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Teaching Business Law: Some ethical dimensions from Australia

Rosemary Lucadou-Wells^a, John F. Bourke^{b*}

^{a,b}*La Trobe University, Melbourne, Bundoora, VIC, 3086, Australia.*

Abstract

This paper discusses ethical dimensions of business law education. Arguably, the fundamental aim of teaching business law is to prepare students for the stark realities of working in a commercial environment where survival requires maintaining profitability. Competition between businesses is essential to persuade consumers to accept their products. As with any competition there are rules. This paper asserts that ethics provide a solid basis for business rules. This paper relies upon the principles from law cases brought to courts of law in England and Australia due to a failure of business to adopt appropriate legal ethics. As well, Rigorist and Casuist theories of ethics for business are considered. The paper discusses the role of ethics education for business law students. A discursive methodology is adopted. The paper concludes that if business people have regard to ethics in decision-making, the development of serious business problems could be avoided. Importantly, the research establishes the assertion that legal ethics is of fundamental importance in business education.

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1. Introduction

Business law education in the twenty-first century of the multi-cultural, pluralist society in Australia is widely regarded as a priority by many students. The student population currently studying business law in Australia is drawn from countries throughout the world, as well as from Australia. Currently 25% of people living in Australia

* Corresponding author. Tel.042.253.9361.

E-mail address: John.Bourke@LaTrobe.edu.au

are not Australian nationals, according to statistics relied upon by the Australian Broadcasting Commission in the National Newscast of 6th June 2015. The value systems giving rise to principles of behaviour are many and varied.

Thus, for the purposes of teaching the subject of business law it seems appropriate to adopt principles of ethics applied in the business models of partnership and company and also enshrined in the legislation of the Australian Consumer Law. Partners in the business model of a partnership and directors in the business model of a company are fiduciaries, in that they are acting with the confidence of other persons, as identified by P. D. Finn (1977). It is reasonable to infer that the client or customer puts his or her confidence in the business person every time there is a business transaction. Arguably the essential fiduciary duty in business is to act honestly and in good faith. This can well be seen as the ethical foundation for partners and company directors. It is adopted as the ethical foundation for introducing ethics to business law students.

1. Selected theories of ethics

Each species of ethics is unique and has evolved because of a specific application of reflective and analytical thought. The Rigidist and Casuist theories provide an appropriate foundation for the investigation of business law education.

The Rigidist view sees ethics as a set of principles or laws. The Rigidist notion follows the premise of John Locke (1959) that the law of right and wrong is in itself eternal and unalterable. The use of such a set of principles has a role in decision-making. The three basic moral dimensions of decision-making can be identified as doing no harm, fair play and not violating basic rights. Those dimensions or principles can be identified as rules. According to Michael Davis (1999) it is rules that articulate the standard of professional conduct and following the rules is sufficient for responsible conduct. However, critical reflective thinking is essential in order to follow the rules. In the Rigidist view of ethics, or Principle ethics, absolute universal principles are applied to all problems.

The Rigidist view of ethics is diametrically opposed to the Casuist theory of ethics. George Brenkert (1994) identifies Casuist ethical theory as reasoning from particular cases to resolve more problems. In Casuist ethics, each specific case is considered, analysed and resolved with its own ethical response. This could well be one of the reasons why Cuilla (2012) is an enthusiastic proponent of Casuistry, because it can be applied to resolve practical ethical dilemmas in business. Each business problem presents an ethical dilemma with its own set of circumstances.

2. Ethics applied to business

The practice of decision-making is a part of life. Whether it is deciding what to say or when to go to sleep, a decision must be made. A personal decision becomes a personal business decision when shopping for simple commodities or leasing a unit. The personal individual decision-making process involves choosing between alternatives. Decisions made by business people can be said to adopt a similar procedure of choosing between alternatives.

Al Gini and Alexei Marcoux (2012) identify business as an 'exchange transaction'. They see business being pursued with the intention of executing profitable sets of transactions. Further, they consider the exchange transaction to be a competition and the competitive aspect is the backbone of the entrepreneurial capitalist system. Within the competition of business the creative aspect of entrepreneurship brings new products, ideas or processes to the market, according to Schumpeter (1942). Certainly, business does not occur in isolation. As Solomon (2007) notes, business is a social practice and business can only take place in a culture within an established set of procedures and expectations. Conventions and principles are inherent within those procedures and expectations. The unique aspect of business decision-making, as identified by Werhane (1994) is that business decision-making is contextual and utilitarian. It is specific to a particular set of circumstances and time. This is the contextual aspect of

business decision-making. The utilitarian aspect of business decision-making is pragmatic: it is fixed upon business survival and the maintenance of profitability.

3. Ethics education for business law students

As Milton-Smith (1997) points out, when business decision-making is unethical it results in moral confusion for the community and dissatisfaction and distrust by consumers. He asserts that the surrender of business people to the temptations of greed, opportunism and abuse of power, results in major ethical problems in areas such as the environment, labour relations and consumer affairs. Milton-Smith (1997) identifies that while codes of behaviour, regulation by consumer and professional authorities, legislation, the judiciary and the media, seek to deal with corruption at various levels, the provision of specific ethical education for business students may prevent unethical decision-making from occurring. From another era, Aristotle (200BC) asserts that ethics education is only useful where one has had sufficient life experience to appreciate it fully.

Applying the notions of Milton-Smith (1997) and Aristotle (200BC) to the context of teaching business law students in Australia, is illuminating. The context of life experience of students in a multi-national business education class in Australia is wide. In the global environment of 21st century, Australian tertiary education has become a commodity and a product. Education is selected and purchased, by students who are Australian nationals as well as visiting students from many countries. Australian Government statistics show that in December 2014 there were 249,990 international students studying in Australia and the most popular subjects selected for study are in the combined fields of accounting, business and management. Thus it can be seen that business education takes precedence over other disciplines for Australian nationals and internationals alike. It is apparent, therefore that business law students in Australian tertiary institutions are from wide cultural and national backgrounds. It is within this wide assortment of student backgrounds that ethics in business law is taught.

Teachers and curriculum planners alike remain aware of the variety of cultural, value and experiential backgrounds of tertiary students. Teaching is delivered in English, Australia's official language. English may well be a second, third or fourth foreign language for students. This has implications for the way teachers use spoken and written language. For example, it has consequences for the preparation and arrangement of study guides and written materials provided to students. In particular, the use of language, its speed and clarity of verbal delivery and the avoidance of ambiguity are paramount. It has importance for the selection of prescribed textbooks and the way students are guided in the use of texts. For example, the identification of specific page numbers and paragraph sections is an important and useful aid for students who are struggling to understand not just the concepts of a subject, but the concepts of a subject in a language other than their first language.

4. The blended learning model of teaching

The blended learning model of teaching offers the learning flexibility required by a varied student population. Blended learning consists of the delivery of spoken lectures in pod casts, together with the provision of written lecture notes or slides on the internet learning management system and face-to-face seminar sessions in classes with peer students under the leadership of a lecturer. Attendance at these weekly, two-hourly seminars is optional however students are urged to attend. The seminars are scheduled over various times, providing flexibility for students to attend. The subject co-ordinator sets particular scenarios and questions for discussion in seminars. Lecturers leading the seminars use a variety of techniques including group work, pairing, writing and class discussion of the set questions. Thus each student seminar group has uniformity of subject content spiced with the variety of each lecturer's individuality. Group work maximises contact and provides practice in collegiality, an important facet of successful business behaviour. Sometimes the groups of students are asked to share their responses with the class after a period of group work. This provides further opportunity for contact with different

ideas. Sometimes students are asked to write a brief self-assessment of their response to the scenario their group has discussed. This provides students with the opportunity for personal reflection.

The technique of blended learning is a response to the diversity of the contemporary business education tertiary class in Australia. The various cultural backgrounds of students result in difficulties in finding a common convenient time for scheduling a face-to-face weekly, on-campus lecture. As well, many students, both Australian nationals and internationals, have part-time paid employment. They are employees as well as being business students. This gives them the enhanced perception of a pragmatic approach to business education and ethics. It also means they have obligations to an employer as well as their personal obligations as students. These obligations, together with the responsibility to family, contribute enormous stress to students. Blended learning can relieve some of that stress by providing students with the option of deciding when to listen to a lecture.

The impact of the face-to-face student-teacher component of learning is not to be under-estimated. Hence the seminars, scheduled at various times, provide students with further flexibility to choose a convenient time to attend and participate with peers. The power of the teacher-learner experience confluence has been known since time immemorial. For example, Jacques Le Goff's (1980) research reveals that in the middle ages teachers were not paid in order to ensure that only virtuous and money-disinterested people were accorded the privilege of teaching. That is far from the situation today. The reality is that Australian tertiary teachers must have professional qualifications. They are employed and are paid a salary for teaching. The scenarios presented to students in seminars are from business situations as well as from law cases. Students are asked to respond to the business scenarios and to discuss alternative ways of resolving the problem. This involves interpretation of the scenario from different perspectives. Therefore students have an opportunity to gain wider understanding of the implications and consequences of business decisions.

In responding to summarised reports of actual law cases, students are asked to identify the parties in the case, distinguish the issue and determine the values or ethical values in the judgment. In Australia it is understood that the law courts mirror and uphold the prevailing values of society. Therefore, familiarity with the reports of law cases increases students' awareness of the principles upheld by the courts of law. It is from these cases that students can begin to build their own foundation of ethical behaviour. Students are assisted to start their response to cases by suggestions developed from the standards set by Patricia Werhane (1994). These questions include asking the students to determine who are the individuals affected by the problem and the decision, what are the consequences of the problem and decision for individuals, how would a disinterested reasonable person decide or respond to this problem, what kind of precedent does the response set, and what moral standards does it meet.

5. The duty of care in ethics

Such questions take in the duty of care based in the legal principles from the case of *Donoghue v Stevenson* (1932). The facts which gave rise to this matter being brought to court were that Miss Donoghue, the plaintiff in the case, drank some ginger beer from a bottle. When she was half-way through drinking the ginger beer, she found a decomposed snail in the bottle. Miss Donoghue became physically ill. The issue was whether Mr Stevenson, the manufacturer of the ginger beer, was responsible for the contents of the bottle. The court decided that the manufacturer of the ginger beer, Mr Stevenson, owed a duty of care to the plaintiff, Miss Donoghue, because it could be reasonably foreseen that a person drinking the ginger beer would feel physically sick, upon discovering a dead snail in the bottle. This judgment of the English House of Lords is important because it established the tort of negligence and the principle in this judgment is accepted in Australia. This law is that a duty of care is owed to all people who fall within the ambit of 'neighbour', that is, anyone who could reasonably be foreseen to be affected by an act or omission.

The duty of care can be seen as a useful foundation for teaching ethical decision-making in a business law course. It takes an almost panoramic perspective of those to whom the duty of care is owed. The notion of ‘neighbour’ incorporates anyone who may be affected by a person’s omission or action.

6. Law-based ethics for business education

The method of teaching business ethics through analysis and application of business situations, as Gini (2012), Marcoux (2012) and Lane (1996) point out, is not new. However, the addition of business law cases with ethical implications provides an additional dimension. As Walton (2010) asserts, the combination of business situations and law case principles can unify themes for the exploration of ethical principles. This application of the Casuist method of introducing tertiary students to ethics has the advantage of providing students with a realistic scenario to unravel. The facts of the problem need to be understood and the ethical principles of behaviour applied. During a course of study of business education various different scenarios can be used. Each different scenario provides a new and fresh stimulus for students. Creativity is fostered as students develop responses. By working in groups students discuss and learn to develop collegial skills of fundamental importance in maximising output in the work environment.

The purpose of teaching law-based ethics to business law students is to assist them to become aware of the moral dilemmas encountered in commerce and to prepare them for ethical decision-making. Ethical business conduct can be said to have four dimensions: it respects and follows the law, values the rights of employees, provides for the legitimate rights of customers and accommodates the reasonable expectations of shareholders. Thus, the sources of business ethics are grounded in the law and community values: the legitimate expectations of shareholders, customers and creditors are also taken into account. While business seeks to be self-sustaining through the creation of profit, long-term profit is only secured through ethical behaviour, as Evans (2011) notes.

7. Unconscionability in business

Although the aims of business ethics are well-established in theory, regrettably, the law reports reveal ample examples of businesses acting contrary to the law as well as unethically to the public, employees and shareholders, for example, in the case of *Vital Finance Corporation Pty Ltd v Taylor* (1991). The facts of the case are that Mr Taylor sought finance from Vital Finance. Mr Taylor needed to replace the truck in his business. He informed the finance company’s agent that he could afford to pay \$1,500 to 1,600 a month. The agent calculated from Mr Taylor’s business records that Mr Taylor would not be able to afford such an amount. But the agent knew that the value of Mr Taylor’s home and the truck itself would be sufficient to meet the loan. Repayments were initially set at \$1,800 per month and then raised without any reason, to \$2,500 per month. It was no surprise when Mr Taylor defaulted. The finance company sought to take back the truck and take Mr Taylor’s home and sell it. Mr Taylor did not intend to lose his home without a struggle.

In Australia there is legislation with the broad title of *Australian Competition and Consumer Act*. Under section 18 of that *Act*, unconscionable or unfair conduct is prohibited. In Mr Taylor’s case the court held that the transaction could be set aside because the finance company had deliberately taken advantage of Mr Taylor’s financial need. Consequently, the transaction was set aside on the basis that it was unconscionable or unfair. Mr Taylor retained his home. *Vital Finance Corporation Pty Ltd v Taylor*(1991) is a useful case for students to know. It demonstrates a situation they may be confronted with as business practitioners, that is, the struggle between increasing profitability for the business as against acting unethically to a client.

Donoghue v Stevenson(1932) and *Vital Finance Corporation Pty Ltd v Taylor*(1991) are just two of the legal cases used in this trial course for introductory business law students. There are also the business scenarios students have been asked to respond to both individually and in groups. These scenarios are aimed at developing students

confidence and capacity to respond to the ethical issues in business scenarios. Ideally students are expected to respond creatively and critically to the business scenarios. For example students are asked how, if they were in a position of responsibility and authority in a business, they would develop and implement a code of ethics for others in authority, employees and in customer relations, as noted by N. Balu Rau (2015). In another scenario students are asked to respond to the suggestion of using a concealed and clandestine camera in business premises to observe customer's behaviour. A third scenario is how a student would respond if she or he were aware that a business was, unknown to anyone else, leaking a minute quantity of a toxic substance into the city's drainage system. Following Lane's (1996) procedure, students are asked whether they would warn authorities, or do nothing. For each scenario students are asked to provide reasons and justifications for their responses.

8. Conclusion

This method of introducing ethical principles to business law students through the Casuist application of business scenarios and law cases is a way forward in teaching ethics for business. It is developed on the foundation that a business has a set of values that takes account of the welfare of employees, shareholders and the community at large. To sustain ethical behaviour in commerce, there needs to be a real commitment to ethical behaviour. This commitment may well conflict with short-term profitability. It is when that conflict between ethical behaviour and profitability occurs, that commitment to ethical behaviour can falter. For example, business expenses such as wages, rent, insurance and taxes continue. The opportunity to have more money in hand is a strong incentive to dispense with ethics in favour of fiscal gain.

Ethical business behaviour is closely tied up with corporate social responsibility. From a broader perspective, the United Nations Global Compact looks at corporate responsibility under four heads. These are human rights, labour standards, the environment and anti-corruption. Additional to the United Nations Global Compact, many countries have adopted guidelines to be followed by multinational enterprises. These guidelines include labour standards, environmental standards and consumer protection. However, although these standards provide constructive benchmarks, as Graw, Parker, Whitford, Sangkuhi and Do (2015) note, they are not legally binding, thus it is up to the ethical incentive of the Directors of multinational corporations whether or not the guidelines are followed.

Ethical business behaviour, therefore, comes down to individuals in business adopting ethical business behaviour. The method of teaching ethics to business law students described in this paper is a response to developing an appropriate foundation for business students to practice ethical behaviour when they enter commercial employment.

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