'a practical lawyer' (Cassimatis & Billings, 2016, p. 11). In fact Holdsworth recognised a 'far broader utility [than vocational training] for moots, emphasising their potential role in promoting deeper discussion by students of the law' (Cassimatis & Billings, 2016, p. 11).

*A. Criticism of mootting as an instrument in legal education – not always justified*

Mooting as an activity and teaching tool in law school has recently been criticised. Much of this criticism has been aimed at the practical relevance of mootting for legal practice. The key points of criticism are set out below. While some of the points of criticism are conceded, the shortcomings of competitive mootting are nevertheless overshadowed by its pedagogical benefits.

*B. Lack of realism*

The most incisive criticism is against the lack of realism in moots (Wolski, 2009, p. 41). Realism, in the minds of the critics, matters in order to properly prepare law students for legal practice. This criticism however ignores the many benefits of mootting, a point which is further discussed in this paper.

Kirby notes that mootting has been criticised for 'lacking the realism intensity and unpredictability of the daily life of the ordinary advocate before courts and tribunals much more humble than the International Court of Justice' (Cassimatis & Billings, 2016, p. vii). Although moots have also been criticised for focussing too much on appellate court work (Wolski, 2009, p. 41 and 44 - 45), this criticism does not apply to all moots, as some are arbitrations, such as the Hon. Michael Kirby Contract Law Moot Court Competition (MK Contract Moot) and the Vis Moot. In any event it is submitted that the benefits of competitive mootting should not be measured against how closely it resembles 'the daily life of the ordinary advocate' but against the actual overall educational benefit gained.

Moot problems (the hypothetical cases on which the moot is based), being fictional creations, may also bear little similarity to ordinary legal practice, frequently including an unrealistic number of complex issues that hardly resembles practice. However, this is a competition necessity, and it is submitted that the detriment of a lack of realism is more than adequately compensated for by the enhanced research, analytical and reasoning skills such problems require.

A further point of critique related to the lack of realism in moot competitions is the unrealistic heavy reliance in moot competitions on policy arguments (that are often resorted to because the area of law canvassed in moot competitions is novel and unsettled) (see Wolski, 2009, p. 46). Students may be wrongly led to believe that 'policy, not law, plays the key role in arguments' in courts in which they are likely to appear as practitioners (Wolski, 2009, p. 58). While this is a detriment, the opportunity to see law in broader context is in itself valuable and accords with one of the key threshold learning outcomes in law (See Kift, Israel & Field, 2010, p. 12-13). The broader context, including political, social, historical, philosophical and economic matters, form part of the knowledge threshold learning outcome for Australian lawyers (See Kift, Israel & Field, 2010, p. 13).

Mooting has also been criticised for not being a 'vehicle for the development of substantive knowledge' (Wolski, 2009, p. 41) and focussing too much on skills. This criticism hardly holds true in competitive moots. Although faculty staff do not have control over the content of the moot problem, and some students no doubt sign up for competitive mootting for the 'mooting experience' rather than the development of a deep knowledge of a particular area of law, it is unavoidable that students in a competitive moot team develop a deep knowledge of the relevant area of law and, more importantly, learn how to develop that deep knowledge.

Wolski also points out that in mootting there is a lack of an opportunity to develop awareness of ethics and values (Wolski, 2009, p. 42), one of the key advantages of clinical legal education (see Wolski, 2009, p. 42, and Nicolae, 2015). Experienced moot coaches Cassimatis and Billings (2016) however consider the development of ethical and professional values as one of the positive outcomes of competitive mootting (p. 16, footnote 33). Even though competitive mootting may not be able to replicate the exposure in, for example, a legal clinic, and the competitive focus

of moot teams may encourage generally unethical behaviour to gain competitive advantage, it is not a fatal flaw in competitive mooting. These shortcomings may be countered by the fact that many moot competitions are judged by experienced and esteemed practitioners (see Cassimatis & Billings, 2016, p. 19) as well as academics who will encourage ethical and professional behaviour even in mock court or arbitration proceedings.

### *C. Limited skills development*

Wolski's criticism of mooting presenting limited opportunities to develop skills in legal writing as well as in legal reasoning and analysis in mooting (Wolski, 2009, p. 58) should be read in the context of her discussion of in-class moot assessments. This criticism is not accepted, and it is the author's submission that mooting competitions excel in teaching legal writing and developing legal reasoning and analysis. The extent of in-depth written submissions required in moot competitions has been illustrated in tables 2 and 3 above. Students in competitive moot teams benefit tremendously from the multiple rounds of feedback that they are likely to have with coaches, including student coaches, faculty staff and sometimes practitioners assisting with preparation. These are essential skills given that written submissions are considered to be 'the first, and perhaps the primary, tool of persuasion' (Wolski, 2009, p. 59). Further, legal reasoning skills and analysis are continuously developed and enhanced over the entire period of the moot, and students are intensely challenged on their knowledge, analytical and reasoning skills in the whole process by coaches, guest judges in practice rounds, and also judges in the actual competition (see Butler & Gygar, 2012, Chapter 9).

Before considering the benefits of competitive mooting in legal education now and in the future, a short detour to consider the pedagogical advantages of clinical and experiential legal education is warranted. The purpose of this detour is to provide helpful theoretical background for the evaluation of the benefits of competitive mooting.

## **5. The paradigm of limiting 'good legal education' to the preparation of law students 'for the practice of law'**

The dominant theme in the literature that promotes clinical legal education is its important role in preparing students for legal practice. This point is particularly noteworthy in this discussion in light of the criticisms levied at mooting for its lack of realism, and perceived disconnect from the realities and requirements of legal practice. An example of the focus on the 'preparation for legal practice' in clinical legal education literature is the requirement of the American Bar Association since 2015 that clinical legal education must be a compulsory component of a law curriculum in the US (see Reuter & Ingham, 2015, p. 181). In Australia, clinical legal education has been promoted because clinical pedagogy also 'accords with a number of the threshold learning outcomes (TLOs) for LLB and JD degrees, such as ethics and professional responsibility, thinking skills, research skills and communication and collaboration' (Cantatore, 2015, p. 150 – 151; see also Kift, Israel & Field, 2010). The Council of Australian Law Deans has not only endorsed clinical legal education but has also set standards of best practice (Evans, et al., 2012).

In much of the literature in favour of clinical legal education, however, the focus is almost exclusively on the vocational benefits of clinical legal education for a future career in legal practice. The most important and notable narrative that runs through the literature on clinical legal education, and to a slightly lesser extent the literature on experiential learning, is that clinical legal education is of value because it prepares students for legal practice. For example, the need for experiential learning was a key outcome of the Pearce Report in 1987, Spencer and Atkinson (2015) strongly advocate for more clinical legal education in law schools (p. 124-125) and Giddings (2010) makes strong arguments for integrating clinical pedagogy into the legal curriculum.

Proponents of clinical legal education strongly equate 'effective and desirable pedagogy' with 'the development of practice-ready skills'. It results in an underlying paradigm or subtext in the literature: legal pedagogy that equips law graduates with the skills needed for becoming a member of the traditional legal profession amounts to good pedagogy. This is not surprising, given the history of a law degree as a professional degree, and the significant control that the legal profession (rightfully) has over legal education as evidenced by its role in approving curricula, its role in consultations on legal education (for example in establishing the TLOs (Australian Learning & Teaching Council, 2010), and fundamentally in members of the legal profession all being products of legal education. The legal profession of course also provides employment opportunities for law graduates. The sway of the legal profession over legal education, however valuable, nevertheless does not completely justify the pedagogical conclusions that are made. More subtlety is probably required and the measure of an education in law should not be confined to how well that education directly prepares a student to practice law, especially the traditional legal profession. It is the author's view that such a focus is too narrow and risks limiting both the intrinsic value of clinical pedagogy, and the value of legal education generally. The value of clinical legal education should not be limited to practical vocational outcomes; neither should legal pedagogy be judged predominantly by its practical vocational outcomes for the traditional legal profession.

## **6. The benefits/value of competitive mootings in legal pedagogy**

Given the benefits of clinical legal education, which include all the advantages of experiential learning and more (including vocational training, the development of social consciousness and awareness, the delivery of benefits to the community), and the criticism levied at mootings, is there still a place for competitive mootings in law school?

Many past participants in moot competitions recognise the beneficial learning outcomes (see Lynch, 1996, p. 84) and many enthusiastically describe their mootings experience as an "amazing" or "awesome" experience, and Cassimatis and Billings (2016) enthuse that competitive mootings is the best way to get a legal education (p. 18). It is suggested that competitive mootings as an 'unreal' experience can indeed produce 'real' benefits.

When evaluating the benefits of different aspects of legal education, the paradigm that 'legal education is only good if it prepares for legal practice' should be reconsidered. It is submitted that a narrow construction of 'a legal education for legal practice' no longer fits present realities and the predicted future realities, and that competitive mootings has a real role to play in present and future legal education.

### *A. Real benefits delivered by competitive mootings now and in the future*

Competitive mootings may fall behind in the preferred pedagogical stakes for not keeping it real. However, it is suggested that competitive mootings delivers specific educational benefits that are very well suited to current developments and trends in the legal profession and legal education. Competitive mootings already shares many of the desirable characteristics of experiential learning and traditional forms of clinical legal education, as it is intensive, involves a small group, and allows students to 'apply legal theory and develop lawyering skills to solve client legal problems (Evans, et al., 2012, p 4). Through the drafting process of written submissions and practice rounds for oral arguments, it also provides the opportunity for 'a system of self-critique and supervisory feedback enabling law students to learn how to learn from their experience' (Evans, et al., 2012, p. 4). I will now highlight a number of key trends or developments relevant to current and future law students and discuss how participation in competitive mootings may address the educational needs resulting from these trends.

(i) *New developments in legal practice*

Daicoff (2011) provides a comprehensive overview of what she sees as a crisis in the legal profession. A general discourse of so-called disruption in the legal profession is also evident. These include a conference entitled 'The Disruption Eruption' (BFSLA, 2016), a public forum entitled the 'Future of the Legal Profession: Unprecedented Disruption and the Law' (Future of the Legal Profession, 2016) and a paper published by the Law Institute Victoria entitled "Disruption, Innovation and Change: The Future of the Legal Profession" in 2015 (Law Institute Victoria, 2015). Clearly, '[d]isruption is going to be a way of life' (Papadakis, 2016). Susskind also foresees 'discontinuity over time and the emergence of a legal industry that will be quite alien to the current establishment' (Susskind, 2013, p. 2)

'Disruption' is occurring in the sense of 'disruptive innovation' (see Kelly, 2015), in which a high-cost, complex industry is transformed through innovation resulting in greater simplicity, accessibility and affordability (Kelly, 2015).

There are a number of key areas in which the legal profession may be subject to 'disruption':

- (1) Technological innovations will substantially influence legal practice, for example, the development of smart contracts using blockchain technology (see Allens Linklaters, 2016);
- (2) The increased demands for lawyers to be involved in the 'rain dance' (see Bagust, 2013, p. 36) and business development, will continue to change the nature of the legal 'profession' to the delivery of legal 'services', and a change in the lawyer's professional identity from 'wise counsellor' to 'slick marketeer' (Bagust, 2013, p. 29). The corporatisation of law firms will increase, and the increased 'proletarianisation' of lawyers (Bagust, 2013, p. 27, 52) will require adaptable and multi-talented legal professionals;
- (3) Increased demands from clients for high-tech, low-cost and even DIY access to legal information (see Kelly, 2015) and fixed price services will affect the business model of law firms (see Daicoff, 2011);
- (4) Changes in legal dispute resolution because of requirements to use court time more efficiently will increase the importance of written submissions (see Hayne, 2007) and arbitral tribunals (See The express lane for claims, 2016) will demand adaptable and resilient lawyers with a range of different skills; and
- (5) The internationalisation of the legal profession including the entry of international firms into the Australian market, and Australian lawyers working abroad.

It is suggested that the challenges of the intense experience of competitive mooting which build confidence and resilience in law students present educational outcomes that align well with the potential changes in the legal profession. Many students sign up to a big unknown when accepting a position on a moot team (see Out of this world, 2016). Nothing prepares students for the intensity of the challenges that lie ahead. The scary reality of competitive mooting involves 'standing at the bar table, trying to make submissions, and simultaneously being subject to penetrating interrogation by the Bench (Thomas & Craddock, 2014, p. 230). Having successfully navigated those challenges, the resulting increase in confidence after competing in a competitive moot in pressurised and changing environments is an important educational benefit (Cassimatis & Billings, 2016, p. 14-15). The mooting experience is an ideal training ground for thriving in the fast-changing legal profession.

(ii) *Future challenges, the knowledge explosion and changes in the job market*

The educational outcomes of competitive mooting similarly also prepare law graduates well for the challenges of the future job market – both inside and outside the legal profession. The benefits derived from working on a complex project in a team under pressure over a meaningful period of time, can have significant impact. The teamwork lessons learnt in competitive mooting will stand law graduates in good stead in future collaborative environments. It is suggested that

the educational outcomes of competitive mootings are of value to law graduates irrespective of whether or not they are employed in the legal profession after graduation. The transferability of skills obtained in competitive mootings is highly relevant as many law graduates exit the legal profession (and do so early) (Fraser, et al., 2013, p 131). Law graduates use their professional skills in other important areas, performing 'diverse roles beyond legal practice' (Australian Learning & Teaching Council, 2010, p. 8). For example, one third of Australian prime ministers have held law degrees but left the legal profession (McCann, 2016).

Concerns about the oversupply of law graduates were recently flagged to the Productivity Commission in 2015 by the Australian Law Students Association (Australian Law Students' Association, 2015), and there are reports of increased unemployment in the legal profession (see Daicoff, 2011, p. 10). The employment figures of Graduates Australia for 2015 indicate that law graduates, at a 74% employment rate (Graduate Careers Australia, 2014), are doing better than some other disciplines. The difficulties for law students, however, to obtain clerkship positions have been referred to as the 'Hunger Games' (Han, 2016) with some law firms receiving upwards of 600 applications for summer clerkships (for example Henry David York in Sydney). Law graduates have also been advised to look beyond law firms for employment opportunities and for example, consider banks (Panadakis, 2015).

The need for law students to increasingly distinguish themselves from their peers in order to be successfully employed in the legal profession, is therefore important. Participation in competitive mootings can provide that distinctive element on a resumé, and as noted by Kirby, 'it is '[t]hose of high student talent [that] select mootings as a worthwhile law school experience' (Cassimatis & Butler, 2016, p. vii). Competitive mootings also falls into the category of co-curricular activities that may bolster graduate employability (See Kinash and Crane, 2015). It is submitted that the 'resumé value' of competitive mootings is nevertheless overshadowed by the educational benefits derived from a competitive mootings experience.

*(iii) Changes in law student expectations and the rise of the law degree as a generalist degree*

Another important key trend is the change in the profiles of law graduates, and allegedly changing expectations of their legal education. There are varying reports as to the percentage of Australian law students who intend pursuing a career in law after graduation. These percentages vary from 64% in 2014 (Survive Law, 2015), 66% (Warren, 2013, cited by Kirby, 2013, p. 11) to 70-88% (see Castan, 2010). In addition, a law degree has increasingly become a component of a double degree (See Bird, 2013, p. 162). Concerns have been raised that a law degree is attributed the status of a generalist degree (Nicolae, 2015, p. 237), and that it is undertaken for its prestige value (Molloy, 2015). Opinions on the other end of the spectrum are that 'a dual degree skillset is incredibly valuable in today's market' (UTS, 2016).

Although Cassimatis and Billings point out that participating in mootings does not amount to vocational training, they particularly note that a broad range of transferable skills are developed (Cassimatis & Billings, 2016, p. 14-15). It is suggested that the learning outcomes derived from competitive mootings equip graduates with high-level skills that will give them an advantage in any profession, including the 'new' legal practice (see for example employer requirements in Pathak, 2015). The skills developed in independent research, teamwork and collaboration, the undertaking and successful completion of large volumes of work, under stress and within time constraints, while juggling other commitments, amount to significant personal skill development and growth transferable to any major professional or vocational project. Nicolae (2015) opines that 'although the aim of a generalist degree appears to be in direct contradiction to a program which aims to produce 'practice ready' legal professionals, the contradiction is illusory only. This is so because most, if not all, professions share similar requirements with respect to the conduct of their members' (p. 238). 'In the current tertiary education climate, the role of law schools has expanded and their aim is to produce not only good legal practitioners, but good professionals,

good citizens and ultimately good human being' (Nicolae, 2015, p. 242). Competitive mootng can play an important role in this endeavour.

### *B. Best practices in competitive mootng to derive the highest educational outcomes*

In order for competitive mootng to provide optimal benefits as an experiential learning opportunity, the competitive mootng experience should reflect best practice in legal education. The following practices will contribute to ensuring that participants in competitive moots gain maximum benefit:

- Emulating best practice in clinical legal education in key areas such as course design, reflective student learning, assessment, staff, supervision and infrastructure (see Evans, et al., 2012, p.8);
- The appointment of moot coaches who are suitably skilled at acting as learning facilitators and managing all the different dimensions involved (cognitive, affective, physical, etc.) (see Thomas & Craddock, 2013, p. 225). As pointed out by Lynch (1996), in experiential learning the cognitive and affective domains work together (p. 79);
- A conscious incorporation of the TLOs by the academic coach or supervisor into competitive mootng. It is submitted that competitive mootng contributes immeasurably to knowledge (TLO1), research skills (TLO4), a collection of cognitive outcomes including critical analysis, legal reasoning and creative thinking (TLO3) as well as the skills of collaboration and communication through the extensive teamwork required over an extended period of time (TLO5) (see Australian Learning & Teaching Council, 2010, for details of the TLOs). Clear learning outcomes should be identified (see Evans, et al., 2012, p. 11);
- The increased use of reflection in competitive mootng, and the deliberate and express adoption of the Kolb experiential learning cycle in the competitive mootng experience in all stages of the mootng competition. Feedback should also be given due consideration (see Stuckey, 2007, p. 132 and 137; Butler & Mansted, 2012, p. 9);
- Giving effect to constructivist theory, being the theoretical underpinnings of experiential learning. In constructivist theory 'the learner is the prime focus of the educational experience' (Lynch, 1996, p. 76) and the learner constructs their own knowledge (Lynch, 1996, p. 76). Coaches should avoid fulfilling the role of 'an omnipotent being capable of transferring knowledge to the student' (Lynch, 1996, p. 76), but should allow the students to construct their own knowledge through active effort; and
- Active management of the competitive elements of competitive mootng for positive pedagogical outcomes and harnessing high levels of student motivation (see Risse, 2013, p. 5-7) for maximising learning. The desire to do well in a competitive environment is an important motivating factor for students and '[s]tudents learn when they are motivated to learn ... How [much] they learn is really connected to why they're learning' (Swartz, Hess & Sparrow, 2013, p. 200).

## **7. Conclusion**

An examination of the nature of competitive mootng as an educational tool and of its characterisation in the defined taxonomy of educational strategies, demonstrates that the educational deliverables of competitive mootng are beneficial to law students. The educational benefits for students are advantageous in the legal profession that is described as currently being in a state of disruption, and also transferable to other professions. Even to those students taking law as a companion degree, as part of a double degree, the educational benefits of experiential learning in an intense and challenging simulation exercise are undeniable. The investments that universities make in mootng activities are therefore worthwhile.

The conclusions drawn in this article are based on the available literature on clinical legal education, experiential learning and competitive mootings. An empirical study would be of great benefit to corroborate and enhance the conclusions drawn and such research is currently in the planning phases and due to commence in 2017. This research will examine in particular the perspectives on and experiences of the educational benefits of competitive mootings of law graduates in Australia.

In 2000 the Australian Law Reform Commission noted: 'In a changing environment, the best preparation that a law school can give its graduates is one which promotes intellectual breadth, agility and curiosity; strong analytical and communication skills; and a deep moral/ethical sense of the role and purpose of lawyers in society' (Australian Law Reform Commission, 2000, as cited in Australian Learning & Teaching Council, 2010, p. 8). Sixteen years on, this statement cannot be more true, and for participants in competitive mootings, that is exactly what they gain from participation in competitive mootings for their university.

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<sup>1</sup> Information for this table was extracted from: <https://law.anu.edu.au/current-students/beyond-classroom-mooting/student-competition-successes>;  
<http://www.canberra.edu.au/about-uc/faculties/busgovlaw/mooting-competition>;  
<https://www.une.edu.au/about-une/academic-schools/school-of-law>;  
<http://www.csu.edu.au/courses/police-security-emergency-management>; <http://scu.edu.au/law-justice/>;  
<http://www.newcastle.edu.au/about-uon/governance-and-leadership/faculties-and-schools/faculty-of-business-and-law/newcastle-law-school>; <http://libguides.acu.edu.au/legal-skills-mooting>;  
<https://www.mq.edu.au/about/about-the-university/faculties-and-departments/faculty-of-arts/departments-and-centres/macquarie-law-school>; <http://www.law.unsw.edu.au/current-students/lawinaction/mooting>;  
<http://www.nd.edu.au/sydney/schools/law/lawsydney.shtml>; <http://sydney.edu.au/law/>;  
<http://www.uts.edu.au/future-students/law/beyond-classroom/mootingcompetition-program>;  
[https://www.westernsydney.edu.au/law/school\\_of\\_law](https://www.westernsydney.edu.au/law/school_of_law); <http://lha.uow.edu.au/law/index.html>;  
<http://libguides.cdu.edu.au/c.php?g=167931&p=3438447>;  
<https://www.griffith.edu.au/criminology-law/griffith-law-school>;  
<https://www.qut.edu.au/law/courses-and-study/real-world-learning/mooting-and-mock-trials>;  
<http://www.usq.edu.au/bela/school-law-and-justice/moot-competition>;  
<https://www.jcu.edu.au/college-of-business-law-and-governance>;  
<https://bond.edu.au/current-students/opportunities/mooting-bond>;  
<https://www.cqu.edu.au/campaigns/1lb-campaign/experiential-program>; <http://libguides.usc.edu.au/mooting>;  
<http://www.flinders.edu.au/ehl/law/home/>; <https://law.adelaide.edu.au/study/why-study-law/>;  
<http://www.unisabusinessschool.edu.au/law/>; <http://utas.libguides.com/c.php?g=498302&p=3412246>;  
<http://www.deakin.edu.au/law/study-opportunities/vis-moot>; <http://www.latrobe.edu.au/law/study/mooting>;  
<http://guides.lib.monash.edu/law/mooting>; <https://www.rmit.edu.au/study-with-us/justice-and-legal>;  
<http://www.swinburne.edu.au/study/course/bachelor-of-laws/>;  
<http://law.unimelb.edu.au/students/jd/enrichment/mooting-and-competitions>;  
<https://www.vu.edu.au/about-us/academic-colleges/law-justice/practical-legal-education/mooting>;  
<http://business.curtin.edu.au/schools-and-departments/law/>;  
<http://www.ecu.edu.au/schools/business-and-law/competitions-and-prizes>;  
<http://www.murdoch.edu.au/School-of-Law/Student-Experience-and-Opportunities/Mooting/>;  
<http://www.law.uwa.edu.au/students/legal-qualifying-degree/mooting-at-uwa>.

<sup>2</sup> General information regarding these moots may be found on their respective websites:  
<http://www.indigenousslayersqueensland.com.au/2016/06/05/indigenous-students-moot/>;  
<http://www.aat.gov.au/about-the-aat/engagement/national-mooting-competition>; <http://www.alsa.asn.au/mooting/>;  
<http://www.law.auckland.ac.nz/en/about/notices/notices-2016/05/air-law-moot.html>;  
<http://www.ali.org.au/events/2016/9/17/animal-2016>; <http://www.womensmoot.com/>;  
<https://www.monash.edu/law/research/centres/castancentre/for-students/moot>; <https://www.ilsa.org/jessuphome>;  
<http://www.rmitss.com/howicki-carbone-personal-injury-moot.html>;  
<https://www.qut.edu.au/law/courses-and-study/real-world-learning/mooting-and-mock-trials>;  
<http://www.alsa.asn.au/ihl-mooting/>;  
[http://mulss.com/competitions/2015\\_sir\\_harry\\_gibbs\\_constitutional\\_law\\_moot](http://mulss.com/competitions/2015_sir_harry_gibbs_constitutional_law_moot);  
<https://www.vu.edu.au/news-events/events/conferences-exhibitions-special-events/kirby-moot>.

<sup>3</sup> General information regarding these moots may be found on their respective websites:  
[https://en.wikipedia.org/wiki/Moot\\_court](https://en.wikipedia.org/wiki/Moot_court); <https://www.ilsa.org/jessuphome>; <https://vismoot.pace.edu/>;  
<http://www.cisgmoot.org/>; <http://emc2.elsa.org/>;

<http://www.murdoch.edu.au/School-of-Law/International-Maritime-Law-Arbitration-Moot/>; <http://iccmoot.com/>;  
<https://pricemootcourt.socleg.ox.ac.uk/>; <http://www.fdimoot.org/>;  
<https://www.law.ox.ac.uk/research-subject-groups/moot-pages-index/oxford-international-intellectual-property-moot>.

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