MONASH UNIVERSITY
THESIS ACCEPTED IN SATISFACTION OF THE
REQUIREMENTS FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY
ON..... 21 October 2003 .....
.....[redacted].....
Sec, Research Graduate School Committee

2475/4120

ERRATA

p. 2 line 2 "task- and audience-" for "task and audience"
p. 4 para 2 line 12 "able to assume" for "able assume"
p. 9 para 1 line 9 "student writers" for "a student writers"
p. 15 para 2 line 1 "for the use of CDA" for "for use of CDA"
para 3 line 8 "a characteristic feature of" for "a characteristic features of"
p. 38 para 2 line 4 "could be seen to be" for "could seen to be"
p. 48 line 1 "the consequences of a decision" for "the consequences of an decision"
line 5 "management of a scientific" for "management of scientific"
p. 50 para 1 line 8 "makes its own" for "make its own"
p. 56 line 2 "is a range of methods" for "are a range of methods"
p. 61 line 11 "that is elicited by my analysis" for "elicited my analysis"
p. 73 para 2 line 3 "to write an analysis" for "to write and analysis"
p. 74 line 2 "their year's work" for "their years' work"
p. 83 line 2 "Examples such as the following" for "Examples such the following"
p. 85 para 3 line 2 "*a problem*" for "*problem*"
p. 95 para 1 line 4 "winning and losing" for "winning and loosing"
p. 107 para 1 line 3 "stances are taken" for "stances taken"
p. 108 para 1 line 1 "transcript of the" for "transcript of"
p. 110 para 3 line 2 "deals with primarily" for "deals primarily"
p. 114 para 1 line 6 "interpretation of Adam's" for "interpretation Adam's"
p. 115 line 2 space between "Appendix" and "4".
para 2 line 6 "sense in which" for "sense of in which"
p. 121 para 2 line 4 "As is indicated" for "As in indicated"
p. 131 footnote 4 "Grbich" for "Grbic"
p. 143 para 2 line 15 "losing its practical effect" for "loosing its practical effect"
para 2 line 16 "*to lose all meaning*" for "*to loose all meaning*"
p. 152 para 4 line 10 "does not lose sight" for "does not loose sight"
p. 156 para 1 line 4 "is caught by the gap" for "is caught be the gap"
p. 159 line 3 "Grbich" for "Grbic"
para 1 line 8 "Grbich" for "Grbic"
p. 162 Table 5.2 line 6 "lose" for "loose"
p. 166 para 1 line 5 "Grbich" for "Grbic"
para 4 line 4 "Grbich" for "Grbic"
p. 173 para 3 line 8 "use" for "uses"
p. 174 para 3 line 6 "lose" for "loose"
p. 179 line 1 "draws" for "draw"
p. 182 para 2 line 1 "loses" for "looses"

Learning Literacies in the Law: Constructing Legal Subjectivities

by

Hector Roderick Maclean

BA (Hons), MA (Hons), Dip.Ed

Submitted in fulfilment of the requirements of the degree of Doctor of Philosophy

School of Literary, Visual and Performance Studies

Monash University

31st March 2003

Contents

List of texts, figures and tables

Abstract

This thesis interprets a commonly used phrase in legal education, 'learning to think like a lawyer,' in terms of the discursive construction of professional legal subjectivity. This interpretation explains some of the difficulties students have in successfully writing and speaking the texts of legal education. It also suggests that students form subjectivities through the way in which they learn to speak and write the genres of legal education.

The thesis confirms this interpretation through an analysis of student texts produced within a practical legal skills program. It establishes that student legal subjectivities can be characterised in terms of two main groups of social identities or positions, one relating to legal interpretation and the other relating to the lawyer's position as practitioner. The thesis further demonstrates that some of the problems students experience in learning to write and speak as lawyers result from unsuccessful attempts to resolve conflicts within and between these positions.

A feature of this thesis is that it shows through clause by clause analysis how legal subjects are formed. Participation in, and reconciliation of the contradictions between, textual practices is demonstrated to be the basic mechanism of subject formation. In addition legal subjectivities are formed through mutually constitutive relationships between self and self and between the self and more knowledgeable others.

Critical discourse analysis (CDA) is used both as a theoretical framework and as a means of data analysis. A problem with CDA, however, is its relatively inadequate theorisation of subjectivity. This thesis demonstrates how CDA can be supplemented by linguistic concepts and by theories of professional and legal subjectivity in order to provide a workable approach to the analysis of subject formation.

Data is formed using the methods of institutional ethnography (Miller 1997) and through the use of contrasting case studies of practical legal skill exercises

by first and final year students. As in all theoretically-oriented case studies, the force lies not so much in conclusions about particular groups of students, as in the potential for the models and methods of analysis to be applied elsewhere (Stake 2000).

Candidate's Declaration

This thesis contains no material which has been accepted for the award of any other degree or diploma in any university or other institution. To the best of my knowledge, the thesis contains no material previously published or written by another person, except where due reference has been made.

Acknowledgments

I wish to thank my supervisors, Terry Threadgold and Chris Worth, for their encouragement and constructive criticism and comments.

Through my work with Barbara Kamler I first learned to do critical discourse analysis. I thank her for encouraging me to begin this project, and also for her support and her fearless criticism.

I am grateful to my colleagues for their support and patience during the completion of this project.

I wish to thank Pam Maclean for reading the final draft, and my whole family for their forbearance and tolerance.

CHAPTER ONE

Introduction

This thesis had its genesis in a project that I and a group of colleagues conducted in 1994 to study the academic writing of first-year university students[1]. The problems students experience in coming to terms with the demands of university writing are well-known (Ivanic 1998; Lea & Stierer 2000). As literacy educators with skills in discourse analysis we believed we had something to offer to colleagues in other faculties seeking to find a way of helping their failing students.

The research took as its starting point the existence of academic discourse communities (Bartholomae 1988; Bizzell 1982), and argued that the difficulties students have in writing are not the result of a deficiency of generic academic writing skills but reflect a struggle to control the conventions of their chosen discourse community. The research team sought to document this struggle through linguistic analysis of the texts produced by students in law and biological sciences, although in practice the study narrowed itself to the study of legal writing. Linguistic analysis of the data from the project (Kamler &

---

[1] This project entitled 'Writing the University: An investigation of tertiary writing practices' was funded by the Deakin University Teaching Development Grant Program. Other participants included Barbara Kamler, Catherine Beavis, Leigh Ackland, Sally Leavold, Howard Mould and Colin Warren. Initial analysis of Text 4.2.1 in Chapter 4 was completed as part of this project, but is all my own work. Data relating to the work of first-year student firms in first semester was collected by me under the auspices of the project with the assistance of Colin Warren as research assistant. I am grateful to Barbara Kamler for her advice and support on the legal writing component of the project.

Maclean 1996) suggested that at least some law students' writing problems have to do with their ability to stage information in a task and audience appropriate way and to produce reader-centred rather than writer-centred prose (Flower 1979).

Following the conclusion of the academic writing project I decided to pursue the issue further by making student legal discourse the focus of this thesis. My choice reflected the factors which had influenced the direction of the earlier project. Choice of law as a focus for study was influenced by its linguistic character. 'Language is both the core technology and the core topic of law and legal work' (Dingwall 2000, p. 885). Law is very much concerned with language and texts, both as a tool used to accomplish action and as a medium used for representation (Phelps 1989). Reflecting these claims, the linguistic and discourse analytical methods I was using proved to have considerable leverage in the study.

A further reason for choosing law as an area of study was the contrast between the writing assigned to students at school and the writing that they complete in legal education. I believed that the difficulties students have in learning legal writing in university are a result not of a lack of writing skill, but of a failure to come to terms with the conventions of the legal discourse community. Confirmation of my view about the discipline-specific nature of problems with legal writing comes from the fact that students with these problems are often capable writers in other areas (Guinier, Fine & Balin 1997; Meyer 1993; Minnis 1994).

Although it is plausible to argue that law as a disciplinary discourse is characterised by conventions, skills, and practices which distinguish it from other disciplines, it is much harder to specify what these are. White (1983) looks for uniqueness in the language of rules, in the closed, systematic character of legal terminology, and in the link between interpretation and procedure in the language of the law. Phelps (1989) claims that professional legal writing is focussed on the detail of specific situations rather than generalisations. Law places less emphasis on originality and creativity than

writing in the humanities; texts do not stand alone but depend on each other. Legal writing is collaborative, heavily routinised and conventionalised, demanding close attention to the rhetorical exigencies of differing audiences and to the detail of word choice and syntax (Phelps 1989). Dias et al. (1999) seek the uniqueness of legal writing in a combination of rhetorical patterns, syntactical complexity and modes of categorisation of experience. Bell and Pether (1998) review literature that portrays the uniqueness of legal writing as a combination of particular kinds of syntactic complexity and skills in applying legal principles. While nominating certain skills as important, for example the skill of synthesising a rule of law from information drawn from a number of judicial opinions (Minnis 1994) or the skill of generating hypothetical cases in order to clarify the application of a legal rule (Lundeberg 1987), Minnis (1994) and Stratman (1990) suggest that there are no individual skills or strategies unique to legal writing. What is significant is the way these skills or strategies are metacognitively deployed in response to rhetorical situations or to types of purpose and audience demand. It seems that the attempt to characterise legal writing in terms of skills, strategies or conventions is misconceived.

If the intention is to characterise distinctive features of law as a profession and a discipline, then a focus on writing skills is too narrow. A more appropriate focus is on the way in which lawyers speak, write, think and act, in other words on their discursive practices. A phrase that keeps recurring is 'teaching students to think like lawyers' (Fish 1989; Kearney & Beazley 1991; Maurer & Mischler 1994), demonstrating that the legal education literature already has a way of talking about the distinctive character of legal discourse.

The frequent use of this phrase suggests that it is meaningful to practitioners. They have a 'folk theory' (Mertz 1996, p. 231) which allows them to recognise a student who can think legally. Attempts to explicate legal thought remain disappointing, however. 'Thinking like a lawyer' is analysed as encapsulating thinking, writing and speaking skills, and sometimes associated also with the learning of professional values (Maurer & Mischler 1994). While these formulations are useful in directing attention away from a narrow focus on writing to a broader range of behaviours, they still retain a focus on generic

thinking and writing skills which turn out to be not particularly legal in character (Stratman 1990). Further, as Goldsmith (1993) suggests, these accounts are based on an atheoretical and formalistic account of legal thinking and reasoning.

More convincingly, Mertz (1996; 2000) characterises 'learning to think like a lawyer' in terms of a rupture between everyday textual practices and the pragmatic, de- and re-contextualising textual practices of the case method of legal education. The case method focuses students on the relationship that narrative accounts of the 'facts' of a case have to precedential cases and applicable statutes. Students learn to strip away contextual features that give meaning and value in order to recontextualise stories as examples of legal categories or rules.

The first piece of analysis I did for this thesis was of a simulated 'letter of advice' (Text 4.2.1 below) to a client written by a group of first-year students. The notion of recontextualisation offered a powerful way to analyse this text. First the students had to transform and recontextualise the narrative account of the facts in order to discover the legal principles applicable to the case, as Mertz (1996; 2000) has described. But I then encountered a second level of recontextualisation not described by Mertz. The students had to reshape their conclusions a second time in order to tell the client about her rights and obligations in terms she could understand. It was not so much the recontextualisations themselves that were distinctive of the textual practice of letter writing as the shifting positions signalled by those recontextualisations. Through the act of recontexualising the students showed that they were able assume a characteristically legal stance; they signalled that they were able to 'think like lawyers'.

On the basis of this initial insight I decided to explore the more general claim that 'thinking like a lawyer' means assuming characteristic legal stances or positions. This claim finds support in the literature on the importance of positioning or identity in academic writing, especially the work of Ivanic (1998). Subject positions or identities as a theoretical construct postulate a set

of common practices, attitudes and experiences deriving from institutional membership. They thus provide a way of bringing together into a single locus the diverse rhetorical, skills and values elements associated in the literature with legal thinking and writing. Subject positions or identities also provide a basis for postulating common discursive features that run across a range of textual practices and genres. They are therefore broadly characteristic of a discipline.

Support for the view that 'identity' is a useful category to use in characterising academic writing practices comes from Ivanic's (1998) case studies. Ivanic shows how students write with many voices deriving both from the positions available within a discipline and from their own autobiographies. Less well-developed references to the importance of identity in academic writing are also made by Freedman and her colleagues (Dias et al. 1999; Freedman, Adam & Smart 1994).

By contending that the distinctive character of legal writing derives from legal identities or subject positions it is possible to avoid some of the limitations of the field of writing research as traditionally conceived. Subject positions provide an alternative to the mentalist tradition which imposes an artificial separation between writing, thinking and speaking. A focus on positioning makes it natural to examine both speech and writing in relation to one another as complementary practices.

This approach interprets law students' difficulties in thinking and writing in terms of a clash of conflicting subject positions. It outlines features of legal discourse which are especially hard for students to learn and hence opens the door to effective teaching interventions.

The literature in which students are cited as reporting discomfort with their academic writing provides one source of evidence for the view that conflicting subject positions make legal writing difficult. Ivanic (1998) shows that it is common for students to feel themselves threatened or compromised by the writing they are asked to undertake. She accounts for these feelings in terms of a perceived disjunction between students' 'real selves' and the roles which

academic writing forces them to assume. Some students feel a sense of falsehood, of going through the motions, of 'getting by' in Bazerman's (1996) words. Others are embarrassed about the self they are forced to present, and adopt strategies to distance themselves from it in order to protect the integrity of what they perceive to be their 'real' self (Ivanic 1998, p. 228). Students experience a conflict between a desire to be 'true to themselves' and the need to appear to be the sort of person valued within an academic discourse community (Ivanic 1998, p. 159). Dias et al. (1999), referring to the experience of social work interns and graduates working for a government agency, put the point effectively in these terms:

> as soon as they begin using the genres of the agency, they buy into the ideology; they learn to live with contradiction. Such professional genres construct subject positions that may not accord with their goals, not to be too dramatic, they fragment the personality. It is the price of professionalization, so that they may do things as professionals that they are not prepared to do as persons (p. 234).

This conflict between a professional subject position and a personal sense of ethics can be especially threatening for law students. Law is potentially their future profession. It is implicated in a fundamental way with their sense of self. For some students their old selves will merge seamlessly with their new legal ones. Others, and this includes women, students from working class backgrounds and members of racial or ethnic minority groups, may experience dissonance. Meyer (1993, p. 790) gives a case study of a first-year law student from a 'working class' 'immigrant' background who after initial difficulties managed to produce an excellent piece of work. When congratulated on her progress, this student responded that she was thinking of dropping out because in completing her law assignment 'she was pretending', 'she was forced to speak in a voice that wasn't "her" voice'. Guinier, Fine and Balin (1997, p. 28) summarise similar interview data from young female law students:

> Our data suggest that many women do not "engage" with a methodology that makes them feel strange, alienated, and "delegitimated." These women describe a dynamic in which they feel their voices were "stolen"

> from them during the first year. Some complain that they can no longer recognize their former selves, which have become submerged:
>
> > Law school is the most bizarre place I have ever been ...[First year] was like a frightening out-of-body experience. Lots of women agree with me. I have no words to say what I feel. My voice from that year is gone.
>
> Another young woman added, "For me the damage is done; *it's in me*. I will never be the same. I feel so defeated."

Conley & O'Barr (1998) characterise Mertz's (1996) similar conclusions in the following terms:

> Law schools inculcate both a way of talking about problems and the logic that lies behind that way of talking. Because such logic is an essential tool of current legal practice, law schools could not give up teaching it even if they wanted to do so. What Mertz reminds us, however, is that the discourse of legal education has other consequences that have not been identified or thought through with sufficient care. As law professors use language to socialize their students, they are simultaneously distancing them from the social contexts from which they emerged, the same social contexts their future clients will inhabit (p. 135).

These experiences suggests that for some students at least, problems in learning to be lawyers cannot be explained only in terms of a failure of skill. Rather the 'roles' or 'identities' or 'subjectivities' they are forced to adopt in order to be able to write and speak the law authoritatively are experienced as alien, or distasteful, or as a threat to their sense of a 'real' self. Similar evidence suggesting that legal education plays a role in the stress and emotional dysfunction of lawyers and law students is reviewed by Iijima (1998). This evidence supports the claim that students who have trouble with legal writing may be resisting, consciously or unconsciously, the radical break between their everyday subjectivities and the demands of a legal position.

But to talk of troubles and problems is to pay attention only to reasons why students fail to come to terms with the demands of legal writing. One of the main advantages of viewing subject positions as distinctive features of legal writing is that attention is deflected away from a negative focus on deficit and

towards a positive focus on the processes through which subjectivity is formed. Stated in positive terms my thesis is that learning to think like a lawyer is a matter of discursive subject formation. My interest is not only in the subject positions law students have to control. Also I am concerned with how they come to control them. I am looking for an answer to the question: How does someone who is not a lawyer become a lawyer?

In answering this question I claim that, as students engage in the textual practices of the legal profession, they are constructed by the subject positions they encounter and reconstruct those positions for their own ends. Effective engagement with legal practices brings with it a rearticulation of students' worlds into new kinds of objects and ways of acting on those objects, and creates for the students new positions from which to act and to relate to other people. This transformation requires students to redefine how they see themselves. They will have new kinds of needs and desires, priorities and values. New opportunities will be opened to them and old ones closed off. Bartholomae (1985, p. 135) characterises the task that students have to perform as 'inventing the university'. A corollary of Bartholomae's claim is that, in inventing the university, students are also reinventing themselves.

My approach to legal subject formation is to treat it as a complex, multifaceted process. It is not a single event, a birth, a 'happy (and mysterious) day when everything, or at least most things, suddenly become clear' as Fish (1989, p. 363) would have us believe. Conventional theories of learning are not sufficient to account for this transformation of ordinary school leavers into lawyers. Theories of subjectivity offer a way of understanding how it is accomplished not just at an individual level, but also at the level of the maintenance and reproduction of legal institutions.

In order to establish my thesis as outlined above there are three questions I must answer:

- What subject positions do law students have to come to terms with in their coursework?

- What difficulties do they experience coming to terms with these positions?
- Through what processes are student subjectivities formed?

In answering these questions I use critical discourse analysis to focus directly on the spoken and written language produced by students as part of their legal coursework. Given that language lies at the core of the practice of law, critical discourse analysis is the most appropriate method because it allows detailed examination of language both as the main site where discursive production of student subjects occurs and as the tool used to form their subjectivities. My application of critical discourse analysis ties abstract social theoretical concepts such as subjectivity or positioning to actual examples of their use, employing word-by-word and clause-by-clause analysis to show how a student writers engage with legal subject positions. Detailed analysis uncovers the traces left in the linguistic patterning of texts by processes of subject formation. Linguistic patternings of sentences and clauses are argued to reflect the subject position of the speaker or writer of those sentences and clauses. For example, a shift from one sentence to the next between *I* and *we*, or between inclusive *we* and exclusive *we*, says a great deal about the positioning of the writer.

In making decisions about the collection of legal education texts for analysis I was motivated by a need to exemplify a range of subject positions, genres and textual practices. Because I wanted a setting that placed students in a broader range of positions than doctrinal classroom teaching (Baker 2000) I focused on a 'practical legal skills' program in which students engaged in legal work on simulated cases. In this program students write for a range of audiences and purposes relating to different aspects of the legal document cycle, and occupy a range of roles as counsel and as members of a firm of solicitors. The texts produced are of a professional 'legal' character and very different from students' previous schooling and from other academic disciplines.

Use of a case study approach allows the thesis to demonstrate developments relating to a single group of students and a single topic over a period of time. The case studies include both monologic texts, demonstrating already formed subject positions, and dialogic or unfinished texts that illustrate processes of

formation. Two case studies are conducted with the aim of focussing on areas of similarity and difference to facilitate contrastive analysis: both case studies relate to the practical legal skills curriculum, but they differ in the year level of the students and in the area of legal doctrine.

Although the contrastive approach broadens the scope of the thesis, the use of methods such as case study and detailed linguistic analysis precludes replicable results and limits generalisability. As in all theoretically-oriented case studies, the force of the thesis lies not so much in conclusions about particular groups of students, as in the potential for the models and methods of analysis developed here to be applied elsewhere (Stake 2000).

A key aim is to demonstrate, in relation to specific examples, how critical discourse analysis can be used to examine processes of subject formation. Given its importance for theories of discourse, subjectivity is a surprisingly neglected area of application for CDA, which has been handicapped by a static and inadequate account of subject positions. This thesis is intended to show how CDA can be supplemented from the one side by linguistic techniques and from the other side by theories of professional subjectivity in order to do useful analytical work.

Subjectivity and identity: a terminological note

I have chosen to talk about 'subject formation' and 'subjectivity' in this thesis rather than 'identity', the term used in much of the relevant literature. This is because my focus is on the characteristic stances, attitudes, ways of seeing and modes of representation of the legal professional. Identity is typically used to refer to that which is unique to a particular individual, or that which distinguishes them from others, while subjectivity refers to that which they have in common with others through engagement with particular institutional or cultural practices.

In many ways the choice of terminology is an arbitrary one. Identity is often used more broadly to refer to 'the content or the defining criteria of the

category, such as common experiences or fate, common origin, or common culture, which distinguish it from other categories' (Widdicome 1998, p. 192). What is at stake, however, are matters of allegiance to different research traditions rather than matters of definition. Subjectivity is a term found in psycho-analytical and poststructuralist literature, while identity is used in traditional social theory and ethnomethodology (Wetherell 1998). In seeking to combine elements of these two traditions I have had to make a choice which leans more in one direction than another. Use of 'subjectivity' reflects the dominant status of critical discourse analysis in my theoretical and methodological orientation.

In this thesis I use the term 'professional le l subject' to mean the subjectivity of the legal professional as expressed in p ional settings, including the characteristic stances, perspectives and a the legal professional takes towards his or her subject matter, the characteristic ways in which the legal professional presents him or herself to others, and the ability to speak and write in 'insider' ways that identify someone as a member of the legal profession. The term distinguishes the professional subjectivity of lawyers from the subjectivity of laypeople drawn within the ambit of the law.

Plan of the thesis

Chapter 2 puts forward critical discourse analysis (CDA) as a suitable means of answering the three questions raised in Chapter 1. The first part of the chapter considers CDA from a theoretical point of view, and in particular examines how and why examination of linguistic data might have something to say about the social-theoretical concept of subjectivity. The next part deals with CDA as a methodology for linguistic analysis, including an examination of criticisms made of the validity of CDA. The chapter then deals with data formation, and in particular with the appropriateness of case study as a means of collecting evidence relevant to the hypothesis. The final part of the chapter describes the legal skills programs forming the background to the case studies and gives details about access to the participants in the study.

Chapter 3 examines concepts of the legal subject and of subject formation intended to prove helpful in the case studies. Literature across a number of disciplines is reviewed with the aim of creating a model or framework that can be put to work in explaining and interpreting linguistic patterning in legal education texts. This application of the methods of critical discourse analysis sometimes means that theoretical constructs relating to positioning and subject formation are recontextualised for use in ways that were not intended by their originators.

The chapter begins by reviewing literature on legal subjectivity. The remainder of the chapter then examines accounts of professional subject formation. Central to this discussion is Wenger's (1998) account of the ways in which identity is formed through complementary processes of participation and reification and through processes of reconciliation. Poststructural accounts of subject formation as a reflexive folding of self onto self are also reviewed. The last section examines techniques of subject formation specific to students, particularly techniques based on interaction between students and their teachers.

Chapters 4 and 5 set out the analysis of data in the form of two case studies of professional legal skills activities. Chapter 4 consists of a case study of first-year students engaged in a legal skills exercise within the context of a contract law course. The case study is presented as a series of text analyses. Initially linguistic techniques are used to describe the standard pattern of interpretation of cases used by students in their examination answers. This standard pattern is then compared in the rest of the chapter with more professionally oriented legal skills texts.

Central to the first group of these texts is a letter of advice to a simulated client, which shows students writing in role as a member of a firm of solicitors. The second set of texts consists of excerpts from the transcripts of two meetings in which students are preparing a 'brief to counsel' for use in a moot court. This dialogic spoken text makes it possible to give a dynamic account of legal subjectivity as in formation. The final set of texts consists of extracts from a

transcript of a student acting as counsel presenting a submission to a moot court. This text illustrates the student's presentation of self in a simulated legal role, but also shows the pedagogical and legal interaction between the student and the simulated judge. A persistent theme of Chapter 4, reflecting the two different views of the legal subject canvassed at the beginning of Chapter 3, is the contrast between the demands on students to take on the position of the interpreter who engages in legal analysis and the position of the practitioner who seeks to serve the interest of a client in an adversary setting.

Chapter 5 deals with a final-year student practical skills exercise in taxation law. It is organised in a similar way to Chapter 4 as a series of text analyses. The first set of texts analysed consists of extracts from the students' case book illustrating more complex modes of legal positioning than were evident in the first-year case study. As in Chapter 4, the second set of texts is made up of excerpts from the transcript of a student meeting in preparation for a moot court, and the third set of texts is made up of excerpts from a transcript of student submissions in the moot. Again there is a theme, this time of the students coming to terms with specialised modes of legal representation and analysis that rearticulate the world of common sense in novel and threatening ways.

Chapter 6 draws the threads together by relating the analyses of the case studies to the research questions and aims. Because of the way in which the case study analyses examine texts sequentially, this chapter performs the substantial task of making links in findings across the range of cases and texts. It also draws conclusions about the significance of the thesis in both theoretical and applied terms.

CHAPTER TWO

Critical discourse analysis as theory and method

This chapter describes and justifies critical discourse analysis (CDA) as the most appropriate method to achieve the aims of the thesis. The chapter begins by explaining reasons for choosing to use CDA. It considers relations between language and subjectivity within the context of a discourse analytical perspective, both from a theoretical and from a methodological point of view. The next section discusses methods of data formation both as institutional ethnography and as comparative case study. The final section outlines the institutional and educational context of the study and gives details of access to participants.

The thesis uses detailed linguistic analysis of written and spoken texts as a way of examining how groups of students successfully or unsuccessfully engage with and are formed by the subject positions of legal education. Because language is the predominant means and medium through which legal subjects are formed, the methodology rests on the ethnomethodologically-derived view that a turn-by-turn and clause-by-clause analysis of textual production will yield evidence of processes of subject formation.

CDA is the best method to achieve the aim of demonstrating how subject formation leaves its traces in grammatical detail because it provides a strongly theorised account of the relationships between social theory and features of language (Chouliaraki & Fairclough 1999; Gee 1999). The ability of CDA to attend closely to language at the level of texture is central to its claim to be able to offer insights into the social that are not available to other social scientists

(Fairclough 1992a). CDA uses social theory to look for evidence of modes of ordering that leave traces in the detail and texture of language. Abstract social theoretical constructs such as subjectivity or positioning are linked to detailed features of the linguistic resources used in the construction of a text. In particular, CDA makes it possible to explain the occurrence of linguistic patterns, ruptures, gaps and contrasts within legal education texts as signs of the success or failure of processes of subject formation.

A strength of CDA is that it does not separate theory and methodology. The relation between linguistics and social theory is both a theoretical one, based on accounts of the ways in which language is constitutive of the social, and a methodological one, because linguistic evidence is used as a basis for drawing conclusions about the ordering of the social (Chouliaraki & Fairclough 1999).

Another reason for use of CDA in this thesis is that much of the data documents spoken interaction and textual practice in order to examine the processes by which subjectivity is constructed. Approaches to discourse which derive exclusively from a Foucauldian or poststructural tradition have great difficulty making sense of this kind of textual material because they tend to be synchronic in their orientation. They have trouble with process and change over time. In contrast, the relative openness of CDA to a range of theoretical traditions such as linguistic anthropology and conversation analysis allows it to examine textual practice and interaction (Wetherell 1998).

A reason for focusing on CDA is that it is 'critical'. What distinguishes CDA from other approaches to discourse analysis is that it can be used as the basis for identification and analysis of a discourse-related problem (Chouliaraki & Fairclough 1999), such as the failure to engage successfully with the subject positions required by the texts of legal education. CDA is useful because it is concerned with issues of power and with the way language is manipulated ideologically to cause speakers to misrecognise the problems they face. As later chapters show, a characteristic features of some legal subject positions is that they are concealed or misrecognised.

Language and social context

The account given by CDA of the relationship between language and social context raises important theoretical issues for this thesis. These include the position of the analyst in making judgments about the relationship of language to the social and the ways in which the linguistic dimensions of the social articulate with the non-linguistic.

In a paper that has since occasioned considerable debate, Schegloff (1997) is critical of the way in which CDA links language and social theory (Wetherell 1998; Chouliaraki & Fairclough 1999; Billig 1999). Schegloff claims that sociological categories such as class, gender (or, I would add, subjectivity) may only be used in analysing a text when there are clear textual grounds for believing that those categories are relevant to the participants in their production and reception of the text. According to Schegloff, CDA is guilty of imposing its own preconceptions, of reading texts to suit its own interests and concerns which have little relevance to speakers and listeners. CDA practitioners see what they want to see, instituting a 'hegemony of the intellectuals' (p. 167) which has nothing to do with the interests of those whose texts are being studied. Others with more sympathy for the CDA project (Fowler 1996; Toolan 1997; Widdowson 1995) make similar points.

One way to respond to the criticisms and to clarify the nature of CDA as a theory is to point to the epistemological differences between CDA and the tradition of conversational analysis from which Schegloff is writing. Influenced by phenomenological and symbolic interactionist traditions, conversational analysis elucidates the resources which participants bring to an interaction or a conversation to gain evidence of the practical ways in which people in the real time of interaction make sense of their world. It is concerned to view conversation from a participant's point of view.

In contrast, CDA seeks to explain rather than just interpret (Fairclough 1989, 1996). CDA is influenced by what Sarangi and Candlin (2001, p. 368), borrowing from Goffman (1974) and Schutz (1962), call 'motivational relevancies'. Motivated social scientists come to discourse not just seeking to

understand what is happening but with an agenda of questions that they want answered.

For example, I bring to this research a view that legal writing is a problem, and a possible explanation of why it is a problem: that students are resisting formation as legal subjects. This is to apply an external, hermeneutic perspective to legal discourse (Schwandt 2000). I am making sense of students' language or behaviour by bringing a retrospective point of view to bear. But that does not mean that the perspective is arbitrary. People take an explanatory perspective on their own or others' discourse whenever their behaviour has a reflexive dimension to it, that is, when they are making representations of their own behaviour and that of others for the purpose of understanding it (Chouliaraki & Fairclough 1999). CDA gives them a tool to do this in a more systematic way. My retrospective view of students' language does not take a self-indulgent theoretical perspective on the text, but does something teachers necessarily do all the time when they seek to explain why their students are going wrong. This explanatory perspective is reflected in the use of a comparative or contrastive method in this thesis, juxtaposing texts that do not belong together in order to find patterns of similarities and difference (Sarangi & Candlin 2001).

The purpose of the analyst in seeking to explain or interpret also determines what counts as relevant social context for a text or utterance (Sarangi and Candlin 2001; Goodwin & Duranti 1992). If the focus is on explanation the analyst needs to regard more aspects of the social setting of a text as potentially relevant than she would if the aim were interpretation. This is particularly true when looking, as I am, for a perspective that deals equally well with written text, monologic spoken text and dialogue. Conversation analysis has the luxury that it only focuses on immediate face-to-face interaction.

Schegloff's (1997) criticism of the role of context in CDA can, however, be interpreted as being about more than just scope or focus. One reading of Schegloff is that text and context are not something separate from each other that have to be brought into correspondence: 'For Schegloff, talk-in-interaction

...represents "a" or even "the" prime socio-cultural site. It is the place where culture and "the social" happen' (Wetherell 1998, p. 391). CDA is vulnerable to the accusation that it has not learned this important lesson about language and context because of its close association with systemic functional linguistics (Halliday 1994). Despite its many fruitful contributions to discourse analysis, systemic functional linguistics (SFL) is burdened with an inadequate concept of the relation of text and context through the metafunctional hypothesis (Halliday 1985; 1994). This hypothesis holds that there is a systematic correspondence between the forms of language and its functions. It claims that features of grammar have evolved to realise particular functions and to express particular kinds of meanings. These functions or meaning types fall into three broad groups:

- field, the social action to which the language relates;
- tenor, the relationships between participants in the language use and/or the social action; and
- mode, which concerns the role the language plays in the situation.

The distorting effect of the congruence hypothesis has been pointed out in the literature on CDA (Poynton 1993; Fairclough 1992b; Fowler 1996; van Leeuwen 1996). Fairclough (1992b) argues that in many situations there is not a close fit between purpose and language use, and the range of language choices a speaker may make in a particular situation is not highly predictable. This observation contradicts the hypothesis of a close fit between form and function. The congruence hypothesis also is conservative in its effect in that it diverts attention from language change (Fairclough 1992b). It distorts because it directs attention to superficial aspects of language which correspond neatly with function, and diverts attention from 'those implicit meanings which do not have direct surface structure representation' (Fowler 1996, p. 11; see also Poynton 1993). There is little independent empirical basis for privileging particular grammatical choices as more congruent with function or 'literal' than others (van Leeuwen 1996). Poynton (1993) draws attention to technical aspects of the grammar which appear there for no other reason than to maintain the metafunctional hypothesis. She argues that the separation between field and

tenor has little empirical basis and appears to be an ideologically motivated way of maintaining a separation of facts from attitudes and values.

The congruence hypothesis implies that there are two separate things: the 'code' (Halliday 1994, p.xxx) of context of culture and the language that realises it. 'Code' is a bad metaphor, first because it implies something predetermined and comprehensive rather than fragmentary and emergent, and second because it suggests that the code has a separate material existence. If, as Wetherell (1998) argues, text is the prime site of the social, the notion of congruence makes no sense. There are not two separate things to be congruent. There is not some code which lies behind text and of which text is only an expression. By defining the semiotic as a code in correspondence with the system of the social, SFL privileges the semiotic and gives it too much weight compared with the other elements or moments of the social (Chouliaraki and Fairclough 1999).

Chouliaraki and Fairclough (1999) and Law (1994) provide complementary accounts of discourse which are less vulnerable than SFL to criticisms that they misconstrue the relationship between language and social context. Both accounts have in common a view that discourse theory occupies an intermediate position between general theories of culture and localised theories of practice. They are complementary because of their contrasting strengths. An important strength of Chouliaraki and Fairclough (1999), reflecting their adherence to the tradition of CDA, is their orientation to the detail of linguistic theory. Law's (1994) account of discourse is useful because it explicitly integrates into discourse theory issues of change, agency and reflexivity coming out of a symbolic interactionist tradition. It is in these areas that CDA has traditionally been weak, and in which Law's broader social theoretical base can offer useful support.

Drawing on the work of Laclau & Mouffe (1985), Chouliaraki and Fairclough (1999) claim that the elements or moments of the social, which include persons, objects, materials, and dispositions as well as language and other semiotics, are 'articulated' with each other in different ways in different social

practices. Based on actor-network theory, Law (1994) offers a similar view of the social as heterogenous networks of materials which include people, use objects, texts, money, machines, tools and other devices, dispositions, spaces, images and the built environment. These networks and materials are characterised by greater or lesser degrees of stability or permanence and by greater and lesser degrees of reach or influence.

For Chouliaraki and Fairclough (1999) discourse theory describes how semiotic elements or moments are articulated with other non-semiotic moments within a given social practice. In contrast Law (1994) does not distinguish discourses which are semiotic from articulations and conjunctures which are social. Unlike CDA, Law's notion of discourse as a mode of ordering is not based on a pregiven dualistic distinction between what is semiotic and what is not semiotic. Discourses are sets 'of patterns that might be imputed to the networks of the social' (Law 1994, p. 95). Discourses are not reified entities but 'modes of ordering' (p. 20). Order is emergent or self-generative. The network is both a medium and an outcome of the mode of ordering. Networks only exist because modes of ordering make them possible, but at the same time modes of ordering are internal to networks.

According to Law's principle of 'relational materialism' (p. 23), networks do not presuppose a clear distinction between the material world and the semiotic world, or between nature and culture. There can be no preordained difference between what is semiotic and what is not. This distinction is enacted at different times and in different ways by modes of ordering which place materials in reflexive relationships of representation with each other.

This relation between modes of ordering and reflexive strategies demonstrates the intimate connection between discourse and the constitution of subjects which lies at the heart of my thesis. Reflexive relations establish what actor network theory calls centres of translation (Callon 1991; Latour 1990) where a network monitors itself using representational practices and acts intentionally on the basis of these representations. Human subjects are one type of centre of translation (although most centres are not persons), thus human subjectivity

can be seen as one kind of reflexive strategy that is generated by a mode of ordering. This view that reflexivity 'is a strategy for generating the practice of mind or its analogues' (Law 1994, p. 138) fits well with the view developed below in Chapter 3 of subject formation as constituted by a reflexive or folding relationship between self and self or self and other. This self-reflexive character of practice is also commented on by Chouliaraki and Fairclough (1999). Practices have an irreducibly self-reflexive element which means that 'people generate representations of what they do as part of what they do' (Chouliaraki & Fairclough 1999, pp. 25-26). In producing a world of action practices also produce reified representations of those who act within that world. In creating means of representation and control they also create an image of the representers and controllers. It is the reflexive strategies through which law students generate representations of what they do as part of what they do that I document in the case studies below.

Linguistic techniques for analysing subjectivity

The claim of CDA to be able to do something distinctively different from other forms of social theory lies in its ability to relate theoretical concepts such as subjectivity to textual and linguistic detail. This section describes linguistic techniques likely to be useful in this thesis as a basis for drawing conclusions about subject formation. Despite the considerable literature on the discursive formation of the subject, little detailed attention is paid to linguistic evidence. Many or even most studies claiming to be doing CDA use only commonsense techniques of close reading. They thus deprive themselves of any other way of supporting their readings of text than their own intuitions and interpretations. Ivanic (1998) makes this point in the following terms:

> cross-disciplinary theory and research on the way in which discourse functions in society needs more sophisticated linguistic and intertextual analysis to show more precisely *how* discourse constructs identity (Ivanic 1998, p. 18).

Attention to the texture of language is essential in CDA. It avoids the misperception that language is transparent, helps link large scale social

categories with small scale realisations, and gives access to additional sources and types of evidence to ground claims (Fairclough 1992a). My aim is to study how linguistic resources are deployed in a sustained way, tactically and in local settings, to construct subjectivities.

> The principle is that in CDA one should aim not only to show what interdiscursive resources are drawn upon in a text under analysis and how they are realised semiotically and linguistically, but also to show through an analysis of the texture of the text how these resources are articulated together in the textual process, how they are 'worked' in the development or 'unfolding' of the text in time (spoken texts) or space (written texts) (Chouliaraki & Fairclough 1999, p. 152).

If it is accepted that the business of discourse analysis is to seek traces of modes of ordering in linguistic detail, the next question is what aspects of the grammar need to be attended to. In seeking to 'throw light on discourse', tools for analysing all aspects of the language system must be available. But that does not mean that all aspects of the language system are equally likely to be relevant. Some aspects of the system when used in textual practice are more likely than others to show traces of subject formation.

A good starting point for examining linguistic means of subject formation is Benveniste's (1971) chapter, 'Subjectivity in Language', first published in 1958, which was the first paper to make the explicit claim that language constitutes subjectivity. This paper has continued to be directly and indirectly influential. In it Benveniste examines pronouns as a means by which 'man constitutes himself as a *subject'* (p. 224). He establishes the self-evident but analytically useful point that pronouns are used deictically to constitute the self through patterns of contrast between *I* and *you* (but also, as Chapters 4 and 5 show, patterns of contrast between *I* and *we*, *we* and *they*, and *we* and *him*).

Benveniste also highlights the fact that the way the *I* is constituted by language differs depending on the kind of clause and the kind of verb it is the grammatical subject of. Three categories are distinguished. The first category is made up of verbs like *eat* referring to the embodied actions or states that constitute a first person subject *I* in just the same way as they constitute a

second or third person pronoun *he* or *you*. The second category is made up of verbs which constitute the first person subject *I* quite differently from a second or third person subject used in the same clause. For example the first person subject of a performative verb like *I promise* is performing an action through her language use, while no such action (or at least a very different action) is performed by the third person subject of *he promises*. A third category is verbs denoting dispositions or mental operations, now called propositional attitude verbs. These verbs construct the first person pronoun in sentences beginning *I believe* quite differently from the third person pronoun in *he believes*. A sentence beginning *I believe* does not describe my mental condition in the same way that a sentence beginning *I suffer* does. Rather *I believe* constructs the self through what Halliday (1994) would call degree of probability or epistemic modality, that is, the degree of certainty with which the *I* affirms a proposition.

Ivanic's (1998) critical discourse analysis of university student writing distinguishes three types of linguistic self-formation similar to those put forward by Benveniste. The first is referred to by Ivanic as the 'writer-as-performer', drawing on Goffman's distinction between the self as performer and character (Goffman 1990). The writer portrays herself through the act of producing text. A second mode of subjectivity is the 'discoursal self' (Ivanic 1998, p. 25), the 'character' or 'principal' in Goffman's terms. The writer portrays herself in what she writes through a process of self-representation. Ivanic further distinguishes a subcategory of the discoursal self which she refers to as the 'self-as-author' (p. 26). This is the authorial presence established as a writer's 'voice'. It is the 'self-as-author' who establishes claims to be authoritative, to have a worthwhile contribution to make about a topic.

Ivanic's case study of a social work assignment uses linguistic analysis as a means of individuating the 'voices' or 'positions' evident in the student's work. She does not just examine pronouns, verb forms and modality, as Benveniste (1971) does, but uses a wide range of discourse analytical tools, including lexis, clause structure, agency, nominal groups, modality and intertextuality, as a means of individuating voices. Her work provides a model

of how SFL can be used to investigate subjectivity that has influenced the approach I take in the case studies.

Although she develops a set of useful linguistic methods for describing the range of subject positions evident in a written text, Ivanic (1998) is not interested in the way in which subject positions are taken up or formed in speech. I also need a dynamic account of subject formation that I can use in my analysis of student discussions. Goodwin's 'participant frameworks' (Goodwin, M. H. 1990) provide such an account. Goodwin claims that activities have associated with them 'participant frameworks' by means of which participants relate to each other and through which representations of the participants are constructed. Participant frameworks include:

> (1) a set of relevant participants, (2) occasion-specific social identities for those participants, (3) a set of relevant actions that these participants are expected to perform, and (4) a relevant past that culminates in the present (Goodwin, M. H. 1990, p. 195).

Participant frameworks are established by linguistic phenomena such as pronoun use, by rebuttals in debates or disputes, and by recipient design in which utterances are intended for some speakers and not others. Participation frameworks determine how individuals are allowed to access ways of interacting or responding within activities (Duranti 1997).

Like Ivanic's three types of student subject, Goodwin's participant frameworks draw on Goffman's (1990) distinction between performers and characters. The difference is that Ivanic is analysing written text and Goodwin is analysing spoken interaction. Participants are positioned through their actions in taking part in talk and through the way in which the talk characterises or depicts them. Evaluation, for example, is a powerful means of positioning others through characterisation (Goodwin C. & Goodwin M. H. 1992).

Another important set of devices for characterisation of participants is discussed by discursive psychology (Edwards & Potter 1992). These include personal pronouns, accounts and attributions, attributions of belief, agreement, alignment and group membership. Edwards and Potter, for example, consider

how 'factual' reports of events construct a representation of the accountability and agency of the participants, including both the participants whose actions are being described and the actions of the speaker in describing them.

Halliday's notion of tenor in SFL is similar to the concept of the participant framework in its concern with the way in which language is used to constitute relationships between participants in a particular setting. The difference is that the interpersonal function of the grammar corresponding to tenor is a pregiven part of a semiotic system, while a participant framework is constructed in interaction. Tenor is realised grammatically through mood, that is, through questions, statements, requests, promises which build an exchange of information or goods between participants, as well as through the choice of politeness forms or means of address (Halliday & Hasan 1985). Like Benveniste (1971), Halliday focuses on personal pronouns and on modality. Despite its theoretical limitations the concept of tenor usefully directs attention to interpersonal resources within the grammar relevant to subjectivity.

In the case studies I place the concept of a 'participant framework' composed of positions or social identities (Goodwin, M. H. 1990; Duranti 1997) at the centre of my analysis. The concept of a participant framework is adapted for use with written as well as spoken texts by integrating it into genre theory. Genres or activities are said to define 'occasion-specific' social identities (Goodwin, M. H. 1990, p. 195) or positions.

A participant framework, in my adapted account, consists of a set of expected social identities or positions associated with a genre. These positions are determined by a broader range of indices than those originally postulated by M. H. Goodwin (1990). Combining Goodwin's work with Ivanic's (1998) analysis of student texts, positions may be constituted through the way language is used to perform actions, produce signs of group membership, adopt a stance or perspective, establish relationships with other people, and refer to self and others. At the level of the clause and the clause complex subject positions are constructed by distinctive patterns of language use of the kind demonstrated by Ivanic (1998): patterns of pronoun use, types of actions and relationships

realised by verbs, nominal group structure, modality and propositional attitudes, and use of evaluations and other attributions.

The validity of Critical Discourse Analysis

There is a silence in the literature on CDA about methodological principles and a lack of reflection on what it means to be a discourse analyst (Fowler 1996). In particular, there is a need for criteria to distinguish valid analyses from invalid ones. Attention has been drawn to these absences by a number of critics. Schegloff (1997), for example, argues that the lack of clear standards of validity and a well-defined methodology for CDA means that it is easy for analysts to read their own interests and preoccupations into a text.

While Schegloff's (1997) criticism that CDA does not take into account the perspectives of participants may not stand up theoretically, it certainly has methodological force if understood as a point about the relationship between researcher and researched. The discourse analyst is open to the accusation of furthering an agenda without concern for the interests of the analysed. If analysts are not participants in the textual practice being analysed, it is likely that they will misinterpret it.

One way to overcome this problem is to check the validity of interpretations with participants. Gee (1999) refers to this as the criterion of 'agreement' (p. 95). Acceptance by participants of what an analyst has to say constitutes a sufficient but not a necessary condition for the validity of an analysis (Bloor 1997). And to insist on this criterion is to fall victim to the intentional fallacy. It gives to the producer or recipient of a text a special authority, when of course she may have no special insight into her own meanings. Particularly when investigating texts that are ideologically invested, and when texts incorporate systematic gaps, silences, distortions or misrecognitions, the refusal to accept an observer's analysis may be a symptom of the problem under analysis rather than a sign of failure of the analysis (Lather 1991).

A better way to formulate the criterion of 'agreement' is to require that the analysis generates readings potentially useful in solving the problem the research addresses. What is produced by the research is not generalisations or truths, but methods of interpretation which can be transferred to other settings and put to work there. Kincheloe & McLaren (1994, p. 151) refer to 'anticipatory accommodation' and Lather (1991, p. 68) to 'catalytic validity'. 'Catalytic validity' is the degree to which research opens the possibility of changing participants' realities or world views. The criterion for validity of an analysis is whether it helps the class of people under study to overcome the problem identified by the research. In creating modes of analysis which others will find useful, CDA does not seek to create generalisations transferable from site to site on the basis of objective similarities. Its aim is to invent modes of reading and interpretation which can be used by others. This is the strategy I have used in this thesis and outlined in Chapter 1.

A further criterion of methodological adequacy is 'construct validity' which holds that analytical categories should be grounded in a theoretical model. In analysing texts it is not sufficient to rely on 'intersubjective intuitions supposedly shared by writer and reader in a common discursive competence, backed up by informal accounts of relevant contexts and institutions' (Fowler 1996, p. 10). Fowler points out that a great deal of work which claims to be CDA is no more than close textual analysis. In order to count as discourse analysis it must be based on a strong foundation of linguistic analysis that provides support for its claims. There must an explicit and replicable standard by which to judge what counts, for instance, as an example of power or subjectivity. One way of creating such a standard is to ground linguistic details in an explanatory social theory. Chapter 3 below establishes a grounding theory of professional subject formation to be used as a means of explaining patterns and regularities in the linguistic data.

CDA is also criticised because of its lack of clearly specified methods of analysis (Fowler 1996). Questions such as the following give a sense of how validity might be established:

- Does the method of analysis account for many of the details of the analysed text and other similar texts?
- Is the analysis grounded in linguistic detail as well as in content and contextual analysis?
- Do analyses based on different levels of detail converge to support each other?

Gee (1999) systematises these questions as the principles of 'convergence', 'coverage' and 'linguistic details' (p. 95). 'Convergence' refers to the fact that analyses tend to converge and provide compatible and consistent answers at the different levels of analysis. 'Coverage' refers to the ability of the analysis to apply not only to a single text but also to other similar texts. 'Linguistic details' refers to the ability of the analysis to demonstrate a link between form and function.

Many of the methodological principles used by CDA come straight from literary stylistics and show the influence of Jakobson and the Prague School (Toolan 1997). The interpretive principles inherited by CDA focus on patterns of distribution and correspondence, including form function relationships. They focus on relations across semiotic systems, and across grammatical and morphophonemic levels within a text. The analyst looks for parallelism, repetition, intrusions of the unexpected, shifts in framing, gaps and silences, foregrounding and contrast. Toolan (1997) notes a division of labour in which literary stylistics and CDA analyse texts in similar ways, but have a tacit territorial agreement about the kind of texts each has access to.

But while methodological principles are important, it is doubtful whether these general guidelines are specific enough to be a guide for action, or a practical way of separating good from poor analyses. And it is important not to make methodology into a method, to reduce CDA to a set of procedures to follow (Chouliaraki & Fairclough 1999).

Data formation

CDA is essentially a way of analysing textual and contextual data. It has little to say about how that data is formed. To find methods of data formation the

analyst must turn to other traditions of qualitative research. This thesis combines CDA as a mode of data analysis with a quasi-ethnographic approach to data-collection in which the researcher systematically over a period of time observes aspects of the practices under study (Chouliaraki & Fairclough 1999).

This methodology can be characterised as a form of institutional ethnography (Miller 1997). Institutional ethnography implies a focus on social reality under construction, on learning and change, and a sense of both agency and constraint. It allows the analyst to consider agency as the astute and inventive use of local resources, and the shaping of generalised social categories to meet local circumstances (Gubrium & Holstein 2000). Wenger's (1998) study of a health insurance call centre discussed further in Chapter 3 provides a good example of how well adapted institutional ethnography is to studying not only agency but also learning and identity. Institutional research gives the opportunity to observe processes of 'reality construction' as participants continually respond to the challenges of accomplishing new tasks:

> [Discursively focussed research] considers how setting members continuously assemble and use the interactional and interpretive resources 'provided' by social settings to construct, defend, repair and change social realities. These reality-constructing activities may involve practices that are so taken-for-granted by setting members that they go unnoticed and unreported. Hence the emphasis by discursively oriented ethnographers on observing (directly, by means of audio and video recordings, and through the careful reading of texts) the actual ways in which setting members construct social realities by making sense of practical issues (Miller 1997, pp. 27-28).

As this quotation suggests, the focus of institutional ethnography is on the observation and recording of naturally occurring talk and textual practice, rather than use of other sorts of data such as interviews (Gubrium & Holstein 2000). This focus on naturally occurring talk shows the influence of the ethnomethodological tradition, which holds that talk and other modes of action are constitutive of the social (as I have argued above), and that interviews do not have a privileged position as accounts of events. This rationale for the use

of naturally-occurring texts lies at the basis of the approach to data formation I have used in this thesis.

Miller (1997) regards institutional study as an opportunity for a dual focus on situational and transsituational aspects of discourse, because institutions implicate both locally situated action and an orientation to broader features of discursive formations. She uses this dual orientation as a rationale for linking ethnomethodological and poststructural perspectives. This orientation also favours the use of comparative and longitudinal studies, allowing the researcher to disentangle the local from more global features of discourses (Miller 1997). The desire to examine both local action and broader context is one of the reasons for the contrastive approach chosen in this thesis.

A second way of characterising my method of data formation is as multiple, contrastive, instrumental case studies (Stake 2000). The activities documented by the data in this thesis take on the self-contained character of a 'case' (Stake 2000). The method of case study is appropriate to the research problem because its bounded but still dynamic quality makes it possible to investigate agency and change over time but still to retain a sense of the contextual constraints under which students are operating. Talk and textual practices are examined not in isolation but as part of a cycle of actions and responses. The two case studies presented in this thesis are designed to contrast in a number of ways in order to provide a broader focus on the research issue, and, as suggested above, to attempt to separate local from more general features of discourse. The case studies are instrumental because they are a means of investigating a question that has been identified as of practical and theoretical importance, and, as pointed out above, a contrastive approach is appropriate to instrumental research.

Background to the case studies

The project was conducted in a law school of relatively recent origin, having been founded in the early 1990s to teach a general course with a focus on commercial law. In an arrangement not unusual in Australian universities

(Lipton 1998), the course was at the time of study part of a five year combined degree program in which students studied law concurrently with commerce, arts or science. Most students began the course as school leavers of approximately eighteen years of age. Students predominantly came from an Anglo-Australian background, however there was a substantial minority whose parents came from non-English speaking and lower socio-economic status backgrounds. This level of student diversity reflected the recent origin of the course and its lesser status than the offerings of established universities.

The ethos of the course was practical, and it emphasised professional skills and the preparation of practitioners, rather than the academic study of the law. In accord with this philosophy, the law school introduced early in its existence a practical legal skills program. The program commenced in first year and was integrated into the teaching of substantive law in each subsequent year of the course. Student work in the program received an assessment which was included as part of the assessment in each year of the relevant subjects in substantive law.

The practical skills course dealt with processes and methods of law such as drafting, research, interviewing, negotiation, taking instructions, and advocacy. Students attended some classes, but in the main the course was taught through flexible learning materials in which students learned at their own pace using study guides and set readings.

The other major pedagogical element of the course was the use of simulation. In the continuum of possible types of simulation, this course takes the form of 'continuing exercises' (Feinman 1995, p. 470), that is, exercises that arise out of a single set of simulated case documents. Students used these documents throughout a subject to complete a series of exercises following the cycle of a simulated case. Students were assigned to groups known as 'firms', working either for the plaintiff or the defendant, and undertook writing tasks, drafting memoranda, letters, pleadings and briefs. Within the program students were required to undertake a series of assessable exercises relating to the progress of a simulated case that raised substantive issues from their other coursework.

These exercises culminated in a 'moot' or simulated court in which students assumed the role of counsel and argued the case before a presiding judicial authority.

Such programs are common in the USA and have a considerable literature devoted to them (Maurer & Mischler 1994; Vaughn 1995), but are less common in Australia (Goldring 1987; Lipton 1998). In these programs legal skills are taught from first year in order to help students see themselves in an active role as lawyers from the start of their course, to help students with legal decision making, writing and research, and to give students a realistic grasp of the variety of activities in which practising lawyers engage (Maurer & Mischler 1994). Legal skills programs aim to teach students about law as action or practice rather than as doctrine, and to help students, who often have a very limited general experience and knowledge of the world, to understand how the law relates to 'real life' situations (Goldring 1987; Goldsmith 1993; Lipton 1998).

In this thesis student activities within the legal skills program are examined in two case studies, one at first year level, and the other at fifth year level. One is integrated with a course in contract law and the other with a course in tax law. One concerns a large group of students and the other a group of two. The case studies show groups of students in the same program but on different campuses. They have in common that they show staff members who are relatively skilled at conducting simulations and students who are in general capable and motivated. Students treat the simulation not as an exercise to be completed, but as an opportunity to extend their professional range and to engage in new learning. The case studies also have in common that they show young women assuming the role of counsel in a moot, a role that is disproportionately uncommon even in this course in which around 50 per cent of the students are female.

The first-year law students participating in the first case study were recent school leavers of eighteen to nineteen years of age who were enrolled in Contract Law in semester one. Overall there were 120 students, grouped in

three double degrees: arts/law, science/law and commerce/law. Contract law consisted of three one-hour lectures and a one-hour tutorial per week. The workload was substantial. Each week students were expected to read and take notes on an assigned number of legal cases. Each lecture focused on a specified point of law as exemplified by the cases and it was the expectation of the lecturer that students would be prepared to answer questions on the set readings. A 'Socratic' method was used in the lectures.

The tutorials of roughly sixteen students and a tutor worked through the case readings in greater detail than was possible in the lecture, with particular attention given to preparing students to write examination answers in case law. Students were explicitly guided as to the specialised format required and models were often provided from previous examinations to demonstrate how this writing was to be accomplished.

After the sixth week of the semester the contract law tutorials met on alternate weeks as 'firms' led by two appointed student 'senior partners' in a compulsory practical legal skills workshop. A special teaching development grant had been received by the faculty to develop this unit. Students were given documentation of and instructions for an imaginary case, and had to complete a series of writing tasks between May and September culminating in a Moot Court (The academic year commences at the end of February in Australia). Half the groups had to provide advice to the defendant and half to the plaintiff. The writing tasks jointly completed by the firms included preparation of a letter of advice with accompanying memorandum, a letter of demand, a statement of claim, a third party notice, a defence and counterclaim, and a brief to counsel (See Appendix 1).

These simulated writing tasks were supported by a 400 page loose-leaf folder which included documentation of the simulated case, advice, requirements and assessment criteria for the various rounds of activity; readings describing the characteristics of the written documents the students were required to prepare; and models based on the previous year's simulation exercise. The simulation

was expected to integrate and apply students' formal coursework studies in contract law and civil procedure.

Access to the students was gained after completing an ethics application and preliminary negotiation with the lecturer in charge of the course. The whole class of students was briefed about the project in a lecture at the start of the year and was given plain language statements. Students were also given consent forms to be returned the following week. Out of the class a single tutorial group was identified to participate this study on the grounds that all students had completed consent forms and on the basis that their tutorial time made access easy. During semester one and two I followed this group of arts/law students, which I shall refer to as 'Barry' in the case study, both in their tutorials and in their legal skills program. At the time of the first data formation fourteen students remained in the group, five young men and nine young women. All were eighteen or nineteen-year-old recent school leavers apart from one young man who had completed a business qualification at a technical college. All are referred to by pseudonyms and identified on records by these pseudonyms.

Barry's first legal skills task required them to complete a letter of advice and an associated internal memorandum setting out the legal basis on which the advice was proffered. This task was completed at the beginning of May. Barry, as a defendant firm, was then required to submit a letter of demand later in May, and a series of pleadings between June and August, including a statement of claim, a third party notice, and a defence and counterclaim. Their final task was to complete a brief used by two members of the firm acting as senior and junior counsel at the moot court in September.

The data for the first case study consists of (a) field notes on contract law tutorials during the thirteen weeks of semester one; (b) anonymous copies of a sample of contract law examination papers; (c) audiotapes and field notes of legal skills firm meetings on May 12, July 27, August 9, September 6; (d) a videotape and field notes of the final Moot Court presentation on September 9; (e) all writing produced by one 'firm' of sixteen students, including drafts and

final copies of assignments submitted by the legal skills firm for assessment; (f) tutor grades and assessments of both oral and written work; (g) teaching materials and assignment topics, and documentation for the legal skills program (Appendix 1).

The second case study was based on the moot court component of the practical skills program undertaken by students in association with their final-year subject on taxation. Again this program was supported by a booklet of flexible learning materials, although less extensive than that available to the level one students. Again the legal skills program consisted of continuing exercises based on a collection of documents around a simulated case. Students acting for the Tax Commissioner in relation to an objection by a taxpayer against a tax assessment before the Administrative Appeals Tribunal (AAT). They had previously as part of the same exercise in firms prepared a Notice of Objection on behalf of the taxpayer. The moot was undertaken not in firms but in groups of two so that every student would have the chance to appear in role as counsel.

The students whom I refer to as William and Emily were recorded in two settings. The first meeting took place in a small room in the university library. I was present in the room throughout, taking notes and operating a tape recorder. The aim of the meeting was for the students to prepare the main lines of the argument and their roles as senior and junior counsel in their moot. The meeting lasted about an hour and a half and took place two days before the moot. The second recording was of the moot itself, and took place in the dedicated moot room on the university campus.

Both William and Emily had entered the course as school leavers, however both were a little older than their peers due to illness, course transfer and part time study. William and Emily volunteered to participate in the case study following a request made to their class on my behalf by their lecturer. No pressure was placed on the group as is evidenced by the fact that that they were the only volunteers. I spoke to them on the telephone to set up a time, and met them for the first time before the meeting in the library. At this meeting I spoke to them about the aims of the thesis project and they read the plain language

statement and signed the consent form approved by the university ethics committee.

Data for the second case study consists of (a) an audiotape and field notes of William and Emily's meeting on September 15th; (b) a videotape and field notes from William and Emily's moot on September 17th; (c) copies of William's and Emily's preparation notes for the moot; (d) teaching materials, assignment topics and documentation for the legal skills program (Appendix 7).

CHAPTER THREE

Forming legal subjects

This chapter reviews literature on legal and professional subject formation with the aim of generating a model that can be applied in the analysis of student texts using the methods of CDA. Concepts that can be usefully applied in understanding strategies and techniques used in student subject formation have been drawn from diverse disciplinary sources. The concepts are selected on the basis of their potential to be recontextualised within the framework of CDA, that is, they are selected on the basis that they can be demonstrated to represent modes of ordering that pattern the texts of legal education. For this reason the concepts are sometimes employed in the case studies differently from the way they are applied in their original disciplinary location.

The first part of the chapter argues that a legal participant framework is constituted by the interaction of two subject positions. Based on a review of literature on legal subjectivity, it is argued that in the first position the lawyer as analyst or interpreter links a timeless and abstract legal order to the detail of specific events. Drawing on legal literature and on Schön's (1983) description of the professional as reflective practitioner, it is then argued that in the second position the lawyer is a professional practitioner acting and making decisions in an institutional setting.

The second part of the chapter examines research on the formation of students as legal subjects as well as relevant studies of academic, professional and vocational subject formation. In accord with the aims of this thesis, the review is limited to the construction of subjectivity through language-mediated

interaction. Discussion is organised into four sub sections that provide a conceptual framework or model used in later analysis in the case studies.

Using Wenger's (1998) account of the development of identity through reciprocal processes of 'participation' and 'reification', the first section of Part 2 examines subject formation in interaction within communities of practice. The next section reviews poststructural accounts that complement Wenger's analysis, portraying subject formation as a reflexive process of folding to create a domain of interiority. Referring to the work of Bakhtin (1981) and Wenger (1988), the third section examines accounts of identity formation as a process of 'reconciliation' of multiple identities. The last section reviews literature on the student subject and the way interactions with their teachers shape students' subjectivities.

Legal subjects as interpreters and practitioners

Chapter 1 reviewed Mertz's (1996; 2000) characterisation of 'learning to think like a lawyer' as a rupture between everyday narrative practices and the recontextualising textual practices of legal education. I argued there that, in engaging in this process of recontextualisation, first-year students could seen to be reflexively constituting for themselves a new kind of legal subject position. Further, the example I gave of the writing of a student letter of advice suggested that in the area of professional skills education students need to engage with more than one subject position. Students occupied Mertz's recontextualising position as they analysed the case, but they also engaged with a second position as they advised the client of her legal rights and obligations and suggested actions she should take.

In this chapter I refer to these two positions as the 'lawyer as interpreter' and the 'lawyer as practitioner', and I suggest that they have a wide currency in legal texts. I further argue that the positions are not independent of each other, but through their interaction jointly comprise a participant framework for legal education. An example of the interaction is provided by Mertz's (1996) argument that law students have to give up a naïve view of text as having its

own fixed, transparent meaning and adopt a view of meaning as relative and contestable. Interpretation cannot be conducted in isolation but only within the context of a particular dispute and jurisdiction. Students in making an interpretation of a case have to move between interpreter concerns which have to do with identifying and applying relevant statutes and precedents, and practitioner concerns which have to do with advice, with decision making and with action in a procedural and strategic context. Different contexts yield different interpretations or different contextualisations of the same set of facts, which is why Mertz (1996) emphasises that meaning and interpretation is relative and contestable. What counts as an interpretation of a case is determined by a pragmatic concern with authority, intertexuality, procedural history and warrants for legal argumentation (Mertz 1996; 2000).

These practices of legal interpretation have a very long history. Their emergence is placed by Legendre in the mediaeval period (Goodrich 1997). According to Legendre the key stage in the history of legal subjectivity was the 'revolution of the interpreter' in the twelfth century, a shift in modes of subjectivity, textuality and interpretation deriving from the emergence of a rational, hermeneutic relation to foundational authority. It was grounded in the rediscovery of Roman imperial law and also depended on the development of systems for training a group of professional civil servants (Kelley 1990). The revolution established forms of 'textually mediated social organization' (Smith 1990, p. 221). Lawyers mediate between local events and the world of the law which has its own discursive time, logic and modes of representation. They use interpretive practices to relate the local order of events to the textual world of the law, and regulative practices to control local events in conformity with their interpretations. According to Legendre this mediation takes place through a process of 'casuistry', the logic and method by which a body of normative rules deals with particular cases. The judge acts as interpreter, mediator and guarantor in the shifting relation between general rules and specific situations (Goodrich 1997).

Kelley (1990) also traces a continuous line from mediaeval legal science to modern legal and social theory. For him this is a history of tension between

nomos and *physis*, between law seen as an anthropocentric, pragmatic activity of making prudent and practical judgments, and law as science, as an abstracted and rational system independent of local circumstance. Kelley argues that the code-based view of law as civil science prefigures the way in which academic social scientists such as Durkheim objectified the social, seeking to erase local subjectivities, agencies and knowledges. Through such techniques Durkheim was able to displace agency (or *'telos'*) from the individual to society in general.

Schlag (1991) traces the implications of this Durkheimian view for modern legal subjectivity. Taking the late 19th Century jurist Langdell as paradigmatic, Schlag analyses the devices through which the position of the subject is constructed in Langdell's writings. When Langdell writes as a jurist, he uses a range of devices to conceal the subject roles he occupies as author, devices such as the use of passive voice, and use of the impersonal third person pronoun in 'it seems' or 'it is important'. In contrast, when Langdell speaks as a teacher he has no trouble using the first person. Schlag asks why is it that Langdell feels he must assume an impersonal mode when speaking the law and speaking as a lawyer.

The initial answer to this question is one that Durkheim would have recognised. According to Schlag, the individual legal subject is erased because legal thinkers pretend that, like scientists, their role is to 'discover' the impersonal and objective order of the law, which exists independently of any individual subject. Lawyers erase their individuality for the same reason that scientists do. The principles, rules and concepts that are discovered hold true independent of by whom, how and where they are discovered and applied. Bourdieu (1987) refers to this phenomenon in legal discourse as the 'neutralisation effect' and the 'universalisation effect' designed 'to establish the speaker as universal subject, at once impartial and objective' (p. 820).

The limitations of a view of the lawyer as scientist are quickly apparent. Legal principles are not like physical laws and it is futile to pretend that they are. An alternative means of deleting individual subjectivities is described by Schlag

(1991) as the strategy of the 'transcendental' subject. Schlag's argument begins with the observation that Langdell's law is not passive like an object but active. For Langdell (Schlag 1991, pp. 1646-1647) legal principles such as 'Equity' act as if 'fully animated'. They act without 'the apparent assistance of any social actor'. The metaphors used for the law present it as organic, as growing, as embodied. Lawyers become subordinated to and an extension of the transcendental subject of the law. Meaning and value are secured independently of the actions of individuals.

The transcendental subject is typical of legal analysis but is also more generally characteristic of the social scientist. The social scientist, in 'reconstructing subjects as figments of discourse', also reflexively provides an index of her own standpoint because she is reconstructing subjects in her own image (Smith 1999, p. 61).

Of course the submerging of the legal subject into the collective or objective order of the law is only apparent. The legal subject is still there, and his supposed self-effacement is a 'ruse of discourse' by which he is 'authorized to project his own self-image onto the order of the object, only to then discover his own self-image as objective truth—all in the name of science' (Schlag 1991, pp.1638-1639). The erasure of the 'I' is designed to conceal the subject's role in creating and maintaining the law, and to represent individual perspectives as universal.

An example the 'ruse of discourse' through which subjects are deleted is provided by Goodrich's account of the process of judicial decision making in his paper on the semiotics of common law (Goodrich 1990). Goodrich analyses a report of an appeal court consideration of a Magistrates Court decision in which two men were found to have engaged in behaviour likely to cause a breach of the peace as a result of overt homosexual behaviour observed by chance at a bus stop at 1.55 am. The issue for Goodrich is how a kiss, movement of a hand across clothing, is transformed by legal scrutiny into the category of offensive behaviour or objectionable conduct likely to provoke a breach of the peace. In what miraculous way do a number of movements,

observed by chance by an anonymous young woman, turn into quite a different sort of event called 'behaviour', and specifically behaviour which is 'offensive'?

The law has to provide a rationale for its decision which is universal in form and abstracts away from the specifics of the case to those aspects legally relevant to the making of a decision. As Goodrich (1990) argues, part of this process is the deletion of the actual persons involved in the case. This deletion creates a paradox, because the definition of offensive behaviour depends on the behaviour being observed and on someone being offended. This paradox is resolved by the characteristic legal manoeuvre of deleting an actual person and substituting the disembodied 'average man', a manoeuvre which is designed to conceal the fact that it is the judicial gaze, and therefore the judicial subject, that creates the offensive behaviour. The judge does not consider whether the homosexual couple Simon and Robert offended someone, or caused a breach of the peace, or even whether they intended to offend someone, but whether in some other possible world a breach or an offence might have occurred though the impact of their actions on some hypothetical reasonable man who is in fact the judge's projection.

Goodrich (1990) also emphasises the metaphorical way in which the intertextual process of precedent works in relation to this case, and particularly the way in which judges perceive a precedent as being legally similar to a case that is being judged. He comments on the judge's ability to find openly indulged masturbation in a public toilet displayed to a known audience 'surprisingly' similar to a case in which a couple are inadvertently observed at a bus stop. Goodrich goes on to ask how we as readers of the judgment can retrieve the basis on which the facts of these two cases are perceived as being similar, the basis on which the metaphor holds together:

> The answer is that it does so only by virtue of the institution, by virtue of being a part of a system of rules that identify and delete behaviours according to a tacit structure of reasonableness, in this case of travel: the institution, the law, creates a manner of doing things, creates a fiction in

> the form of a list of the permitted and the excluded (Goodrich 1990, pp. 243-4).

This analysis by Goodrich illustrates how a judicial practitioner makes judgments and rulings on the basis of a directly apprehended legal vision (Fish 1989; Murphy 1994), a direct gaze which is just as much a ruse or artifice as the self-effacing subject. However the legal subject in this role is not self effacing. Rather than concealing the subject, the language of judgment or opinion characteristically makes extensive use of the first person.

Surrounding this position of the legal subject as practitioner are a range of views characterised by Schlag (1991) as 'rule of law' theories. These theories portray the law as a practice that cannot be reduced to a set of procedures. Law is characterised as *nomos* (Kelley 1990), as what able practitioners do. One can only learn the law by participating in the legal community as a practitioner. Fish (1989) contrasts a practice-based view with the modernist view that judges need some sort of articulated theory to provide them with a model to follow in coming to a judgment. Labouring a sporting comparison with baseball, Fish argues that law is a practice, and that practitioners act as they have been trained to do by making decisions in real time. Where judges claim to be following a particular approach this is at best a *post facto* rationalisation. Thus claims to portray the law as a rational practice are essentially rhetorical glosses to secure the acceptance by outsiders of the activities of a specialised group of legal insiders who are embedded in the day-to-day demands and complexities of legal practice (Fish 1989).

Murphy (1994) offers a related account of the contrasting interpreter and practitioner positions. He characterises them in terms of a contrast between a modern and a mediaeval approach to textuality and interpretation (quite different from Legendre's distinction between mediaeval and modern). For Murphy the modern, 'hermeneutic', perspective is concerned with issues of method and theory in interpretation. A judge reflects on and has theories about how to interpret the law. He puts a reflective distance between himself and his 'object of observation' (Murphy 1994, p. 95). He formulates a set of procedures that will lead to correct interpretation of the law. Judges are

technicians, their interpretations merely an allocation of events to pre-established categories.

The medieval system, which Murphy identifies with the common law, is characterised in practice-based or 'rule-of-law' terms. Through immersion in a tradition of law, and as the living embodiment of that tradition, the judge sees the world in legal terms. His vision is imbued not with rules, principles and codes but with a concrete metaphorical outlook which is tuned in such a way as to immediately and intuitively apprehend relevant 'legal' similarities between case and precedent.

The direct concrete gaze which 'absorbs the world in the eye of the law' (Murphy 1994, p.93) guarantees that perception is immediate, not mediated, and it could not have been otherwise, as if the legal world was always already there:

> practice will naturalize the artifice entailed in lawyers' use of language, and that use, where language is a pure instrument ..., means that language cannot conceal 'the thing itself' which in turn means that when judges see a word they see the thing (Murphy 1994, p. 96).

The problem for law students is that it is very hard to know how one can develop this direct concrete gaze of the practitioner other than through years of practice. Just like the self-effacing subject, the direct gaze is a ruse of discourse, an artifice designed to lend authority by concealing the processes behind the making of a judgment. But the artifice also seems designed to have the effect of constructing a positioning that is difficult for students to emulate. The ideological devices used in legal texts to wield authority and to mystify the layperson also may tend to have the effect of mystifying law students.

Goodrich (1996) makes this point in criticising practice-based views of the law such as those put forward by Fish (1989) as a form of systematic forgetting, of submersion and loss of the subject. Goodrich cites Placentinus' polemic against law as '*Domina ignorantia* ... a science which kills both its subjects, its students, and also its object, the law' (Goodrich 1996, p. 130). Law is based on

a repression or denial 'by means of which it institutes its identity, its life, its fictive forms' (p. 112).

And this criticism of the law as repressing the legal subject applies not only to practice-based theories. Schlag (1991) argues that all legal theories have a built-in and systematic blindness which conceals the true nature of legal subjects and that this blindness is somehow constitutive of modern legal thought. What characterises the law is that it reproduces the forms of legal subjectivity while at the same time denying their existence.

This repression of the subject has a disastrous effect on legal education and more generally on the reproduction of legal institutions. There is a concern for the increasing loss of meaning, value and commitment, the inability of older lawyers to pass a sense of worth on to the next generation (Schlag 1991; Goodrich 1996).

This concern with loss or forgetting is opposed to memory, a sense of the historicity of the law '...memory allows for a history of resistance to the fiction of the autonomy of law, an objection to the addiction to law and to its capture of subjectivity by the absolute order of a beautiful but hidden norm' (Goodrich 1996, p. 137). Schlag (1991) similarly argues that the legal subject should operate in the knowledge of its own constructedness. He pleads for the reinstitution of a sense of a living tradition, and for the reinvention of legal subjectivity with each generation.

In order to find a theory of the subject fulfilling these criteria it is necessary to go outside the legal literature to Schön's (1983) account of the professional as reflective practitioner. Schön avoids Schlag's (1991) twin dangers of viewing the practice of law as either science or craft. Unlike Fish (1989), Schön distances himself from an account of the professional as a craftsman whose performance is spontaneous and whose judgments are not verbalisable. The professional is able when necessary to stand back from everyday practice, to reflect on a performance and to verbalise and modify theories which underlie it. At the same time the professional is different from practitioners of technical rationality like Murphy's (1994) modernist judges, who deal only in solutions

of problems by the application of general principles to particular situations for the achievement of well-defined ends. As Schön points out, professionals deal with unique cases which do not yield to simple means-ends analysis based on well-understood principles. This account of professional practice as case-based recalls Legendre's (Goodrich 1997) analysis of the law as 'casuistic'.

Schön's (1983) theory is that professional practice is reflective practice. The professionals in Schön's studies use a metalanguage to reflect on the nature of their professional activity and their role in that activity. Through this professional metalanguage the students are taught to construct representations of the self-in-action which are constitutive of professional identity. This metalanguage is part of the code through which subjectivity is transmitted, reproduced and renewed.

Schön's (1983) account of professional practice also recalls Mertz's (1996; 2000) account of the pragmatic basis of legal interpretation. For both Mertz and Schön professionals engage with the pragmatics of a particular situation in order to find a solution. Both implicitly characterise the legal subject not simplistically as either an interpreter or a practitioner, in terms of either *nomos* or *physis*, but terms of an interaction between the two. However Schön's account differs from Mertz's because he is investigating a more sophisticated level of professional practice. It is not just that the process of interpretation is influenced by pragmatic concerns, as Mertz claims. In Schön's account forwards and backwards reasoning allows students to move from a practitioner position to an interpreter position and back again in order to find the fit between the concerns of both that is most relevant to a particular case.

Work on professional vision (Goodwin 1994; Schön 1983) also offers a more complex view than that put forward by Murphy (1994) and Goodrich (1990). Professional vision is not just a matter of perceiving common sense objects or events as exemplifying professionally relevant categories. It is also a means of constituting or creating previously unrecognised objects or events that emerge in the course of interpretation from the interaction of coding schemes and data. Features of a situation that to the lay observer are unconnected or even

imperceptible are to the specialised eye evidence for the presence of an object or event:

> An event being seen, a relevant *object of knowledge,* emerges through the interplay between *a domain of scrutiny* ... and a set of *discursive practices* ... being deployed for a *specific activity* (Goodwin, C. 1994, p. 606).

For example, seemingly random patches of colour in the dirt become to the trained archaeological eye a 'post mold'. A bending of the leg or movement of the buttocks imperceptible to the lay observer when highlighted on the Rodney King videotape become to the trained police eye instances of threatening behaviour (Goodwin, C. 1994).

Professional representational practices create a virtual world that focuses pragmatically on features relevant to the task at hand. These representations brings with them a 'structure of priorities for attending to features of situations' (Schön 1983, p.98), a specialised means of attending to, or even constituting, certain features of a situation as relevant and important. The representations rearticulate the commonsense world into a set of new objects of knowledge. For example, in Schön's (1983) account of a teaching interaction between an architect, Quist, and a student, Petra, who is attempting to design a school to fit on a particular site, the demands of the task create new objects of knowledge such as 'nooks', 'precincts' and 'L-shaped classrooms' (pp. 88-89).

Representational practices that create new objects of knowledge have not only a goal of directing attention to relevant features. They are also designed to make it possible to simulate the consequences of decisions. For example, Quist's rough drawings of a particular geometrical configuration for the school are used to test how the building fits into the incline of the slope, how it relates to the access road, and how it relates to the direction and inclination of the sun. Professional representational practices make it possible to predict or anticipate the consequences of actions, and to compare how well each of a range of options achieve a professional outcome. A feature of these systems of representation is that they allow forwards and backwards reasoning, as

professionals trace the consequences of an decision, and then return to modify their initial assumption based on what they find. Professional representational practices 'find ways of simulating and exploring the properties of the more durable in materials that are less durable', as Law noted in his study of the management of scientific research institute (Law 1994, p. 139). Chapter 2 showed how these representational practices constitute a mode or ordering through which centres of reflection and control reflexively generate the practice of mind (Law 1994).

The formation of the legal subject

Subject positions do not have an autonomous existence. People have to work to generate them. An account of subject positions is incomplete without an accompanying account of how they are produced and maintained (Goodrich 1996). Lacking an account of the formation of subjectivity, theorists are reduced to the circularity of 'rule of law' theories in which the subject is defined in terms of practice and practice is defined in terms of the subject (Schlag 1991).

This section examines the techniques and strategies used to generate and reproduce legal subject positions. Studies of legal subject formation have generally remained within a Lacanian paradigm (Caudill 1997; Milovanovic 1994) that has limited compatibility with a discourse analytic approach. Because this literature is relatively inadequate I draw as well on the literature on professional subject formation.

Legal subject formation is not a single 'happy day' or transformation, as Fish (1989, p. 363) would have us believe, but a cumulative process. It is accomplished through the application of 'human technologies', diverse assemblages of practices, knowledges, objects, instruments, spaces, signs and persons that 'take modes of being human as their object' (Rose 1996, p. 26). There is no such thing as the 'professional legal subject', merely a series of processes or 'technologies' through which subjectivity is continually restated and renegotiated. The discussion below examines the four groups of these

processes that are expected to be useful in the later case study chapters in analysing legal education texts using the methods of CDA.

Participation and reification

The most basic way in which professional subject positions are constructed is through sustained engagement with activity and textual practice in an institutional setting. As the discussion in Chapter 2 showed, a participant framework is reflexively restated and renegotiated with each sentence or utterance. By forcing students to write texts in professional legal genres, educators are able to ensure that students engage with legal subject positions.

A most useful account of this process is provided by Wenger (1998) in his account of workplace learning. Wenger emphasises how identity and practice continually reshape each other. (I shall use 'identity' which is Wenger's term in discussion of his work). A central aspect of the establishment of identity is participation in a community of practice. A community of practice is a work group characterised by mutual engagement, in that participants work together on a regular and sustained basis; by joint enterprise in that participants have common tasks to complete and negotiate a shared understanding and means of carrying out the tasks; by a system of mutual accountability or joint responsibility; and by a shared repertoire of actions, language and tools used to carry out tasks, as well as shared styles that express the identity of members of the group (Wenger 1998).

Within the community of practice identity is not a fixed attribute but emergent and continually renegotiated:

> Who we are lies in the way we live day to day, not just in what we think or say about ourselves, though this is of course part (but only part) of the way we live. ... Identity in practice is defined socially not merely because it is reified in a social discourse of the self and of social categories, but also because it is produced as a lived experience of participation in specific communities. ... An identity, then, is a layering of events of participation and reification by which our experience and its social interpretation inform each other (Wenger 1998, p. 151).

According to Wenger, identities are established by means of the complementary processes of participation and reification, terms which have their origin in symbolic interactionism (Mead 1934) and structuration theory (Giddens 1984). Participation determines how shared understandings of the identities of participants are negotiated in interaction. Actions or speech addressed to an audience display an assessment of its identity and status and make a claim about the speaker's own identity and status. The audience's response accepts, rejects or challenges the speaker's claims and make its own counterclaims, which in turn require a response (Goodwin, M. H. 1990). Thus identity is interpersonally negotiated and ratified through an 'architecture of intersubjectivity' (Heritage 1984, p. 254). Bogoch (1999), for example, discusses how gendered legal identities are interactively constructed in courtrooms through assessments displayed by forms of address, interruptions, and evaluative comments.

While 'participation' refers to the way someone constructs an identity for themselves on a particular occasion and in a particular context, 'reification of identity' refers to the process through which discursive resources become available to people to use in identity formation. Any discursive practice implicitly defines a set of participant roles or identities (Goodwin, M. H. 1990), and on any occasion of use these reified roles are occupied by individuals, who thereby make claims to a position within a community of practice. Reifications of identity are renegotiated with each occasion of use, but they also preserve memories of their previous uses. For example, the reified category of 'lawyer' or 'law student' is appropriated by different people in different settings for different purposes, but still retains an implicit reference to its previous uses.

In this thesis I have extended the use of the term 'reification' to refer to more than socially available resources or categories. I also use it to refer to the construction by an individual student or a group of an identity specific to that group or individual, a representation which functions as a resource to guide future actions of the group or individual. In this view participative processes form the 'writer-as-performer', the way the writer presents herself through her

writing, while reificative processes form the 'writer-as-character', the way the writer represents herself in her writing (Ivanic 1998, p. 25).

Reflexive or folding processes

By extending the concept of reification to cover a subject's representation of itself as a character I have already taken Wenger's work beyond the point to which it was intended to go. But it is essential that any model of subject formation has an account of the way in which the subject relates to itself. In order to find such an account I turn to more philosophically and psychoanalytically-oriented theories. What all these accounts have in common is the view that the relation of self to other is internalised or folded as the relation of self to self and thereby creates a domain of interiority. These theories also compensate for the weakness of interactionist approaches such as Wenger's, which treat the emergent subject as pregiven and therefore assume what they seek to explain (Rose 1996).

Butler (1997) synthesises a tradition of philosophical and psychoanalytic work on subject formation from Hegel, Freud, Nietzsche, Althusser and Foucault. Although she does not apply her work directly to legal subjectivity, her focus on subjects of power makes much of what she says directly applicable. Butler argues that subjectification can be characterised as a process in which an unformed collection of impulses, signs, and perceptions is brought within the ambit of an institutional power through a process of marking or regulation. This process constitutes the collection as an identifiable totality and places restrictions on its actions and interactions. Subjectivity arises as external regulation becomes self-regulation, and as the identifying mark imposed from outside reflexively becomes the constitutive means through which the self recognises itself. These processes of enfolding enact a distinction between inside and outside. The emergence of an internal space opens up a world of symbols and representation, constructing the illusion of the autonomous subject.

Accounts such as Butler's of subject formation as entry into a symbolic order are vulnerable to the criticism, exemplified by Smith's (1999)

comments on Butler (1993), and by Schlag's (1991) critique of the transcendental subject, that the 'subjects' of these theories are disembodied proxies for groups and institutions. Smith (1999) further claims that Butler multiplies subject positions without regard for the relationships between one subject and another, or indeed, without regard for an adequate theoretical basis for their individuation.

Rose (1996) shows how the work of Deleuze and Guattari helps to avoid some of these criticisms. According to Deleuze and Guattari (1987) subjectification begins when a group of signs is captured or detached at a 'point of subjectification' (p. 129) through a process of fixation on some external event or object, which then constitutes its 'reason for being or destiny' (p. 121). This 'packet of signs' detaches itself from its own circle or network, and heads off in a new direction. Subjectification is a flight, a turning away, a betrayal, as the ties which bind a group of signs in a relation of signification are severed.

Deleuze and Guattari's (1987) account does not end with individuation at the point of subjectification. From the point of subjectification emerges the speaking subject, which Deleuze and Guattari refer to as the 'subject of enunciation'. The subject of enunciation then reconstitutes itself through a process of doubling as the 'subject of the statement' (p.129), the self which is talked about rather than talking. Demonstrating the influence of Benveniste (1971), the subject of enunciation is the performative subject of 'I think' or 'I proclaim'. On the other hand the subject of statement is the represented subject (or character), the 'I' of 'I am', 'I breathe', 'I walk', 'I feel'.

The relationship of subject of statement and subject of enunciation is a mutually constitutive one of recoiling or turning back. The subject of statement is the origin or guarantor of the subject of enunciation, and is what anchors the subject to 'conformity with a dominant reality' (Deleuze & Guattari 1987, p. 129). At the same time the subject of statement is only 'known' through being reflexively monitored by the subject of enunciation.

This process of doubling or turning back is further elaborated by Deleuze (1988) as an account of the 'fold' based on his reading of Foucault (1990). According to Deleuze, Foucault (1990) introduced a new type of relationship to the self achieved by folding power into itself, by folding 'a man's' relations to others into his relation with himself. The forces of the environment are reinstalled as forces of the interior, thereby creating an interior/exterior duality. The reflexive folding back of a relationship of power onto itself produces the self as an autonomous domain of interiority, and this domain in turn produces a locus of action, 'the subject', through which power over others can be exercised (Rose 1996).

The reflexive dialogue between the self and itself can be related to the more general instance of the dialogue between self and other. Reflexive phenomena occur not just individually but within the group as collective and individual self-representations mutually influence each other.

An account of subject formation as infolding or interiority is offered by Bakhtin (1981), who regards subject formation as the 'assimilation of another's discourse' which plays a role in 'an individual's ideological becoming' (p. 342). People take another's discourse and make it their own, so that it no longer operates externally but becomes internally constitutive of subjectivity or 'ideological relations with the world'. The determining feature of internally persuasive discourse is that it is not imposed from outside but interacts with 'one's own word':

> Internally persuasive discourse—as opposed to one that is externally authoritative—is, as it is affirmed through assimilation, tightly interwoven with 'one's own word'. In the everyday rounds of our consciousness, the internally persuasive word is half-ours and half-someone else's (Bakhtin 1981, p. 345).

Reconciliation

Bakhtin's (1981) work is also important for its acknowledgment that people are formed as subjects not in relation to a single institution such as the law, but in relation to multiple institutions and discourses. His concept of heteroglossia is

a helpful way of understanding the importance of multiple voices. Internally persuasive words are spoken by many voices from a diverse range of sources.

Wenger (1998) takes a similar position. For him an 'identity' is constituted not only by current participation in a single community or symbolic regime, but in a trajectory or history of participation in a range of communities of practice past and present, and in simultaneous membership of a number of different communities. This combination of histories and multiple memberships is different for every person and is a key factor in creating a sense of personal uniqueness and individuality.

History has a key role in shaping subjectivity. It creates a set of embodied dispositions or habitus which are shaped by and adapted to the fields people inhabit and the trajectories they take (Bourdieu 1990). History creates a set of memories that constitute the subject's unified sense of individuality as a spatio-temporal being. These memories are edited to preserve a sense of personal unity and autonomy and are subject to retrospective censorship (Rose 1996).

Both Rose (1996) and Wenger (1998) quite rightly reject a simplistic reading of the poststructural subject as fragmented and multiple. Rose points out that people in modern Western cultures generally perceive themselves to have a unified autonomous self or personality. But this historically-produced subject form takes hard work to maintain and is constantly under threat.

Wetherell (1998) similarly argues for an historical view that people's subject positions are accumulated over time and are jointly constitutive of identity. These positions are available as resources to draw on in interaction (Antaki, Condor & Levine 1996). Subject positions are part of a broader interpretative repertoire available to people through their participation in a field, and can be evoked through words and phrases which draw on a script of argumentation (Wetherell 1998). The self is formed by the way in which these discursive resources are tactically deployed by people for particular purposes in particular settings in giving accounts of their actions.

But the multiple positions occupied by a person do not simply lie heteroglossically alongside each other, nor do they constitute a menu of discursive resources to be deployed at will. Their relationship is better understood in terms of Bakhtin's (1981) notion of dialogism. The different voices or positions which are constitutive of the subject are aware of each other and seek to create bridges from one to the other. The formation of a sense of self can be impeded by incompatibilities between voices or positions, but at the same time the compromises that are made in order to reconcile conflicting voices are constitutive of subjectivity. Wenger (1998) labels the maintenance of a sense of self across boundaries and despite contradictions and incompatibilities as 'reconciliation'. Reconciliation is achieved by modifying practices so they can be used by members of a range of communities. Wenger talks about finding 'boundary objects', objects or practices which function as a means of reconciliation by being held in common across a range of communities and institutions.

Forming student subjects

As Ivanic (1998) points out in her case studies of female student writers, being a student is very much an experience of multimembership and of reconciliation. Chapter 1 above gave an example of this phenomenon by examining the problems students have in reconciling selves based on work, home and community with the sorts of selves they are required to project through their academic or legal writing. There is a tension between projecting the sort of self one's readers expect one to be and being true to oneself. Students believe that they have to choose between playing the game and having their individuality submerged or resisting the academic idiom. Bazerman (1996), in his discussion of the relation of disciplinary socialisation to literacy development, talks about students 'getting confused' (p. 4) because the narrowly reproductive forms of literacy they are used to do not prepare them for the communicative demands of disciplinary activities.

It is easy to understand the alienation students feel as a result of being forced to take up new subject positions without adequate preparation (Dias et al. 1999).

But students are not always thrown unprepared into these writing tasks. There are a range of methods used by teachers to assist students, and these methods often owe their effectiveness to the fact that they assist in the formation of student subjectivities. 'Modeling', for example, is designed to demonstrate task performance to students in a way that makes the requirements transparent; 'scaffolding' gives students staged assistance to complete a task jointly with a teacher that they would not have been able to complete on their own; 'coaching' gives feedback that helps a student align her performance more closely with what is required (Collins, Brown & Newman 1989, pp. 481-483).

One form of coaching relevant to this study is often referred to as reconceptualisation (Cazden 1988). A reconceptualising teacher reformulates a student answer in a way that marks the answer as belonging to specialised academic discourse rather than just everyday common sense, as for example when a physics teacher reformulates in terms of the particle theory of gas a student's predictions about what will happen when a jar is partially evacuated. A more general version of this strategy is what Fairclough (1992c, citing Sacks 1972) calls 'formulation'. In formulation one speaker, as part of a conversation, refers to or summarises the words of another speaker in order to explicitly comment on the ongoing conversation.

Collins, Brown and Newman (1989) also refer to 'reflection' and 'articulation'. These are reificative processes that allow students to think and speak consciously about their own learning and thinking processes. In articulation students describe their own knowledge and learning processes, while in reflection students explicitly compare their performance either with expert performance or with the goals they intended to achieve.

These techniques are evident in the teaching dialogues used by Schön (1983) as data for his study. One of his key examples, of an architecture student and teacher negotiating a design solution for a site, shows how students are assisted by their teachers to participate in ways that are characteristic of professional subjects. In dialogue with her teacher the student reflexively shapes a subject position as an architect through engagement in representational practices

characteristic of the profession, allowing her to develop a 'professional vision' (Goodwin 1994). The dialogue between the architect Quist and the architecture student Petra shows Quist using specific strategies to shape Petra's participation in the discourse. These include 'reframing of the problem' (Schön 1983, p. 85), in which Quist seeks through a form of coaching to get Petra to look at the problem in different terms, 'demonstration' (p. 85) in which Quist models for Petra a way of solving the problem, and 'intermediate reflection' (p. 90) and 'next steps' (p. 91) in which Petra articulates her new understanding of the problem and uses that articulation as a basis for forming new goals.

Dialogic techniques for subject formation are also widely used in legal education. 'Socratic' teaching is the most frequently cited. The term 'Socratic dialogue' is one which has a long history in legal education, having been introduced by Langdell in 1870 (Mertz 1996) as the form of pedagogy that best complements a curriculum based on the case method. The Socratic dialogue was designed as a means of producing the Langdellian subject, that is, a quasi-scientist for whom the law is an objective, transcendental order that he or she might interpret or discover but never create or challenge (Schlag 1991).

The term 'Socratic teaching' has been used widely and often loosely in legal education (Cole 1984; Cramton 1982; Kamler & Maclean 1997; Kearney & Beazley 1991; Mertz 1996; Morgan 1989). It usually refers to a process through which students are interrogated in class by a teacher about cases they have prepared in advance. This question and answer process is often at a low level, reflecting the initiate-respond-evaluate pattern (Mehan 1979) often found in school classrooms (Mertz 1996; Kamler & Maclean 1997). Such patterns do no more than produce the student subject as one who can provide factual or procedural answers appropriately on request. They turn learning in class into a form of 'alignment' (Wenger 1998, p. 178) through which an individual is shaped by discipline, accountability, and meeting the expectations of supervisors. Such contexts have few of the characteristics of communities of practice which allow them to serve as an effective settings for professionalisation (Bernstein 1986; Wenger 1998).

Socratic teaching however differs from the initiate-respond-evaluate pattern in the way that students are subjected to sustained questioning until an issue is resolved. Transcripts of Socratic teaching such as those offered by Mertz (1996) or Kamler and Maclean (1997) show extensive use of scaffolding and coaching as professors prompt students to help them find the right answers and reformulate the answers in more acceptable terms.

One of the arguments offered for the widespread use of Socratic teaching is its ability to function as a boundary object (Wenger 1998) that bridges the gap between student and professional legal discourses. While the Socratic approach is educational through its strong resemblance to other forms of classroom discourse, it also has legal features through its adversarial quality and through the pressure to perform publicly in front of a large group (Burns 1997; Dingwall 2000).

> Law school is a hard, stressful, and often painful experience, which may be very uncomfortable for students from milieux where the kind of public accountability enforced by the pedagogic practices described by Burns is rarely experienced or valued. At the same time, it is a close proxy for the public experience of trial in an oral and adversarial system. It does not seem that the one is easily reformable without changing the other in rather fundamental ways—which leads to some very basic normative questions (Dingwall 2000, p. 901).

However others would criticise this public adversarial character as providing an outdated model of legal practice and as excluding many capable students (Guinier, Fine & Balin 1997; Morgan 1989).

Burns (1997) discusses a classroom transcript in which the Socratic exchange between student and professor shifts very naturally in and out of a simulated interchange between counsel and judge. The student moves between an out-of-role reflective approach in which she talks about issues and about how she would act if she were appearing in the matter, and an in-role participative approach in which she acts as counsel making submissions to the judge.

Burns (1997) also discusses simulation as another technique designed to bridge the gap between academic and professional discourse. Freedman, Adam & Smart (1994) describe how students wore suits to class for a simulated financial analysis meeting, the wearing of suits symbolising the assumption of professionals stances and values. Nathanson (1997) examines the use of clients' problems as means of shifting students from an academic to a professional practice-based conceptualisation of legal subject matter. Maurer & Mischler (1994) and Vaughn (1995), as already discussed in Chapter 2, refer to extended year long simulations in which students organised as law firms worked through the stages of dispute, and Feinman (1995) develops a taxonomy or range of options for legal simulations.

CHAPTER FOUR

First-year case study: contract law

This chapter and the next use critical discourse analysis of student written and spoken texts to examine how students begin to 'think like lawyers'. Using the model developed in Chapter 3, CDA provides evidence of conflicts within and between student subjectivities that explain why they have trouble learning to 'think like lawyers'. The case studies also demonstrate powerful techniques used to form students as legal professionals.

This chapter presents a case study conducted over an academic year of students engaging in the professional legal skills component of their first-year course. The first section analyses answers in a contract law examination in order to demonstrate how students are positioned as interpreters by the techniques of legal analysis. Later sections then examine a range of professionally-oriented texts from the legal skills program: production of a letter of advice, a 'firm' meeting, and a submission to a moot court by a student acting in role as counsel. These texts show examples of the practitioner position and of the processes of subject formation described in Chapter 3.

Analysing cases in tutorials and examinations

Before examining the professional legal skills program as the main focus of the case study, I begin with the teaching first-year students received in the first few weeks of their course in the specialised genre of analysis of cases. This kind of case analysis is the first genre law students learn and the one they are most frequently called on to write. I then look at the way they put this teaching into practice at the end of first semester in their examination answers.

In analysing cases, students read dispute narratives provided in examination questions or tutorial exercises, and they write analyses of the legal rights and obligations of people engaged in those disputes. This analytical writing obliges students to adopt the interpreter position discussed in the last chapter and in Chapter 1 (Mertz 1996; 2000). Students occupying this position write impersonally as if the conclusions are universally valid. They classify actions and events from the dispute narratives as examples of legal categories. They reject as irrelevant actions that would appear from a lay perspective highly relevant to understanding the motives of the disputants. This positioning as legal interpreter leaves traces in the linguistic patterning of the examination answers elicited my analysis.

Students received very detailed and explicit instruction to help them learn to do legal analysis. The need for explicit, procedural and structured help is a sign of how difficult it is to introduce learners to the new textual practice of legal analysis, and how great the rupture is between this genre and the previous genres students have been familiar with (Phelps 1989). Legal analysis requires students to step into 'an impersonal, objective and abstract view of human conflict' (Mertz 2000, p. 106). Students are learning in a step by step and explicit fashion 'a process of translation that they will eventually take for granted' (Mertz 2000, p.111) between the everyday human world and the abstract textually-mediated world of the law.

Students were taught to analyse cases in a procedural way using the acronym MIRAT which they were told to 'tattoo on their arms' (Contract Law tutorial, 28/2). MIRAT stands for:

Material facts
Issue
Raise the law
Apply the law to the facts
Tentative conclusion

This procedure gives a strict sequence of actions which is applied recursively to each element or sub-issue of a case until completed. MIRAT is better known

in legal education as IRAC: Issue, Rule, Application and Conclusion (Brand & White 1976; Woolever 1987).

Students practised these techniques of legal analysis by completing exercises each week in class. As befits a procedural genre, the tutor's language as he led students through the cases was confined to 'wh' questions or yes/no questions and to tips and instructions in the imperative mood.

Table 4.1 Tutor's language prompting the MIRAT genre

Tips
Do it in the straight clinical manner, you won't miss a beat (28/2)
Use that formula and you'll get your mark (28/2)
To get marks, identify the issues and subissues. Say what the law is with authorities. (11/3)
Questions
What are the elements of a contract? (11/3)
Is there a contract? Is there an offer? (11/3)
What's the rule of law on offer? (11/3)
What's the first subissue? (11/3)

As a teaching technique, MIRAT can be described as a form of 'procedural facilitation', that is, it assists students in carrying out a complex series of steps by providing them with an overt prompt about what to do next (Scardamalia, Bereiter & Steinbach 1984). The MIRAT formula can also be seen as an 'instructional representation' (Resnick 1983). An instructional representation teaches a complex task by providing a simplified representation that displays key features of the task without confusing students through reference to the complexities of actual use. MIRAT seeks to introduce students to a simplified view of what is required by the 'legal subject as interpreter' position. It does this by pretending that case analysis is a procedural matter in which the interpretation can be found by correctly following the five steps. As an instructional representation MIRAT is not seeking to match the methods used

by experts. It provides a way of getting students started while they gradually build their own expert procedures.

There is a tension between the presentation of the formula using these explicit techniques and the fact that the exercise of professional judgment can never be reduced to following rules (Schön 1983). Legal educators are caught by a dilemma. Legal analysis has to be introduced in an explicit and simplified manner. But the simplification presents a potential obstacle to students' understanding of their own position by ignoring important contextual factors.

Analysis of student writing in first-year examinations provides examples of some of these pitfalls. I analyse answers to a question (Text 4.1) that students were set in their mid-year contract law examination.

Text 4.1 Contract law examination question

QUESTION ONE

In April 1993, George, a right handed professional table tennis coach, entered into a contract with Ivan, a landscape gardener, pursuant to which Ivan promised to build a patio and spa in his garden for a fixed price of $6,000. Under this contract, the project was to be completed by 30 July 1993, progressive payments were to be made at the completion of each stage of the project and a deposit of $2.000 was to be paid when the agreement was signed.

George paid the deposit and Ivan commenced work. However, George had insufficient funds to meet the first progress payment. Therefore, in May, he borrowed $2,000 from Patsy, agreeing to repay the debt, including interest of $400, in twelve equal monthly instalments commencing in June.

During excavation work with his bobcat, Ivan struck an enormous granite boulder which needed to be blasted out. As this would be a costly procedure, Ivan told George that he would continue with the work only if George agreed to pay him an additional $800. Considering the state of his backyard, George felt he had little choice but to agree.

In June, further misfortune befell George when he tripped over a piece of the granite boulder unearthed by Ivan's bobcat and broke his right arm.

> As a result, he was sacked from the table tennis club that employed him. Short of income, he asked Patsy if he could repay only the interest on the loan as it became due until he could find another job. Sympathetic to his plight, Patsy agreed.
> Two months later, George received a letter from Patsy asking that he immediately pay her the arrears of capital and resume paying the loan on the agreed terms. Ivan completed the patio-spa project in the middle of August and demanded the extra $800 George had agreed to pay.
> Because of the trouble he experienced with George's project, Ivan decided to dispose of his landscaping business and open a hairdressing salon. Therefore he rang a friend, Jeremy, and told him that because of all the voluntary help he had provided in the past, he (Jeremy) could have the bobcat if he collected it from George's house. Jeremy agreed with alacrity and collected the bobcat that evening. However, Ivan changed his mind when he was offered $5,000 for the machine by Julie and now seeks to recover the bobcat from Jeremy.
> Advise George and Ivan of their position.

This question constructs for students a relationship between themselves as lawyers and members of the general public. It uses trivialisation as a form of 'contextual disavowal' (Baker 2000, p. 140) to distance law students from the human dimension of the stories that they tell (Mertz 2000). It is easy to dismiss the portrayal of people's lives in the examination question as irrelevant because it merely designed to serve as a basis for student demonstration of knowledge about contract law. But the lack of authenticity, the purposeful implausibility of the facts as presented, and the lack of contextual information that would portray the parties as having reasons for their decisions, are not just evidence of poor teaching. They are grounded in a need to construct for students a relationship to the facts in which it is easy to distance themselves from the parties and their everyday concerns, and in which those facts not relevant to the legal issues appear just that: arbitrary and irrelevant.

Analysis of students' examination answers shows how they construct their own positioning as legal interpreters and analysts. Students are asked to advise one

or more individuals on their legal position. In writing this advice they have to determine where there is an issue in dispute on which advice is required, identify the relevant legal principles raised by that issue, separate relevant information from irrelevant details, and apply the law to the facts.

The analysis focuses on the answers given by three students to one issue they are expected to deal with, the issue of duress. It is presented in four sections, each section relating to one stage of the IRAC (or MIRAT) formula (see Table 4.2). The analysis is used to introduce many of the analytical techniques that are then reapplied in later sections. In Table 4.2 some deletions of repetitious material have been made from the student answers. Epistemic modality is indicated by single underlining and deontic modality by double underlining. Nominalisations are indicated by dotted underlining, and non-finite participial clauses by wavy underlining.

A Langdellian view of the law as an objectively given body of doctrine is constructed by the student texts in Table 4.2 (Schlag 1991). In this view the subject has merely a ventriloquistic role as one through whom the law speaks. Statements about relevant legal principles are in 'timeless' present tense, emphasising their status as truths independent of local circumstance. This timeless world is established by the language of definition. The verb *to be* is frequently used as a means of defining terms: *Duress is illegitimate pressure applied by a dominant party*. Other verbs also accomplish the work of definition: *Pressure via refusal to perform a contract can constitute illegitimate pressure*; *Illegitimate pressure can take several forms*. Legal principles are also defined through the use of lists of criteria either in the form of questions: *was a bona fide compromise reached?* or in the form of rules: *there must be illegitimate pressure exerted upon the weaker party by the dominant party*. Students draw on the language of course materials through quotation. Phrases like *illegitimate pressure exerted on the weaker party by a dominant party, was a bona fide compromise reached, did the dominant party provide consideration* come straight out of the students' study guide and are reproduced freely in the examination.

Table 4.2 Three students' examination answers in relation to the issue of duress

	Student 1	Student 2	Student 3
Identify the issue	The first question which would arise if I was advising George is his position in the question of duress. (...)	In regards to George it appears that there is an element of duress whereby Ivan requires an excess of $800 for the blasting of the granite.	DURESS Another element to consider here is duress. This is some form of illegitimate pressure.
Raising the law	Duress Duress is illegitimate pressure applied by a dominant party (D) to a weaker party (W) which induces the latter to enter into a contract. For a contract to be voidable on the grounds of duress two preconditions must be satisfied. Firstly there must be illegitimate pressure exerted upon the weaker party by the dominant party. Illegitimate pressure can take several forms. (...)	Illegitimate pressure, as a general rule that the pressure must be so great that it removes the free will of the weaker party.	Pressure via refusal to perform a contract can constitute illegitimate pressure. There are four elements to consider when looking at this element of illegitimate pressure. Did the dominant party provide consideration? Merely performing an existing contractual duty will not be good consideration. Was a bona fide compromise reached? (...)
Applying the law	1(i)In this case, Ivan was merely performing an existing contractual duty and thus this will not be good consideration (ii)Here, Ivan knew that George had no alternative so, it can be argued that the compromise was not made in good faith.(...) Hence all the preconditions are satisfied and therefore illegitimate pressure is established. 2In this situation George was induced to pay the $800 because he thought that Ivan would not perform the contract otherwise, hence the illegitimate pressure induced the contract.	The 2 elements of illegitimate pressure (by refusing to perform the contract) & this in turn inducing George into the contract, are present. George reluctantly agreed because of the state of his backyard, thus this element is present. Also the second element of it having to induce George is also present. This doesn't have to be the sole or even dominant reason for entering the contract as long as it is a reason.	If all those elements exist, then George will not have to pay the additional $800. As I have already mentioned, there was no consideration for the promise to pay the extra money. Although it required extra work on Ivan's behalf, no extra benefit was conferred on George. A bona fide compromise was not reached between the parties. However George's response does not appear to have been made under protest.
Reaching a concl.	So, having established duress, the contract would be voidable on that ground. A voidable contract remains operative until it is rescinded. Hence, George could rescind the contract *ab initio* and recover any damages for duress	From this, the contract for $800 or refusal to perform the contract becomes voidable, and may be viewed as a breach if he doesn't perform. George then has the choice of rescinding the contract or possibly recovering the money ($800).	Therefore I believe that the contract would not be voidable on the grounds of duress, and Ivan would be able to recover his money. However if it was made under protest, I would consider that Ivan was aware the threat was wrongful, and therefore he would not be able to recover the extra sum.

The way that law students position themselves in their examination answers is also evident in their use of topical themes. 'Topical themes' are the initial grammatical constituent of the clause with a representational function (Halliday 1994). The theme shows where the author's focus lies. While the theme of a single clause is not particularly informative, analysis of the range of themes in a text says a great deal about the writer's positioning. The lack of a focus on the subject can be seen in the way in which topical themes almost all relate either to legal concepts such as *duress, illegitimate pressure, pressure via refusal to perform a contract*, or to the parties to the dispute, *George* or *Ivan*. The author's focus is on application of the law to the actions of the parties. The lack of focus on the individual subject can also be seen in the infrequency with which *I* is used in Table 4.2. There are only four cases in which the theme is *I*, three of them in student 3's answer.

In the second half of Table 4.2 students are doing the important work of applying the law to the facts. This work is what the professional casuist does in linking a body of doctrine to a unique situation, and it lies at the heart of the position of the interpreter.

Students make interpretations by linking between legal principles and the facts of the case that exemplify those principles. This alternation between the facts and the law is marked linguistically by switching: between timeless present tense relating to the law and past tense relating to the facts; between the verb *to be* relating to the law, and action or mental verbs such as *thought, perform, agreed, pay* relating to the facts; and between legal themes such as a *bona fide compromise* or *illegitimate pressure*, and participants such as *George* or *Ivan* as themes relating to the facts.

In interpreting the facts students have to show that a particular event meets the criteria or passes the tests necessary for it to be assigned to a particular legal category. At its simplest a link between the law and the facts takes the form of a statement that a legal element is or is not exemplified by the facts. Students create these statements by instantiating specifics into the variables offered by

general statements of rules. For example, the students' study guide states the law relating to duress in terms of a variable W (standing for weaker party):

> For a contract to be voidable on the grounds of duress (i) W must have been subjected to illegitimate pressure and (ii) this pressure must have been at least one of the reasons why W entered into the contract.

Student 2's first sentence restates this rule, instantiating the specific name 'George' for the variable W: *the 2 elements of illegitimate pressure (by refusing to perform the contract) & this in turn inducing George into the contract, are present.* This statement suggests that Ivan's action in pressuring George into signing the contract can be counted as 'duress' because it meets the two relevant tests.

Commonly the application of the law to the facts is also realised by the use of a conditional construction. The facts of the matter are stated in the antecedent clause of the conditional: *Ivan knew that George had no alternative,* and the legal interpretation of those facts is stated as the consequent: *so, it can be argued that the compromise was not made in good faith.* Use of conditional reasoning gives a reassuringly technical appearance to the application of the law to the facts, which is reinforced by the logical connectives used frequently in Table 4.2: *then, so, hence, therefore, if, thus.* There is an almost syllogistic logic in the way in which the student moves from choosing an area of the law to apply, to raising the relevant elements of the law, to applying those elements to the facts and finally to reaching a conclusion. White (1983) refers to this phenomenon as 'the false appearance of deductive rationality' (p. 148).

Students accomplish the linking of the law to the facts by changing the narrative statement of facts in the examination question into a set of examples of legal categories (Mertz 2000). This process of transformation is evident in Table 4.2. For example, where in the question there was a confused sequence of events surrounding a boulder, now there is the application of duress. And this duress in a sense had no existence before the students applied themselves to a set of facts and brought it into being.

In simple narratives such as Text 4.1 clauses tend to construct events and states of affairs in a relatively direct way, with a clear match of one event to one clause, and with concrete rather than abstract participants (subjects or objects). In contrast to this pattern, a narrative account of the facts as a sequence of events is converted in student answers into a synoptic or abstracted representation. There is a move from a dynamic representation of events based on verbs to a synoptic representation of events based on nominalised forms. This transformation implies a tension between a dynamic self that participates in a narrative world of everyday events, and a 'facialised' legal self (Deleuze & Guattari 1987) that inhabits a static world in which events have been objectified and categorised.

A comparison of the language of the examination answers with the language of the examination question shows how the transformation is accomplished linguistically. In Text 4.1 events are presented mainly through the clause structure, with one event to one clause, and events realised through finite or non-finite verbs. The clause is the basic grammatical unit of representation, consisting of processes, participants and circumstances (Halliday 1994), that is, of verbs, subject and objects, and of adverbial elements.

Table 4.3 Clause analysis of an extract from Text 4.1

During excavation work with his bobcat, Ivan struck an enormous granite boulder
which needed to be blasted out.
As this would be a costly procedure, .
Ivan told George
that he would continue with the work
only if George agreed
to pay him an additional $800.
Considering the state of his backyard,
George felt
he had little choice
but to agree.

In contrast, Table 4.2 shows events being realised through nominal groups rather than clauses, reflecting the fact that they have become objects with attributes. Many events are compressed into a single nominal element as the students refer to complex event sequences in a way that is typical of legal genres (Bhatia 1993). One way this is done is by nominalisation (which turns a verb into a noun), for example when the student refers to *the promise to pay the extra money*, or *refusal to perform the contract* (dotted underlining in Table 4.2). An event has been turned into a thing because it is easier to apply an adjective labelling a legal category (*voidable*) to a thing than to a clause. A further means used to turn events into things is the use of non-finite clauses with a nominal function: *by refusing to perform the contract & this in turn inducing George into the contract, the choice of rescinding the contract or possibly recovering the money* (wavy underlining in Table 4.2).

In classifying facts as instances of legal categories there is a combination of abstraction and specificity (Mertz 2000). Table 4.2 shows examples of clumsy nominal constructions which result from the difficulties students have in balancing between abstraction and specificity. Specific features of the facts that are relevant to their classification need to be retained, while at the same time representations abstract away from other features irrelevant to the categorisation. Students want to abstract from contextual features of events and to make them into things that have attributes, but specific aspects of the events need to be referred to because they are relevant to legal categorisation. This tension leads to the tortured syntax of: *The 2 elements of illegitimate pressure (by refusing to perform the contract) & this in turn inducing George into the contract, are present*. The problem here is that Student 2 wants to indicate a causal link between two non-finite clauses, but there are no resources available to him in the grammar to do this elegantly.

As well as constructing a position by the way they represent the world through clauses, students are also positioned by the stances they take towards those representations. The taking of a stance is indicated linguistically by modality (Halliday 1994). Modality, or at least the form of modality often referred to as 'epistemic modality', indicates the certainty or doubt with which someone

asserts a proposition and is an important means through which positioning is constructed. There are a number of examples of epistemic modality in Table 4.2, especially where students have to make a commitment through identifying an issue or reaching a conclusion. These examples violate the requirement that the legal analysis be expressed in as impersonal a way as possible. It is hard for students in their first year to assume the authoritative position required of the legal interpreter, and unconsciously their lack of confidence seeks a linguistic outlet in their work. When student 1 modalises his answer through the conditional clause *if I was advising George* he is writing his own attitudes and beliefs into the examination answer. Student 2 modalises and generalises the position of the writer through *it appears that*. Student 3 introduces a generalised legal actor as the implicit subject of the verb *to consider*, and thereby avoids making a commitment to the position that duress is relevant.

Students also use epistemic modality to distance themselves from a commitment to their conclusions. Student 3 writes, for example: *Therefore I believe that the contract would not be voidable on the grounds of duress*. He does not come to a definite conclusion, but has an each way bet, marking his alternatives with *however, I would consider, I believe.* Student 2 modalises his conclusion with *may be viewed*.

The role of some of the modalisations is also ambiguous with respect to the available subject positions. Do they reflect the status of the analysis as 'opinion', a stance which is appropriate for a professional lawyer and which will be evident in the next section, and thus place the writer in the practitioner role of someone who offers opinion to a client, or do they reflect the insecurities students inevitably feel in making choices which are to be assessed by experts, and thus place the writer in the role of a student whose opinions are subject to confirmation by others? For example, *if I was advising George* can be read either as an unconfident student distancing from the conclusion or as the stance of a professional who recognises the decontextualised nature of the examination question.

The request in the last line of the examination question (Text 4.1) to advise two of the parties about their position also tends to place students in a practitioner position. In response to this request the students reach a tentative conclusion about obligations or rights of parties in the case. But although the examination question invites the students to 'advise George', the genre of the answer does not have the form of advice. George is not addressed directly but referred to in the third person, and the advice has the form of apparently objective conclusions about George's rights and obligations, as if reporting to a third party. It is as if the examination question attempts to abstract away from the client-focussed, interested basis of the law, but is unable fully to accomplish this abstraction. Inevitably any analysis of a case must be contextualised in some way, even if only because an analysis of rights and obligations must be from the point of view of one of the participants.

Traces of the practitioner position are realised linguistically by deontic modality (indicated in Table 4.2 by double underlining): *George will not have to pay*. Unlike epistemic modality, deontic modality does not express the author's certainty or uncertainty about a proposition. Deontic modality refers to the use of language to regulate the actions of others. It refers to the degree of strength in a speaker's statement of another's obligation to act: *George could rescind the contract, Ivan would be able to recover his money*. Modality is also expressed lexically through the word 'choice': *George then has the choice of rescinding the contract*. This use of deontic modality positions the students as authorising or empowering parties to the case to perform actions or to make choices. The student as professional is telling laypeople, even if only in a simulated way, what they can or cannot do and is thus placed in a powerful position.

This conflict between the two positions is challenging to students because of the way in which the law simultaneously empowers them and subjects them to its authority (Butler 1997). There is a tension between young people writing as students whose work is going to be assessed in an examination, and who are subordinated both to the academic hierarchy and to the authority of the law, and young people writing in the seductively powerful role of the lawyer, whose

advice will have an impact on the (simulated) lives and conduct of the people described in the examination question. These contradictory rhetorical demands create a tension between power and powerlessness evident in the two contrasting ways in which modality is used in the students' conclusions.

A letter of advice

This section examines the first task faced by students in their practical legal skills program, writing a letter of advice to a client. In contrast to the examination answers that showed students acting primarily in the position of interpreter, the letter of advice requires students also to occupy a practitioner role. This is the first writing task in which students are required to make a transition from writing about the law to writing within the law, that is, writing in role as a lawyer. Students have a great deal of trouble with this task and it is noticeable how poorly written the result is.

This section argues that the poor quality of the students' writing results from their attempt to simultaneously occupy both the position of interpreter and the position of practitioner. In order to give advice students first had to write and analysis of their case. But the writing of this analysis prepared them poorly for the giving of advice. My argument is that problems lie in the transition from the analytical position to an advisory position and in the failure to keep the two sufficiently separate.

The letter (Text 4.2.1) is written by the Barry 'firm' of students introduced in Chapter 2. After some early withdrawals from the course, Barry consisted of 14 students completing the first year of either Arts/Law or Science/Law double degrees, 5 male and 9 female. Of these perhaps 11 remained actively involved through the program, although most of the work was done by a smaller group of 5 or 6. All the writing was collaborative. Typically there was a consultation of the whole group where the writing tasks were divided up into shorter subsections completed by small groups.

Barry's simulated client (and the defendant in the hypothetical case presented to the students as a basis for their years' work) was a sculptor, Susan. Susan's sculpture (Close Encounters of the Worst Kind) had collapsed after being suspended from the ceiling of a lobby of a new building owned by the Victorian Development Corporation (VDC), the commissioners of the work. This collapse destroyed another work by Susan located in the lobby (Angry Penguins), delaying the opening of the building and causing loss. Documentation provided to the students about this case included a narrative of the facts of the case set out in the form of instructions. Also included as annexures to the instructions were copies of orders for the two sculptures, and two letters from firms of engineers, one for the plaintiff and one for the defendant, offering provisional interpretations of the results of testing the fallen sculpture (see Appendix 1). While the hypothetical case raised a number of issues, the central one was whether Susan had failed to fulfil the terms of her contract with the VDC, was responsible for the fall of the sculpture because the sculpture lacked 'structural integrity', and was therefore liable for damages, or alternatively whether the VDC was responsible for the fall of the sculpture through failing to hang the sculpture correctly, and therefore liable to pay Susan for Angry Penguins, the sculpture which had been destroyed in the fall and which had not been paid for. Even if it was found that Susan should be paid for Angry Penguins, a subsidiary issue was whether she should receive the full sum owing, as it had emerged that Angry Penguins was substantially completed not by Susan but by Fred Townsend, the unqualified owner of a foundry and metalworking business used by Susan.

In writing a letter of advice to Susan about her legal position, the students were required to focus not on technical points of law but on the client's position in terms of obligations, choices to be made, and actions to be undertaken. This need is reflected in the structure of the 'letter of advice' genre given to Barry firm by their tutor and discussed by them at their first independent firm meeting (2/5):

1. Summary of factual instructions
2. Identify problems

3. Explain the law
4. Draw conclusions
5. What client should do

This structure is recognisably related to the MIRAT or IRAC structure examined in the last section, but it has been modified for a different audience and purpose. The students only have to explain the law instead of applying it, and after they draw conclusions the students then have to recommend to the client what she should do. The focus is more on action than on analysis.

An extract from the letter of advice written by the students is presented as Text 4.2.1. The summary of the factual instructions has been deleted. Text 4.2.1 therefore illustrates the last four elements of the recommended structure. It begins with a short statement of the problem to be addressed, then it addresses each of the relevant terms of the contract in turn under subheadings, seeking to both explain the law and to draw conclusions, and finally moves to a statement of the client's liability.

Text 4.2.1 Student letter of advice

This text omits the presentation of facts and reproduces only that section which offers advice on the terms of the contract. Original numbering and spelling is retained.

'CLOSE ENCOUNTERS OF THE WORST KIND'

We perceive that the main problem is whether or not you can be held liable for the damages caused by the collapse of 'Close Encounters'.

The Contract

In our opinion, the terms of the contract as stated in the order form are as follows:

1. *You were required to supply and install 'Close Encounters'*

It is obvious that you supplied 'Close Encounters'. It is on the question of installation that we believe the Corporation will argue upon. We believe that you have a strong case for installation; the structure was established in place for use, and the word 'install' is a very ambiguous term. So we believe the Courts would be more inclined to find in your favour here.

2. *Suspension was to be organised and directed by the VDC engineering office, and they were to supply the suspension apparatus*

This follows on from the issue of installation. However, before we can make any further conclusions regarding your liabilities, we believe it is necessary to aquire

a statement from structural engineers clarifying an engineers vocational duty in regards to suspension being organised and directed.

3. *Structural integrity required*

The Corporation may allege that pre-contractual negotiations between yourself and the Corporation representatives constitute a separate term and/or collateral contract. After extensive examination, we believe that your negotiations were neither a term or collateral contract. Instead we feel it is a representation on your behalf. A representation does not give rise to a breach of contractual duties and obligations even if it is false.

However, the Corporation may try to obtain a remedy under section 52 of the Trade Practices Act (1975). Then it would be necessary for us to try to prove that you didn't mislead or deceive them in your pre-contractual negotiations. We feel that the pre-contractual negotiations between yourself and the Corporation representatives were vague and ambiguous. For it is unclear whether they intended for you to seek professional advice. Also, the term 'professional' can differ in meanings. Thus, in you consulting Fred, it would be necessary for us to decipher whether or not he could be considered a professional.

Again we are faced with the issue of ambiguity in defining terms. Due to this we see the stronger case here as being in your favour.

Therefore we feel your case would be sound in relation to abiding by the term of structural integrity.

4. *Property and risk in said items to pass on completion of installation*

Again we are faced with the problem of defining installation. 'Installation', as stated earlier, is an ambiguous term of the contract. We would argue that installation occurred when the structure was fixed in place.

5. Work to be completed in a proper and workmanlike manner

As the Corporation did not adequately specify what constituted proper and workmanlike manner, there will be a problem arguing against you not acting in this way. If you considered your manner to have complied with the term specified, the courts are more likely to find in your favour, and in doing so, you cannot be liable for breaching this term.

Liability

In short, we think you would have a reasonably sound chance of defending the allegations posed by the Corporation for the damages arising from the collapse of 'Close Encounters'.

> As of yet, we do not have any expert opinions from structural engineers giving their view on the cause of the fall. Obtaining such a document could assist your case, as well as further substantiating reasoning behind our conclusions.

Although one might expect that the letter is merely an artificial exercise, it retains its integrity and resembles the writing of a professional solicitor more than it resembles an academic writing genre. The genre has its own 'memory' (Bakhtin 1986). It shapes the students by bringing with it from its primary context in legal practice constraints which remain in force even in an academic setting.

The letter leads students into an advisor stance through the need to recommend actions and evaluate options. For example Susan is offered advice about what should be done: *it would be necessary for us to try to prove, it is necessary to aquire a statement, necessary for us to decipher.* Recommendation of a course of action is also implicit in the evaluative nature of the language: *your case would be sound, you have a strong case.* The students writing as 'Barry' present themselves as concerned to anticipate a range of future options and their likely consequences, that is, as able to manage future risks and benefits. This is evident, for example, in the use of *if* to indicate contingencies: *If you considered your manner to have complied with the term specified.* Another index of positioning is the use of the first person *we*. There are 12 uses of *we* with an opinion or attitude verb in Text 4.2.1, emphasising the status of the letter as opinion. The use of first person means that the subject is foregrounded, unlike the (not always successful) attempts to delete reference to the writer in the examination answers.

It is this positioning as a solicitor built into the letter genre that causes problems for the students. As mentioned in Chapter 1, my argument is that the students' poor writing reflects the problems they have with the unfamiliar positions thrust on them by the letter. This genre forces students to consider the law not merely as a means of interpreting 'the facts of the case', but as a means of participation in a textually-mediated adversarial practice. In the letter of advice the forming of a legal opinion is contextualised within the ongoing

action of legal proceedings, and the students have not only to form an opinion about legal issues, they have also to give advice about action. The students are required simultaneously to occupy and to integrate the positions of: offering advice to a client, reasoning about the application of law to facts, and projecting the course of future events in the event of legal action. They have to find the right law, apply it to the facts, project potential consequences in terms of client obligations, actions, liabilities and rights. They then have to present the results in a way that recognises what the client is interested in and needs to know, while deleting technicalities that are of no interest.

The difficulties students experience in escaping from the conventional genre of legal analysis in order to write from a practitioner position are evident in a comparison of a section of the student letter with an earlier draft of the equivalent passage. This comparison is presented as Table 4.4.

Table 4.4 Comparison of a paragraph from Barry's letter with an earlier draft

In this table passages included in the draft and deleted from the final version have been italicised, and additions to the final version which were not present in the draft are included in the right-hand column.

Draft	Revisions
1. *From the facts given,* it is obvious that you *did supply* 'Close Encounters' *and* it is *on* the question of installation that *we believe* the Corporation will argue. We believe that you have strong case for installation *as* the structure was established in place for use. *A further advancement on this argument is the fact that* the word 'install' is a very ambiguous term.	supplied upon So we believe the courts would be more inclined to find in our favour here.
5. As the corporation did not adequately specify what constituted proper and workmanlike manner, *we see that you acted in a manner that you* considered to comply with the specified term. *Therefore we believe that you have followed such a term and thus* you cannot be liable for breaching this particular term *of the contract.*	there will be problems arguing against you not acting in this way. If you (considered) your manner to have (complied ...) the courts are more likely find in your favour. In doing so,

In the draft the focus is on the wording of the contract through terms like *specified, proper and workmanlike manner, specified term, followed such a term, term of the contract.* This wording suggests an emphasis on the contract rather than on events.

An examination of what has been added in the course of the revision makes it possible to see traces of an attempt to relate to the world of the client's actions and interests. There are explicit references to future action in the final version of the paragraph which do not occur in the draft. *The courts* and the likely future role of the Corporation are mentioned explicitly, thereby shifting the focus of the paragraph from opinion about the status of the contract to a consideration of likely future actions by other parties. Also noticeable is the shift from *therefore* to *if* as a connective. *Therefore* normally expresses the results of reasoning: that one proposition follows from another. *If* on the other hand traces anticipated contingencies that will lead to action, and its use shows the students' attempt to shift from reasoning about the application of the law to reasoning about practical action. However the inclusion of these new elements makes the final letter more complex and unwieldy than the draft. Students are attempting to adjust to their new positioning, but are having trouble finding the linguistic resources to do justice to it.

The argument that students' problems are caused by the transition from legal interpretation to the giving of advice is reinforced through a comparison, based on theme and clause analysis, of the students' letter (Text 4.2.1) with the more expertly written letter they were given to use as a model (Text 4.2.2). Text 4.2.2 provides an extract from this model letter of advice, which also advises a client on the terms of a contract.

Text 4.2.2 Extract from a model letter of advice

The Contract

The terms of the contract, in our opinion, may be gleaned from the terms of the above two letters read together. The most significant are as follows:

CSV was to prepare (or procure and be responsible for preparation of) the Bogotti according to Group Y specifications. We are instructed that Group Y are well tried, reliable specifications for tuning racing cars.

We do not think that the obligation was wider than this, e.g. generally to ensure that the car was suitable for racing. If CSV can demonstrate that it did duly follow Group Y specifications you would lose any action.

CSV would not, we think, be liable for any inherent defect in the car, or unsuitability of Group Y specifications for Alpine racing. This is what you stipulated to be used, and you gave no indication of seeking CSV's advice generally.

However, we think it unlikely that such long established specifications would be inadequate, and there was no history of defects in the Bogotti itself.

Therefore, we think any claim by you would have quite a good chance of success.

You might be able to rely on a doctrine called res ipsa loquiter (sic) – the thing speaks for itself. The sequence of events strongly suggests faulty workmanship or materials.

You would pay $95,000 for the work and materials.

We think it appropriate that you have not paid any money. There has probably been a total failure of consideration, i.e. you didn't get what you agreed to pay for. If not, CSV's liability in damages for breach on contract would in any event be set off against your liability for the price, if you win, and would extinguish it.

You should also pay by painting CSV's name on the racing car.

We think you would be liable in damages for failing to do this. (Also, your original intention not to do this, which you have admitted in a letter, smacks of fraud. It could lose you the sympathy of a court.)

However, the measure of damages would be small. We expect that the ordinary tuning costs would not have been much greater, and the advertising potential of a car which blew up in its first race would have been minimal or even negative.

The film offer was too vague to be enforceable, in our view.

Although the structure of Barry's letter of advice (Text 4.2.1) is very similar to that of the model (Text 4.2.2), the language is different in a number of respects. It is striking how poorly written Text 4.2.1 is, despite the fact that it was drafted by a large group of students, most of whom write well in other settings. There are a number of possible reasons for the poor quality of the writing. An obvious explanation has to do with the inadequacy of students' preparation. Students' previous experience in writing about cases in their tutorial exercises has predisposed them to write in ways that are inappropriate for a letter of advice. And, in the university context, they have very little support to help them with their writing task. They are given the model letter and some general guidelines about the genre, but very little feedback on their drafts. Students also have to manage a shift from individual to collective authorship, with its

attendant separation of the roles of author (the composers of the words and ideas), animator (the scribes) and principal (the client) (Goffman 1981; Ivanic 1998).

Although the student letter contains a number of features of a practitioner position appropriate to the rhetorical task of giving advice, there is a failure to consistently maintain this position. Some of these problems can be demonstrated through a comparison of topical themes in Texts 4.2.1 and 4.2.2. As indicated in the previous section, in Halliday's linguistic terminology, 'theme' is the initial part of the clause which is the point of departure for the message (Halliday 1994); it is that which is in focus in the clause's representation. Topical themes relate to the representational function of the clause (Halliday 1994). The theme of a clause provides an index of an author's positioning by showing where her focus lies. Writers discursively construct a position through the world of objects they focus on as important to write about. While the theme of a single clause is not particularly informative, by analysing the range of themes in a text it is possible to give an index of the subject positions occupied by the writer.

When compared with the model letter (Text 4.2.2), the students' letter (Text 4.2.1) thematises additional elements which have to do with the textually mediated world of the law, rather than the everyday world of the client. The world constructed in the student letter is more concerned with the law and the contract and the way things are worded than is the world constructed by the model letter. In contrast, the themes of the model letter focus much more directly on the client's concerns alone. It is more focussed on 'you' than 'we', on facts rather than on wording, and on obligations, choices and liabilities rather than on the apparatus of the law.

Table 4.5 below compares major theme types of the student letter of advice (Text 4.2.1) and the model letter (Text 4.2.2). In the model letter the themes focus on issues of immediate interest to the client: *we*, the writers of the letter, *you*, the client, *CSV*, the opponents, *Group Y specifications*, the issue of dispute between the parties, and the client's rights and liabilities. The students' letter

also thematises a similar range of topics: *we, you, the Corporation,* and the issues and events in dispute. But a significant difference is their treatment of claims and liabilities, which one would assume to be of most immediate interest to the client. Themes such as *the obligation, CSV's liability in damages* which appear in the model letter are thematised by the students to a very limited extent. Another difference lies in the student letter's focus on the wording of the contract and the contractual negotiations as well as *the courts.* For example, the student letter thematises words such as *the word 'install', the term 'professional', 'installation'* as well as legal terms such as *a representation* and *pre-contractual negotiations between yourself and the Corporation representatives.*

Table 4.5 Comparison of types of topical themes in Texts 4.2.1 and 4.2.2

Types of themes	Text 4.2.2 (Model)		Text 4.2.1 (Student)	
We	7	20%	13	30%
You	10	30%	7	16%
Contract	3	9%	8	18%
Technical legal terms	0	0%	2	5%
Opponents/ Other parties	4	12%	5	11%
Liabilities, claims, obligations etc	4	12%	1	2%
Facts, background	6	17%	5	11%
Actions required of client/ the courts	0	0%	3	7%
Total	34	100%	44	100%

Students' previous experience with the MIRAT genre of legal analysis encourages a preoccupation with wording. Their relative lack of focus on the client's perspective reflects the problems they have freeing themselves from the template imposed by the methods of legal interpretation. This makes it hard for the students to achieve a smooth integration of real world reasoning about why things break or fall down with legal reasoning about contractual obligations.

Problems students have in occupying a practitioner position are also demonstrated by a further comparison of Texts 4.2.1 and 4.2.2 using clause

analysis. At first sight Text 4.2.1 is more grammatically complex than the model Text 4.2.2. Examples such the following are striking: *If you considered your manner to have complied with the term specified, the courts are more likely to find in your favour, and in doing so, you cannot be liable for breaching this term*. This and other examples of complexity are examined further in Table 4.6 below. Dias et al. suggest that an explanation of this syntactic complexity of student legal writing lies in the specialised categorisation of experience characteristic of legal analysis, resulting in a 'more intense interest in the hierarchical interrelationships between propositions: specific propositions are seen in the context of others, and relationships of cause, effect, condition and concession are highlighted' (Dias et al. 1999, p. 55). The above sentence *If you considered...* contains two embedded cause and effect relations which seems to confirm this analysis.

There is another aspect of the letter's complexity that is not explained by this position (Dias et al. 1999). Much of the complexity and the impression of poor or cumbersome style evident in Table 4.6 below results from nested clauses of attitude and opinion. My explanation is that this cumbersome nesting of clauses is a result of students' attempts to integrate both interpretation and advice into each clause complex. The students are attempting to write from both interpreter and practitioner positions simultaneously. For example, in the sentence above, *If you considered your manner to have complied with the term specified, the courts are more likely to find in your favour, and in doing so, you cannot be liable for breaching this term*, the student authors move between past tense reference to the original fulfilment of the contract *if you considered*, to present tense reference to current liabilities *you cannot be liable*, to future reference to the likely actions of the courts *the courts are more likely to find in your favour*. They also move between a focus on the terms of the contract and a client-focussed concern with actions and liabilities. This example demonstrates the same tendency towards overexplicitness that was identified by the theme analysis of Table 4.5.

Table 4.6 Clause complexes extracted from Text 4.2.1

Table 4.6 includes both finite clauses and reduced clauses. Indentations indicate hypotactic clause relations while aligned clauses are paratactically related. Numbers indicate clause position in the whole letter.

		Extract 1
14	A	However, before we can **make** any further **conclusions**
15	C	**regarding** your liabilities,
16	A	we **believe**
17	A	it **is** *necessary*
18	B	to **aquire a statement** from structural engineers
19	B	**clarifying** an engineers vocational duty in regards to
20	C	**suspension** being **organised** and **directed.**
		Extract 2
29	B	However, the Corporation *may* **try to obtain** a remedy under section 52 of the Trade Practices Act (1975).
30	A	Then it *would be necessary* for us
31	B	to **try to prove** that
32	C	you didn't **mislead** or **deceive** them in your pre-contractual **negotiations.**
		Extract 3
39	C	Thus in you **consulting** Fred
40	A	it *would be necessary* for us
41	B	to **decipher**
42	C	whether or not he *could* be **considered** a professional.
		Extract 4
47	A	Therefore we **feel**
48	B	your case *would* **be** sound in relation to
49	C	**abiding** by the term of structural integrity.
		Extract 5
61	C	If you **considered**
62	C	your manner to have **complied** with the specified term,
63	B	the courts **are** more *likely*
64	B	to **find** in your favour
65	B	And in **doing** so
66	A	you *cannot* **be** liable
67	C	for **breaching** this term.
		Extract 6
68	A	We **think**
69	A	you *would* **have** a reasonably sound *chance*
70	B	of **defending** the **allegations**
71	C	**posed** by the Corporation for the **damages**
72	C	**arising** from the **collapse** of 'Close Encounters'.

The students' writing in Table 4.6 gives equal weight to all aspects of the situation constructed by the simulated case rather than being able to focus selectively on relevant elements in a role-appropriate way.

Analysis of the grammatical characteristics of the clause types within Text 4.2.1 presented as Table 4.6 confirms that the example discussed above is characteristic of the text as a whole. Three clause types are distinguishable in Text 4.2.1 and presented in the second column of Table 4.6 as A, B and C. The linguistic features of these clause types provide a sensitive index of the different subject positions that students have to reconcile within their letter. Both A and B clauses relate to the practitioner position while C clauses relate to the interpreter position.

A clauses provide advice from solicitor to client: *we feel your case would be sound.* These clauses are usually main rather than subordinate clauses, and usually have 'we' as the explicit subject of a propositional attitude (*feel, believe, see, think*) or they are modalised *it would be necessary for us.* These clauses indicate the giving of advice, that is, they constitute a current interaction between the solicitor and the client.

B clauses project likely future dealings between the parties or before a court: *there will be problem arguing against, the courts are more likely to find in your favour.* They are usually in future tense or contain a modal element; participants include *you* or *us* (Susan), *the Corporation* (the VDC) and the *courts*; verbs are generally legal actions: *argue, allege, obtain a remedy, find, defend, assist your case, prove.* The modalities are epistemic or conditional, and express opinion about likely future events.

C clauses relate to past events which include the making and fulfilment of the contract and demands made by the Corporation, for example, *the Corporation did not adequately specify.* Tense varies between past and present, depending on whether the focus is on past action or present interpretation. These clauses refer to the contract either intertextually through reproduction of the wording or through nouns such as *term.*

An overexplicit attempt to combine A, B and C clauses, that is to combine grammatical elements of both interpreter and the practitioner roles in the same sentence, leads to the complexity of Text 4.2.1. This is evidenced by the fact that all clause complexes contain all clause types.

A clash between the dynamic character of the practitioner subject position and the synoptic or timeless character of the interpreter position are also demonstrated by analysis of some of the unwieldy clause complexes in Table 4.6. The students are torn between two contradictory aspects of the participant framework: the need for specificity in reference to relevant features of events such as agency, and the synoptic perspective that the law takes towards facts as examples of legal categories. Students frequently (in 25 of the 80 clauses in the letter) opt for a compromise between a synoptic and a dynamic representation of events through use of non-finite or participial versions of the verb, for example: *to decipher, to aquire, clarifying, to have complied, for breaching.* These allow some level of agency to be represented (van Leeuwen 1996). On occasion this need to preserve agency results in constructions that are only marginally grammatically acceptable: *in you consulting Fred, and in doing so, your manner to have complied.* Students have not yet developed the grammatical devices seen in the model letter (Text 4.2.2) needed to finesse tensions between generality and specificity. These include use of parenthesis and apposition (*we think, eg generally to ensure, ie you didn't get*) and avoidance of non-finite verbs and participles.

Another reason for the clause complexity is the nesting of attitudes and opinions. The student in the position of interpreter only has to worry about her own interpretation of a case. In the position of practitioner she has to be concerned with the perspectives of other participants such as the client, the opponents, experts, and possibly the courts, as well as with the dynamic interplay between these perspectives in the course of legal action. In seeking to negotiate between the positions and perspectives of different participants and different positions, the letter presents opinions about opinions about opinions. Thus for example Extract 5 in Table 4.6 deals not only with the opinions of the letter's authors as expressed by the modals *likely* and *cannot*, it also deals with

Susan's beliefs (*if you considered*) and with the rulings of the court (*the courts are more likely to find in your favour*). The students have to negotiate the grammar needed to capture these relationships between different perspectives on, or representations of, events within the one clause complex. Extract 6 shows a similar pattern of nested attitudes. The student firm's opinion (*we think*), the client's response (*defending the allegations*), and the Corporation's actions (*allegations posed by the Corporation*) are all nested within each other. These hypotactic relationships of modality and projection reflect the complex way in which participants in, and interpreters of, the simulated case read and respond to the interpretations, judgments, attitudes and understandings by the four different parties: the corporation *the corporation did not specify*, the solicitors (who are the source of the judgment that the Corporation's specification is not *adequate)*, the client (*if you considered)*, and the courts (*the courts are more likely to find)*. The representation of these relationships in the grammar constitutes a trace of the complex processes the students go through in sorting out the interrelationships of the various participants.

The simulated context, for example in the complex interaction of participants, is demonstrated by the theme and clause analysis to have a shaping influence on the way the students write their letter (Freedman, Adam & Smart 1994). All the analyses document students' struggle to come to terms with the professional positioning thrust on them by the rhetorical demands of giving advice.

But students producing a letter of advice are both writing as students for assessment and writing as lawyers to a client in the world of the simulated exercise. This dual audience brings with it conflicts because the simulated audience of Susan places the students in a practitioner position while the tutor audience positions them as students.

Given the effort students put into the writing of advice, it is sobering to realise that for the tutor this was entirely secondary. For her the key point was the students' abilities as legal interpreters. She wanted them to disentangle the key facts and key issues from a host of 'red herrings' and apply the correct legal

rules and principles to these facts. In her comments made to the students after marking their work she suggested that they were too influenced by the rhetorical context of the simulation. It distracted them from an objective consideration of the facts by making them too partial:

> In general terms the task mainly concerned Breach of Contract so it was a matter of determining what were the relevant contractual terms and arguing on the facts what tentative conclusions you could make as to whether those terms were being breached or not and whether or not what and if further information you required. Now some firms chased a few red herrings in relation to issues and made it look more complicated than it actually was. That was part of the exercise, identifying the issues. One other trap which I think your firm fell for to a certain extent was that you were arguing what you thought your client wanted to hear. You were arguing in favour of your client. You have to bear in mind that it's a letter of advice. What's the purpose of a letter of advice? (Tutor's feedback to Barry firm on letter of advice).

Meetings of 'Barry' firm

This section examines the meetings of Barry firm on September 6th and 8th in which the firm discusses the brief to counsel and prepares for the moot court proceedings on September 9th. This meeting took place at the end of the legal skills program, four months after the letter of advice was submitted, but the students, following the 'continuing exercises' model (Feinman 1995), were still dealing with the same defendant, Susan, and the same case of 'Close Encounters'.

The student meetings are informal and private. They provide examples of what Goffman (1981) would call 'back' or offstage interactions and processes, especially processes of rehearsal, to extend Goffman's theatrical metaphor, in contrast with the front or onstage interactions in the moot court seen in the next section. These offstage interactions show students' positioning not so much as performed, but in formation through reflexive processes of self-formation.

Participation in spoken discussions positions students differently from their writing tasks. In these spoken texts, students are not acting in role as simulated lawyers but are representing their future actions through processes of planning and rehearsal. The spoken texts therefore give a dialogic, interactive perspective on the construction of subject positions, rather than the synoptic presentation of an accomplished position seen in the written texts of the previous sections. The most relevant aspects of the model of subjectivity developed in Chapter 3 are those dealing with processes of subject formation: participation, reification, reflexivity and reconciliation. One subsection deals with participation, reification and their reflexive relationship. The other subsection deals with processes of reconciliation.

In the analysis I examine segments of the transcript where particular linguistic patterns predominate, providing indices of subject positions and processes of subject formation. Although many of the moves or elements from the earlier texts are also present in the spoken texts, there is no overall structure or sequence. The students cycle in an unpredictable way from one element to another and then return later to pick up the thread again. In this it resembles other transcripts of student small-group meetings in which complex issues are discussed (Berrill 1988). This unsequenced character of the conversation makes it more dynamic in that it allows for experimentation and change.

Student skills in meeting procedure are not well developed, and the conduct of the meetings is at times chaotic. Talk tends to move between general discussion and simultaneous conversations in subgroups. Transcripts of the meetings (see Appendices 2 and 3) record the general discussion, but become fragmentary when there are a number of simultaneous conversations.

Analysis is based on sections in which a relatively coherent transcript is possible. Both meetings are analysed together. However the same group of students is not present at both meetings (although the main contributors are the same). A seating plan for each meeting gives a sense of the differences (note that all names are pseudonyms). The students are seated at desks in a tutorial room.

Figure 4.1 Seating plan for Barry meeting of 6th September

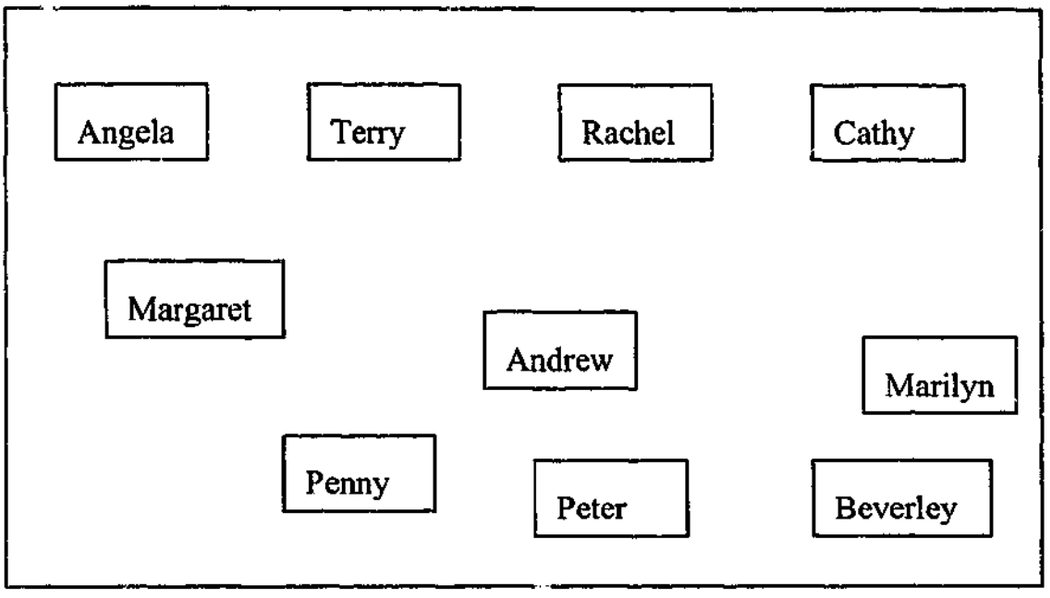
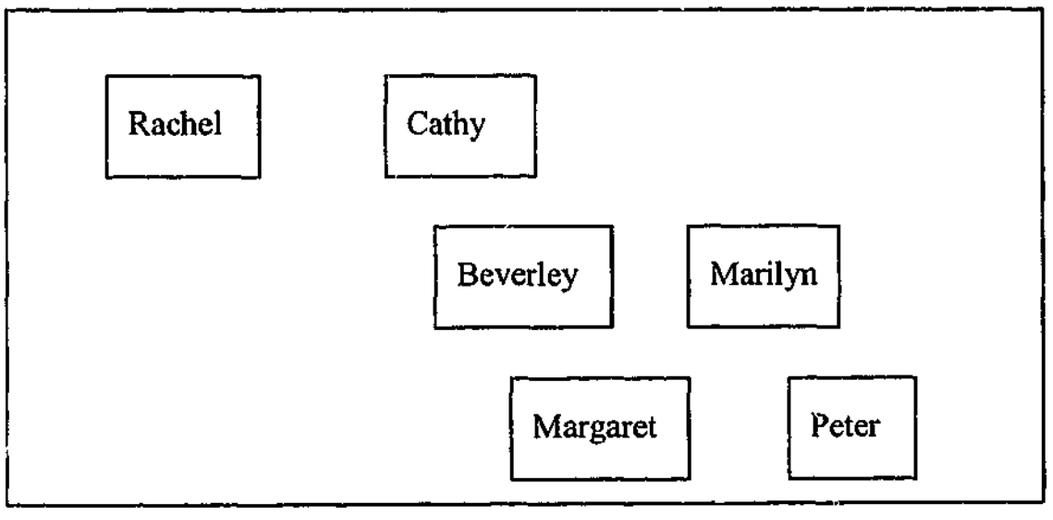


Figure 4.2 Seating plan for Barry meeting of 8th September



Key roles are occupied by Andrew, who is designated as the group leader or 'senior partner', and by Beverley and Marilyn, who are nominated as senior and junior counsel respectively and therefore make submissions to the moot court. Beverley and Marilyn can also speak with some authority, as they had previously worked as a team in the first year mooting competition (which is conducted independently of coursework). During the first meeting, Margaret also assumes an important role as instructing solicitor, and this is reflected in the change in her position on the seating plan between the two meetings.

The meetings manage practical issues associated with the tasks, including who will write what portions of the 'brief to counsel' submitted for assessment, how the completion and submission of this document will be managed, who will act as instructing solicitor in the moot, and how to manage the necessary documents and exhibits placed before the court. Large portions of the transcripts deal with these management issues and with the blocking of unproductive lines of argument, allocating tasks and deadlines, meeting times and places, and editing drafts. I do not consider these activities further.

Subject formation through participation, reification and reflexivity

The first excerpt (Text 4.3.1), taken from the transcript of the meeting of September 6th, shows Barry firm discussing whether the purchase of the sculpture is the supply of a good or the supply of a service. This issue bears on the way in which damages are assessed and on the potential liability of the defendant. Students are considering what cases and facts are relevant to supporting the defendant's position and what cases and facts the plaintiff will use to rebut them.

Because the focus is on legal argument, Text 4.3.1 relates to the position of the legal subject as interpreter. However the dialogic nature of the text displays not a finished presentation of this position but evidence of its formation. In participating in the debate about the sculpture as a good or a service students are at the same time reflexively constructing a subject position. They are doing this in two ways.

In one mode of participation students are constructing a place for themselves in the community of practice (Wenger 1998) which is the 'Barry' firm through their suggestions about legal arguments and resources and through the way these suggestions are taken up by others. Students are cooperating to arrive jointly at an agreed position and also competing within the group to be a person whose opinions count.

Text 4.3.1 Barry firm discussion of goods and services[2]

Clauses showing students engaging in legal argument are **bolded.**

1	Margaret	how come you're [laughs] you're looking really shitty
2	Marilyn	I just don't think we'll be able to prove that **it was a service**
3	Cathy	**of course it was a service**
4	Rachel	**yes it was cause** [inaudible, everyone talking at once]
5	Andrew	**study guide and that makes it a service**
6	?	**yeah but**
7	Beverley	**yeah (...) Study Guide refers to R & G this book says that Robinson and Graves is very unpersuasive**
8	Marilyn	**there's another case in Lee and Griffin, it says** [reads] **where the supply is more artisan than artist there seems a distinct tendency towards sale of goods**
9	Beverley	**Lee and Griffin actually specify a sculpture and says a sculpture will be considered goods [and not a service**
10	Marilyn	**[so what that means is**
11	Beverley	**it was before R& G but they seem to think ( )**
12	Penny	**like they wanted the product right but they wanted her to make it it wasn't just something that they looked at and said we'll have it**
13	Marilyn	**but the order form says goods [and services**
14	Penny	**[they ordered it**
15	Cathy	**[but why yeah**
16	Rachel	**[before it was made (....)**
17	Penny	**the order form says goods and services**
18	Cathy	**the difference is that they** [cough] **like in the sale of goods they pay for the goods but in sale of goods and services they're paying for like the skill of the artist that's what they're paying for here (...)**

[2] Transcription conventions are as follows:

A left bracket [shows where current talk is overlapped or interrupted by other talk.

Equal signs = indicate that there is no interval between turns.

Numbers in parentheses in mark the length of silences in seconds (4.5). For short silences periods are used, with one period equalling a second (...)

Words in parentheses indicate an uncertain transcription. Parentheses with a blank ( ) indicate that the word could not be transcribed.

Prosodic features are not indicated in the transcription as the analytical focus is chiefly grammatical. Where relevant to the interpretation prosodic features are noted with other comments in square brackets [ ].

19	Beverley	**yeah that's what that's what that book says and that's the argument** we'll try and use **but it's but there are other cases that say** (....) [students all talking at once]
20	Peter	**says goods and services anyway** [All talking at once]
21	Marilyn	**that's the one that's in our study guide Robertson and Graves**
22	Beverley	yeah but then I mean you're not supposed to go [All talking at once]
23	Penny	Beverley they'll be arguing about working ( ) relationship, won't they
24	?	yeah
25	Andrew	services they can't
26	Penny	**yeah but then that's classed as service** so you're going to have to find something to prove it just get rid of that book
27	?	**[it's also in this book and**
28	?	**[it says in the thin book**
29	?	[goods and services [All talking at once]
30	Margaret	I'll have to go and do this one it's another one
31	Sophie	**in the commercial law book it says something about um it being a service depending on the party's intent or something and seeing as the order form says [goods and services**
32	Penny	**[yeah, that shows intention**
33	Sophie	**misleading intention**
34	Beverley	**does it say something about intention in the book**
35	Cathy	yeah can't remember
36	?	I remember
37	Sophie	I can't remember
38	Beverley	and **it the book actually seems positive to us because it says that if it's hard to distinguish between the two it's more likely to be services** [interruption] **then you can't think of them as separate contracts it's more likely services**
39	Peter	aren't they just going to say the order form says [All talking at once]
40	Cathy	**the order forms that was probably the routine**
41	?	ok next point

Within 'Barry' firm ideas are held in common as a result of a shared history of discussion, so the language is dependent on the context created by this shared history. This more contextualised location of speakers as members of the group can be seen in the use of pronouns and demonstratives, particularly in uses of *I* to refer to personal history or opinion, *I mean, I just don't think, I remember*, in repeated uses of *they* to refer to the plaintiffs as the opposition or as those who are not members of the firm, and in use of *that* and *it* to refer to other parts of the discussion, for example: *that's what that book says, that's classed as a*

service, that makes it a service. The contextualised character can also be seen in more elliptical references to cases and legal principles: *the thin book, the commercial law book, R&G*, in intertextual references to the facts of the case as represented in pleadings, and in reference to relevant documents: *the order form*.

But the student contributions in Text 4.3.1 are not just intended to claim a place in the community of practice, they are also produced as rehearsals of possible future arguments before the moot court. Students are engaging in a joint project to create a subject position for Beverley and Marilyn to animate as senior and junior counsel. This sets up a dialogue between the individual and the collective in which each reciprocally constructs the other. Individual students have their status confirmed when the group takes up a suggestion that they make and includes it in the joint position. At the same time the joint position of the firm is no more than a composite of the views of its members.

Traces of the construction of this joint position can be seen in the bolded clauses in Text 4.3.1. These exemplify a number of the linguistic patterns previously seen in the student examination answers in Table 4.2: the use of intertexuality to cite legal texts and authorities (reading out quotations, as seen for example at turn 4.3.1.8, citation of relevant cases such as *Lee and Griffin* and *Robinson and Graves*, other references to study materials such as text books and the study guide); thematisation of impersonal elements of the law and the facts of the case such as the order form, the supply of the sculpture, the parties to the case (clauses with themes of this kind are bolded in Text 4.3.1 and comprise 28 of the 41 turns); and use of the timeless present tense to talk about law and historical past tense to talk about facts. Verbs in the bolded clauses are predominantly 'to be' or 'to say' (jointly 26 instances), emphasising the role of definition and categorisation. Another characteristic of the bolded clauses is the extensive use of connectives between clauses, mainly *but* but also *so* to express legal reasoning.

Although Text 4.3.1 shows students acting as interpreters, their positioning is modulated by the dialogic context. The logical *if then* connectives in the

examination answers which reflect accomplished reasoning are replaced in the discussion by the interplay of debate as students agree and disagree with each other, marked by *yeah* (9 uses) and *but* (8 uses). This debate demonstrates the status of the subject positioning as in formation or in rehearsal rather than finished.

A different kind of interplay between students as members of the firm and their representations of themselves as counsel is illustrated by a further set of excerpts from the transcript (Texts 4.3.2 and 4.3.3 below). In these texts Barry firm is oriented to winning and loosing, to anticipating the likely moves of the opponent and countering them, and to being aware of alternatives and making choices and evaluations. The focus is therefore on the practitioner rather than the interpreter role, and on reificative processes of self-representation rather than participative processes of rehearsal. As students attempt to plan the future course of events before the court they reflexively construct a representation of themselves as practitioners. Marilyn's extended turns at the end of Text 4.3.2 (10 and 12) show how the interaction between *I* and *we* is a reflexive process of self representation.

> If um **they**'re using Section 18 and 19... Part 1 **we** have **we** have to prove that part 1 doesn't apply in ( ) because that only applies to sale of goods so that's where **we**'re using Robinson and Graves (...) it's the best case for us

Marilyn uses her position as junior counsel to establish a shared agenda for the firm as a whole as 'we'. She thus is both representer of the future actions of the group, and is also part of the collective self whose future actions are represented. She talks herself into existence as a legal subject.

In Texts 4.3.2 and 4.3.3 students are not debating legal issues but anticipating and planning their future actions in the moot court. The focus is on the students' collective identity as a group *we* opposed to another group *they*. This focus is reflected in the distribution of themes. While the themes in Text 4.3.1 were predominantly impersonal the predominant topical themes in Texts 4.3.2 and 4.3.3 are *we* and *they*.

Text 4.3.2 Barry firm representation of plaintiff positions

Use of **we** and **they** as themes is bolded

1	Andrew	[talks over general chat] so is buying a sculpture sale of goods, sale of services or sale of goods and services? (……) cause um (.) I just went looking (…) guarantee the other people (.) to be using (…) section 90
2	Marilyn	89 and 90
3	Andrew	yeah cos **they**'ll try and say (…) 89 commercial quality of goods sold
4	Beverley	**they**'ll try and use section 17 and 18 as well
5	Andrew	yeah
6	Beverley	same sort of thing
7	Andrew	**they**'ll probably try and say that they weren't of merchantable quality they weren't (…) they weren't fit for the purpose
8	Marilyn	yeah
9	Andrew	that's all
10	Marilyn	but if um if um **they**'re using section 18 and 19
11	Andrew	yeah
12	Marilyn	part 1 we have we have to prove that part 1 doesn't apply in ( ) because that only applies to sale of goods so that's where we're using Robinson and Graves
13	Andrew	[right
14	Marilyn	[it's the best case for us (…)

Text 4.3.3 Barry firm evaluation of plaintiff positions

Use of **we** and **they** as themes is bolded

1	Rachel	oh that yeah [laughter] that it would be it oh yeah no but aren't we saying that it was wrong
2	Beverley	yeah **we** are but **we**'ve got to (....) if it's found that it's not right (....)
3	Marilyn	in the alternative **we** have to explore the options
4	Rachel	oh I'm sick of options
5	Marilyn	I don't think **they**'ll say that I mean **they** will say there was[( )
6	Beverley	[you said **they** were relying on breach
7	Marilyn	that's Robert that's their grief **they**'re not even relying on Part IV that's how stupid **they** are [laughter] I mean **they** don't even rely on Part IV that's the only one that's really good that's the one that **they** can get away with
8	Jonathan	do **they** use Part IV and then (....)
9	Marilyn	yep our group ( )
10	Beverley	**they** said it was ordinarily acquired
11	Marilyn	**they** can use Part IV I wish **they** hadn't it would have been easier for us

Both *we* and *they* are characterised in terms of their future actions. The verbs taking *we* and *they* as subject nearly all refer to actions accomplished verbally: *say, use, rely, prove, explore*. Reflecting this focus on action, the joint representation of the collective self as *we* is constructed through a debate over the agenda of the firm. Just as in Text 4.3.1, this debate is indicated by multiple uses of *yeah* and *but* as students indicate support or offer qualification. But while there the debate was about how to interpret the case, here it is about what to do. In Texts 4.3.2 and 4.3.3 students establish a position for themselves by having their suggestions for action accepted. These suggestions are marked by the use of deontic modalities indicating the need for action: *we've got to* or *we have to.* Arguments are constructed by reasoning about future actions in response to others: *if they do this then we should do that.* This reasoning is marked by the use of *if* at turn 4.3.2.10 and *so* at turn 4.3.2.12. In response to the uncertainty about what *they* will do, *they'll probably try, I don't think they'll say, they'll try and say*, the *we* develops a range of options, hence the phrase *in the alternative*.

Barry firm also constructs a practitioner position through the negotiation of shared evaluations of particular courses of action. Negotiation of shared assessment is a central way in which the group establishes a position for itself (Goodwin C. & Goodwin M. H. 1992). This is evident when Marilyn says *it's the best case for us* at turn 4.3.2.14. Evaluation is also used to reinforce the opposition between *we* and *they*. At turn 4.3.3.7 *not even* establishes an evaluative stance to the actions of the other group, which is followed by further evaluations: *that's the only one that's really good, that's how stupid they are*. These turns make evident the potential of the adversary system to create divisions and polarise differences between self and other.

While Texts 4.3.2 and 4.3.3 above show how subject positions are reflexively formed through representations by a group of their future actions, Texts 4.3.4 to 4.3.7 below show a self-reflexive form of subject formation discussed in Chapter 3 as the 'fold'. In these texts students evaluate their own actions and internalise others' evaluations.

The texts examined here show the beginnings of a construction of 'folk wisdom' or 'personal theory' about what a lawyer is and how to behave as lawyers. This folk wisdom is encapsulated in the use of anecdotes about students' experiences (Texts 4.3.4 to 4.3.6).

Text 4.3.4 Beverley's criticism of Margaret

1	Beverley	I started having problems and getting confused when I was going through
2	Margaret	you're getting confused though because you've gone through it so many times that's the problem
3	Beverley	the hardest thing was in that one that we did the last Moot that we did it was all (...) we were defending and we weren't counter-claiming and so I'm going through writing my introduction thinking OK we're going to show that this is not true and this is not true and then we've got to say (...) then we're going to claim that we're going to claim stuff from them and I don't I didn't work it too well have to go through and change that
4	Marilyn	yeah [all talking at once]
5	Beverley	oh no it was really bad like it was as bad as yours that you did for us that was really badly worded and you'll admit that yeah you gotta admit that because you changed
6	Margaret	yeah I know I was reading it last night it didn't make sense (.....)
7	Marilyn	but we've basically got the main points down anyway we have to re-organise it

Text 4.3.5 Beverley and Marilyn's anecdote (1)

1	Margaret	they're putting a different slant on it
2	Beverley	yeah that's what they did in the one we all did they tried to put their slant on it and John just kept going that doesn't appear what the facts say to me and so we kept picking it up so it had to be facts not favourable to
3	Marilyn	he kept asking them questions it got really bad like they were trying to twist the facts so it was for them only

In Text 4.3.5 Beverley discusses the dangers of being too partial in presenting the 'facts' of the case. The point about partiality is made not by adducing a rule but by use of an anecdote about an occasion in which another team of students came to grief by 'slanting' the facts. This anecdote illustrates effectively the tension between the partiality of the practitioner position and the impartiality of the interpreter position, and the students' awareness of this tension.

Anecdote can be used as a device for constructing a position through self-reflexive evaluation, as turns 4.3.4.3, 4.3.5.1-2 and 4.3.6.3-9 illustrate. These turns are all initiated by Beverley through a reference to earlier moots in which she appeared as counsel, mainly with Marilyn as junior partner. The anecdote at turn 4.3.4.3 is told by Beverley alone, while the other anecdotes are co-constructed with Marilyn. Beverley's initiation of the anecdotes shows the influence she wields in Barry firm as the student who has made the most use of her opportunities to get experience in advocacy.

Text 4.3.6 Beverley and Marilyn's anecdote (2)

1	Marilyn	we also have to know all the cases just in case he asks the facts
2	Margaret	I'll just have it all marked down [and just in case he asks us (...)
3	Beverley	[one case I didn't know the facts to and he asked me
4	Marilyn	yeah he asked you
5	Beverley	I've gone=
6	Marilyn	=couldn't believe it=
7	Beverley	=then I started trying to guess them=
8	Marilyn	=not too sure your honour [laughs]
9	Beverley	I got through about two lines started trying to describe the facts because I had then in front of me but I hadn't read them so I'm going um (...) the facts were oh actually your honour I really don't know what the facts are

The anecdotes have a number of narrative features in common. They include references to situations in which a student or students (usually Beverley) was humiliated in the public space of the moot by inadequate preparation or by breaking the rules. The anecdotes are characterised by the use of *so* and *then* indicating the motives and the sequence of actions leading to error. They all involve quotation as Beverley and Marilyn recount words and thoughts in the past events: *not too sure your honour, that doesn't appear what the facts say to me*, thereby intensifying the key points. Anecdotes make extensive use of evaluative language to draw out the lessons learned from students' mistakes: *I didn't work it too well, it got really bad.*

The anecdotes construct the self around a pronoun contrast (Benveniste 1971), not *I/you* or *I/we* as was evident in Texts 4.3.1-4.3.3, but *I/he* which indicates the relation of the student (usually *I*) to legal authority (*he*). The anecdotes

reconstruct 'his' evaluative stance to the students' earlier words and actions (signified by quotation), and this evaluation is internalised as a stance the student now has to her own actions.

Beverley can be seen as the agent as well as the subject of this process of internalisation in Text 4.3.4. This text begins with an anecdote in which Beverley made a fool of herself by confusing the role of counsel in defending with the role in counterclaiming (an example of the management of multiple positions). At turn 4.3.4.5 Beverley then moves from self-criticism to overt criticism of Margaret's work (remembering that Margaret has assumed the role of instructing solicitor and is therefore formally responsible for filing documents on behalf of Barry firm). Beverley invites Margaret to internalise this overt criticism by applying it to herself as a self-criticism *you gotta admit that*. This invitation is accepted by Margaret *Yeah I know... it didn't make sense*. There is an almost confessional quality to this interaction. Then at turn 4.3.4.7 Marilyn as Beverley's helper comes in to mitigate the criticism: *We've basically got the main points down anyway*.

Use of maxims or general principles to govern students' actions is another form of 'folk wisdom' used as a secondary means of self formation. Sometimes the maxim is presented as the point of an anecdote, as in Text 4.3.6: *We also have to know all the cases.* In Text 4.3.7 a maxim or rule is invoked to guide behaviour of the generic 'you': *you've got to be completely honest.*

Text 4.3.7 You've got to be completely honest

1	Margaret	why have we can't we I mean can't we use the word strongly I mean that makes like so you can appear more convincing
2	Penny	but isn't it like when you get to see a client
3	Andrew	yeah (...)
4	Margaret	you've got to be [you got to be
5	Beverley	[you've got to be completely honest in the brief because it's not=
6	Marilyn	=it's just to us
7	Beverley	your client's only going to see it
8	Marilyn	that's right

This rule makes explicit the role of the lawyer in advising and working on behalf of the client. Its use shows that Beverley is conscious of the conflicts in positioning between speaking to a client and speaking on behalf of a client.

Subject formation through reconciliation

This subsection examines how student subjectivity is formed through attempts to reconcile conflicting positions. As the discussion in Chapter 3 suggested, reconciliation is marked by Bakhtinian dialogic phenomena (Bakhtin 1981) and by the deployment of multiple frames or perspectives (Wetherell 1998). The excerpts from the meeting transcript examined in this section show processes through which students' gendered and aged autobiographical selves (Ivanic 1998) are reconciled with their decontextualised, discursively-constructed legal subject positions.

One of the most extended passages in the student meetings demonstrating dialogism is excerpted below as Text 4.3.8. This text records an occasion close to the start of the first Barry meeting when the issue is raised about who would become the instructing solicitor. The text shows Marilyn and Andrew in dispute about who is going to be instructing solicitor, a position that carries some status.

The instructing solicitor is a third, non-speaking participant in the moot. Instructing solicitors sit with their back turned to the judge, and can control the documents needed by counsel, and look up cases and other references needed by counsel during proceedings. The instructing solicitor also has formal responsibility for completion of the brief, the document which is presented by the firms to counsel as the basis on which they argue the case. The brief is the final assessed written task produced by the firms as part of their legal skills course.

As opposed to the focus on clause structure in the analysis of the earlier texts, analysis of Text 4.3.8 is more focussed on interactions, speech acts and prosody, reflecting the important role of keying and framing in this text.

Text 4.3.8 Who is going to be instructing solicitor?

1	Andrew	did anyone agree to be instructing solicitor
2	Marilyn [to Beverley]	it's only you and me [ie senior and junior counsel]
3	Margaret	yeah I will be [laughs] I wanna do this [change in voice quality, emphasis] (..)
4	?	yeah yeah I would be if you don't want to be
5	Andrew	I don't care no
6	Marilyn	ah Margaret you can be the junior counsel I'll be the instructing solicitor [laughs]
7	?	[no
8	Andrew	[you've just got to sit there.
9	?	no because all the [3 people talk at once]
10	Andrew	get dressed up [laughter]
11	?	hey no Margaret Margaret wait the (...) really isn't Marilyn a really good reader
12	?	[I'd say she was
13	?	[yes she is
14	?	yeah well then
15	?	she uses word taken it so ( ) she's really good
16	?	( ) I've gotta ( ) [softly] (...)
17	Andrew	do you want to be
18	Peter	you can (.)
19	?	what do you have to [do
20	Margaret	[do you wanna be [laughs] (..)
21	Andrew	what's the point
22	Peter	let's ask her if I ask you
23	Margaret	yeah well you don't have a (.) claim
24	Andrew	hey
25	Margaret	I've got a claim
26	Andrew	what's the point=
27	Peter	=pooh [releases breath]
28	Andrew	now [we
29	Margaret	[ah you really don't wanna be [laughter] I'll do it I'll do it if you want me to [Emphasis on really]
30	Peter	yeah ok cool [laughter] (....)
31	Margaret	what do I do
32	?	you going [to
33	Marilyn	[you have to do the brief to counsel for us then [laughter] (.....)
34	Peter	( ) missing link [laughter continues]
35	Margaret	ok [laughter, emphasis]
36	Margaret	yeah ok what do I do [down to earth]

37	Several speak together	brief to counsel [falling rising inflection, as for repetition]
38	Andrew	you got to be able to sit still and not talk for 3 hours Mags
39	Margaret	( )
40	Andrew	it's a big [ask
41	Beverley	[instructing solicitor does the brief to [counsel
42	Peter	[try and sit there and not talk
43	Margaret	ohh ho yeah

Text 4.3.8 is framed by peer and gendered student stances towards the role of instructing solicitor. Students move between institutional frames of university study and frames based on gendered casual conversation within a friendship group. There is a conflict between egalitarian peer-group discourse norms which militate against a display of eagerness, and legal norms which promote competitive public performance. This basic dispute is further overlaid with a gendered conflict between a young man and a young woman.

These alternative framings represent not only a source of instability and shifting positioning, but also a discursive resource that can be exploited in a strategic way to further students' own ends and to find a position within the group. The manipulation of framing in Text 4.3.8 provides a good example of the way in which positioning is a resource through which action is accomplished rather than just a constraint (Hall, Sarangi & Slembrouck 1999; Wetherell 1998).

At turn 4.3.8.1 Andrew raises the issue of who will be instructing solicitor. Andrew's move triggers a contest conducted in terms of the construction of wants and desires: the word *want* is repeated six times between turns 4.3.8.3 and 29. There is a significant contrast between the stances of Andrew and Margaret. Margaret openly acknowledges her wish to become instructing solicitor, while Andrew never openly bids for the role. Margaret stakes an immediate claim: *I wanna do this* (4.3.8.3). Margaret's role construction is realised grammatically by modal auxiliaries around the verbs 'do' or 'be': *want to, have to* or *got to* at turns 4.3.8.3, 6, 17, 19, 20, 29, 31, 33, 36, 41 that construct the role as something desirable.

Margaret's claim frames the situation as educational. She occupies the position of the good student by volunteering to do an extra piece of work. And, further than this, in the change in her voice quality at turn 4.3.8.3 there is also an element of self-conscious assertion, of displaying to the other students a determination to claim the role.

But a key issue for Andrew's presentation of self is the way desire is acknowledged and negotiated. Margaret's frank acknowledgment is not available to Andrew. As a male student in a peer setting he cannot be seen to be too keen to take on extra roles and responsibilities. So he claims that the matter is one of indifference to him (4.3.8.5).

But Margaret's stance is unsettling not only to Andrew. At 4.3.8.6 Marilyn's response is to propose a role swap, offering Margaret her own more important role as junior counsel. Marilyn's own self-definition, which is that of a reluctant volunteer for an unpleasant task (see Texts 4.3.9 and 4.3.10 below), is thrown into doubt by Margaret's overt bid for the role. But the group perceives Marilyn to be more suited to the role than Margaret, and constructs Marilyn as a 'good reader', a formulation designed to keep Marilyn in the job but save Margaret's face.

At turn 4.3.8.17 Andrew again raises the issue of who will be instructing solicitor, asking Margaret to reaffirm her claim and offering her a way to back down. Margaret responds by inviting Andrew to put up a counter bid to hers, to come clean about the interest he is showing rather than working indirectly (4.3.8.20), a point made by the strong contrastive emphasis on *you*. His reply *What's the point* (4.3.8.21, 26) is not directed to Margaret but is a gendered commentary on the impossibility of disputing with her. But Andrew's comment is also an expression of helplessness, of his lack of the discursive resources to find an effective way of countering Margaret's bid.

Having won the day, Margaret laughs and says at 4.3.8.29, interrupting Andrew, *You really don't wanna be*. She is reaffirming the terms in which the negotiation was conducted, that of the construction of desire, but at the same time mocking them. The modal marker *really* is used ironically, to laugh at

Andrew's refusal to acknowledge that he wants the role. At the same time Margaret quotes the powerful use of *really* to construct other people's wants and desires: (*Do you really want ...?*). Margaret uses the power won through her victory to enforce a consensus that the group all along wanted her to be instructing solicitor. *If you want me to* then reinforces the view that Andrew 'really wants' Margaret to do the job. Her victory is acknowledged by Peter at 4.3.8.30 in his role as Andrew's helper: *Yeah Ok Cool.*

At 4.3.8.36 there is a marked change of key (Goffman 1981) as Margaret reverts from playfulness to a more businesslike tone and seeks guidance and support from the other students about her role. This type of request for assistance is a significant area of male female miscommunication (Tannen 1990). Men interpret a request for help as an admission of inferiority or incompetence, while women interpret it as a means of promoting group solidarity. At 4.3.8.39 Andrew uses Margaret's request for help as an opportunity for a put down. Andrew and Peter emphasise how hard it is for Margaret to *sit still and not talk, and* use the diminutive *Mags*. This allows them to claim superiority by constructing Margaret as a talkative, bossy woman and to reassert the status quo she has disturbed.

Throughout Text 4.3.8 there is a great deal of laughter. This creates an ambiguity about whether the competition is serious or an enjoyable form of gendered play. The text can be read as a form of borderwork (Thorne 1993) in which students play with gender roles and boundaries for the entertainment of a peer audience. Margaret is assertive, but in an ambiguous way which can be read as playful. Overt conflict is minimised by manipulating keying or framing. This is reinforced by an element of parody, for example in the exaggerated intonations of the question and response at 4.3.8.36 and 37.

Text 4.3.8 shows students reconciling themselves with the competitive aspect of legal positions using humour and play. Reconciliation also occurs when students acknowledge their fears and are open about how threatening it is to occupy a legal position. Texts 4.3.9 and 4.3.10 below focus on student attempts

to manage the fear of performance and the fear of becoming a centre of attention.

Text 4.3.9 You only have to humiliate yourself

1	Beverley	what are you stressed about [laughs] (..) you worried [about
2	Marilyn	[you only have to humiliate yourself [laughter] humiliate yourself Beverley ok
3	Peter	we'll be watching
4	Marilyn	oh sure
5	Peter	we'll be watching
6	Marilyn	all right for you [laughter]

Students frequently show concern with their appearance and with the way legal performance takes them into the public gaze. In Text 4.3.8 the male gaze of Andrew and Peter denigrates the role of instructing solicitor as suitable to women because it involves getting dressed up (turn 4.3.8.10), but difficult for women because it involves sitting still and not talking (turn 4.3.8.8, 38, 42). The theme of appearance is taken up again in the second Barry meeting of September 8th by Peter in turns 4.3.9.3 and 4.3.9.5: *We'll be watching*. At turn 4.3.10.10 Peter then reiterates the theme of female inactivity first raised in the meeting of September 6th in Text 4.3.8: *you just got to sit there*. The theme of exposure to the public gaze modulates later in Text 4.3.10 to a concern about dress and appearance. Margaret initiates this at turn 4.3.10.12 with the comment *I've got to get dressed up* and this is followed by a discussion of dress conventions for women in court from 4.3.10.12 to 4.3.10.19.

Text 4.3.10 I've got to get dressed up

1	Marilyn	I'm going to have a problem speaking for 15 mins it's just so (...) I feel so nervous I hate being asked questions cause I'm scared of them ( ) [all talking at once]
2	Marilyn	thank you (.) thank you [laughing]
3	?	what was that
4	Marilyn	I'm not going to sleep tonight (...) it's going to be a real life judge a real life judge out in the real world
5	Beverley	it might not be
6	?	it might not be
7	?	it might be what
8	Beverley	it might just be a lawyer

9	?	well still
10	Margaret	it's still the same
	Peter	you just got to sit there
11	?	it's different having a lawyer
12	Margaret	I got to do the brief do bits and pieces of that yeah I know and I've got to look up books if they ask me it's all I've got to get dressed up
13	Marilyn	you just have to sit there and look good
14	Margaret	yeah its going to be ace
15	Rachel	You're going to have to get dressed and ( )
16	Margaret	you do no you do seriously you're not allowed in court unless you're wearing a skirt
17	Marilyn	oh you are so I've been in courts in jeans
18	Margaret	oh that was bad
19	Rachel	they hold it against you what you wear

Subjectivity is also constructed through negative affect in the students' stance toward their legal roles. Texts 4.3.9 and 4.3.10 demonstrate expressions of affect as a resource through which differential stances taken towards legal positioning. Moots are an ordeal for students, closely tied to their view of themselves as capable students. Students talk about their fear of answering questions in court and of the importance of knowing what they are talking about. The experience of standing up and subjecting their expertise to a public scrutiny by an adversary and by a 'judge' is a threatening one. These feelings of inadequacy are primarily expressed by Marilyn in Texts 4.3.9 and 4.3.10: she is *humiliated, nervous, scared, has a problem speaking, hates being asked questions, is not going to sleep.* In this she is supported by Beverley who refers to her as stressed and worried. Beverley, on the other hand, who has a more demanding role, expresses no fears.

Turn 4.3.9.2 *you only have to humiliate yourself* encapsulates a number of the issues examined the transcripts from the student meetings. Humiliation captures both the sense of negative affect and the idea of exposure to the gaze of others. The grammatically reflexive nature of the sentence captures the idea that the humiliation of being a law student is not something that is done to you but something you do to yourself.

Moot court

The final stage of this case study is an examination of a transcript of the Beverley's submission to the moot court. The moot is the culmination of Barry firm's professional legal skills course for the year. As previously mentioned, the moot proceedings concern a sculptor (Susan) whose sculpture (Close Encounters of the Worst Kind) had collapsed after being suspended from the ceiling of a lobby of a new building, thus delaying the opening of the building and causing loss to all involved.

In this discussion I consider Beverley's submission in relation to two of the questions at issue. The first is whether the fall was the fault of the sculptor (the defendant), who made the work, or the plaintiff (the Victorian Development Corporation or VDC) who attached cables to and suspended the sculpture. The second issue at stake in the moot is, if the defendant Susan Gratemaster is found to be in breach of her contract in supplying the sculpture, how are damages to be calculated. This calculation raises issues under the *Goods Act 1958* (Vic) about how the supply of the sculpture is to be classified. Key questions are: is the sculpture a good or a service, and, if it is agreed that the sculpture is a good, is it 'ordinarily acquired for personal, domestic or household use or consumption'?

This moot avoids the widespread criticism in the literature (Martineau 1981) that student moots focus almost exclusively on appellate proceedings. There is some attempt to deal with factual and evidentiary issues as well as legal issues, although there are inevitable oversimplifications, both procedurally and in the way evidence is presented.

Both the interpreter and the practitioner positions identified at the start of the chapter are evident in the moot. Beverley presents legal arguments based on her analysis of the facts of the case. But the practitioner role is also in evidence as Beverley focuses on procedural matters, on keeping her arguments relevant to matters in dispute, on countering the arguments of adversaries, and on attempting to anticipate the responses and rulings of the 'judge'. Because the

moot is a performance, Beverley's positioning is not only enacted linguistically but through the semiotics of gaze, posture, dress and gesture.

The moot court is a powerful means for students to assert their emerging professional stance. Student positions are established through action and interaction, or in Wenger's (1998) terms, participatively. The moot court is a 'front' or public activity in which students are on display in their professional role (Goffman 1990). In this respect it contrasts with the private, or 'back' activities of firm meetings examined in the last section. A major challenge for students is to be seen to occupy the role of counsel adequately without major breakdowns in the maintenance of 'face'. This concern is evident in the talk about humiliation at the end of the last section.

Beverley's moot presentation differs from other texts examined in this chapter in its blend of written and spoken language and of dialogue and monologue. Presentations are normally read aloud by students from a prepared script. However the 'judge' may interrupt at any time for a variety of reasons. Often a response to these interruptions requires the student to extemporise, and these extemporisations have linguistic characteristics quite different from the prepared scripts.

In discussing the moot I focus on two main issues: the way Beverley presents the self as being able to argue a case against an opponent, and the subject forming and pedagogical qualities of the interaction between student and 'judge'.

It may help first to set the scene. The moot took place in a real courtroom in the local modern court complex. Senior and junior counsel sat at tables at the front of the courtroom facing the judge, while the instructing solicitor sat on the other side of the table facing counsel. All six students participating in this moot were female. The lecturer in charge acted in role as clerk of court. The 'judge' was a practicing solicitor who entered the law in a mid-career change after previously being a school teacher. I shall call him 'Adam'. He sat at a raised bench which placed him well above the head level of the counsel who faced

him, even when they were standing. All the students were wearing dark suits. All wore light coloured blouses apart from Marilyn who had a black top.

The moot began with an interaction between the students and the lecturer acting in role as clerk, ensuring that the documentation including statements of claim, defence and counterclaim (pleadings), and exhibits of evidence, had been correctly submitted. Counsel for the plaintiff spoke first and Beverley and Marilyn, appearing for the defendant, spoke second. Adam left the court for about half an hour between the plaintiff's and the defendant's submissions in order to meet a professional obligation.

As the analysis of the Barry firm meeting showed, Beverley has a considerable investment in occupying a legal role. She is not just 'getting by' (Bazerman 1996) but is rewarded by a commitment to and engagement in the law (Wenger 1998). This commitment could be seen in her bodily *hexis* (Bourdieu 1977), which was characterised by considerable discipline. She remained stationary throughout the whole presentation. Her hands were in front of her on the table or holding onto her papers. Her gaze alternated between the pages she was reading and Adam. She only made three hand gestures during the whole of the submission. (These are discussed further below). This bodily discipline contrasted markedly with counsel on the plaintiff's side who moved their bodies and hands constantly in a noticeably gendered way. These observations suggest that the decontextualisation of legal subjectivities occurs not only linguistically but also in relation to other semiotics.

Beverley's submission (presented in full as Appendix 4) is analysed in two parts. As mentioned above, one deals with primarily with facts: why did the sculpture fall down? The other primarily deals with legal issues: is a contract to produce a sculpture a contract to supply a good or a service? I will examine the legal part first, even thought it came chronologically later than the presentation about the facts, because it is the more successful part of the submission.

Three extracts from the submission transcript excerpted as Texts 4.4.1 to 4.4.3 show Beverley in the position of legal interpreter raising the law and then applying it to the facts:

Text 4.4.1 The Goods Act does not apply (1)

Bold sections of the transcript are read aloud from a prepared script.

1	Adam	why it do you think it doesn't apply
2	Beverley	ok (.....) we will show **that the goods supplied by our client do not fall within the description of sale of goods under sections 3 subsection 1 and 6 subsection 1 of the Goods Act ah** we need only look **we need look no further than the order form provided by the plaintiff to our client which is Exhibit A before the Court to see that it was clearly an order for goods and services as the contract in this case was in substance for the exercise of skill and it was only incidental to that skill that some materials were passed from the defendant to the plaintiff the contract is not one for the sale of goods but for work labour and materials supplied**

Text 4.4.2 The Goods Act does not apply (2)

Bold sections of the transcript are read aloud from a prepared script.

1	Adam	why doesn't it fit into Part IV
2	Beverley	**because subsection ah 85 ah section 85 subsection 1a places a price limit on goods covered by this part at $20,000** and ah **section 85, 1b** ah says that those goods can exceed this amount when they **are ordinarily acquired for personal domestic or household use or consumption**
3	Adam	and were these done for that purpose
4	Beverley	we don't believe they were your Honour
5	Adam	why not
6	Beverley	because according to certain ah although **although sculptures may be usually considered to be purchased** ah for the **for the household** or may be purchased for the household if you **take into account the weight size and price paid for this sculpture it is not one of a kind ordinarily acquired for the household**
7	Adam	hold on so you're narrowing the proposition that the plaintiff put down to say that sculptures of this (..) quality are not normally acquired for personal domestic use yours is a narrower proposition than the plaintiff's that would say generally sculptures are normally acquired for personal domestic use you say hang on ones in this value couldn't possibly because people couldn't afford to put in the front room would you say

Texts 4.4.1-4.4.3 show a number of linguistic traces of the interpreter position first seen in the students' examination answers. Conditionals are used to indicate legal reasoning. Antecedent clauses of the conditionals are marked by *as* in text 4.4.1, *considering that* in 4.4.3, and *because* and *if* in 4.4.2, for example *if you take into account the weight size and price paid for this sculpture*. Consequent clauses apply legal categories, for example, a judgment

about whether or not the sculpture *is not one of a kind ordinarily acquired for the household.*

Text 4.4.3 Is supply of a sculpture like the supply of carpet?

Bold sections of the transcript are read aloud from a prepared script.

1	Beverley	yes your honour the plaintiffs did make reference to the case of Carpet Call Pty Ltd and Chan...
2	Adam	they did yes
3	Beverley	**yes in this case it was held that carpet for a nightclub was a sale of goods ordinarily acquired for personal household or domestic use**
4	Adam	yes
5	Beverley	**however considering that almost every household has carpet and carpet in substance is mainly the same whether purchased for the house or elsewhere looking at the situation in question** as your Honour has earlier stated **a unique piece of art work is quite distinct from a roll of carpet such as this one**
6	Adam	good point
7	Beverley	sorry
8	Adam	that's a good point

Beverley also demonstrates control of the language of professional vision (Murphy 1994). The different interpretations by the plaintiff and defendant of the status of the sculpture as a good or a service tend to foreground the judgment of those making the interpretation. One of the challenges for Beverley is to manage the differences in a way that makes her view seem authoritative, not interested or arbitrary. This is done in 4.4.1 and 4.4.3 by using the language of looking and seeing: *we need look no further... to see that, looking at the situation.* Using a visual metaphor for the process of interpretation tends to make it seem obvious or transparent: *it was clearly an order.* A similar focus on vision and judgment is conveyed by words indicating mental processes: *consider, take into account.* These bring into play the thought processes used in arriving at a judgment. However the fact that they are passive, for example *be usually considered to be purchased*, non-finite, for example *considering that almost every household,* or use the generic *you,* tends to deemphasise the role of a subject and make the exercise of judgment seem a free-floating, shared process, rather than an individual accomplishment. This emphasis is supported by the use of words like *usually* and *ordinarily*

frequently used in law to conceal the role of individual judgment in making decisions about category membership.

Although Beverley's arguments in the moot (Texts 4.4.1-4.4.3) resemble the interpretive examination answers in their use of connectives, in their use of tense and theme, and in the deletion of subjectivity, there are also differences. Beverley is not only arguing for a particular application of the law to the facts, but against a different application previously put forward by the plaintiffs. This adversary role is realised linguistically in the use of negatives and adversatives: *was only incidental, is not for ... but for, although sculptures may, is not one of a kind, is quite distinct.*

Beverley's strategy of arguing 'in the alternative' also indicates the take up of a practitioner position. MIRAT sees interpretation as a recursive but linear process. In contrast, in legal proceedings it is often necessary to argue in a branching rather than a linear way. Students must anticipate rulings going against them and prepare an argument 'in the alternative' to minimise the damage in this event. This is evident in Text 4.4.4, where Beverley argues that it was not Susan Gratemaster's fault that the sculpture fell.

Text 4.4.4 Arguing in the alternative

Bold sections of the transcript are read aloud from a prepared script.

1	Beverley	**in addition I will show that neither part I nor part IV of the Goods Act 1958 Victoria are applicable in this action and the claims based on these parts are unfounded *in the alternative* I will show that *if* either part I or part IV of the Goods Act are found to be applicable the provisions contained therein are not effective to provide for a claim of damages in this action also *in the alternative* my learned junior will show in approximately ten minutes that *if* there was a breach of contract or if any sections of the Goods Act do apply to render our client liable for damages those damages are significantly less than those claimed by the plaintiff**	Hands holding edges of paper

As it seemed likely that Adam would rule against them on this argument, Beverley prepared, 'in the alternative' an argument that a sculpture is a service to minimise the damages that she would be required to pay. Anticipating that this argument might fail, she then produced a further argument, also in the

alternative, that this sculpture was 'not ordinarily acquired for personal, domestic or household use or consumption'. Anticipation of the need to present several mutually incompatible arguments depending on the judge's rulings is indicated by the use of *if* clauses in Text 4.4.4. The branching alternatives implied by these conditionals presuppose a different kind of relationship of the interpreter to the facts than the linear relationship of the MIRAT formula. This issue will be pursued further in the next chapter, but it can be seen that a student who arrives at a single interpretation of a set of facts – as in the answering of examination questions – has a different relation to those facts from a student who is prepared to put forward several mutually incompatible interpretations. This preparedness presupposes a dissociation of self and of belief from textual and reading practices (Mertz 1996). The professional has to be a person who can keep in mind and be concerned with a range of mutually contradictory possibilities.

The dialogue between Adam and Beverley in Texts 4.4.1-4.4.3 also exemplifies strategies used to shape the positioning of novice practitioners. Beverley's words are spoken with an 'evaluative accentuation' (Voloshinov 1973, p. 21), that is, they are spoken in the knowledge that they are being received and evaluated by Adam. For example, in Text 4.4.3 Beverley aligns her interpretation Adam's previously expressed opinion: *as your Honour has earlier stated.*

Adam's power is also evident in his own use of language, which has many of the characteristics of language used by those in institutional authority. He takes control of the presentation of the submission away from Beverley. He cuts her short and directs her to new topics once he has grasped the point of the current argument. This can be seen in the fact that approximately a third of the prepared submission is not used in the moot. It can also be seen from the fact that Adam interrupts Beverley five times during her whole submission (Appendix 4) (Fairclough 1992c).

Adam also uses language which presupposes Beverley's agreement. He is able to construct Beverley's subjectivity by attributing opinions to her. Tag

questions are the simplest of these devices, and Adam uses six tag questions in his exchange with Beverley transcribed in Appendix4 (Cameron 1992). Adam also uses three negative yes no questions which like tag questions presuppose agreement on the part of the listener, for example: *doesn't the evidence say all those things were intact.*

As noted in Chapter 3, another device widely used to construct another's subjectivity is 'formulation' (Fairclough 1992c). Formulation occurs when a more powerful speaker summarises the contribution of a less powerful in terms which are more institutionally or socially preferred. It is a device widely reported as being used in educational and professional contexts where learners are acquiring new discourses and new identities (Roberts & Sarangi 1999). An example of formulation is provided by Peter's response to Beverley's argument at turn 4.4.2.6. Beverley's argument is problematic because it has an appearance of self-contradiction. Turn 4.4.2.6 begins by conceding that *sculptures may usually be considered to be purchased for the household*, but this is exactly the point that Beverley is supposed to be arguing against. She belatedly realises that there is a problem with her argument and initiates an unscripted repair, *may be purchased for the household.* However this repair is not completely satisfactory. At turn 4.4.2.7 Adam helps Beverley out by reformulating her argument in terms that make more sense: *You say, hang on, ones in this value couldn't possibly because people couldn't afford to put in the front room, would you say.* The repetition of *you* and *you say* makes it clear that an opinion is attributed to Beverley.

The reformulation does not put the point in technical legal terms but uses idiomatic language to highlight the differences between the plaintiff and the defendant. The contrast is made by the repetition of *narrow, normally acquired for personal domestic use*, and the use of words like *hang on, front room* to make the argument more concrete. This more concrete use of language has the role of clarifying the argument, but there is also a sense of in which the contrast between the student's earnestness and Adam's breezy style is modelling a different view of the professional position of the lawyer. Adam is a practising lawyer who is inserting himself into an academic context, and is finding a way

to enact that difference discursively. He models for Beverley a practitioner position marked by common sense, seizing on the salient points and brushing aside irrelevance, effortlessly mastering detail, being able to argue on his feet and not relying on the written word. His positioning is based on the ease and fluency of his mastery of the evidence, and illustrates practice-based accounts of legal subjectivity reviewed in Chapter 3 (Fish 1989; Murphy 1994). For most students this professional world is remote from their experience of academic education.

This point about Adam as a model of a practitioner subject position can be reinforced by attention to the other part of Beverley's submission, the part that deals with the factual question of why the sculpture fell (Text 4.4.5). Here Beverley is less successful, or at least less well received.

Text 4.4.5 Why did the thing fall down?

(underlined sections indicate the point where hand gestures are made)

1	Beverley	if it pleases the Court the defence will conclusively show that our client did not breach a contract with the plaintiff and no provisions of the Goods Act apply and thus damages are not recoverable further [we will demon	Hands holding edges of paper
2	Adam	[why did the thing fall down	
3	Beverley	sorry	
4	Adam	why did the thing fall down	
5	Beverley	your Honour it's no-one's been asc been able to ascertain exactly the cause of the falling down there have been two expert reports submitted ah one report from F Turnbull & Associates Structural Engineers employed by the plaintiff ah and they they acknowledge that no-one can say for certain what caused the sculpture to fall to fall however they did conclude that in all probability the accident could not have resulted from a lack in structural integrity and they went further to say that the plaintiff's engineer's job in organising and directing suspension would have included checking and providing specifications for all suspension points	

6	Adam	but I mean as far as I understand the evidence the the guys and the hooks were still in place after the ah unfortunate (.) demise of Close Encounters which seems to suggest doesn't it that uh (…) they'd done their part and you say you say there's no evidence of structural failure but it's either that's not it's either got to be doesn't it the guys and ropes that held it up or it's got to be some weakness in the thing itself it's got it can't be anything else can it apart from an act of God how could in that scenario aren't you fixed with that it must have been structurally (…) [failing	Left hand point at B. in open handed gesture
7	Beverley	[your honour on I mean I don't have experience in engineering=	
8	Adam	=no but your engineers do=	
9	Beverley	=yes that's right and they have not been able to come to a conclusion the engineers employed for the plaintiffs were also unable to come to a conclusion they concluded that it was most probably due to structural integrity but acknowledged that that they couldn't really tell as with our engineers we believe that our engineers should be given more weight because they specialise in structural engineering [and they weren't able to (....)	Lifts right hand. Straightens wrist to turn over palm
10	Adam	[isn't your report sorry isn't your report incomplete or wasn't there some problem with your report	
11	Beverley	the report was not necessarily incomplete it was not completed by the person who initially set out on it due to a heart attack but it was still an expert who reported on it	
12	Adam	um (..) all right (…) the problem for you as far as I see it is (…) it's a bit like I don't think you've done tort yet	
13	Beverley	no your honour	
14	Adam	*res ipsa loquitur* if something goes dreadfully wrong and you can't explain the part there's only one possible explanation of what went wrong but you haven't got the evidence then that's sufficient to get you over the line in relation to tort it seems to me that if the guys are intact the thing is on the floor smashed into thousands of pieces then the person who created that (…) sculpture is fixed there is no way they're they're impaled on the evidence the facts the thing's lying smashed on the floor and the guys are still intact	
15	Beverley	your Honour it could possibly be due to where suspension cables were hooked on the sculpture perhaps that was the ah the plaintiff's engineers were directed to organise that aspect of it and perhaps they weren't hooked in the right place	Lifts both hands. Moves each hand at wrist alternately up and down twice.

16	Adam	but doesn't the evidence say that all those things were intact the guys the pulleys the whole thing was intact after it fell	
17	Beverley	they were intact but they weren't necessarily connected where they should have been connected to enable the sculpture to remaining hanging	Lifts right hand and moves it laterally.
18	Adam	um all right (..) I'm not completely convinced but let's hear about are you going to talk about the Goods Act or is your learned junior going to talk about the Goods Act	

Beverley's problem is that she sees the work of engaging with the expert evidence as a kind of textual practice similar to the practice of interpreting and applying legal doctrine. In textual practice one text refers to other texts and they in turn refer to yet more texts. Her language when referring to the expert testimony is heavily influenced by the grammar of discourse representation (Fairclough 1992c). She paraphrases, summarises and quotes from the expert testimony rather than talking about the sculpture and why it fell. This use of paraphrase is evident in Table 4.7 which compares her submission with the original letter from the consulting engineers (see Appendix 1).

Table 4.7 Comparison of expert letter and Beverley's submission

Overlap of both texts is highlighted in **bold**

Expert letter from 'Turnbull and Associates	**Senior Counsel submission read aloud**
We are not lawyers, but it seems to us that **the accident could not** be said - **in all probability** - to **have resulted from a lack of structural integrity.** In the engineering profession a breakage of hanging points is usually called an engineering, design or handling failure. Structural integrity, in contrast, is usually taken to mean inner, corporal strength.	acknowledge that no-one can say for certain what caused the sculpture to fall. However they did conclude that **in all probability the accident could not have resulted from a lack of structural integrity**
We also think that if VDC's engineers were required to **'organise and direct' the suspension, this would have to include** responsibility for **checking and providing specifications for all suspension points.**	and they went further to say that the plaintiff's engineers job in **organising and directing suspension would have included checking and providing specifications for all suspension points.**

Table 4.7 shows that Beverley regards her task as an intertextual one – to provide a summary of the expert evidence. This means that she adopts and even increases the abstract and synoptic character of the engineers' report. But

the nature of the subject matter, which deals with the cause of specific events in time and space, resists this process of abstraction (Mertz 2000). This resistance can be seen in the clumsiness of the linguistic constructions. Verbs often cannot be completely turned into nouns, leading to a proliferation of participial constructions such as *organising and directing suspension, checking and providing specifications*. Nested possessives result from an attempt to retain reference to subjects or agents while making verbs non finite: *plaintiff's engineers'* (van Leeuwen 1996). Beverley's writing also suppresses the logical connections (ifs and buts) between sentences and clauses in an attempt to make her language seem authoritative and to hide the process by which conclusions are arrived at.

Beverley is confusing the kind of practices required in making legal arguments with those required to argue about factual evidence. She lacks appropriate resources to talk about things as opposed to words. For Adam, on the other hand, dealing with the expert evidence is a representational practice. In representational practice texts engage not with other texts but with the material world. Adam treats the written expert evidence as if it were transparent, and talks about events as if they were unmediated by textual forms. The very different focus of Adam and Beverley in dealing with the evidence is illustrated by an analysis of the topical themes in Text 4.4.5 presented as Table 4.8. Beverley thematises the engineers and their report many times; her reference to the events is in more abstracted terms such as *the accident, suspension of cables*. On the other hand Adam thematises the sculpture and the hooks and guys many times, but thematises the evidence and the engineers and their report only once each. He focuses on events, but deemphasises the mediated and textual way in which the evidence is presented, while Beverley does the reverse.

Table 4.8 Topical themes in Text 4.4.5

Beverley: Written	Beverley: spoken	Adam
no-one	no-one	I
	they	I
they	it [unclear reference: to the fact that the guys are intact]	the guys and the hooks
		It [the fact that the guys and
the accident	I	hooks were in place]
	they	they
they	suspension of the cables	you
	The engineers employed for	the guys and ropes that held it
the plaintiff's engineer's job	the plaintiffs	up
in organising and directing	they	In that scenario
suspension	engineers	Structural engineers
	they	you
	We	The problem
	that [unclear reference]	your report
	The report	I
	it	you
	the plaintiff's engineers	you
	they	that [the fact that there's only
	they	one possible explanation]
	they	the guys
	they	the thing
		the person who created that sculpture
		you
		the thing
		the evidence
		all those things
		The guys, the pulleys, the whole thing

In attempting to change Beverley's practices from textual to representational Adam adopts the strategy of putting up his own reading of the facts. This provides a model for Beverley of how to do the work of interpreting factual and expert evidence and shows what is wrong with her current practice. Rather than just reading from her prepared submission Beverley has to imitate Adam's model by arguing from the evidence to refute him. The way Adam works to realign Beverley's vision with his own is evident at turns 4.4.5.14-17. He puts Beverley under pressure to begin to treat the evidence in a representational fashion. The effect of this pressure shows up in the fact that Beverley's last four themes in column two of Table 4.8 are *they*. In response to Adam's questioning she is referring to the guys and pulleys suspending the sculpture. This contrasts with the earlier entries in column two which almost all deal with

the engineers and their report. Pressure on Beverley to adopt a representational semiotic can also be seen in the fact that only in this section of her submission does she make hand gestures (see column 4 at 4.4.5.15, 17). The hand gestures reflect the need for a more visual semiotic to do the job of representation, but they also reflect the inadequacy of Beverley's control of the factual detail of the consultant's report. She is unable when challenged to summarise the evidence that supports the case that suspension of the sculpture was inadequately organised. She speaks more softly and hesitantly, and her front is in danger of breaking down.

Adam's other thematisation focus in Table 4.8 is *I* and *You*. As the discussion above of Text 4.4.2 showed, the use of *you* is a device through which Adam authoritatively constructs for counsel a position as a lawyer through expressions such as *if you can't explain (4.4.5.35) if you haven't got the evidence* (4.4.5.36-37) positioning her, and representing her, as an agent within the courtroom interaction. The use of *you* is supplemented by the use of questions presupposing the answer yes, for example *isn't your report incomplete* at 4.4.5.10 or *doesn't the evidence say* at 4.4.5.16. These questions work to coopt Beverley to his point of view, to presuppose her agreement. The use of *you* in these questions, as well as more explicitly in the sentence *I don't think you've done tort*, demonstrate a blurring between Adam's judicial role and his educational role. He is assisting a beginning student but at the same time is able to remain in role.

The relationship of Adam and Beverley to each other and to the facts is also evident in the stance both take to events which are represented. Their respective stances are shown in Table 4.9 which compares Beverley's and Adam's uses of modality and propositional attitudes in Text 4.4.5. As in indicated in Chapter 2, propositional attitudes are verbs taking noun clauses as object that express attitudes and opinions.

Table 4.9 Modality and propositional attitudes in Text 4.4.5

Beverley: Written	Beverley: spoken	Adam
	no one had been able to ascertain exactly	as far as I understand the evidence
they acknowledge that no one can say for certain	not been able to come to a conclusion	It would seem to suggest, doesn't it
	unable to come to a conclusion	you say (there's no evidence)
they did conclude that in all probability (the accident) could not have (resulted)	probably due to	it's either got to be, doesn't it
	acknowledged that they couldn't really tell	it's got to be some weakness
would have included	we believe ... should be given more weight	It can't be anything else
	not necessarily incomplete	it must have been (structural)
	it could possibly be due to	I don't think you've done tort
	perhaps	you can't explain
	perhaps	only one possible explanation
	weren't necessarily connected to where they should have been	It seems to me that if the guys
		But doesn't the evidence say

Adam's modality is strongly polarised in Table 4.9. Propositions are either right or wrong: *got to be, can't be anything else, must have been, only one possible.* Beverley's is more qualified: *perhaps, in all probability, not been able, possibly, not necessarily*. This language constructs Adam as decisive, as putting forward conclusive arguments, whereas Beverley's language depicts her as tentative and indecisive. Like the students who could not resist modalising their examination answers (Table 4.2), Beverley's modalised language reflects not the role of counsel she is trying to occupy, but her positioning as a beginning student. It is very hard for students to talk in an authoritative way when they have limited knowledge and their performance is being evaluated by experts.

The number of verbs in columns 1 and 2 of Table 4.9 dealing with other people's attitudes and opinions shows that Beverley spends a lot of time representing what other people said. She talks about the experts *concluding* or *acknowledging* or *ascertaining*. On the other hand Adam talks about what *the evidence* suggests. His representation of the evidence is more abstracted from the textual detail, and he only presents his own opinions rather than

representing the views of others: *It seems to me, as far as I understand the evidence*. He makes the evidence into a thing and there is less attention to the detail of who said what about the topic. This avoidance of opinion makes him appear to addresses the issues in a more direct way.

The emphasis on the concrete is reinforced by Adam's metaphors which make facts into things: *impaled on the facts*. The use of metaphor reinforces Adam's concrete, practical persona and echoes the advice given to students in their workbook:

> Indeed, in a majority of cases, the real battle is mastering the facts, and when the facts are established, very often the case will solve itself (Young 1986, p.27)

Summary

This chapter has tested a model of professional legal subject formation against a range of texts drawn from a first-year professional legal skills program. The model of a participant framework made up of an interpreter position and a practitioner position was demonstrated to have applicability to the analysis of the texts under analysis. This construct was further confirmed by being shown to be relevant to the analysis of texts of different modes and different genres.

Conflict between the two positions in the participant framework was shown to be a source of difficulty for students. Students have trouble moving from a synoptic interpreter perspective to a dynamic practitioner perspective. In writing or speaking from a practitioner perspective, students tend inappropriately to carry over interpreter elements into their practitioner texts. This is evident both in the letter of advice and in the moot submission.

Student meetings were analysed as a reflexive interaction between individual membership of Barry firm as a situated community of practice and students' joint positioning through collective authorship of the brief to counsel. These interactions are characterised in participative terms as a rehearsal of the role of the interpreter and legal analyst, and in reificative terms as a set of plans for the group's future actions in the role of practitioner. Analysis also showed that

positions are constructed through students' evaluations of their past and future actions. Analysis of attitudes and affects showed how students construct stances towards their legal positioning. Students manipulate these stances strategically as frames or keys to help them come to terms (or to fail to come to terms) with legal positions.

Analysis of Beverley's interactions with Adam in the moot court showed his use of powerful pedagogical strategies to form her positioning as a practitioner. These include devices which attribute certain ways of thinking to Beverley, such as tag questions and formulations, and they include Adam's modelling of a practitioner position in his interpretation of the factual evidence.

CHAPTER FIVE

Final-year case study: taxation law

Chapter 5 presents a second case study as a contrast and supplement to the case study in Chapter 4. This second study resembles the first in that it examines student participation in, and preparation for, a moot court as part of a practical legal skills program. And as in the first case study the practical legal skills program is integrated into, and forms part of the assessment for, the study of a substantive area of law. The contrast between the two case studies lies, first, in the area of law it relates to, taxation rather than contract, and, second in the fact that the skills program examined in this case study is at level five and is normally taken by students in their final year. Another contrast lies in the fact that this case study is concerned with a group of only two students, William and Emily. In the final year all students have to appear as senior or junior counsel in the moot. There is not the same organisation of students into firms for the moot preparation that occurred in the first-year program.

This second case study reinforces the model for the discursive construction of student legal subjectivity that emerged from the previous chapter by demonstrating how it applies in a different area of the law, with a different group of students, and with different texts. Examination of these texts also leads the model in a number of new directions.

One of the themes of the last chapter was the conflict between the interpreter and the practitioner position within the participant framework. The focus on correct interpretation by students following the MIRAT formula conflicts with a practitioner position in which the aim is not to find the right interpretation but

to find the one that is strategically suited to a particular client and a particular jurisdiction.

Mertz (1996; 2000) sees this conflict as a defining feature of legal thought. Interpretations of cases vary depending on how similarities are perceived between the facts of a case and relevant precedent. These perceptions of similarity in turn vary as cases are reinterpreted and recontextualised strategically according to plaintiff and defendant interests or within the hierarchy of appellate courts (Mertz 1996; 2000). This pragmatic dependence of interpretive positioning on context means that students have to give up the 'textualist' ideology that text has its own fixed, transparent meaning. Rather they have to adopt a view of meaning as relative and contestable (Mertz 1996).

By focusing on the contextualisation of interpretation within the pragmatics of a particular situation, Mertz's (1996; 2000) analysis resembles Schön's (1983) account of professional practice discussed in Chapter 3. However there are also differences between Mertz and Schön relating to the level of sophistication of students' practices. Mertz's study, and Chapter 4 above, are concerned with how first-year students deal with the task of classifying events using legally salient categories. In Chapter 4, for example, an issue was whether the sale of a sculpture should be counted as provision of a good or a service. This process of classification caused problems for first-year students because they had to engage in a new kind of textual practice translating a contextualised, dynamic account of an event or a set of facts into a decontextualised, synoptic account.

Studies reviewed in Chapter 3 on the teaching of professional practice and professional vision at more advanced levels (Goodwin 1994; Schön 1983) suggest that the professional subject is positioned within a wider array of specialised practices than those engaged in by the first-year students.

In this chapter I demonstrate that tax law forms a specialised professional practice with many of the characteristics outlined by Schön (1983) and C. Goodwin (1994). Through analysis of extracts from the key written texts used by the students to prepare their submission, a case and an extract from the *Income Tax Assessment Act 1936* (Cth), I show that the law on tax avoidance

constitutes a specialised professional representational practice through which new objects of knowledge emerge from the interaction of a coding scheme provided by the Tax Act and a domain of scrutiny provided by cases in tax law. I then ask what kinds of problems these specialised practices are likely to cause for the students.

The following section examines excerpts from the transcript of a meeting between the two students in which they prepare for the moot. Examination of these transcripts shows the problems students have in taking up the specialised practices and positions of the Tax Act, as well as the strategies they use to come to terms with these problems.

A final section is based on a transcript of the students' submissions in the moot to a simulated Administrative Affairs Tribunal (AAT). It examines how students construct a subject position to present to the moot, as well as the way in which their subjectivities are formed through interaction in the moot.

Reading a case in tax avoidance

This section does something not attempted in Chapter 4. It examines one of the appellate cases read by students in their casebook, the Full High Court judgment in the case of *FCT v Peabody* (1994) 28 ATR 344 (as excerpted by Kobetsky & Dirkis 1997, pp. 525-526) (Appendix 5). Peabody is chosen, first because it is one of the key cases relevant to Part IVA of the *Income Tax Assessment Act 1936* (Cth) referred to by the students in their moot preparation, and second because it illustrates features of the subject positions constructed by the courts in the writing of judgments. The judgment of the Full High Court in Peabody is argued to demonstrate specialised representational practices of the kind discussed by Schön (1983) and C. Goodwin (1994).

Without wishing to state all the complex facts of the Peabody case, part of the issue was the purchase of shares in the Pozzolamic Group from a Mr Kleinschmidt by a shelf company, Loftway Holdings, and their subsequent conversion to non-voting preference shares or Z Class shares. The question to

be decided was, whether, if the scheme had been cancelled, it would be reasonable to expect that the trustee company of the Peabody Family Trust, TEP Holdings, would have acquired the Kleinschmidt shares rather than Loftway Holdings, and hence to expect that taxable income would have flowed to Mrs Peabody as a beneficiary of the Trust in the year ended 30 June 1986. The Full High Court in its judgment in Peabody establishes that, even if the scheme had not been entered into, there is no necessary reason to think that the profits from the sale of shares would have formed part of Mrs Peabody's income, in other words that it is quite possible that profits from the sale of shares would not have formed part of Mrs Peabody's income.

In the last chapter, application of the law to the facts in student examination answers was shown to be a relatively simple process in which specifics from the facts of a case were inserted into variable slots offered by the general statement of a rule. Understandably, judgments of the Full High Court present more complex forms of legal reasoning, especially in the area of taxation. In order to establish that a person has entered into a scheme to reduce income tax, the Tax Commissioner has to show that a taxpayer obtained a tax benefit in connection with the scheme. To show a tax benefit he has to demonstrate 'an amount not being included in the assessable income of the taxpayer of a year of income where that amount would have been included, or might reasonably have been expected to have been included, in the assessable income of the taxpayer of that year of income if the scheme had not been entered into or carried out' (*Income Tax Assessment Act 1936* (Cth) s177C(1)(a)). This means that he has to establish a counterfactual conditional using hypothetical reasoning. He has to show that if the scheme had not been entered into, it would be reasonable to expect that tax would have been paid by a particular taxpayer in a particular year of income.

Hypotheticals takes legal reasoning out of the realm of the syllogism and into the realm of modal logic (Hughes & Cresswell 1968). In order to demonstrate a counterfactual conditional one must establish a relation of strict or necessary entailment between the antecedent, that the scheme was not entered into, and the consequent, that the taxpayer received a tax benefit. This counterfactual

proved to be very difficult for the Tax Commissioner to demonstrate in Peabody. On the other hand, in order to refute the counterfactual conditional, the defence needed only establish that it would have been possible both for the scheme not to have been entered into and for the relevant tax benefit not to have been included in the taxpayer's taxable income in the year in question[3].

The students in this case study are acting for the Tax Commissioner in the simulated case, and are well aware of the problems that this feature of the Act creates for their client. A great deal of the transcript of their meeting (Appendix 8) is devoted to ingenious attempts to circumvent it.

But the counterfactual, 'hypothetical' nature of the Tax Act also requires the students to argue from subject positions they have difficulty accommodating. I argue that Part IVA, the Part of the Tax Act that deals with tax avoidance, is a specialised coding practice which, when applied to cases as a 'domain of scrutiny', rearticulates events so that new 'objects of knowledge' emerge (Goodwin C. 1994, p. 606). For example a series of transactions between trusts and companies is suddenly transformed into a scheme to avoid tax when rearticulated as a new kind of object using the technical vocabulary of tax law. Further, this technical representation of the affairs of a taxpayer makes it possible to simulate counterfactually how much net additional tax the taxpayer would have had to pay (the tax benefit) if the scheme had not been entered into.

These specialised coding practices position students who are trying to learn to use them in demanding and contradictory ways. The rupture between these specialist practices and everyday commonsense views of the world is far greater than for first-year students. Participation in these practices reflexively creates for lawyers who use the Tax Act a position not epistemically defined as that of an interpreter but ontologically defined as that of a creator (Grbic 1997a; Williams 1995). Lawyers' coding practices create objects where

---

[3]Formally the reasoning can be expressed in the following proposition of modal logic
$(\sim L(\sim p \rightarrow q)) \approx (\sim L(p \vee q)) \approx M\sim (p \& q) \approx M (\sim p \& \sim q)$

previously none existed and partition the world in new ways. That which was known and familiar becomes unknown and unfamiliar. That which was whole is partitioned, and previously unrelated phenomena suddenly are unified. The powerful positioning associated with these coding practices can be vertiginous for students who would prefer to retain a view of the world as stable and pregiven.

I use the representation of personhood to provide an example of the power of the Tax Act to partition the world in novel ways. This focus is chosen bearing in mind Smith's (1999) dictum, cited in Chapter 3, that the social scientist, and hence presumably the lawyer, in representing subjects also represents her own subjectivity.

The Tax Act reconstructs what would normally be counted as the attributes of personhood in order to deal with the problem that counterfactuals require the reasoner to make judgments about what people would have done if the world had been different from the way it in fact is. Given the unpredictable course of events, these judgments are fraught with uncertainty. The actions of individuals in particular situations are unpredictable. The Tax Act avoids this problem by deleting the individuality of subjects in order to make reasoning about their actions easier.

One strategy it uses to achieve this reconstruction is to redefine subjective notions in a non-subjective way. Part IVA of the *Income Tax Assessment Act 1936* (Cth) achieves this goal by defining the purpose of a person in entering a scheme in terms of a set of objective criteria: 'It is notable that the actual subjective purpose of any relevant person is not a matter to which regard may be had in drawing the conclusion' (*FCT v Peabody* 1993 25 ATR 32 at 41 per Hill J in Kobetsky & Dirkis 1997, p. 528). Further, Part IVA partitions the roles associated with tax avoidance, so that the person who obtains a tax benefit from a scheme is not necessarily the same as the person who had the purpose of obtaining the tax benefit. And of course, persons need not be humans or 'natural persons', but are just as likely to be companies or trusts (Williams 1995).

A further strategy is one that was examined in Chapter 3. In order to reason counterfactually about people's actions and motives judges and lawyers must reframe or reconstruct those actions and motives in terms that make legal sense. In Peabody the Full High Court does this by putting itself into the place of the Peabody interests, and projecting what it, the Court, would have done, if it, the Court, had been in the position of acting for Peabody. Peabody thus provides an example of Schlag's (1991, p. 1638) 'ruse of discourse' through which the legal subject projects its own self onto the other[4]. This ruse conceals the role of contextualised, embodied individuals in making decisions, and reconstructs the actual people in the Peabody case as 'figments of discourse' (Smith 1999, p. 61). The legal subject of enunciation or subject as performer, the Court, takes the place of the subject of statement or subject as character, the Peabody interests, and reasons and acts in place of those interests (Deleuze & Guattari 1987; Ivanic 1998). The Court manages to effect this substitution of itself for the Peabody interests through the studied use of ambiguity. An analysis of Texts 5.1.1–5.1.5 shows how this is managed.

Text 5.1.1 Counterfactual reasoning in Peabody (1)

> There were difficulties in the way of TEP Holdings itself financing the purchase of the Kleinschmidt shares, *regardless* of any subsequent devaluation. Even if it had been possible for that company to issue and pay dividends upon redeemable preference shares having *regard* to its status as a trustee, it is far from clear that it could have established any entitlement to a rebate in respect of the dividends paid on the Kleinschmidt shares acquired by it (*FCT v Peabody* (1994) 28 ATR 344 in Kobetsky & Dirkis1997, p. 526)

[4] Grbic (1997) in her interpretation of Williams (1995) makes a similar point about the concept of the 'natural person' in tax law. The 'natural person' is recognised as a reading effect through which 'the person of the reader recognises him or herself as the 'natural person' and understands the writer (Williams himself, reading himself) as the creator of this 'reading effect' (Grbic, 1997, p. 87).

Text 5.1.2 Counterfactual reasoning in Peabody (2)

> The purchase of the Kleinschmidt shares was necessary for the purposes of the float. The actual purchaser of those shares was Loftway and it is apparent that the Loftway, or some other company performing the same role, was required to be the purchaser in order to obtain the cheaper finance for the purchase, *regardless* of the subsequent devaluation of the shares (*FCT v Peabody* (1994) 28 ATR 344 in Kobetsky & Dirkis1997, p. 525).

Uses of *regard* and *regardless* in Texts 5.1.1 and 5.1.2 raise the question: whose regard? Is it the regard of TEP Holdings or the regard of the High Court? At the start of 5.1.1 the regard is that of the High Court. In contrast the subject of the second *regard* is less well established. Who is it that is regarding the status of the trustee? Is it the company, TEP holdings, which is weighing up factors in deciding whether or not to issue and pay dividends, or is it the High Court which is commenting on the possibility of the company issuing and paying dividends in the light of the Court's knowledge of the company's status as a trustee? There is a systematic ambiguity in which the subject of the non-finite clause *having regard to its statement as a trustee* may be read elliptically either as identical with the subject of the subordinate clause, the subject of statement i.e. *the company*, or identical with the writer of the main clause, the Full High Court, because the semantics of the modal *had been possible* implicate the writer's judgement of likelihood (Halliday 1994; Quirk et al. 1985).

A similar argument can be made about a parallel use of *regardless* in Text 5.1.2. Again the question is: whose regard? Should Text 5.1.2 be read as claiming that the Peabody interests had to have a company like Loftway to make the purchase, irrespective of any later decision to devalue the shares? Or is it claiming that the Court should set aside its knowledge of what later happened to the shares in making its decision about whether or not the purchase of shares by Loftway was necessary to achieve the legitimate commercial end of obtaining cheaper finance?

Interaction between modality and the expression of writer's attitude as *certainty* again is used in Text 5.1.3 to create a systematic ambiguity about the subject of the attitude:

Text 5.1.3 Counterfactual reasoning in Peabody (3)

> If the shares were acquired by TEP Holdings on behalf of the trust, the dividends would not have been included in its taxable income (see the Act, s 96) and there would have been no rebate in respect of them (s 46(2)). Since the purchase of the Kleinschmidt shares had to be financed whether or not they were subsequently devalued, any *uncertainty* as to the entitlement of TEP Holdings to a rebate in respect of dividends upon those shares made it unlikely that TEP Holdings would have been chosen as the purchaser of the shares (*r'CT v Peabody* (1994) 28 ATR 344 in Kobetsky & Dirkis1997, p. 526)

Is the *uncertainty* here the uncertainty that the Peabody interests are hypothesised to have felt in contemplating whether or not to use TEP holdings as the purchaser? Or is it an uncertainty felt by the Court as a result of its argument attributing to TEP the desire to obtain a rebate? The nominalisation of *uncertainty* within a reduced clause having a nominal function as subject of *made* erases the holder of the attitude of *certainty*. Through its use of syntax the Court is bracketing the question of the subjectivity of the actual or hypothetical person who had the uncertainty.

The device of 'reasonable expectation' introduced by the *Income Tax Assessment Act 1936* (Cth) has a similar end in mind. This is evident in the definition of tax benefit:

> An amount not being included in the assessable income of a taxpayer of a year of income where that amount would have been included, or might reasonably be expected to have been included, in the assessable income of the taxpayer of that year of income if the scheme had not been entered

> into or carried out (*Income Tax Assessment Act 1936* (Cth) s177C (1) (a))[5]

As mentioned in Chapter 3 above, Goodrich (1990) shows in his analysis of *Parkin v Norman* that the device of reasonable expectation deletes the actual subjectivity of individuals and substitutes the more predictable reactions of an imaginary 'average man'. Legal professionals are no longer dealing with what would have happened, but just with what a reasonable person would have expected to have happened. This device immediately raises the question: whose expectation? In order to decide what is reasonable, the Court must put itself in the place of the participants in the scheme, attribute motives to those

---

[5] In 'might reasonably be expected to have been included' there are problems of interpretation raised by the word 'might'. On the face of it one would expect scope ambiguities based on the interaction of the modal *might* and the propositional attitude *expected*. Traces of the difficulty this potential ambiguity causes for legal interpretation can be found in the student text Kobetsky and Dirkis (1997):

> A further problem with s 177C is the meaning of the words "reasonably expected" (used to describe whether a taxpayer could expected to have gained a tax benefit) is unclear. The term could encompass a range expectation (sic) from a "reasonable belief" to the "actual holding" of that belief. It could even could (sic) encompass the existence of a greater than 50% chance of holding that belief (p. 525)

The High Court decision in *Peabody* makes it clear that the 'where' clause really means:

> That amount would have been included in the assessable income of the taxpayer, or it is reasonable to expect that it would have been included, if the scheme had not been entered into.

In the Act this complex clause is transformed into a simple projecting hypotactic verbal group complex (Halliday 1994, 7A.6): *might reasonably be expected to have been included*. When the projection is reduced to a verbal group the main verb becomes non-finite and can therefore no longer carry tense or modality. The modal and the tense marker shift to the front of the phrase. Use of *would* would have created a problem of scope because it attributes the hypotheticality to the reasonable expectation, rather than to the inclusion. 'Might', on the other hand, does not have this property: 'With the epistemic possibility of *might*, however, it is the meaning of the following predication, rather than of the modal itself, that is interpreted hypothetically', (Quirk et al 1985, pp. 232-233). *Might* has been selected by the draftsman of the Act not because it conveys possibility, but because it must be read with the correct scope in the verbal group complex. It is an example of the quasi-subjunctive use of 'may' also observed in clauses of concession and purpose (Quirk et al 1985 [4.53]).

participants, and decide what actions the participants would have engaged in to further those motives if the scheme had not be available to them. In the case of reasonable expectation, however, the Court does not consider the actual participants, the Peabody interests, but the hypothetical actions of an imaginary 'reasonable' person. The Court puts itself in the (imaginary) place of the originator of the scheme and determines what it would have done in that situation, if it, the Court, were acting in role as that imaginary person. It is difficult to escape Schlag's (1991) conclusion that the reasonable person is none other than the Court itself acting as a person entering or carrying out a scheme. This analysis can be illustrated by reference to uses of *reasonable expectation* in Texts 5.1.4 and 5.1.5 (as opposed to mentions):

Text 5.1.4 Use of 'reasonable expectation' in Peabody (1)

> There is no reason to suppose, and the Commissioner was unable to demonstrate, that, had the devaluation not taken place and had that profit been made by Loftway, it would have flowed, or could *reasonably be expected* to have flowed, to TEP holdings and hence to Mrs Peabody in the year ended 30 June 1986. In other words, and quite apart from any income tax which Loftway might have been liable to pay in respect of that profit, there was no *reasonable expectation* that Loftway would have declared dividends which would have reached the Peabody Family Trust in that year of income. (*FCT v Peabody* (1994) 28 ATR 344 in Kobetsky & Dirkis 1997, p. 526)

Text 5.1.5 Use of 'reasonable expectation' in Peabody (2)

> But the method adopted by Loftway, apart from the devaluation of the Kleinschmidt shares, was found below to be entirely explicable upon a commercial basis and it could not be said of any of the examples advanced that, even if commercially possible, they would have been adopted in the absence of the devaluation as a matter of *reasonable expectation* (*FCT v Peabody* (1994) 28 ATR 344 in Kobetsky & Dirkis 1997, p. 526).

In all cases where *expect* or *expectation* is used it is reduced in such a way that the subject of the verb is deleted, either through nominalisation in *expectation*, or through passivisation: *reasonably be expected*. This deletion creates an ambiguity about the grammatical subject of *expect*.

William and Emily's moot preparation meeting

The High Court strategy of concealing the legal subject in the mock figure of the reasonable person leaves students lacking guidance about judicial and legal subjectivity. If the judges present themselves as objective appliers of legal reason, and conceal the role that subjective factors, such as experience of life and ability to assume the roles of others, play in their ability to reach judgments, then this may assist the authoritative appearance of their judgments. But this positioning is poor pedagogy because it makes it more difficult for students to understand, imitate and anticipate judicial modes of reasoning.

Some of these difficulties are evident in this section which is based on a transcript of a meeting held by William and Emily, the two final year taxation students who were introduced at the end of Chapter 2, to prepare their submissions to a taxation moot as part of their level five legal skills program. I use the model of subject formation developed in Chapter 3 as a means of analysing excerpts from the transcript of William and Emily's meeting (See Appendix 8).

The simulated case set for the legal skills exercise (see Appendix 7) deals with a licensed surveyor, Fred Bloggs, who had left a company of surveyors, Lots of Dough Pty Ltd, and formed his own private company, Mega Bucks Pty Ltd, as well as a family trust. Fred continued to work for Lots of Dough as consultant under a two year contract. While Fred's wife Sheila did a little work for Mega Bucks, she received no salary. She did however receive the same income as Fred from the annual distribution of the trust. The Tax Commissioner has amended Fred's tax assessment to include all Sheila's income from the family trust. William and Emily are acting in role as counsel for the Tax Commissioner defending the amended tax assessment against the plaintiff's, Fred's, appeal.

In William and Emily's meeting the emphasis is not, as in Chapter 4, on the binary question of whether or not Fred entered a scheme. The issue is not one of right or wrong, but of modes of representation. In constructing a defence for

the Tax Commissioner they are attempting to find a way of characterising Fred's affairs as a scheme that meets the criteria set down in Part IVA.

Subject formation through participation

Traces of William's attempts to come to terms with the detailed requirements of counterfactual or 'hypothetical' reasoning required by Part IVA, and thereby to construct for himself a position as a tax lawyer, can be seen in a segment of the student meeting (Text 5.2.1). This text displays some similarities with the similar Text 4.3.1 in Chapter 4 that showed Barry firm reasoning about whether a sculpture is a good or a service. Both texts demonstrate the participative construction of a subject position through rehearsal of arguments. As in Text 4.3.1 clauses which demonstrate rehearsal of arguments are bolded. These bolded clauses thematise elements of the case and of the law and use logical connectives such as *so* and *if* to indicate the reasoning that supports their arguments.

Text 5.2.1 The average accountant in a hypothetical world

Clauses showing students engaging in legal argument are **bolded.**

1	William	**a scheme or a part of a scheme and so on is the purpose of only one person and if your accountant had ever envisaged that this could be done and if the accountant had spent more than five second thinking about it the accountant would have realised that they could derive some sort of tax benefit here and so long as the accountant has thought that went through that mental process** we can say **that he's part of the scheme or she is part of the scheme and the scheme you know whether it's a really huge scheme or whether this is the scheme itself um the dominant purpose or the[only purpose**
2	Emily	**[result yeah there's still the same result as the fact at the end of the day all the money winds up in the same account and they all draw on it as they need**
3	William	mm mm
4	Emily	um and **it is evidenced again by the fact that he only ever draws the nominal sum weekly sum that's because he knows he has direct access to all the funds of the company anyway via this account so he doesn't need to via the books say that he's been paid any more money because he knows that he has full access to those funds anyway in reality**
5	William	so I think we should I think we should actually invite Peter to consider the accountant in a hypothetical world it has to be hypothetical as Peter said in the lectures because um you're asking about something that hasn't actually occurred and **you take your average accountant and you say what has gone**

		through this accountant's mind here you know has he and then basically ask Peter to consider has he **would the accountant have thought that the income if you're setting up a trust you're obviously thinking about distributing and so you're dividing money and if you're dividing money it's the accountant you know the accountant lives for the idea of being able to get some sort of tax benefit whether or not it's avoidance or not like it should be struck down is a different story but your accountant's surely open to those sort of opportunities in other words the accountant considered it** all we have to do is convince Peter that **that's part of the scheme which it has to be discretionary decision to split and then ultimately as far as the evidence is concerned bring back together**
6	Emily	um
7	William	and then we can invite Peter to try and think of another reason why **they would have wanted it just with the income that** way and then bring it back to the same account and then after Peter has paused and scratched his head for five seconds we're going to submit to him that **there's no other reason** learned members of the tribunal **that this could occur** blah blah blah

But there are also considerable differences between Texts 5.2.1 and 4.3.1, reflecting the different positionings of first-year and final-year students. William's attempt to emulate the styles of reasoning and the representational practices modelled by the High Court judgment in Peabody is marked by distinctive linguistic features. For example, in 5.2.1.5 there are a striking number of uses of *you*. Apart from *you know*, which functions as an interpersonal device, the referent of *you* shifts tellingly in the course of the turn. In the early part of the turn, *you* denotes a legal role of a person reasoning about or preparing for a court case: ***you** take **your** average accountant and **you** say what has gone through this accountant's mind.* But later the *you* becomes an average person in a hypothetical world setting up a trust: *if **you**'re setting up a trust **you**'re obviously thinking about distributing and so **you**'re dividing money and if **you**'re dividing money it's the accountant.* This slide in the use of *you* between a legal and a commercial subject is similar to the ambiguities built into the High Court judgment in *Peabody*. In using the generic *you* William moves from occupation of the role of a judicial or professional legal subject to occupation of the role of persons participating in a scheme to avoid tax.

William's attempt to deploy the specialised practices of tax law is also indicated by his emphasis on the intentions of the accountant and by his use of

counterfactual hypotheticals, especially conditional modality, *would, could,* and past perfect and perfect aspect: *if your accountant had envisaged, would the accountant have though.* These differences mark William's attempt to deploy the two devices for suppressing subjectivity included in Part IVA of the *Income Tax Assessment Act 1936* (Cth). He uses the counterfactual device of expectations about what a reasonable person would have done by speculating about what would have happened if the hypothetical accountant had stopped to think. He also attempts to use the non-subjective definition of purpose, putting forward a view in which the person who triggers the application of Part IVA by having the relevant 'dominant purpose' is the accountant, not the taxpayer.

However a number of problems are evident in William's argument which illustrate how difficult it is for students to take up the specialised practices of tax law. While his focus on the accountant is a clever use of the possibilities offered by Part IVA, William is using it as a mechanism to avoid the difficult but fundamental tasks of specifying the nature of Fred's scheme and of reasoning counterfactually to determine how his tax benefit was arrived at. Further, the clauses of Part IVA relating to dominant purpose which are referred to by William are not used correctly. He is confused because the Act has positions for the taxpayer, who might or might not be a real or natural person, and a person who enters or carries out a scheme for a purpose, who is a real person, but who may not be the same person as the taxpayer. It is unclear whether William is dealing with a real person in the real world, or whether he is dealing with an average or reasonable person in an imaginary or virtual world. This shift between real and hypothetical accountants is evident in turn 5.1.3.5 which begins with references to *the average accountant* in *a hypothetical world*, and finishes with an indicative past tense statement of fact: *in other words the accountant considered it.*

William's use of hypothetical reasoning in relation to the accountant illustrates the further problem that William is discussing the dominant purpose of the accountant, but dominant purpose is not defined hypothetically. It is tax benefit that is defined hypothetically, but there is no question that the accountant received the tax benefit. William is confusing with each other the two devices

used to delete subjectivity: reasonable expectation and the non-subjective definition of purpose.

A further trace of this confusion is the fact that William is focussed on *what is going through this accountant's mind*, when the definition of purpose in Sec 177D explicitly excludes reference to subjective factors of this kind. It is noticeable that on almost all occasions when the accountant is mentioned in Text 5.2.1 it is as the subject of a verb referring to his mental state: *realise, envisage, think, consider, is open to*, when Part IVA and the case law make quite clear that what is going through the accountant's head is completely irrelevant to the issue.

Another sign of the difficulty the students have in engaging with a hypothetical approach to reasoning is the lack of engagement between William and Emily. Although their talk is structured as turn taking, Emily's comments in this text bear no relation to William's. Rather than being dialogic the text shows interleaved monologic statements with little relation to each other. This can be seen in the very different themes of clauses in Emily and William's turns. Emily is completely focussed on what happens to Fred's money and his control over it. She has no interest in the accountant.

This lack of engagement is indicative of the very different way in which Emily responds to the challenges of the Tax Act. Emily's is a more resistant stance than William's. She is not attempting to engage with the strategies for desubjectifying and dividing subjects contained in Part IVA. She combats the artificiality of hypothetical arguments by a concern with what is happening *in reality.*

This reluctance to give up a realist stance can be seen in a number of Emily's contributions, evidenced by Texts 5.2.2-5.2.5. Emily contrasts a realist approach with a hypothetical one. In Text 5.2.2 she replaces uses of conditional modality and connectives with non-technical language like *dodgy things.* She also uses the present indicative and polar modality through sentence adverbs like *really*, emphasising that things remain the same whichever option is chosen.

Text 5.2.2 Emily's realist argument (1)

Emily	[cause I think the arguments still apply whether we just take that little segment of the scheme or whether we take the whole thing it still applies that at that particular point this is where the dodgy things happen

Similarly in Text 5.2.3 there is an explicit contrast made between a counterfactual approach and a realist approach in which it is argued that Fred all the time has control of the company.

Text 5.2.3 Emily's realist argument (2)

Emily	that is that the fact that he's done all the work that it really operates as a fiction the company and the trust operate as a fiction

In the later parts of Text 5.2.4 the use of polar modality is indicated by sentence adverbs such as *effectively* and *ultimately* and present indicatives, in contrast to the hypotheticals of the first 6 lines.

Text 5.2.4 Emily's realist argument (3)

Emily	family trust the money if they then run the argument well if it wasn't for the family trust this is stemming from what we came up with that is if the trust doesn't exist then we can't um with any umm consistent sort of probability say that this is where the money would go or that the money would stay in the company or that it would be disbursed through dividends well we can say that doesn't matter because ultimately Fred is still in control of the is still the controlling force of the company and so wherever the money went it would effectively be coming straight back to Fred even if it did go via dividends and whatever the trick here is that if it went via dividends they'd still have to pay tax on it

Text 5.2.5 shows Emily bringing the multiple income streams together into the reality of the single bank account. Again Emily uses the polar modalisation of *ultimately* and the present indicative. This realism is reinforced by a flowchart jointly constructed by William and Emily in the course of their discussion that shows the diverse flows of income being brought back to a single location.

Text 5.2.5 Emily's realist argument (4)

1	Emily	well the fact is that it doesn't actually divide at all it just goes straight into the household that is the Bloggs family	While speaking William is drawing a diamond shaped diagram which shows the income being split between Fred and Sheila and then brought back together in a single household bank account.
2	William	mmm	
3	Emily	and this is evidenced by the fact that they only have one account	
4	William	mmm	
5	Emily	but whether on paper it goes here or by the [( )	
6	William	[ok so what you're really saying	
7	Emily	it still ultimately ends up in the same pocket	

William and Emily are deeply uneasy about the use of hypotheticals because of their lecturer's warnings. Their distaste is evident in Text 5.2.6 below: *what we don't want to do, the commissioner had so much trouble, the difficulty I'm having, that may be the downfall, you're closing your options*. This unease relates not only to the difficulty of succeeding using hypothetical arguments, but is also principled, following a direction of critique developed by their lecturer, whom I call Peter, in his lectures. This conceptual stance to the law illustrates another difference between William and Emily's positioning and that of the first-year students. William and Emily's critique is based on an understanding of taxation in relation to other areas of the law and in relation to broader legal principles. Their understanding of the law and their position in it has a conceptual basis as well as a procedural one.

Subject formation through reification

As described in Chapter 3, there are two types of hypothetical reasoning associated with the professional practitioner (Schön 1983) and with professional vision (Goodwin C. 1994). Relating to what I have described as

the position of the interpreter is the use of hypothetical reasoning within virtual or simulated worlds to investigate the consequences of decisions. Relating to the practitioner position is the use of forwards and backwards reasoning aimed at establishing which one of a number of ways of representing a problem is the one most likely to lead to a solution.

William and Emily's unease about the use of hypothetical reasoning at the level of simulation contrasts with their embrace of backwards and forwards reasoning at the level of practice. This contrasting attitude reflects the fact that practitioner reasoning is pragmatically oriented to future action rather than epistemically oriented to the interpretation of past events. The pragmatic position is not a threat to students' received view of the world.

Forwards and backwards reasoning is evident in Text 5.2.6 below. Here William and Emily are arguing which of a range of possible ways of characterising Fred's actions as a scheme should be chosen in order to maximise their chances of success. And they are establishing a sequence of schemes in order to have fall back positions should the first of their characterisations be rejected. In deciding which scheme to use William and Emily have to balance competing considerations. Because Part IVA of the Act specifies that the intention to obtain a tax benefit has to be the dominant purpose of the person entering a scheme, the students are moving between two conflicting sets of criteria. The first is the need to restrict the ambit of the scheme in order to minimise the number of purposes motivating the person entering the scheme and hence the difficulty of establishing which purpose was the dominant one. William summarises this position in the principle *the smaller the scheme the better*. The second is the need for the scheme to have a broad enough ambit that it can stand on its own without loosing its practical effect: *this scheme is not so defined as to loose all meaning*.

In Text 5.3.6, just as in Chapter 4, the *I* and *you* of the meeting functioning as a community of practice constructs the *we* of the future appearance in court. This process of construction is conducted as a debate between the two competing criteria for establishment of a scheme.

Text 5.2.6 Backwards and forwards reasoning

1	William	just going to try and get down the main arguments here against it you're going to say that the ah you're going to say that there's a several purposes (..) for the scheme (.) that's why I think it's important for us to so long as we can convince Peter that this scheme is not so defined as to loose all meaning that the smaller the scheme is the better and the scheme that we should try and rely on is the idea of the discretion to as the trustee discretion of the director which would have been Fred um to split the income of the trust that that small part there was the scheme because in Peter's terminology there's no other way to explain it other than to achieve a tax benefit
2	Emily	uh huh do you reckon we need to go that narrow
3	William	I reckon we should go that narrow whether we can actually the problem there is [( )
4	Emily	[cause I think the arguments still apply whether we just take that little segment of the scheme or whether we take the whole thing it still applies that at that particular point this is where the dodgy things happen um like you look at Peabody um (.) the Commissioner ran the argument that it was quite a wide concept of the scheme that included quite a few different elements um and while yes on the whole well individually they could all be explained it was the combination of the lot in this particular
5	William	the commissioner in Peabody also that's why the commissioner had so much trouble trying to find the purpose of it because it was quite large so there was a lot of different purposes there so the commissioner had to go to great lengths to try and explain them all away hypothetically the smaller it is the less variables we have but then we're going to come up against Peter's going to draw us on this idea well this scheme's just you've given me something that's not really that's only a part of the scheme that's what Peter will say ok we'll take all we'll take a larger scheme because if that's part of the scheme then section 177C D sorry says that as long as the purpose is evident in one part of that scheme it's ok
6	Emily	yeah exactly you don't need to necessarily
7	William	hmm [so what
8	Emily	[I suppose the difficulty I'm having with it all is that every individual transactional element can be explained on reasonable grounds but it's just a matter of defining those in a way that helps our argument and getting my head around that that's the hard part and then trying to put it in some sort of a logical framework
9	William	yeah
10	Emily	without trying to trying to rely on hypotheticals too much because that would alter that may be the downfall=
11	William	=so that's what=
12	Emily	=the argument because then once you start using hypotheticals you're closing your options

In the debate William argues for a minimalist position, while Emily argues for the scheme having a broader scope: *every individual transactional element can be explained on reasonable grounds*. This dialogic framework is set up, for example, by William at turn 1: *against it you're going to say*, and is evident through Text 5.2.6 in the use of *I* and *you* language at the start of turns and by the use of the language of support and challenge: *I reckon, I think, I suppose, you don't need to, the difficulty I'm having, yeah, hmm so what, uh huh do you reckon.*

In contrast to the *I* and *you* of their participation in their meeting, William and Emily represent themselves reificatively as the *we* who will engage in future action: *so long as we can convince Peter, we should go that narrow, whether we just take that little segment, we'll take a larger scheme.* These uses of *we* relate to future contingencies or hypotheticals marked by modals and conditionals such as *so long as, should, whether, need.* They also relate to a dialogical framework in which William and Emily are imagining a future response to Peter's objection: *that's what Peter will say OK we'll take a larger scheme.*

Pragmatic forwards and backwards reasoning that anticipates the future course of the moot and plans ways to respond flexibly to the actions of the other parties is also evident in Texts 5.2.7 and 5.2.8. In 5.2.7 William and Emily represent their own future actions in terms of an opposition between *we*, William and Emily acting in role as counsel for the Tax Commissioner, and *they*, their opponents acting for Fred the taxpayer.

Text 5.2.7 Anticipated future dialogue

1	William	if they rely a lot on the company and limited liability then we have to be flexible enough to deal with that so we have to no matter what they say we have to respond to them because we're not here to stake our claim on why we want the money we're just here to we've already staked our claim in the old assessment and they've staked their claim in the objection and we're just here to make sure that their objection doesn't get up and if the objection doesn't get up then unless they appeal then our assessment will stand

This opposition is strikingly reinforced by the repetition of *we* and *our* (11 uses) and *they, their* and *them (7 uses)* in the text. The emphasis on hypothetical reasoning anticipating the course of a future dialogue can also be seen in the use of logical connectives such *as if...then, unless, so, because.*

Text 5.2.8 similarly shows William and Emily representing their future actions before the court in terms of contingencies. Here the contingencies do not depend on the opponents but rather on the way their arguments are received by the tribunal. In Text 5.2.8 William and Emily are making plans about arguing 'in the alternative', taking up the option offered by the High Court judgment in *Peabody* of arguing different versions of a scheme. The need to argue in the alternative requires students simultaneously to entertain multiple and potentially conflicting positions, challenging their naïve view of themselves as representers of the truth (Mertz 1996).

Text 5.2.8 Reasoning in the alternative

1	William	yeah we can say that (..) so it's Fred and in the alternative company
2	Emily	yeah.
3	William	it's our taxpayer (.) our that's point one and in the alternative it's ordinary income in Fred's hands anyway (...) and then (...) the scheme (.) which at its widest in the alternative again cause Peabody says we can put in an alternative the widest would be company
4	Emily	company and trust=
5	William	=trust (..) and on that on a wider scheme (..) we're going to have to deal with both of them we're going to have to deal with this idea of dominant purpose smallest
6	Emily	just the trust

They structure the alternatives in a sequence from most favourable to least favourable in order to provide a series of fall-back positions. This structuring is evident in the repetition of *alternative*, and also in the comparative and superlative forms of *wide* and *small* used to convey the choices being made between a range of options.

Subject formation through reconciliation

Chapter 3 argued that an important means of subject formation is the need to reconcile and keep track of multiple and conflicting positions. William and Emily have difficulty reconciling their dual positions as students and as simulated counsel. In their submissions to the moot they have to find a balance between the need to do a good job of acting as counsel and the recognition that they are in a university setting and being assessed by their lecturer. A good index of their management of this problem is the way they represent their relationship to their lecturer.

Unlike the first year study, in this case study the lecturer in the taxation subject, Peter, also acts as the 'moot master' in role as a simulated member of the AAT. This makes his role more significant than that of Adam in the first year case study who was unknown to the students. Peter is also notable for his interest and expertise in student mooting, an interest well-known to William and Emily.

William and Emily form themselves as subjects through their desire for Peter's good opinion and their desire to succeed in their study. Peter's actual and anticipated opinions are appropriated and applied reflexively by the students to themselves in a process of self-formation. But this is not altogether a straightforward task. 'Peter' is not a unitary being, but presents himself to William and Emily in a number of guises. William and Emily relate to Peter as tribunal member in their practitioner position as counsel, and to Peter as lecturer and assessor in their student role.

There are three dimensions to the way in which William and Emily represent Peter in their meeting, which I call 'Peter 1', 'Peter 2' and 'Peter 3' in Table 5.1. In his role as tribunal member 'Peter 2' is someone William and Emily have to act on or who acts on them (or their opponents). Peter's educational position is represented in two different ways. 'Peter 1' is represented as lecturer and academic who provided a model of thinking about taxation that William and Emily seek to emulate. 'Peter 1' is presented in past tense and intertextually through references to his utterances and arguments.

Table 5.1 Excerpted references to Peter from the transcript of William and Emily's meeting

Peter 1	Peter 2	Peter 3
in our discussion of Peabody Peter was saying that	we should just make sure that Peter knows that we're aware that	we have to pitch the argument to Peter about what's dominant
that's what Peter said that the commissioner did in Peabody	what Peter's getting at there is that this idea of freedom of contract	so long as we can convince Peter that this scheme is not so defined as to loose all meaning
was Peter advocating income on a very broad concept	just what Peter said because it was an objection in AAT	Peter's going to draw us on this idea (...) that's what Peter will say
in Peter's terminology there's no other way to explain it	this is something that Peter gave us (...) last week (...) to clarify some of the facts	if they run that argument surely Peter'll see the mistake
it's definitive only for the reasons that Peter pointed out in class	Peter is sharp enough to know whether they might be on the ball	when you sum up you usually don't get any questions from the bench but Peter has something for all occasions
I think that's Peter's tax policy argument	you talk to Peter about it	if they're going off at a tangent (...) Peter would probably pull them up on it
Peter was getting at that stuff	this is what Peter is really wanting us to look at	once Peter asks you a few questions you'll get into a really conversational mood (...) Peter's pretty good with that
company's just a thing that sits in your as Peter says, just sits in your filing cabinet	ultimately where Peter's leading towards is the trust	even if we run that Peter's going to say you're assessing them on a Part IV
it has to be hypothetical as Peter said in the lectures	as far as leaving a good impression on Peter	want to get up in front of Peter and say they're the same thing
that's exactly what Peter was saying that the Commissioner	she's never actually mooted in front of Peter before	what Peter's ... going to say they could be the same thing in theory and you know I agree with you because I've [Peter1] said that in lectures
that was what Peter was saying	Peter will say oh that's cute but move on (...) to the conceptual	Peter look I haven't studied company law

'Peter 3' is presented as assessor of the moot whose judgment William and Emily await. Peter's position as assessor is constituted through reference to

Peter's wants, intentions, judgments, and opinions, which are then internalised as goals the students are seeking to attain.

William and Emily have trouble separating Peter's various roles, reflecting the problems they have with their own positioning. These problems of role maintenance are evident at a number of points in Table 5.1, particularly in relation to Peter 3. William and Emily move between referring to Peter as a tribunal member and Peter as a lecturer whose characteristics they are familiar with: *once Peter asks you a few questions you'll get into a really conversational mood ...Peter's pretty good with that, Peter will say oh that's cute but move on...to the conceptual.* This confusion comes up explicitly as they contemplate giving back to Peter his own conceptual argument from the lectures about the relationship of ordinary income to Part IVA: *what Peter's ... going to say they could be the same thing in theory and you know I agree with you because I've said that in lectures.* In trying to please 'Peter 1' (the lecturer) students fail to anticipate the reactions of 'Peter 2' (the tribunal member). The speech that William and Emily attribute to Peter has him shifting between his position as lecturer and his judicial position. But as Texts 5.4.1-5.4.11 below show, this anticipation is mistaken, and Peter remains firmly in role as a tribunal member.

A further example of a confusion between student and lawyer positioning can be seen in William and Emily's plan to assert their individuality by presenting their case in an unpredictable, interesting and non-standard way. This emphasis on originality is evidence of the persistence of a student self definition rather than a professional one. Students have to think about standing out in the crowd and being noticed because they are in competition with their fellow students, especially in a course like law. William and Emily are interested to present something special that the other students have not put forward. This desire to be different is evident in Text 5.2.10 when they are discussing Emily's desire to do well in order to get onto the mooting team. The repetition of the word *unique* and the use of attitude and evaluation at moves 5.2.10.2-3 shows how Emily and William seek to stand out from the other students. In this respect

they are thinking like students and not like lawyers in their approach to the moot preparation.

Text 5.2.10 We may not be so unique

1	Emily	look at specific yeah specific subsets of ordinary income (...)
2	William	oh yeah I think that's good that's unique anyway
3	Emily	we hope are we one of the last moots because we may not be so unique
4	William	oh well it's not like we've sat in on anybody else's moot
5	Emily	no that's true

Text 5.2.10 is in Bakhtin's (1981) terms a heteroglossic text demonstrating the confusion of student and legal positions. But it is not a dialogised heteroglossia because William and Emily are not aware of the multiple roles they are occupying. Dialogised heteroglossia occurs when William and Emily comment from a student point of view on the legal roles they have to adopt. This stance taking, as in Chapter 4, is marked by the expression of affect, of likes and dislikes.

A example of stance taking and dialogism occurs in Text 5.2.11 where William and Emily are discussing whether they prefer to take the Commissioner's or the taxpayer's side in taxation cases. They are referring to their previous work on the notice of objection, and to the fact that for this moot they have changed roles from plaintiff to defendant. They are comparing one role with the other in order to reflect on their preferences. There is a strong affective element in Text 5.2.11, that of being *pro taxpayer*, of *preferring the Commissioner's position.* In this text too, the word *position* is explicitly used as metalanguage to allow William and Emily to reflect on the positions they occupy.

Emily takes a stance towards the positions of taxpayer and tax commissioner through expressions of affect such as *like, prefer*. But the stance is a more complex one than the affect examined in Chapter 4. In order to construct for herself a professionally distanced position, Emily is arguing that she prefers to take the commissioner's position because she feels most affinity with the taxpayer position, and thus has a better understanding of how to oppose it.

Emily's likes and dislikes are beginning to be colonised by a distanced and calculating legal positioning.

Text 5.2.11 Preferring the commissioner's position

1	William	yeah so we'll have to sort of get really [but I think we should be OK
2	Emily	[um I'm ( ) yeah um I mean um prepared for that
3	William	mm
4	Emily	to a degree not probably physically but mentally I'm prepared for that
5	William	yeah I think we are because we've spent so time on it from the taxpayer's point of view
6	Emily	mm
7	William	we've we've [( ) it
8	Emily	[we've sort of nutted it out
9	William	yeah we've got the we've got some of the factual arguments down pat
10	Emily	I much prefer working in the commissioner's position than the um the taxpayer's position
11	William	yeah
12	Emily	yeah
13	William	I thought [you and John were pro taxpayer the other
14	Emily	[cause at least we precisely that's why I like being the commissioner because I know exactly what I was going to run as the taxpayer
15	William	yeah ha ha ha
16	Emily	it's more work on our behalf so
17	William	so how would you move as a taxpayer then if you had to
18	Emily	how precisely as we did in our um
19	William	thing
20	Emily	our um objection

This dialogised stance taking is particularly evident in the use of *I* at turn 5.2.11.14: *I like being the commissioner because I know exactly what I was going to run as the taxpayer.* Here the subject of enunciation, the *I* of *I know* and *I like* corresponding to the Tax Commissioner role, takes a stance towards the subject of statement *I was going to run,* corresponding to the taxpayer role.

William and Emily's taxation moot

This section deals with William and Emily's appearance before Peter in their tax moot two days after the meeting discussed above. The moot was in a dedicated moot court room on the university campus furnished in a court-like manner, but relatively informal compared with the real courtroom used in the moot in Chapter 4. (For a transcript of the moot see Appendix 8).

As in Chapter 4, the transcript shows William and Emily participatively constructing a legal self through their words and actions in presenting the case. An interpreter position is constructed through their presentation of legal arguments and a practitioner position through their interactions with Peter.

This section examines how the plans formed by William and Emily in their preparation meeting come to fruition. The discussion focuses on each of the three main participants in turn. I begin by examining how William takes up his opportunities to engage with the legal subject positions made available by the *Income Tax Assessment Act 1936* (Cth). Next I discuss how the resistant conceptual position developed by Emily is put forward and received in the moot. Finally, I examine the strategies used by Peter in his questioning to shape William and Emily towards the goal of 'thinking like lawyers'.

William, like Beverley in Chapter 4, is a good subject. He is engaged in the business of being a law student, and is ambitious to do well. He has worked previously with Peter in a mooting team and is an experienced student mooter. The formality with which he approaches the moot is noticeable. In contrast to the other male participants, including Peter, who are in shirt sleeves, William is wearing a dark suit with a white shirt and tie. Like Beverley he projects authority by resting his hands or forearms on the lectern and making very sparing use of gestures. His language use is formal. He addresses Peter as *sir*, using legalisms such as *if you are well pleased, begging the tribunal's pardon*. William does not loose sight of the fact that he is appearing on behalf of a client and refers frequently (15 times), especially in the early part of the submission, to the Tax Commissioner's opinions or wishes which he, William, is supposedly representing.

William arrived late for the moot and missed some of the opponents' presentation of their objection to the Fred Bloggs tax assessment, which means that his opportunity to rebut their points is limited. But a sense of drama is created by this late arrival. Unlike most student mooters, William does not read out extended passages verbatim from his notes. While he refers to his notes frequently, he speaks almost always looking directly at Peter. He is able to maintain a front without becoming flustered even when his arguments are rejected or challenged.

Text 5.3.1 shows William enthusiastically embracing the hypothetical practice of simultaneously arguing multiple and conflicting positions, and begins with an elaborate presentation of schemes which he is prepared to argue *in the alternative*, including some of the extreme wide or narrow schemes discussed with Emily in their meeting. He puts into practice the speaking positions he had previously planned.

Text 5.3.1 Pleading different schemes in the alternative

1	William	very well sir in our in our submission uh the scheme first of all the commissioner notes that in the case of Peabody the High Court did envisage a situation where the commissioner could plead several different schemes in the alternative and this is indeed what we do today

William's attempts to engage with a hypothetical vein of argument are evident in his discussion of the widest scheme in Text 5.3.2 below. Here he successfully employs a counterfactual, reasonable expectation argument and corrects the problem noted above in relation to Text 5.2.1, where he made the mistake of defining the accountant's purpose in terms of reasonable expectation.

In order to reason effectively about reasonable expectation in relation to his various schemes, William has to put himself in the place of Fred's roles as taxpayer, as trustee, as company director, as company employee, and discuss what Fred would reasonably have done if the scheme had not been entered into.

Text 5.3.2 William's widest scheme

1	William	the very widest scheme we submit that we should reasonably expect that if he did not enter into that scheme um its widest sense then he would have become uh sole proprietor by himself in his own right
2	Peter	why couldn't couldn't he have been a partner and equal partner with his wife in which case the money would have been split down the middle anyway
3	William	he may have been if we were to go directly to the actual facts at hand and if he hadn't even gone to to see his accountant which we include as the first step in wider scheme then he may not even know about the situation with partnerships or the idea of entering into one with his wife
4	Peter	again that's a possibility but why is that on balance a probability as the more logical reasonable hypothesis I mean wouldn't I presume that an accountant would talk about the relative benefits of each type of structure
5	William	well that's exactly right uh sir but if we assume that he didn't go to the accountant because that was the first stage in the scheme [so but for the scheme
6	Peter	[oh I see I see your argument
7	William	then he was he was it was most reasonable that um that would have been the sole proprietor ah if I could deal with the issue of dominant purpose especially in regards to the largest scheme sir I wish to emphasise uh section 177D and the words which occur after oh section 177D B sorry and the words which occur after the actual the enumeration of the factors which we should consider um in in particular this idea of a part of a scheme we believe that on on at the apex of the submission of the commissioner that the relevant intention the relevant dominant purpose can most easily be be found in the mind of the accountant and we believe that the particular part of the scheme which is most cogent towards our argument is this idea of splitting the money in the trust

William's positioning in Text 5.3.2 is different from the one that was evident in the High Court decision in *Peabody* where the judicial subject projected its well-informed self into the position of the average taxpayer. William is not so well informed, and consequently the self he projects onto Fred-as-average-contractor is also not well informed. On the contrary, Fred is presented as someone who knows nothing about the tax and other benefits of companies or trusts for taxation purposes, and who would thus but for the scheme have operated as a sole trader.

Rather than treating the taxpayer as an extension of his professional advisers, as the High Court does, William isolates Fred from the professional advice of

his accountant. This separation means that the relevant dominant purpose to obtain a tax benefit is attributed to the accountant rather than to Fred, making Fred into a pawn of the experts.

William succeeds in taking Peter by surprise at turn 5.3.2.6 with this proposal, achieving his goal of being different from the other students. He also succeeds in taking him by surprise in Text 5.3.1 by offering a series of schemes argued in the alternative when Peter only asks for one: *firstly I want you to tell me what you think your scheme is to see if there is any disagreement between you* [ie between the plaintiff and the defendant]. William is 'getting smart' by demonstrating that he knows how to position himself within the complex field of tax law, but not yet 'getting real' (Bazerman 1996). When directly challenged by Peter in the following terms to deal with central points he not well prepared: *I'd be interested to know what you think about Fred Bloggs as the triggering person, I you know I dragged your opponent to 177D and invited him to look at the particular factors what do you say about each of those particular factors*. His attempt to avoid the problems of hypothetical reasoning by focussing on the accountant turns out to have been ill conceived.

However William's attempts to distinguish himself are far less extreme, and far less resistant to the main thrust of Part IVA, than Emily's. Unlike William, Emily in her presentation to the moot relies not on Part IVA but on concepts of 'ordinary income', and in particular Sec 19 of the Tax Act. Emily's argument is a radical one: that the company structure is a fiction; that income received should be treated as Fred's ordinary income; and that the company and trust structures should be treated as irrelevant because the income is the product of Fred's personal activity and remains in his control. The money is Fred's, first because he earned it through his 'personal exertion', and second because he had control over it during its path through the company and the trust. A third argument is based on the fact that all the money comes to the one joint bank account after is has passed through the company and the trust. These arguments are unsuccessful, as the actual conduct of the moot quickly makes clear. The personal exertion argument is based on a faulty reading of the case law, the

'control' argument based on a faulty reading of the Act, and the bank account argument has factual problems apparent to any couple with a joint account.

Emily's ordinary income argument represents a considerable risk because it goes outside a clear expectation that the case will be argued in terms of Part IVA. Emily is encouraged in this stance by Peter's lectures, which take a conceptual approach to tax law, but is caught be the gap between an academic approach to tax law (associated with the 'Peter 1' position in Table 5.1) and the practicality of arguing a case within a particular jurisdiction (associated with the 'Peter 2' position in Table 5.1).

The question is why Emily makes these arguments despite a number of their deficiencies having become apparent during her discussion with William (Appendix 8). Her claimed reason is that she has the aim of distinguishing herself, of coming to Peter's attention as a potential member of the mooting team. This aim of being distinctive is evident in the preparation meeting (Text 5.2.10).

But her stance can also be interpreted as a resistant one. Emily is in revolt against the demand that she abandon a 'textualist' ideology (Mertz 1996). She seeks to oppose the counterfactual approach of Part IVA with a return to the foundational and realist concept of ordinary income. This aim is shown in Texts 5.2.2-5.2.5 of the preparation meeting, where Emily seeks to reinstate Fred as a single real person, as opposed to the artificial partitioning of his roles into company director, trustee, employee, and beneficiary created by his tax avoidance arrangements. The continuation of this vein of argument is evident in Texts 5.3.3-5.3.6 from the transcript of Emily's submission.

Text 5.3.3 The artificiality of Fred's affairs (1)

1	Emily	I suppose again we go back to the issue of the purpose for that and in this instance the artificiality seems to stem from a purpose of attempting to avoid tax rather than really genuinely wanting to provide for his family

Text 5.3.4 The artificiality of Fred's affairs (2)

1	Emily	what I suppose my argument is leading towards is that the result of the way they have organised their affairs can be seen as a fiction because ultimately the money only ends up in one place and that is ultimately at Fred's contro. to do with as he pleases

Text 5.3.5 The artificiality of Fred's affairs (3)

	Emily	it is all being taken out at the end of the financial year which to all intents and purposes is merely just a book um a bookkeeping exercise is not really a reflection of the reality of the situation

Text 5.3.6 The artificiality of Fred's affairs (4)

	Emily	all the money earned as a result of his activities as a licensed surveyor um going via the company or whatever um would have u'timately have ended up in the bank account and at his control and discretion regardless of what chain of events took in the middle it ultimately would have um come yeah ended up in his hands

Texts 5.3.3-5.3.6 demonstrate a consistent theme running through Emily's submission of opposition between the artificial and the real. On the one hand is *artificiality, fiction, merely a bookkeeping exercise*, and on the other hand, as is also evident in Texts 5.2.2-5.2.5 from the meeting transcript, a string of adverbs representing reality, *genuinely, ultimately, really* and references to a single locus of control, *in one place, in the bank account, in his hands, at Fred's control.*

My interpretation of these texts is that Emily is operating not so much at the conceptual level, as she claims, but at the level of the image. Images are foundational to the law (Goodrich 1997; Grbich 1997a; 1997b), and law is dominated by imaginary thinking:

> The institution is built upon fictions, represented through images, repeated through rituals and elaborated through the simulated categories of a collective subject or will. … Law relies upon images because it is through images that the legal subject is most directly affected by law …too great a love of images (*latria*) would distract the subject from the

> dictates of law, while an absence of images would deprive the law of subjects (Goodrich 1997, p. 35).

The image which works its power on Emily, and which 'distracts her from the law's dictates', is that of 'Fred Bloggs', the paterfamilias who earns money through his work as a surveyor to provide for his wife and child. This mythic (or at least fictional) nuclear family has been dismembered by an accountant into a company and a family trust in which the family members play multiple roles as company directors, trustees, beneficiaries, and employees. The company introduces the 'corporate veil', or in William's words, the 'pane of glass', which partitions Fred's activities. Emily's dream is to restore the lost unity of the family and to place Fred back into the position of breadwinner.

Emily's image of Fred and his income as a reconstituted whole over which he has control illustrates what Grbich (1997b) calls the gendered bodies of taxation narratives. Emily reinstates the traditional duality of masculine control over the feminised bank account that has been disrupted by the imposition of the scheme. This duality recalls Grbich's analysis of income as a gendered trope in which the flow of money into and out of a lake serves as a metaphor for earning and expenditure. The lake represents the passive female principle of the joint bank account, while the control of flows represents an active male principle:

> the word 'income' is made to mean that flow of money which returns to a human worker as the effect of human effort, and the process of how models or images of human embodiment and action naturalize money returns to only some kinds of bodies, and also naturalize the money returns to capital as if they were effects of human-like effort (Grbich 1997b, pp. 136-7).

Embodiment is restored to disembodied or fictitious structures through Emily's reference to the unity of the family bank account and to the physical exertion of Fred as the worker. The split flows are literally reunited in the diamond-shaped diagram drawn by William (Text 5.2.5).

Emily refers to Fred as the 'holy trinity', a powerful image of the one in the many (Text 5.3.7). Emily's reference can be seen in Oedipal terms as an

attempt to restore the totality before the split, the wholeness of the family before the fragmentation caused by imposition of the symbolic order of taxation and corporate law (Grbic 1997a).

Text 5.3.7 The holy trinity

1	Emily	Fred Bloggs in this instance um occupies the position of almost like a holy trinity that is he is not only the director of the company well employee of the company director of the company he is um trustee of the trust he is also beneficiary of the trust

If the taxpayer is Oedipally produced through insertion into a 'fiscal logic', what of the lawyer who produces this effect through his or her reading practices? By writing the texts of taxation law, as she does by making her submission (in both senses of the word) to the moot, Emily is being coerced into assuming the masculine legal position of progenitor, of producing life from formless material. She is being made complicit in 'the effect of the author as performing the original model of, God-like, 'naturally'/symbolically giving life to new artificial bodies' (Grbic 1997a, p. 88) or 'text-tube babies' (p. 94). Emily is in danger of producing herself as an agent of the symbolic order she is trying to resist.

But by attempting to restore the lost totality of Fred's business, she is resisting this pressure. She is producing herself as the writer who has no creative or God-like powers, but merely represents the reality of the undivided body of the taxpayer.

The fact that this conflict takes place at the fundamental level of the image and of the construction of self helps to explain why Emily sticks fast to her line of argument right through the moot, despite the many weaknesses of her position. Peter almost implores her to give him an argument, *a dividing line*, based on legal doctrine (Text 5.3.8), but, as Texts 5.3.3-5.3.6 show, she keeps reiterating essentially the same argument over and over again. Emily cannot oblige Peter precisely because she does not want to insert a dividing line. She is trying to eliminate the 'God-like' power of lawyers to constitute new objects and new subjects by representational practices that destroy common sense boundaries.

Text 5.3.8 Give me something to hang my hat on

	Peter	you're really asking me to do something more fundamental you're asking me to say that that that the real essence of income means that if it really is his effort and his control it ought to be his money and I ought to ignore what other branches of the law don't ignore which is companies and contracts and things like that now I'm not now I'm not now I may be politically disposed to that but give me something to hang my hat on I can't find in your favour unless you give me a dividing line that
	Emily	uh huh
	Peter	lets all of the ordinary plumbers go and catches what what you think's wrong with Fred

In examining this and other responses to Emily and William's arguments it is interesting to make a comparison with Beverley's moot at the end of Chapter 4. Both moots show the exercise of judicial authority. Both Peter and Adam use their authority to interrupt when the students stray off the point and to cut them off when enough has been heard. In other ways Peter's moot is less formal. Peter is less formally dressed, and is not sitting on a raised bench. The relationship he establishes with the students in their presentations is a collegial one. He makes less frequent use of powerful language such as tag questions and formulations which attribute opinions to the students, and is more inclined to speak to them in a respectful manner: *whilst it's an elegant argument I don't think I'm disposed to find in your favour on that point, remember I'm only a tribunal member I'm not a High Court judge ...do I have any authorities that I can hang my hat on.*

A feature of Peter's language is the way he attempts to construct William and Emily as legal subjects by teaching them to 'think like a lawyer'. His intention can be seen in his response to Emily's refusal to argue in a lawyer-like way. This response is evident both in Text 5.3.8 above and also in Text 5.3.9 below. In both these texts Peter can be seen asking Emily to produce an argument, a dividing line or a proposition that is demonstrably legal in character.

Text 5.3.9 Give me a legal principle

1	Peter	you've got to give me a legal principle from somewhere you either find one directly from the statute and your colleague's dealt with Part IVA or you pluck a common law one of the air as the commissioner tried in Leidig and Mr Justice Hill says it's not there I can't find it I can't find cases that establish it I can't find words in the act that establish it uh it might be a nice philosophical idea but it's not law so where do I find this proposition even if you tell me there are many distinguishing facts between this and Leidig what's the proposition and where does it come from

In Text 5.3.9 Peter seeks to make explicit for Emily the difference between legal thinking and other styles of argument. In law, what is needed is: *a dividing line, a legal principle, a proposition, authorities that can that I can hang my hat on.*

Peter's attempts to elicit legal thinking, as is appropriate in his judicial role, are, however, mainly responsive and evaluative rather than explicit; they are challenging or seeking clarification of student submissions rather than displaying his opinions. Peter never tells William and Emily what to say, but forces them to clarify their position through exposing flaws or deficiencies in their submissions.

Peter's strategies are Socratic, but in a different sense from the relatively debased use of the term in legal education reviewed in Chapter 1. Peter's moot is different from the traditional 'Socratic' approach in legal education because it is not taking place in a classroom and because Peter has to remain in role as a judicial figure. In the moot court William and Emily are not dealing with a series of paradigm cases such as they might find in a casebook, but with a hypothetical case designed to challenge their reasoning and to illustrate problematic issues in the application of the law.

Peter's Socratic strategies (Table 5.2) are more in keeping with the original use of the term, referring to attempts by the pedagogue through questioning to expose the inadequacies of the case put forward by the student. This is a pattern established in dialogues such as the Meno in which Socrates first

asks his interlocutor to define a concept, then through a series of apparently simple questions elicits answers which lead the person into contradiction.

Table 5.2 Socratic strategies used by Peter

Alternative explanations

isn't the accountant's dominant purpose to get professional fees

why could Fred have been an equal partner with his wife

Absurd or impossible consequences of student's position (reductio ad absurdum)

if I accept it ( ) would automatically mean every client would loose under a Part IVA assessment

if I allow you to argue it at that level anyway won't your client go round and assess every family discretionary trust in Australia

would you want me to hold that all family businesses don't count

Internal inconsistencies in students' argument

that doesn't accord with your narrow view of scheme

Counterexamples

if Kerry Packer has a joint bank account with his wife that doesn't stop the money that he earned in the company name really being in the company name

Other relevant factors or an alternative point of view

but point 7 says any other consequence for the relevant taxpayer so if ...

what about the change in the financial position of Lots of Dough

Fred and his company now have a direct liability for negligence

doesn't 177D 6 demand that I consider the change in the financial position of any person

why weren't there other financial changes I mean one minute he could have been a sole proprietor and now he's a trustee

Sheila takes issue with that she doesn't think it's his money to do with what he pleases

Probes by asking for clarification of a position taken

how do I decide what's more important and what's less important

well it's a possibility that he would have got it why is it a reasonable expectation that he would have got it

While the original use of the Socratic method by Langdell was adapted to the production of one kind of legal subject, it is my argument that the form

of Socratic dialogue used by Peter is adapted to produce not the Langdellian subject of the traditional case method, but rather a Schönian subject (Schön 1983). Peter's strategies are designed to elicit from William and Emily the hypothetical reasoning and multiple representations that previous sections suggest are typical of tax law and that Schön claims are typical of professional, reflective subjects. An examination of the strategies used by Peter in Table 5.2 gives a sense of how he goes about producing a distinctive legal subjectivity. The strategies look very much like the kind normally used in inquiry teaching (Collins & Stevens 1983). In inquiry teaching Socratic methods are used to teach students how to discover rules or models operating in particular domains of knowledge and to explore the application of these rules to particular cases or examples. The emphasis is on the selection of real or hypothetical cases and counterexamples; on drawing students' attention to relevant features of the world; and on showing when student suggestions lead to an absurdity (Collins & Stevens 1983).

A reason for the success of the Socratic approach is that it offers a means of reconciling legal and academic discourses. As noted in Chapter 3, Socratic dialogue is a technique adapted both to the law and to education (Burns 1997). Many or most of the Socratic strategies used by Peter are things a real judge might do in a real court. But the way they are done, both tactically and in terms of frequency and distribution, also has a pedagogical function. What makes the moot effective is that the exchange between mooter and moot master, between Peter and William and Emily, slides easily and seamlessly from the legal to the pedagogical and back again. This is similar to the slide that was evident in Burns' (1997) classroom transcript between out-of-role classroom discussion and exchanges in role as judge and litigator. Socratic strategies of subject formation work similarly in the production of the student subject and the production of the legal subject, and the moot therefore functions as a boundary object building bridges between education and the law (Wenger 1998).

The judge, just like the Socratic educator, cannot tell counsel what to say, he merely indicates where things are going wrong. The mix of constraint and freedom is a powerful tool for subject formation. The student/lawyer is forced to construct her own representations, interpretations and arguments, but can only do this within the strict parameters of what meets judicial approval. It is in this sense that the student creates herself in the image of the other.

At the end of the moot Peter moves out of his judicial role as tribunal member and into the role of adjudicator to give a quick informal response to the student submissions on both sides (Text 5.3.10).

Text 5.3.10 Peter's response to the moot

Peter	well thank you all um I do ( ) weak bits of your argument and it's to try and create create an understanding that being well prepared in a case is not given in an adversarial system going in and actually having an extreme argument but it's actually having a well thought out and balanced argument and that's the same thing in an exam and in a court case that you can actually think what are my best arguments what are my worst what are my opponents' best arguments what's the court likely to ask me and really ultimate preparation is knowing the answers to all of those questions and having it ranked accordingly and as I say the more the more extreme you try and be the more on thin ice you are and the more you actually get challenged by um by whoever you're debating with in whatever forum and so um for all of you you can often stop me interrupting you by actually conceding some of the weaknesses in your argument so there's a difference between saying this was solely done for commercial reasons rather than tax reasons in which case I'll jump on you or you could say um I realise how the tribunal will see there are certain tax benefits there was saving but we say at the end of the day after you look at 177B these are the four commercial factors and it's a difficult question but on balance for the following reasons I say that these will predominate so you try and be more convincing by meeting the concerns of the person before they even get there themselves uh and ultimately the main thing I'm trying to do the main difference between this and the lectures is in the lectures I ask a lot of questions but I don't pick on individual people to answer here you're stuck up at the podium for 15 minutes and you're there but my main aim is to convince you that you you do have brains and and they're good brains and they're worth exercising and we usually discourage you from using them and your natural original reaction was to say hang on I didn't prepare to talk about 177D I don't want to do it uh but then you did a fine job in 15 seconds of actually reading it and thinking and that's really what very much oral communication in all walks of life is you do an articles interview you can't walk in with a screed and present it someone's going to ask you a question and you're actually going to have 5 seconds to think of an answer and present it and it's the same think when you're ringing another solicitor trying to settle a

	case or talking to a client or appearing in court so all aspects of of of these professions that we feed into have a lot of dynamic forms of oral communication and it's about thinking and not you know giving it a go and thank you for your uh involvement in it

He offers advice to William and Emily and their opponents about how to be effective lawyers. He is constructing for them a representation of a practitioner position by making explicit how lawyers are supposed to act and think. In response to William and Emily's use of extreme arguments Peter models in first person the way a student subject should think: *you can actually think what are my best arguments what are my worst what are my opponents' best arguments what's the court likely to ask me*. Peter is constructing for William and Emily a professional approach to legal argument, as opposed to their individualistic, student-centred goal of being distinctive. Similarly he models in first person how to concede the weakness of an argument in a balanced way: *I realise how the tribunal will see there are certain tax benefits there was saving but we say at the end of the day after you look at 177B these are the four commercial factors and it's a difficult question but on balance for the following reasons I say that these will predominate*. In these terms Peter models a legal voice which brings with it a professional orientation or way of seeing the world (Voloshinov 1973).

The second message of Text 5.3.10 is similar to one discussed at the end of Chapter 4. Peter introduces the students to a practice-based view of the world in which decisions and responses must be made in real time rather than debated over or read from prepared scripts. Peter makes this clear in his claim that: *all aspects of these professions that we feed into have a lot of dynamic forms of oral communication*. Students need to be confident in their ability to speak and respond, a confidence which in many cases their experience as students has undermined. Peter builds a practitioner position for the students by presenting them in a full professional role: *you're ringing another solicitor trying to settle a case or talking to a client or appearing in court*.

Summary

This chapter extended the model of legal subject by applying it to final-year students. This extension was based on literature on professional practice and professional vision. This literature (Goodwin 1994; Law 1994; Schön 1983) describes professional practice in terms of specialised representational strategies which in an ontological way (Grbic 1997a) produce new objects of knowledge. These practices give professionals control of a situation or a case by allowing them to simulate a range of options or choices and to seek optimal solutions through backwards and forwards reasoning.

Based on an analysis of excerpts from the *Income Tax Assessment Act 1936* (Cth) and of the key Peabody case read by William and Emily, the chapter argued that the law on tax avoidance codified in Part IVA of the Tax Act constitutes a specialised professional practice of this kind. This argument suggested the need for a more complex account of both the interpreter and the practitioner position in which the legal subject pragmatically, through forwards and backwards reasoning, seeks the best way to rearticulate or reconstitute a case in terms that achieve a desired result.

William and Emily's meeting in preparation for their moot demonstrates some of the difficulties students face in coming to terms with these specialised practices of tax law. Both were shown to be reluctant to engage in hypothetical reasoning. But the reluctance expresses itself in different ways. William attempts to interpret the act in unusual terms in order to circumvent the problem, but ultimately is unable to escape from engaging with the positioning demanded by Part IVA.

Emily takes the radical position of rejecting the whole body of law in Part IVA and returning at a conceptual level to legal basics. This move enables her to avoid the artificial rearticulation of events, subjects and practices built into the act. It was argued following Grbic (1997a; 1997b) that in returning to a more common sense, realist position Emily is resisting a 'God-like' positioning as an agent of the symbolic order.

Both Emily and William in their submissions consciously attempt arguments that are radical and different. While this can be interpreted as an avoidance mechanism, it is also seen by them as a means of distinguishing themselves from the other students. It was argued that this strategy of putting themselves forward is evidence for a conflict between their positioning as students competing for grades in the final year of a course and their role as simulated counsel in a legal case. In real life counsel would not take such radical positions. William and Emily fail to reconcile the competing demands of their two positions, as Peter is quick to point out in his summing up of the case (Text 5.3.10).

A feature of the moot are the strategies used by Peter to form William and Emily as subjects and to help them to think like lawyers. It was argued that Peter's pedagogical strategies are Socratic in the proper sense of the term, that is, they deploy a pattern of questioning that seeks to lead students into contradiction in order to expose the inadequacy of their conceptions. While Socratic approaches are well suited to producing legal subjects, it was argued that there are a range of Socratic approaches that produce different types of legal subjects. Peter's strategies are designed to elicit a Schönian, reflective subject, in opposition to the legal tradition of classroom Socratic questioning designed to form a Langdellian subject.

CHAPTER SIX

Conclusion

The aim of this thesis was to examine how law students engage with the subject positions they encounter in their writing and talk. This analysis was undertaken in order to confirm the view that the distinctive character of legal subject positions makes it difficult for students to learn to write and think like lawyers. The analysis was intended to demonstrate that students who fail may not always do so because of a lack of general thinking or writing skills but because they find the positions presupposed by the legal profession difficult to assume, contradictory, or incompatible with current subjectivities.

The thesis also aimed to discover processes and techniques used to form subjects. It was anticipated that this focus would yield not only a negative focus on students' problems, but also a positive focus on the means through which successful formation of positions is achieved. Examination of successful instances of subject formation would help to make explicit the powerful techniques used to shape law students in a professional mould. It would demystify the ideological means by which students, in order to succeed as lawyers, may be covertly required to write and speak taking positions or assuming attitudes of which they are unaware.

Critical discourse analysis of linguistic texts was chosen as the most appropriate method of testing the model. CDA was used, first, because legal textual practices are predominantly linguistic, unlike those of many other professions. Second, it allowed linguistic data to be used as a basis for drawing conclusions about the social theoretical construct of subjectivity. Finally, CDA was used because the study has an ideological dimension, and because it is

oriented towards the practical educational issue of understanding why law students have difficulties producing some kinds of texts.

The research strategy was to base a model of legal subject formation on a literature review, and then to test and refine that model against case studies of professional legal education. This strategy was intended to yield a transferable resource that is capable of being modified for application in other settings.

Case studies of practical legal skills exercises were chosen because they demonstrated students coming to terms with the simulated roles of professional lawyers. They also combined a range of genres and a range of written and spoken texts showing varied positions within a participant framework and displaying both participative and reificative processes of subject formation. This range made it possible to use contrastive analysis as the dominant analytical tool.

Findings

This section presents a synthesis of the detailed findings across the two case studies and across the different texts and analyses within the case studies. This synthesis follows the guide questions established in Chapter 1, and is presented in terms of its relevance to confirming, elaborating or modifying the initial model from Chapter 3.

What subject positions do law students have to come to terms with in their coursework?

The case studies confirmed the view that there are positions embedded in the textual practices of the law, and that these positions are identifiable through their association with characteristic patterns of distribution of linguistic elements. Examination of texts from a range of genres and contexts also suggested that student subject positions are identifiable independent of the genres in which they are embedded. For example the interpreter position was evident in all sections of both case studies, that is, it was evident in student written and spoken texts, in letters of advice, examination answers, meetings,

and in moot appearances (See Tables 4.2, 4.8, Texts 4.3.1, 4.4.1-4.4.3, 5.3.2). This finding confirmed the view, argued for in Chapter 1, that subject positions are identifiable independently of other discursive features such as genres or textual practices. It established the explanatory power of subject positions by demonstrating that they are not mere proxies for genres or stages within genres.

The interpreter subject position was shown to be reflexively constituted by representational and interpretive practices in which students work at a conceptual level at applying the facts to the law. It is recognisably related to the representation of the legal subject as interpreter described in Chapter 3. This interpreter position was individuated by a characteristic pattern of linguistic features, supporting the view that the concept of a subject position captures distinctive aspects of legal writing. Clauses are predominantly in timeless present tense, and are used to state a fact that holds true independent of the circumstances of its statement. Themes relate to elements of the case or to the parties to the case. Extensive use is made of nominalisations, demonstrating the synoptic nature of the textually-mediated social practice of the law. Logical connectives indicating relations of consequence are widely employed.

A refinement of the model developed in Chapter 3 was suggested by the text analyses (Table 4.2). The interpreter position can be divided into two sub elements: statements of what the relevant law is and application of legal rules and categories to the facts, referred to in MIRAT as 'raising the law' and 'applying the law to the facts'. While the two sub elements are relatively clearly distinguishable, they often are closely bound up together within the same clause or clause complex, and hence are grouped as a single pattern.

These sub elements were shown to be distinguishable by the characteristic patterns of linguistic elements associated with them. For raising the law, themes of clauses are usually legal concepts (such as duress). The verb *to be* signifies existence, definition or attribution. Clauses often take the form of a rule stated using a deontic modality (*must*). Extensive use is made of explicit intertextuality in citing elements of the law (see Table 4.2). In applying the

law, themes of clauses relate either to parties to a case or to their legal obligations. Specific details from the facts of a case are restated as instantiations of general legal rules. This restatement is achieved through nominalisations and reduced non-finite verbal constructions which change the facts of the case from events and actions to noun-like entities with legal attributes. Conditionals with facts as antecedent and a legal conclusions as consequent are used to express reasoning about the application of legal principles to facts (Table 4.2).

The interpreter position was shown to be related to the stance students assume towards their conclusions, expressed through propositional attitudes and modality. In some cases students emphasise the status of their reasoning as opinion, while in other cases they emphasise the certainty and objectivity of their conclusions using polar modality. In moots, for example, in the role of simulated counsel, and in their examination answers, students attempt to speak authoritatively as the voice and vision of the law (Table 4.2, Texts 4.4.1-4.4.3, Texts 5.3.2).

This deletion of subjectivity is partly a matter of simplicity, of appearing to write directly and to the point. But, in a confirmation of the discussion in Chapter 2 of universal and self-effacing subject positions, the deletion was also argued to be a matter of artifice, of concealing the linguistic traces of the complex range of roles and frameworks implicit in the textual practices of the law. Simplicity was argued to be a matter of authority, of trying to make legal representations transparent and inevitable, but also a matter of concealment, of hiding the subject and her actions behind the appearance of objectivity (Texts 4.4.1-4.4.3).

In contrast to the pattern of the deleted subject, however, in letters of opinion and in student discussions conclusions are presented explicitly as opinion, arrived at via legal reasoning based on evidence. There is no attempt made to present these views as authoritative or objective or to delete traces of the subject. This is because the conclusions have the status of opinion, as in a letter of advice (Text 4.2.1), or are being presented provisionally as suggestions, as

in the student meetings (Texts 4.3.2-4.3.3, 5.2.6-5.2.8). The pattern of the self-effacing subject was confirmed, but it was shown to be localised to specific contexts rather than a defining feature of the subject position.

While the interpreter position forms the major element of texts such as the examination questions and the counsel submissions, all texts also contain traces of the second position postulated by the model. Texts such as the letter of advice (Text 4.2.1) make extensive use of first person because of the greater influence of this practitioner position. The students in this position write and speak as members of a law firm in giving advice and making plans about a client's actions within an adversary world of legal process. Activities relating strongly to this position include giving advice to a client about future action and about the strengths and weaknesses of her current position. Students in this position consider future actions of adversaries and attempts to counter those, and give advice about the likely reception of legal arguments by a judge or other authority.

This practitioner position is also individuated by a characteristic pattern of linguistic features evident in a range of texts (see Table 4.6, Texts 4.3.2-4.3.3, Texts 5.2.6-5.2.8). Tense is predominantly future, reflecting an orientation contextualised to a particular place and time. This pattern makes strong use of pronouns, often in theme position, again reflecting its contextualisation to a particular dispute. Common pronouns are 'we' or 'they' referring to a firm of solicitors acting for a client opposed to an adversary (inclusive 'we'), or 'we' and 'you' where a firm of solicitors is giving a client advice (exclusive 'we'). Modality is often deontic where future action is recommended. Conditionals are dynamic in the sense that they refer not to reasoning but to future actions being conditional on contingencies. This dynamic character is also conveyed by references to argument 'in the alternative'. The practitioner pattern contains frequent evaluations and assessments, referring to the merit of positions, arguments and actions. Adversatives highlight the contrast between a client's position and those of an opponent.

The combination of interpreter and practitioner positions into a participant framework was also examined. The analysis suggested that these positions combine in different ways to constitute a spectrum of participant frameworks. At one end of the spectrum is the practical view, fostered by the MIRAT formula, that answers are obtained by applying the right kind of legal tests and having the right kind of legal judgment. This practice is exemplified by the student examination answers. Like Murphy's (1994) modernist judges in Chapter 3, it regards legal analysis as a process of technical rationality. Students follow the MIRAT procedure in order to generate legal analysis of a case (Table 4.2). On the basis of this analysis they then in a practitioner role advise people of their legal positions. The relation of the interpreter and practitioner positions is a linear one of dependence. This type of practice uses polar modality and the language of vision, as was evident in the analysis of examination answers and moot court submissions (Texts 4.4.1-4.4.3).

In the middle of the spectrum are the pragmatic, recontextualising practices described by Mertz (1996; 2000) that students use when they begin to realise that the interpretation of a case is not fixed or transparent but varies according to context and purpose. These were evident in Beverley's arguments in the alternative about whether a sculpture is a good or a service (Text 4.4.4). In this intermediate view interpretation is not a technical, linear process but informed by practitioner concerns such as precedent, strategy and jurisdictional and procedural issues.

At the other end of the spectrum are reflective practices (Schön 1983). Students learn specialised coding practices that make it possible to use simulations to establish which one of a range of possible interpretations is most appropriate to their needs. Forwards and backwards reasoning allows students to move from a practitioner position to an interpreter position and back again in order to find the fit between the concerns of both that is most relevant to a particular case. This type of practice was evident in William and Emily's discussion around taxation issues (Texts 5.2.6-5.2.8). It is distinguished by uses of comparatives to compare the merits of different interpretations, and hypotheticals to reason out the consequences of choosing one course of action over another.

Representations of future actions are not deontic *we must*, but conditional *If they do this, we should do that.*

What difficulties do students experience coming to terms with legal subject positions?

Analysis confirmed the view that students would find it difficult to engage with legal positions. Although it was assumed in Chapter 1 that these difficulties would result primarily from incompatibilities between legal and non-legal subject positions, many of the text analyses also demonstrated problems arising from internal inconsistencies and contradictions within legal participant frameworks. These findings came from analysis of unsuccessful or flawed student attempts to produce legal texts, as well as comparison of student texts with texts written by legal professionals.

Some student problems were argued to result from unsuccessful attempts to resolve internal conflicts between the interpreter and the practitioner positions. A conflict was observed in the letter of advice (Text 4.2.1) between reasoning about how the law applies to the facts and advising a client about her legal position. In attempting to manage both of these positions simultaneously students lose focus in their writing. This loss of focus was evident in Table 4.6. The tangled syntax of the clause complexes illustrated the students' struggle to incorporate the linguistic patterns of both interpreter and practitioner position simultaneously in the same complex. The stress of attempting to occupy two positions was evident in the poor quality of the writing, centring on overuse of reduced participial or non-finite constructions within multiple embeddings of propositional attitudes and modals, as well as in unfocussed theme patterns.

Another example of internal conflict within the participant framework was provided by the contrast between the two parts of Beverley's submission presented as Texts 4.4.1-4.4.3. In the part of her submission dealing with issues of legal interpretation she succeeds in assuming a self-effacing interpreter position. In the other part of her submission (Text 4.4.5), analysed as Table 4.8, the pressure of the judge's counterargument causes Beverley to loose authority through excessive reference to the opinions and attitudes of the defence and of

the expert witnesses. It was argued that problems with this part of the submission come from misapplying techniques associated with the interpreter position to arguments about fact. As Adam shows, matters of fact would have been more appropriately addressed from a practitioner perspective.

Although some problems for the students result from internal conflicts within the participant framework, a greater number result from conflicts between legal positions and other perspectives brought by students to their work.

The counterfactual form of reasoning required by the avoidance provisions of the *Income Tax Assessment Act 1936* (Cth), examined in Chapter 5, poses special difficulties for William. This is because counterfactual reasoning requires the legal professional to project what someone would have done if things had been different, and such projections necessarily require the personal knowledge and judgment of an individual who cannot easily be made to vanish. The traces of William's struggle to control the device of making his opinion disappear by reinserting it as the views of the 'reasonable person' were evident in Texts 5.2.1 and 5.3.2. It was argued that William's difficulties result from the fact that his autobiographical self does not have enough experience of commercial matters to allow him to put himself in the place of the 'reasonable person' and decide what this person would have done in a given situation.

Evidence of a further conflict was argued to lie in Emily's rejection of hypothetical reasoning in Part IVA. This difficulty was evident in Emily's opposition to multiple alternative characterisations of Fred's affairs as a range of schemes, and her insistence on an argument based on a realist position about Fred's income (Texts 5.2.2-5.2.5, 5.3.3-5.3.6). Emily is opposed to the loss of epistemic authority that comes with the end of what Mertz (1996) calls the ideology of 'textualism', and to the loss of the view that texts have a unitary and transparent meaning guaranteed by authority. Her rejection was argued to come from a deep incompatibility between Emily's autobiographical self at the level of the 'image' and the version of the legal participant framework embedded in Part IVA of the *Income Tax Assessment Act 1936* (Cth).

A major source of conflict was argued to lie in incompatibilities between students' simulated roles as legal professionals and their positions as university students. One example of this conflict was evident in the examination answers (Table 4.2). Students seek to appear objective and authoritative, but in practice they often use epistemic modality and propositional attitudes to express a personal stance. This intrusion of personal opinion reflects the fact that students do not yet have the authority to present their conclusions as if speaking with the objective voice of the law.

Students also have trouble distinguishing between their position as participants in a simulated legal practice in which the aim is to manage a case effectively on behalf of a client, and their academic position in which their aim is to perform well in assessed work. One source of this confusion is uncertainty about assessment. There is often an ambiguity in the professional skills program about whether students are evaluated academically on their individual skills or in their simulated roles as lawyers. This ambiguity was evident in the letter of advice (Text 4.2.1), where there is a tension between the need to write as a lawyer to a simulated client and the knowledge that the letter is going to be assessed by a tutor on academic grounds. And the tutor comments, in their focus on the purely legal aspects of the letter of advice, show that this concern is well founded.

The confusion between legal and student positions also shows itself in William and Emily's representation of Peter's different positions in the moot process (Table 5.1). It was argued that confusions about Peter's role correspond to a failure by William and Emily to separate clearly their own legal and their academic positions. This confusion leads William and Emily astray in anticipating how Peter would respond.

Also evident in William and Emily's meeting was their desire to distinguish themselves and put arguments which are different from other students (Text 5.2.10). This was argued to be student-like behaviour, and to demonstrate a confusion between their positioning as students and their positioning as

simulated legal professionals. When these plans are put into practice in the moot, Peter's response in Text 5.3.10 makes it clear that they are inappropriate.

Problems also occur as a result of the ambiguous positioning of students within firm meetings as simulated legal professionals and as members of a peer group. In a conflict of social and professional norms, students express fear at being exposed to the gaze of others if they stand up and single themselves out (Texts 4.3.9-4.3.10). Male students are reluctant to compete with others or to express desire or ambition because this requires them to give up a gender-based rejection of the role of conscientious student (Text 4.3.8). Students are reluctant to assert themselves and make negative comments about others who do assert themselves (Texts 4.3.12-4.3.13). However there was also evidence that a student such as Margaret is able to use ambiguous framing as a positive resource by strategically shifting from one position to another.

Through what processes are student subjectivities formed?

The case studies generally confirmed the model developed in Chapter 3 of processes of subject formation. Through text analysis a more detailed picture emerged of the linguistic means through which subjects are formed. And the analysis also demonstrated some ways in which the processes work together in ways not envisaged in the original model.

Examination of student work confirmed the view that a major form of engagement is participative. Students write and speak participatively as 'performers' or 'subjects of enunciation'. Two forms of participation were evident: participation in legal education as represented by texts produced for assessment, and participation in the communities of practice of 'firms' or small groups of students. Participation in legal texts is generally associated with the self-effacing subject known by her words and actions rather than any explicit self reference. Participation in communities of practice, on the other hand, is marked by use of 'I'.

Students also write and speak reificatively of themselves as 'characters' or 'subjects of statement'. Most examples of reificative engagement occur in the

meetings where students are reflecting on past actions and planning for future actions. Students in reificative mode generally identify themselves as 'we', recognising the collective construction of a 'subject of statement' by the group (Texts 4.3.1-4.3.13 and Texts 5.2.1-5.2.11).

As the model suggests, subject formation can result from the reconciliation of tensions both within a participant framework and between subject positions from different domains. For example tensions between the legal and academic domains are exploited by Peter and Adam as a means of forming student subjects. Peter and Adam make use of interactions that are framed ambiguously as student/teacher or judge/counsel exchanges in order to make the moot into both a simulation and an educational experience (Text 4.4.5, Table 5.2). As was argued in relation the Socratic strategies in Table 5.2, there is an overlap between the strategies used in legal and in teaching texts. It was argued that discursive practices such as the Socratic approach are designed to create a continuity between legal and educational participant frameworks (Burns 1997) and hence to be used as boundary objects (Wenger 1998).

Conflicts between legal positions and the gendered and classed peer positions associated with student communities of practice were also evident in Texts 4.3.8-4.3.10. These tensions are resolved by use of techniques which are dialogic in Bakhtin's sense of the word (Bakhtin 1981). These include stance taking from the point of view of one position towards the other position (Texts 4.3.9-4.3.10, 5.2.10). They also include playful experimentation with the reframing of positioning as a resource to overcome conflict (Text 4.3.8), allowing students to work through issues of desire and affect, alignment and attitude. The playful character of much interaction in the meetings allows students to experiment in a relatively risk-free way with finding a comfortable stance towards their legal positioning.

As anticipated in Chapter 3, participation and reification were shown not to be merely complementary processes, but also to have a mutually constitutive or 'folding' relationship, for example the reflexive relationship between the *we* as character or subject of statement and the *I* as performer and subject of

enunciation. In the moot courts the *I* of counsel making their submissions draw on the plans of the *we* formulated in the student 'firm' meetings. And in the meetings the formulation of a *we* draws on the experiences and arguments of the various *I*s and *you*s who made up the collective community of practice (Texts 4.3.2-4.3.3, 5.2.6-5.2.7).

The criticisms and opinions of legal authorities are folded inwards in processes of self-construction. In Texts 4.3.7-4.3.6, for example, students internalise and use as a means of self-regulation an evaluative stance held by others. Also in this group of texts the generic reificative *you* or *one* of a rule or maxim of conduct was shown to be internalised by the participative *I* and to influence his or her actions through reflection and self-criticism.

Reflexive processes of subject construction were also evident in Text 5.2.6 where William and Emily take a position like that of Schön's (1983) reflective practitioner, showing that they possess a metalanguage to speak and reflect on their own practice. This reflective positioning was evident in William and Emily's debates about the future actions they should take.

Finally, the case studies also confirmed the claim that subjectivity is formed through pedagogical interaction between students and more knowledgeable others. This was shown to be achieved through modelling, through formulation, through assessment, and through Socratic questioning. Legal authorities form and reform students' responses in a way that attributes a particular kind of opinion or position to them. This reformulation of student positioning was evident in Text 4.4.5 where the pronoun *you* is used by Adam to construct a representation of Beverley through tag questions and formulations using *you say*. In Text 4.4.5 Adam also models what it is to be a legal subject by reformulating Beverley's submission and then using a counterargument to demonstrate the stance of a practicing lawyer. Peter demonstrates a form of modelling in which he rehearses in first person how a legal subject should take a stance towards his or her subject matter (Text 5.3.10). Evaluation is also important in subject formation. An example is

Peter's attempt to plead with Emily to produce an argument that is legal in character (Text 5.3.9), as well as his final evaluation comments (Text 5.3.10).

Finally, William and Emily are formed as subjects by 'Socratic' strategies. Peter's Socratic approach was analysed as a technique designed to achieve formation of a Schönian subject who can engage in distanced representational practices and hypothetical forwards and backwards reasoning (Table 5.2).

To summarise, a general model emerged with the following characteristics. Discursive participant frameworks are reflexively created by participation in activities. Subjects are formed by the process of coming to participate in activities, and by the way subject positions within a framework are appropriated and reconciled. Participation in an activity forms a subject in two ways: as a character whose actions are represented as part of the activity, and as a performer who participates in the activity. There is a reflexive relationship between these two modes of engagement in which the represented self normatively controls the actions of the performing self, and the actions of the performing self form the basis for representations of the self-as-character. Subjectivity is formed by interactions between subject positions from one domain and another, and by authorities' shaping of learners within their control.

Significance of the thesis

As Chapters 2 and 3 established, a problem with CDA is its relatively inadequate theorisation of subjectivity. This thesis has shown how CDA can be supplemented by linguistic concepts and by theories of professional and legal subjectivity in order to provide a workable approach to the analysis of subject formation. The model of subject formation, and the methods used to apply the model in textual analysis, are developed through the case studies and summarised in the findings. A feature of the model is that it brings together into a single framework, through a combination of poststructuralism and ethnomethodology, approaches to the analysis of both spoken and written language.

That subjects are discursively formed is a commonplace. A special feature of this thesis has been to show at the level of the texture of language how the process of formation occurs for specific subjects located in specific contexts. The case studies show language being used both as a tool for subject formation and as a site where subject formation occurs. Macrosocial categories such as subjectivity and professionalisation are linked to the microsocial detail of clauses and of turn taking.

One of the main aims was to show that problems with law students' writing are not just due to a failure of academic writing or legal analysis skills, but also reflect the demands students face in coming to terms with the unfamiliar positions taken up by a professional legal subject. The findings show that the case studies have established this claim by demonstrating that 'subject positions' and 'participant frameworks' can be used as means of distinguishing one kind of professional or disciplinary discourse from another.

But further work would be needed to establish the practical significance of these findings. First, it would be necessary to broaden the analyses developed in the case studies to cover a wider range of students, of institutional settings, and of legal genres. Baker (2000) points to the need to examine other sites of the legal skills curriculum such as legal clinics, externships and alternative dispute resolution courses. Second, the significance of the work for legal writing and legal skills practitioners would need to be established. Roberts & Sarangi (1999) suggest that the significance of applied discourse research is best established in a partnership model in which practitioners and discourse analysts collaborate to formulate research questions, to make recommendations and to design interventions.

This thesis has a number of implications for the improvement legal writing. Students should be taught where they can intrude their personal opinions into writing and where not, and they should be taught the self-effacing devices used by lawyers to delete traces of their own positioning. Teachers should be more explicit about the ways in which rhetorical context shapes a piece of legal writing (Baker 2000; Phelps 1989).

The thesis also has implications for the redesign of tasks and instructional materials used by legal educators. Students should not be placed in positions they do not have the knowledge or experience to occupy. Educators need to abandon 'contextual disavowals' (Baker 2000, p. 140) that erase the real circumstances of people's lives through stereotyping or trivialisation (Text 4.1). A more inclusive representation of people's lives would help those students who at present feel alienated (Baker 2000).

But this instrumental approach, while important, looses sight of the critical edge of the analysis. The universalised, self-effacing subject is an ideological device for creating a form of blindness that prevents legal subjects seeing themselves as they really are. Students are caught in this bind. They can only learn to engage with legal positions if those positions are made explicit. Legal texts are however designed to conceal the positions occupied by their authors. Good teaching should give students the information they need to allow them to make their own choices about how they accommodate to the subject forms of the law. Educators also need to find a version of the law that is not based on repression of the subject and that does not thereby 'kill' its students (Goodrich 1996).

Educators also need to recognise that legal practice has associated with it specialised forms of representation that remove students from the everyday commonsense world (Mertz 2000). Students should not be absorbed by these professional perspectives. They need to retain the ability to view events from multiple points of view. Dialogic and reframing practices such as those examined in the case studies are a helpful way of counteracting the hegemonic tendency of the law to colonise all aspects of social life.

Finally, the question of legal subjectivity is about far more than just formal legal education. Both Goodrich (1996) and Schlag (1991) show that legal subjectivity is crucially implicated in the way in which the legal profession develops and reproduces itself:

> the cultural reproduction of an intellectual or moral vision is not so much a matter of handing down stone tablets (doctrinal or otherwise) as it is a matter of engaging the next generation (Schlag 1991, pp. 1677-1678)

The view of the legal subject that has emerged from this study is not a particularly engaging one. It is to be hoped that this thesis can contribute to the development of a more inspiring 'intellectual and moral vision'.

Appendices

Appendix 1: "Close Encounters of the Worst Kind": Instructions, Tasks and Annexures

This appendix reproduces information from the Practical Legal Skills study guide given to each first-year student at the start of the academic year. It includes assessment tasks and the support materials in the form of instructions and documentation.

2 Instructions

Important note
Where dates and times are given in the Instructions for these Tasks, they apply to the fictitious fact situations given. You should follow them, hypothetically, *regardless* of the *actual dates* upon which you may be completing Tasks.

Semester 1

Instructions

Susan Gratemaster is a renowned painter, who affects a flamboyant personal manner. She has frequently appeared as a celebrity artist on television shows, and, until recently, few of her works sold for less than $100,000 through galleries. Her commissions to paint were of comparable value.

On 20 January, Susan was approached in her studio by Mr Bruce Tweed and Ms Trisha Brown, representing the Victorian Development Corporation ('the Corporation').

The Corporation, incorporated under the *Victorian Development Act* 1993, owns various sites in the central business district of Melbourne, in Geelong and in other provincial cities. Its charter is to develop them in ways that will improve the cultural life of Victoria, at the same time providing a focus for industry development.

Tweed and Brown said that the Corporation wished Susan to provide a sculpture, to be suspended in the grand entrance hall of a building soon to be completed in Bass Boulevard, Melbourne. However, they were concerned that she had not had experience with sculpture or structural work.

Seeing a wonderful chance for career advancement, Susan sought to reassure them. 'Don't worry about that. Leonard French had never worked with stained glass before he put in the ceiling of the Great Hall at the Cultural Centre! We artists have an instinct for this kind of thing. Besides, I'd naturally consult with experts about any of the technical la-de-dah. Rest assured, though, I can do it.'

Ms Brown said, 'Oh, you don't have to worry about attaching it to the building. We'll supply the cables and connections, and we've got engineers to check them out. You only have to be concerned with the structural integrity of the sculpture itself.'

'That's even better!' Susan replied.

Two weeks later, she received an order form (Annexure 1) for a mobile sculpture, to be called 'Close Encounters of the Worst Kind'. It was to be hanging in place on 30 April, two weeks before the building's opening.

Susan set to work in Fred's Foundry at 167 Metalworks Road, Broadmeadows, owned by a local artisan called Frederick Townsend. She told Fred, first, that she had to rely on him for technical advice. He pointed out that he was a self-taught tradesman, but said that he was prepared to advise her. He would include the advice in the charge for hiring his foundry and equipment to her. That rate was $150 per day, for 30 days. She gave him a security deposit of $1,500.

Fred watched Susan occasionally, as she welded together ploughshares, wheel hubs and other paraphernalia. He made suggestions from time to time on how the structure should be strengthened. He did not know that the sculpture was to be suspended in the air; Susan wrongly assumed that he would realise this from its shape.

Susan ensured that the total weight did not exceed ten tonnes, the maximum set by the builders who, in consultation with engineers, installed the necessary anchor-points on the walls and ceiling for the sculpture's suspension cables.

The cables were more than sufficient to suspend ten tonnes. They ended in hooks, placed under strategic parts of 'Close Encounters', selected by Susan. Some were hooked under parts of the main frame itself, and artistic projections from it, while others went through metal loops specifically welded on for the purpose.

On 20 April, 'Close Encounters' was in place, and the Corporation executives were enraptured by it. Two days later, to Susan's surprise, she received an order for another sculpture, in a letter from the Corporation (Annexure 2). It was to be named by her, and installed at ground level, freestanding, in the same entrance hall. Her fee was to be $350,000. She signed and returned the enclosed copy of the letter, to signify her acceptance.

At this stage, however, Susan had commenced work on a mural painting in another building, for another client, and she had no time to devote to both tasks. She rang up Fred Townsend on 22 April, and asked him to put together some metal oddments, to a maximum weight of one tonne, in a similar style to the previous sculpture. She told him she would pay him $35,000, provided he finished it within four days, and that this work for her on this project remained 'our little secret'.

At 5.00 p.m. on 26 April, Susan arrived at the foundry to inspect Fred's work, and was pleased to find it remarkably good. She only needed to weld on two flanges, to have something she could be proud to call her own. She etched her signature in with a blowtorch, after completing that welding, and arranged for the sculpture to be delivered the following day. She decided to call the work 'Angry Penguins'.

'Angry Penguins' was installed directly below 'Close Encounters'. At 6.00 a.m. on 30 April, the majestically suspended sculpture crashed thirty metres to the ground, in pieces. Several tonnes of artistically arranged scrap metal crashed onto 'Angry Penguins', destroying it completely. Extensive damage was also caused to the marble flooring.

The sculpture was smashed into pieces when it struck ground level, the fractures almost always occurring along its welding lines. It was unclear which parts of it fractured as it broke free from its suspension, or during the fall, or on impact with the ground. The suspension cables and hooks were all undamaged.

Fortunately, no-one was injured, but the building's opening was delayed by one week, due to repairs and structural testing. Numerous tenants are expected to sue the Corporation for breach of its covenant, in the leases, to provide quiet enjoyment of the premises as from 14 May,

At the time of the crash, Susan had received payment, by bank cheque, for 'Close Encounters'. She has not paid anything to Fred, other than the deposit. Nor has she received payment for 'Angry Penguins'.

A prospective client who was negotiating with Susan to commission another sculpture has, since this incident, broken off the negotiations. The fee being discussed was $500,000. Susan now expects to receive no offers from that prospective client. Further, the market value of Susan's paintings has dropped by 50%.

Tasks

Plaintiff firms act for the Corporation
Defendant firms act for Susan Gratemaster.

Task 1

Plaintiff firms
Write a letter of advice to the Corporation, based on the instructions it would be able to give concerning these facts on 7 May, (Task time).

Defendant firms
Write a letter of advice to Susan, based on the instructions which it would be able to give concerning these facts on 7 May,

Task 2

Plaintiff firms
Write a letter of demand to Susan, as at 7 May, on behalf of the Corporation.

Defendant firms
Write a letter of demand to the Corporation, as at 7 May, on behalf of Susan.

Plaintiff and Defendant firms
Reduce the two Leading Statements on pp. 47 - 48 (51 - 52) of the Course materials to one memorandum stating, as clearly and memorably as possible, the function and nature of pleadings.

Task 3

Plaintiff firms
Prepare a Statement of Claim against Susan, on behalf of the Corporation, based on the information known to it on 7 May,

Defendant firms
Prepare a Statement of Claim on behalf of Susan Gratemaster against the Corporation, based on the information known to her on 7 May,

(In real life, it would probably be premature to commence proceedings at this stage. Plaintiff and Defendant firms must provide, with each Statement of Claim, a list of reasons why this would be the case. When would it be more appropriate for your client to issue proceedings?)

Semester 2

Instructions These instructions continue on from the instructions given in First Semester.

On advice from senior counsel, by 31 August, (Task time, remember, not real time), the Corporation has settled all threatened actions by tenants for late occupation of the building, for $560,000 in total.

The other losses caused by the falling sculpture were as follows:

Expert reports	$55,000
Transport	$3,300
Marble flooring	$235,000
'Angry Penguins' (unpaid)	$350,000
'Close Encounters of the Worst Kind' (paid)	$750,000
Other materials	$17,500
Labour	$88,000

The Corporation and Susan have each obtained an expert's report as to the cause of the sculpture's fall (Annexures 3 and 4, respectively.) These will be exchanged before trial, but not before the issue of the pleadings referred to below.

On 15 September, after receiving the Corporation's Statement of claim, Defendant firms serve a Third Party Notice on Townsend.

Plaintiff and Defendant firms agree, on 30 September, that to simplify matters, no Defendant firm will rely upon its Statement of Claim prepared against the Corporation. Instead, each Plaintiff firm will, by consent, file an amended Statement of Claim out of time, and the Defendant firm will plead to it in that proceeding. The costs thrown away by abandonment of the Defendant's proceeding will, by consent, form part of the costs in the Plaintiff's proceeding.

Task 1

Plaintiff firms

Draw an amended Statement of Claim against Susan Gratemaster, based on the information now known to the Corporation.

Defendant firms

Draw a Third Party Notice against Fred Townsend (with reference to the unamended Statement of Claim).

Task 2

Plaintiff firms

Draw proceedings appropriate to make a claim on Townsend also.

Draw documents appropriate to bring any claim you consider your client may have against Fred Townsend, in the light of the copy Third Party Notice sent to you in accordance with the Rules.

Defendant firms
Draw a Defence and Counterclaim to the Corporation's amended Statement of Claim, based on the information now known to Susan.

Task 3

Both firms
Prepare a brief to counsel, to appear on trial of the proceeding between the Corporation and Susan Gratemaster. (The Third Party proceedings have lapsed. Fred has been made bankrupt, and his estate will not be able to pay any dividend.)

Tasks

Annexure 1 to Stage 1 Task -

Victorian Development Corporation

VDC

17 Autumn Street
MELBOURNE VIC 3000

Form 629/A4

ORDER for Goods and Services

TO: Ms S. Gratemaster ..... No: 8640 A3

OF: [redacted] .....
.....

Kindly supply and install undermentioned items

AT: "Development House" .....
[redacted] .....
[redacted] .....

BY: 30 April .....

PAYMENT: Within 30 days of Delivery .....

ITEM DESCRIPTION: Suspended sculpture, 'Close Encounters of the Worst Kind'. Handing fromsuspension apparatus supplied by VDC. Location: foyer. Theme: Escape from Recession. Weight range 8-10 tonnes. Structural integrity required. Suspension to be organised and directed by VDC engineering office.

Property and risk in said items to pass on completion of installation.
No representations by agents or employees shall bind or prejudice the Corporation.
Work to be completed in proper and workmanlike manner, using materials suitable for the purpose.

PRICE: $ 750,000.00

E&OE

Authorised: .....
Bruce Tweed

94

Ever onward and upward for Victoria!

Annexure 2 to Stage 1 Task -

Tasks

Victorian Development Corporation

VDC

17 Autumn Stree:
MELBOURNE VIC 3000

22 April

Ms S. Gratemaster
'Valhalla Retreat'
[redacted]

Dear Susan,

'CLOSE ENCOUNTERS OF THE WORST KIND'

Our C.E.O. and executive staff were so delighted by the speed and skill with which you delivered this sculpture, and the way in which it soars impressively in the entrance hall, that they persuaded the Chairperson and Executive Committee of the Corporation to order another.

'Close Encounters' really captures the spirit of our mission - rising high above the world's economic malaise!

There has been no time for a full board meeting, because 'Development House' is opening so soon. However, I am authorised to ask you urgently if you will make us a freestanding sculpture to be installed underneath 'Close Encounters'.

It has to be not less than 10% the size of 'Close Encounters' , but otherwise it is up to you. You can choose the name, materials and theme according to your artistic discretion. Our board is confident that you will again give us an exceptional work of art.

Terms the same as before, except the fee is $350,000.

Please sign and return the enclosed copy of this letter if you are interested, and can comply by 27 April.

With kind regards,

Trisha Brown
PROPERTY OFFICER

Tasks

Annexure 4 Practical Skills Course Task -

F. TURNBULL & ASSOCIATES

Structural Engineers

Messrs Defendant Firm
c/- Law School

Our ref: XL - 456 21
Your ref: PM: AKE

15 November

Dear Defendant Firm,

S. GRATEMASTER AND
VICTORIAN DEVELOPMENT CORPORATION

We are sending our full report on this matter under separate cover later this year when our senior partner returns to work. He was the principal investigator but, unfortunately, has since suffered a heart attack and been hospitalised.

You have asked for a brief summary of our views, however, as a matter of urgency. They are as follows:

1. No-one can say for certain what caused the sculpture to fall.

2. The pattern of crystalline breakdown is thought by some to show whether metal and welding fractures are due to stretching by weight or sudden impact. However, research is still inconclusive. Many engineers, ourselves included, think that after a fall and impact such analyses are little help.

3. Spectrographic and X-ray tests on what was left of 'Close Encounters' show a roughly even spread of weight and impact fractures, as between the main structure and its hanging add-on points.

4. There were slightly more in the structure but not enough, in our view, to overcome the inherently strong probability that several of the welded flanges gave way first.

We are not lawyers, but it seems to us that the accident could not be said - in all probability - to have resulted from lack of *structural* integrity.

In the engineering profession a breakage of hanging points is usually called an engineering, design or handling failure. Structural integrity, in contrast, is usually taken to mean inner, corporal strength.

We also think that if VDC's engineers were required to 'organise and direct' the suspension, this would have to include responsibility for checking and providing specifications for all suspension points.

Yours faithfully,

Ms I.M. Flexible
PARTNER

96

Annexure 3 Practical Skills Course - Task

Tasks

R.O.L.

R.O.L.
Consulting Engineers

Consulting Engineers, 16 Werribee Street, Bundoora, Victoria, 3083

30 November

Messrs Plaintiff Firm
c/- Law School

Ref: VDC.crash

Dear Sirs,

VDC v. Gratemaster

You have asked our opinion concerning the cause of the sculpture 'Close Encounters of the Worst Kind' falling down in Development House on 30 April 1994. In particular, you want to know whether it was due to lack of structural integrity in the sculpture.

We were on site within 6 hours of the accident, and visually inspected the damage. We noted that all suspension cables were intact, including their hooks.

Obviously the fault lay with the sculpture itself. However, it is difficult to say which precise feature was to blame.

The sculpture generally fractured on welding points and along welding lines, but this may have occurred when it hit the ground.

Some of the welding was part of the structure, and some of it was to secure hanging flanges and eyes from the cable hooks. The fractures were equally divided between the two kinds of welds.

We have since X-rayed and carried spectrometric tests out on the debris, in an effort to see which fractures were due to an accumulation of weight, and which to sudden impact. There are minor crystalline differences which enable some tentative conclusions to be drawn.

We can send the detailed test results for you to inspect, but they comprise voluminous computer data which might not mean much to you. We suggest a conference to explain their implications.

Meanwhile, we can say that 67% of the 'weight' fractures were in the structural welds, and the rest in the hanging accessory welds. 56% of the structural fractures were 'weight' fractures, while only 39% of the hanging weld fractures were 'weight' fractures.

In our opinion this makes it more probable than not that the accident was due to structural weakness.

Please let us know if we can be of further assistance.

Yours faithfully,

DIRECTOR

Appendix 2: Transcript of Barry Firm Meeting of September 6th

	that is a good point
Beverley	what was Angry Penguins price before payment was due for it (.....)
	no
	yeah yeah
Marilyn	it wasn't due till the 27th of May ( )
Beverley	is that Section 42
	that's what I said
	commercial
	now buyers right ( )
	that's a reasonable examination
	analysis ( ) section
	Section 41
	Section 41 and 42
	and 91 ( )
	what you want to squeeze in your examination so ( )
	yesterday
	they should know if it was structural integrity then just to check it out
Andrew	wouldn't a reason for examination be to determine the contract after reading that section
	feedback term of the contract
Andrew	yeah
	examination
	engineers
Andrew	no it was the term of contract
	and they had it for a fair bit of time before it fell down
Andrew	even if it's there sitting in the shed I mean to have to go by that it sounds as though its a reason to have reasonable examination has to be a term of the contract something that not in the contract provided that its 3 days earlier in the space of and it just sits there people will have expected to go and have a look at it that's all I think it's got to be in the contract (silence) that's all
Margaret	say that again I missed that
Andrew	all right reading these two parts of Sections 41 for there to be the provision of reasonable examination that provision like from what I've read in number 2 of it it has to be a term of the contract that there is a provision for there to be reasonable examination
Beverley	where do you get that from it just says unless otherwise agreed when the sale of tender is delivery [Andrew coughs] of goods it is the buyer who is bound by request to afford the buyer reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity of the contract [reads aloud] why does it have to be a term of the contract

	that they're allowed to examine the goods doesn't matter to me
Margaret	there's another section about examining.. yeah [33 sec talking quietly among subgroups]
Beverley	so if you include 41 and 42 that is she's accepted them because he's indicated that he's accepted them I mean he hung them up
Margaret	if you're going to loose then you could actually argue like you're not going to loose points (..)
Andrew	just put it in anyway
Margaret	yeah
Margaret	I'd say put it in and just like make sure you can clarify it and you know what you're talking about so when the judge asks you a question you can start (…) these are mine [laughter]
	cool [talking within groups and turning pages]
	no it's just got [Andrew gets something in his eye]
	close your eyes
	don't trust
	eyelashes
	close your eyes
	seriously make a wish
	it's an old wives session
	don't you do that every night
	brief to counsel
	right
Beverley	that's due today [students all talking at once]
Beverley	I think we can put in 35 as well which says that payment and delivery are concurrent
Andrew	is it a contract
	why not
Andrew	it says payment 30 days after it's
	hey guys
Andrew	( ) different terms of the contract It says on page 38 ( )
Marilyn	property and risk pass together unless 1 2 34 and 5
Beverley	except that unless otherwise provided and it's in the order form it says that risk passes with property so it's otherwise provided for
Margaret	can't we get around it somehow like
Beverley	why because you don't it still says risk passes with property so it's still good for us
Andrew	who's got an answer to that
	yes
	ok
	sure
	you have that one covered
	you've kicked up
	sorry
	do you have to mention it ( )

Andrew	did anyone agree to be instructing solicitor
Marilyn [to Beverley]	it's only you and me [ie senior and junior counsel]
Margaret	yeah I will be [laughs] I wanna do this [change in voice quality emphasis] (..)
	yeah yeah I would be if you don't want to be
Andrew	I don't care no
Marilyn	ah Margaret you can be the junior counsel I'll be the instructing solicitor [laughs]
	[no
Andrew	[you've just got to sit there.
	no because all the [3 people talk at once]
Andrew	get dressed up [laughter]
	hey no Margaret Margaret wait the (...) really isn't Marilyn a really good reader
	[I'd say she was
	[yes she is
	yeah well then
	she uses word taken it so ( ) she's really good
	( ) I've gotta ( ) [softly] (…)
Andrew	do you want to be
Peter	you can (.)
	what do you have to [do
Margaret	[do you wanna be [laughs] (..)
Andrew	what's the point
Peter	let's ask her if I ask you
Margaret	yeah well you don't have a (.) claim
Andrew	hey
Margaret	I've got a claim
Andrew	what's the point=
Peter	=pooh [releases breath]
Andrew	now [we
Margaret	[ah you really don't wanna be [laughter] I'll do it I'll do it if you want me to [Emphasis on really]
Peter	yeah ok cool [laughter] (….)
Margaret	what do I do
	you going [to
Marilyn	[you have to do the brief to counsel for us then [laughter] (…..)
Peter	( ) missing link [laughter continues]
Margaret	ok [laughter emphasis]
Margaret	yeah ok what do I do [down to earth]
Several speak together	brief to counsel [falling rising inflection as for repetition]
Andrew	you got to be able to sit still and not talk for 3 hours Mags

Margaret	( )
Andrew	it's a big [ask
Beverley	[instructing solicitor does the brief to [counsel
Peter	[try and sit there and not talk
Margaret	ohh ho yeah [laughter] (.....)
	I've got it all down off .
	I've got it all down
	finish the part that's due today
	isn't that the brief to counsel
	no the brief to counsel
	it still doesn't
Beverley	all right I'll take it out it doesn't matter I'll take it out
	oh right ok
	what are you looking for
	95
	and um
	that's all
	have I got the letter of advice somewhere
	a completed section
	Yeah [reads draft aloud]
Marilyn	I did find something on ...
	account or something
	there's one copy
	doesn't have any instructions
	how's that (.....)
	you guys you know how she's saying um my=
	=pages
	should get it
Margaret	you guys having anything like that
	what
Margaret	you know how she said um you know in the last one where she stood up and answered some things
	about our leaders oh
Margaret	and you've got to make sure
Beverley	[tutor] said that she spoke to [lecturer] and he said don't worry about it
Margaret	I reckon you should do it
Cathy	just in case
Margaret	like 'cos that shows at least that you've got some idea
	yeah
Margaret	ah they can't take points off and say
Beverley	I've got a reference to how to do it
	got to figure out
Terry	yeah I agree

	write this
	from the library
	goes on over the page
Margaret	I've gone through and put down
	due by due five o'clock know we can pick it up then
	so we just walk it around
	You've got to put in particular one of the copies from there
	oh ok
	need half a day
	do you want me to
Peter	what else do you want
	got to put it in
	do you want me to
	put 3 copies in there
	hate doing that
	pages
	help me write it
	two services
	most recent cases
	where's the brief to counsel
Marilyn	oh p 36
Rachel	I'm not in the photos
Andrew	for this brief to counsel it's basically it's basically in two parts um instructions and observations so maybe we should divide it into two groups and each do one of them what do you think
Andrew	maybe its easier that way
Peter	what was that divide into two groups
Andrew	see how it's in two parts
	no that's not working
Andrew	instructions
Margaret	the facts aren't they
Margaret	um Beverley
Margaret	like the facts that's sort of like what the instructions are so you just take that and put it in there and that's
Beverley	you've got a copy of it as well
Margaret	yeah
Andrew	it's in the letter of advice
Margaret	something like that yeah so like should we just take that and that's the instructions (....)
Andrew	yeah
Peter	have to rewrite them a bit
	yeah
Margaret	that'd be right
Penny	then with the observations you have to say what's the thrust ( ) and what

	it's about
	yeah
Marilyn	it's supposed to be the other way around
Marilyn	no that's all right we'll tell you
Margaret	yeah cause I don't really know what you have talked about
Marilyn	neither do we at the moment
Beverley	can we burn this book
Marilyn	there's a case that says a sculpture
Peter	that's what
Marilyn	there's a case
Peter	yeah that says a sculpture
	exams that was it I thought nothing else to do
	next thing I got to worry about
Andrew	[talks over general chat] so is buying a sculpture sale of goods sale of services or sale of goods and services (……) cause um (.) I just went looking (…) guarantee the other people (.) to be using (…) section 90
Marilyn	89 and 90
Andrew	yeah cos they'll try and say (…) 89 commercial quality of goods sold
Beverley	they'll try and use section 17 and 18 as well
Andrew	yeah
Beverley	same sort of thing
Andrew	they'll probably try and say that they weren't of merchantable quality they weren't (…) they weren't fit for the purpose
Marilyn	yeah
Andrew	that's all
Marilyn	but if um if um they're using section 18 and 19
Andrew	yeah
Marilyn	part 1 we have we have to prove that part 1 doesn't apply in ( ) because that only applies to sale of goods so that's where we're using Robinson and Graves
Andrew	[right
Marilyn	[it's the best case for us (…)[all talk together for 5 secs]
Marilyn	so if they use part 4
Beverley	it's still binding at the moment
Rachel	oh no it's not because they're […
Marilyn	[Robinson and Graves is more recent
Peter	but was it a sale by description (.)
Marilyn	no there's a um I dunno
Peter	so how can all you say that
	that the[notion (…)
Marilyn	[19 and
Beverley	[19 and
Marilyn	A & B

Andrew	oh right yeah
Margar et	and this is what [I feel
Penny	[and if they …
Marilyn	[they've got to use Part IV
	yeah
Marilyn	they're going to try and use it
Andrew	yeah
Marilyn	then we've got to argue that its and we've got to argue that it's not ( ) why its personal
Andrew	yeah
Marilyn	so
Beverley	shut up [laughing]
Margaret	hey guys there's really no point us sitting here all arguing about it and trying to work out what we're doing right I thought I'd go home and fix up the instructions a bit (…) fix up the instructions but I don't know how I can't cope with the observations until you guys have worked out exactly what you're doing (…)
	so if you can [draft
Margaret	[there's no point like if you write down yeah this is what we're going to do I'll come in and say we've got a strong case here might miss point here or write that point [there (…)
Marilyn	[we don't have a strong case that's the problem we can't say [laughing voice] we have one because we don't have one
Margaret	why have we can't we I mean can't we use the word strongly I mean that makes like so you can appear more convincing
Penny	but isn't it like when you get to see a client
Andrew	yeah (…)
Margaret	you've got to be [you got to be
Beverley	[you've got to be completely honest in the brief because it's not=
Marilyn	=it's just to us
Beverley	your client's only going to see it
Marilyn	that's right
	( ) well if you just broke it's the very end ( )
	you want me to (…) [laughter]
	yeah
	sorry [laughter]
	don't worry about it
Margaret	um if you just like write down what you want me to write up in sentence form I can write it up in sentence form no problem but I don't know what you guys are (.) going on about over there
Beverley	[softly] neither do we (.)
Margaret	like you guys have to get it all organised you know what I'm trying to say you guys have to like (.) like work out what's going on [rising tone] (……..)
Andrew	silence is deadly (24 secs)

Beverley	That's one book (……)
Marilyn	[Reads aloud] Where goods are consumer or ( ) other goods (…) materials instructions [students all talking at once over the reading]
Andrew	Mags was saying
	all right ok I'll do that
	we don't have a tute
Margaret	ok what's the problem
Andrew	huh
Margaret	how come you're [laughs] you're looking really shitty
Marilyn	I just don't think we'll be able to prove that it was a service
Cathy	of course it was a service
Rachel	yes it was cause [inaudible everyone talking at once]
Andrew	study guide and that makes it a service
	yeah but
Beverley	yeah (…) Study Guide refers to R & G this book says that Robinson and Graves is very unpersuasive
Marilyn	there's another case in Lee and Griffin it says [reads] where the supply is more artisan than artist there seems a distinct tendency towards sale of goods
Beverley	Lee and Griffin actually specify a sculpture and says a sculpture will be considered goods [and not a service
Marilyn	[so what that means is
Beverley	it was before R& G but they seem to think ( )
Penny	like they wanted the product right but they wanted her to make it it wasn't just something that they looked at and said we'll have it
Marilyn	but the order form says goods [and services
Penny	[they ordered it
Cathy	[but why yeah
Rachel	[before it was made (….)
Penny	the order form says goods and services
Cathy	the difference is that they [cough] like in the sale of goods they pay for the goods but in sale of goods and services they're paying for like the skill of the artist that's what they're paying for here (…)
Beverley	yeah that's what that's what that book says and that's the argument we'll try and use but it`s but there are other cases that say (….) [students all talking at once]
Peter	says goods and services anyway [All talking at once]
Marilyn	that's the one that's in our study guide Robertson and Graves
Beverley	yeah but then I mean you're not supposed to go [All talking at once]
Penny	Beverley they'll be arguing about working ( ) relationship won't they
	yeah
Andrew	services they can't
Penny	yeah but then that's classed as service so you're going to have to find something to prove it just get rid of that book
	[it's also in this book and
	[it says in the thin book

	[goods and services [All talking at once]
Margaret	I'll have to go and do this one it's another one
Sophie	in the commercial law book it says something about um it being a service depending on the party's intent or something and seeing as the order form says [goods and services
Penny	[yeah that shows intention
Sophie	misleading intention
Beverley	does it say something about intention in the book
Cathy	yeah can't remember
	I remember
Sophie	I can't remember
Beverley	and it the book actually seems positive to us because it says that if it's hard to distinguish between the two it's more likely to be services [interruption] then you can't think of them as separate contracts it's more likely services
Peter	aren't they just going to say the order form says [All talking at once]
Cathy	the order forms that was probably the routine
	ok next point
Marilyn	what does workmanlike mean what does it mean
Rachel	I shouldn't have mentioned that should I [*sotto voce*]
Marilyn	what does it mean what does workmanlike mean
Penny	we did that we had that problem last semester didn't we workmanlike
Sophie	(.....)we sat and talked about it for about three hours in your room
Terry	do you reckon they would put that at the top of the page so [laughter] ( ) it up that's saying something [laughter] it's the boldest thing on the whole page
Marilyn	[lecturer] seemed to think it was services remember when we talked to him and he was [students all talking at once]
Beverley	we still need to be able to argue Part I in the alternative
Penny	Part I Just in case
Beverley	if they don't accept that it is services
Marilyn	just in case it applies what happens if Section 19A and 19B what do we do then
Beverley	it fits the purpose
Marilyn	yeah it fits the purpose
Cathy	you're talking about um where they say that like would presume like where the merchants are of equal knowledge and things when there's two sort of business people um contracting [with each other
Penny	[yeah that's true
Cathy	you know like normally there's a re( ) that's assumed but when they're of equal knowledge there's no
Beverley	are they of equal knowledge
Marilyn	she's an artist
Beverley	The Victorian Development Corporation are of equal knowledge perhaps the engineers are but that's not who they're contracting but that might show that they don't rely on the fact that they're getting engineers to look at it but they do specify that you do have to have structural integrity (.....) and it has to be under ten tonnes it has to be fit for that particular purpose what are going to rely on for that which I don't know how we get around

	except by submitting that letter it says it wasn't her fault
	Yeah [general talk]
Beverley	it asked for structural integrity but well you this thing about holding up and stuff it doesn't say anything about you have to get it in the right spot or anything so you could say that's why it broke and that's not really the structure
Margaret	think of arguments
	talking all at once
Peter	could you maybe argue that it's like a standard a standard form which is usually appears on so I dunno so (...)it's really just services but could you say that
Beverley	it's OK if its goods and services because if it's goods and services then its Section 4 [general talk]
Marilyn	tell me what you want me to type up
Margaret	what's happening with the observations do yous just want to nut it out or what
Beverley	we just feel like we're sitting here wasting time that's all
Marilyn	do you want to come and see us later on the library then this afternoon
Margaret	later on this afternoon all right I'll go now and I can do the instructions
Marilyn	I'm going to write the amendment because that's due in by 5
Peter	I might stay home then
Penny	well do you want to wait till tomorrow and we can you can [give us the observations
Marilyn	[done by Thursday because how are we supposed to write up our speeches
Penny	oh we'll have it done for you tomorrow night
Margaret	I can get the instructions done for you this afternoon that's what I'm saying I'm going to do the instructions you can finish them;
Peter	and the observations you know the observations really
Penny	you already know em
Marilyn	all I want is a sheet of your observations that I can hold
Margaret	ok we'll do that
Marilyn	you know what I'm talking about Margaret
Margaret	yeah I know what you're talking about
Beverley	I'd be happy to get anything
Marilyn	if you like just give me a sheet of your observations I can go and write that up and
Beverley	we don't have our full observations yet
Margaret	I'll go and do the instructions
Penny	because you've got to worry about the amendment that's the main thing at the moment if you can have it by tomorrow we can have it back to you by tomorrow night
Marilyn	ok all right tomorrow where and when
Penny	there's no need for the whole firm to meet
Marilyn	when to meet
Penny	or do you want to go over the observations before we type it up or what
	we've got a tute 3 or 4
	give them tomorrow I can do them tomorrow night then I can drop them

	back round at your house Beverley something like that
Beverley	I'll be in Thursday anyway
Margaret	I can give them to you you might want to check them Wednesday 9o'clock at night
	give them to me tomorrow afternoon write it all up I reckon it'll only take about an hour
Beverley	don't bother typing it up anyway
Margaret	if you get it all done and give it back to you guys to check it over tell what the problems are with it I'm sure there'll be many then fix them up again then you can have them by Wednesday night
	Ok
	pause
Beverley	tomorrow which class are you going to
	well go to the 3
	well meet at 3 o'clock then
	yeah whatever
Margaret	we'll go and do the amendments now and get them in by 5 and we'll give you the list we'll go and do the amendments now and hand it in by 5 and get their amendments
Marilyn	do you want any help with that or is it just pretty straight forward
Penny	we don't know how to set it out because there's no precedent they said like a letter like you've got to write Dear Sir or whoever and set it out
Margaret	and then like you just put ( ) number one this is (...) from this is now (...) we are claiming this two (....)
	we can do that I've got to go to but I can be back at 4
	meet tomorrow at 3 o'clock in the foyer
Penny	I'll be in my room all afternoon if you want any help if you want me to do something
	yes same here I'll be in my place
	do you know what you do when its hard
	the amendment we have no problem with it's just the rest of it
Margaret	are you writing it up or are you are typing it up or what
Beverley	the amendments I'll type them up because we need three copies it won't be very long it won't be more than a page
Marilyn	but it doesn't need to be like its only ( )
	all right then

Appendix 3: Transcript of Barry firm meeting of September 8th

Beverley	maybe you noticed the independent engineers that they got were consulting engineers the engineers that we got were structural engineers so they specialised so ours should have more weight also [many voices talking over]
	will they still
Beverley	can't be really sure and that's why I was trying to find (...) most of this morning I was trying to find where it said the onus is on them to prove it but if they're trying to claim the onus would be on them wouldn't it I think we should see someone about that because if we get up there and say the onus is on them to show and they say how do you know
	course it is
Beverley	it doesn't say it anywhere that it is sometimes the onus is on where people
Margaret	you know how we did paragraph 9 ( )
Beverley	I read through anyway our Gaze(case) and realised that its really really bad but its just about line up our arguments basically
Marilyn	yeah it's not an order ever like (....)
	no
	also I forgot to tell you the
	yeah
Rachel	a couple of cases
Beverley	I went through what I thought we'd put in the expert's contention I wrote something for that
Margaret	I don't like the order that it's in
	no
Beverley	no neither do we we did it as we went along
Margaret	yeah that's fine I just kept what you've done but I was just
Beverley	I think put it in the order that we're going to put the arguments in
Margaret	yeah that's right
Beverley	and work that out but that's pretty easy enough to move around should we [cough] (.....)
Beverley	and somewhere I read that we said that she has a good case for frustration
Beverley	because she doesn't have a good case for frustration
	[no I don't think we should bring it up
Beverley	[she's got a good case
Beverley	no in our brief we can we could say...
Marilyn	she doesn't have a strong case
Beverley	she does have a strong case if they bring up frustration
Rachel	I don't know if we're going to be able to prove self-inducement
	can't prove frustration
Beverley	frustration is self-induced whether its her fault or their fault its still self-induced therefore it's not frustration its got to be breach[if it's anything

	[mmm
Margaret	I've read a paragraph on it [laughs] (.....)
Margaret	I just tell you what we do go away and do it and come back and see you tonight and then we may get to sleep a couple of hours every night
	right
	this is what I want to do with my life
	that's
Beverley	we haven't claimed their repudiatory breach for them for Angry Penguins which I think we should because we've said that they have a case for Angry Penguins we haven't really said why
	why
Beverley	well it may not paying amounts to a repudiatory breach really (.....) don't you think (..) and the other thing (.....) in two respects because there's three ways you can have repudiatory breach and one like expressly refusing to perform the contract which they have and two they've claimed the contract is discharged for breach of contract when the claim is unjustified we're trying to show the claim is unjustified [interjection] but well they have to pay for it and then reclaim it they can't (....) because it's breach of a completely different contract that they're saying is the reason that they don't have to pay it
Margaret	was that one [laughs] sorry
Beverley	no you said something
Margaret	I already said that
Cathy	they're saying like that the contract is at an end right like the Corporation are they don't have to pay but they're not paying because of like we were saying last semester like and they say its a repudiatory breach they're actually breaching themselves they say it's a
Beverley	which it can't be because it's a completely different contract
Cathy	exactly there was nothing wrong with anything in it so
Rachel	but how do we say that [laughter]
Beverley	I started having problems and getting confused when I was going through
Margaret	you're getting confused though because you've gone through it so many times that's the problem
Beverley	the hardest thing was in that one that we did the last moot that we did it was all (...) we were defending and we weren't counter-claiming and so I'm going through writing my introduction thinking OK we're going to show that this is not true and this is not true and then we've got to say (...) then we're going to claim that we're going to claim stuff from them and I don't I didn't work it too well have to go through and change that
Marilyn	yeah [all talking at once]
Beverley	oh no it was really bad like it was as bad as yours that you did for us that was really badly worded and you'll admit that yeah you gotta admit that because you changed
Margaret	yeah I know I was reading it last night it didn't make sense (.....)
Marilyn	but we've basically got the main points down anyway we have to re-organise it
Margaret	you've gotta reorganise it
Marilyn	you've gotta reorganise it I know [laughs]
Beverley	well I've got the order here pretty much

Marilyn	good [and I've got a suggestion
Cathy	[one suggestion point form make a few changes
Marilyn	and like I've done like half of it half the submission well not half but pretty much so
Margaret	we have to fix it up [laughs] today and then type it up tonight tomorrow morning something
Beverley	um what I'm not sure what to say in the actual opening paragraph
	you [have to
Beverley	[because in our other one we said oh we submitted that it wasn't there's so many things
Marilyn	are you supposed to outline um the facts of the case even though [they're going to do it
Beverley	[I'm not sure
	yeah
Marilyn	cause we're not supposed to do it defendant usually
Beverley	that's what I thought
Peter	maybe we should just ask him ask the judge
	oh yeah
Beverley	'do you want me to outline'
Marilyn	over the other
Beverley	but then I would have thought [it's up to the plaintiff it's only up to us if want [
Marilyn	[he'll will say yes
Margaret	[if the plaintiff says anything you can say we want to add any extra facts
Peter	yeah
Marilyn	something like that they they've missed out so you're going to have to sit there and listen to what they say
Beverley	that wasn't exactly how that happened
Marilyn	yeah yeah
Margaret	they're putting a different slant on it
Beverley	yeah that's what they did in the one we all did they tried to put their slant on it and John just kept going that doesn't appear what the facts say to me and so we kept picking it up so it had to be facts not favourable to
Marilyn	he kept asking them questions it got really bad like they were trying to twist the facts so it was for them only
Beverley	but what facts can they give that's the thing we're just going to be repeating the facts they give because the facts are given to both the only thing that they might say is a fact is that you know because of lack of structural integrity and that
	I don't think
Beverley	but they can't say that because its not a fact
Cathy	[lecturer] said you're supposed to outline the facts
Beverley	I don't think you are
Margaret	You're just repeating what they said [all taking at once]
	any good defence
	that's why that thing in the extracts

	put down yourself
Beverley	yeah they've got extra time just so they can give the facts
Marilyn	so don't so just introduce and what we're going to submit
Rachel	what time is it tomorrow [general talk about the location of the moot]
	[1 o'clock
	[past two days
	[you know where the police station is police station
	[yeah
	[around there
	[it's past the second left and its where you see a bridge
	[If you're going along the main road Geelong
	[Why don't you just follow me and Julie
	[going down that way and you'll see um a bridge um I don't know
Peter	how much time have you got
Marilyn	we've got 30 minutes
	30 mins
	half an hour
Peter	and how much have the plaintiffs got
Beverley	forty five
Marilyn	I'm going to die in 30 minutes [laughter]
Beverley	they have to read out our amendment
	sorry
Beverley	( ) they have to read out our amendment which is wrong
Margaret	so is theirs
Peter	they're both wrong
Beverley	I think they show up there and say well change change defendants to plaintiffs and change your plaintiff to defendant
Marilyn	were hoping [lecturer] said that they might want us to read our defence and counterclaim and amendments so they might not remember they might just read out theirs
Beverley	but if you read out ours and if we get up and like change it to plaintiff they're going to say like well you
Marilyn	if they change [we can say the same thing[
Beverley	[they say [how do you know that
Cathy	and they go first so (.....) also what we can put in the
Beverley	[I don't want to get up about an amendment
Cathy	where they said the plaintiff has failed to exercise due skill and care I think we'll get to change that because that's the one that's a mistake and if the defendant [has
Beverley	[you won't go [laughter]
Marilyn	now that ours is stuffed up we can't
Beverley	we'll be generous
Rachel	well what do we do now
Beverley	we the defendant[where
Julie	[defendant has failed to pay 350,000

Rachel	that's more like that's more like a mistake than theirs I reckon so I reckon
Beverley	we did it twice though
	(TAPE TURNED OVER)
Beverley	this is just the same
Marilyn	could you pass me a pen please
Marilyn	we're going to use um Clay and Yates because that's where that quote about gold and silver comes from
Beverley	even though it's bad for us
Rachel	why's it bad [laughter]
Beverley	no it's just
Rachel	it's all right don't mind us
	we just lost it
Margaret	just this case which is the same as Robinson and Graves and [all talking at once]
	[stuff like that
	it said something bad didn't it
Marilyn	yeah didn't [it
Beverley	[it said something good but overall it was bad I would have thought
Marilyn	oh It's got a good quote in it
Beverley	you know where I change the (....)
Marilyn	except I don't know what is
Margaret	what it says 1 18 (.....)
Beverley	[oh I just got the citation
Marilyn	[you know how you've got court
Beverley	you can look it up
Cathy	cause you've got to say it out in court you can't
Rachel	is that the one with it it doesn't matter if its gold or something
	yeah yeah
Rachel	where did you get that one from
	she was just [laughter]
Beverley	now I went through [background chat]
Margaret	I don't (s) between 8 o'clock and 10.30 tonight
	ok
Marilyn	here
Margaret	what is it
Marilyn	federal court
Margaret	oh yeah I was just checking cause I couldn't read your writing properly I wasn't sure
Marilyn	all right yeah neither could I
Margaret	sitting there going hang on well I thought I'[d better get it right
Marilyn	[did you like that because we didn't know what to write so we just left it
Margaret	yeah I was sitting there going right well one moment [laughter]
Beverley	I was going through that and I came across this case [all taking at once] (....) where is it [leafing over pages and reads aloud] 'Although this case is

	difficult it should be distinguished because is different dammit [laughter all talk at once]
Beverley	what about the.. I've put what the experts contended right this is supposed to be fact so
Marilyn	we're not going to use Koufos v Clthorpse or however you say it [C Czarnikow] I don't know because that's bad I don't want to use that case
Beverley	they might though so (..) we'll look at it
Marilyn	you want to know how to spell
Beverley	[reads aloud] F Turnbull & Associates found that although no-one can say for certain what caused the sculpture to fall they believe it was unlikely that it resulted from a lack of structural integrity it was more likely to be engineering design or handling failure and that the engineers job of organising and directing suspension would include checking and providing specifications for all suspension points
Margaret	yeah and what about the other
Beverley	and the then the other one just said tentatitively
Margaret	I can't say that word either
Marilyn	what word was it
Beverley	tentatitively I can't say it
Marilyn	I can't say pppeprp [Laughter all talking at once]
	can't say this word
Beverley	structural weakness (.....) what do consulting engineers know about it are they do they specialise in anything or are they just ....
	they're just sort of any sort of engineers
Cathy	engineers that consult with you
Beverley	it's just that our engineers were structural engineers and ...
Marilyn	yeah I know
Beverley	And theirs are consulting engineers
Marilyn	so you think structural engineers it's more like we're we're specialists
Peter	yeah I think that's true
Beverley	but there's still nothing conclusive from it we could say that although
Marilyn	[say we're structural
Beverley	[structural engineers are more likely to (....)
Margaret	to know what's going on here (.....)
Beverley	now how do we find somewhere that says who the onus of proving that it was a breach onus....
Marilyn	I wonder there's that's in there though
Beverley	but isn't that repudiatory breach
Margaret	glad you can say it [laughs]
Beverley	and it's not really a repudiatory breach
Margaret	you're on a deal with her [I could
Beverley	[they have to they have to say if its a repudiatory breach they have to prove I think.... it says somewhere who the onus is on but it's not a repudiatory breach its not an anticipot an anticipatory breach and it's not the other one what's the other one
Margaret	I can't say the other one either [all talk at once] (.....)
Beverley	failure to perform you can't say that [laughter]

Margaret	I just want to do it that's why
Beverley	and it's not a failure to perform the contract's been concluded basically hasn't it they've paid she's supplied it's installed
Marilyn	they were using that case again you know that really long one that I used in the other one and he asked me to say it backwards (...)
Beverley	what [laughter]
Marilyn	it's got some sort of weird name it's another case
Beverley	and she said it's really weird say that backwards and she was just going 'What' [laughter] (....) But there hasn't been there hasn't been any of those breaches that's why I can't figure out what we're going to argue what they're going to argue
Marilyn	there's been an R breach
	R breach
Beverley	it hasn't there are three kinds of repudiatory breach expressly refusing to perform the contract the contract's already performed insisting upon [something to perform
Rachel	[in relation to which one
Beverley	no look this is not Angry Penguins this is Close Encounters
Rachel	Ok yeah
Beverley	no that's what the main things about and claiming the contracts been discharged because.... they haven't claimed the contract's been discharged they just want money back (.....) yeah oops
Beverley	so the only thing they can really use is the Goods Act
Marilyn	yeah they can't use contract for Close Encounters
Beverley	I don't think they can
Cathy	we could use it for the other one
Beverley	unless they claim that
Rachel	how can they use it for the other one
	the R breach.
Beverley	but there's been a breach there has been a breach of the term of the contract if there's no structural integrity But it's after the contract's concluded (....) but what breach does it come under (...)
Margaret	fundamental breach
	[all talking at once] this anyway
Beverley	the only breach that's occurred is a breach of the term of the contract that was discovered after the contract (...)
Rachel	what breach all it was [
Beverley	[lack of structural integrity
Rachel	oh that yeah [laughter] that it would be it oh yeah no but aren't we saying that it was wrong
Beverley	yeah we are but we've got to (....) if it's found that it's not right (....)
Marilyn	in the alternative we have to explore the options
Rachel	oh I'm sick of options
Marilyn	I don't think they'll say that I mean they will say there was[( )
Beverley	[you said they were relying on breach
Marilyn	that's Robert that's their grief they're not even relying on Part IV that's how

	stupid they are [laughter] I mean they don't even rely on Part IV that's the only one that's really good that's the one that they can get away with
Jonathan	do they use Part IV and then (....)
Marilyn	yep our group ( )
Beverley	they said it was ordinarily acquired
Marilyn	they can use Part IV I wish they hadn't it would have been easier for us
Rachel	one group got 45 or something for the last task
Beverley	that's what we're going to get for our um if that for our amendment [laughter] well look what we wrote
Marilyn	I mean we stuffed it up
Beverley	we stuffed it up and it's all Margaret's fault too because she was she was
Rachel	trying to remember reading [laughter] she was singing
Beverley	we wrote 'the defendant's installation of Angry Penguins was inconsistent with the ownership of the seller' the defendant was the seller and they did install the defendant's us
Rachel	no I remember reading that [all talking at once]
Peter	but that's not going to count for much at all though
Beverley	it shouldn't
Margaret	the brief's going to
Peter	yeah the brief [
Margaret	[but the brief's just as bad [laughs] [students all talking at once]
Beverley	sorry
Peter	can we get a copy of that
Marilyn	yeah I have a copy I gave you one photocopied
Beverley	you photocopied three you already have about two copies
	you told me
Peter	is that it
	yeah
	I need two one for Beverley
	do you want a copy
	all right
	I'll have
	I've got one
Marilyn	we also have to know all the cases just in case he asks the facts
Margaret	I'll just have it all marked down [and just in case he asks us (...)
Beverley	[one case I didn't know the facts to and he asked me
Marilyn	yeah he asked you
Beverley	I've gone=
Marilyn	=couldn't believe it=
Beverley	=then I started trying to guess them=
Marilyn	=not too sure your honour [laughs]
Beverley	I got through about two lines started trying to describe the facts because I had then in front of me but I hadn't read them so I'm going um (...) the facts were oh actually your honour I really don't know what the facts are
Peter	there's only two little mistakes in there

Marilyn	two little ones
Beverley	two [laughs] two big ones
Rachel	any particular page
	what about it
	are you going to spot what they did to you
	to a page
	what they did
Beverley	we copied how they spelt it in theirs
Rachel	but they spelt it wrong as well so they should know better
	we don't have to
Beverley	yeah not it's IR we don't have a letterhead from them so we copied what they gave us and it's spelt wrong no it's their fault I'm still stuck though on what we're going to argue for this breach I don't understand it
Rachel	oh get over it
Margaret	Beverley I don't think it was supposed [all talking at once]
	[we can argue
	[same thing
Rachel	I wouldn't worry about it
Marilyn	yeah but you got to come up you got to come up with an answer for me
Beverley	oh give me a minute wait a minute failure to perform comes with defective performance (……) we'll just argue failure to perform then that's right
Marilyn	that's what I was saying before oh you don't listen
Beverley	no you did not
Marilyn	yes I did
Cathy	they just took the form
Beverley	did not
Marilyn	yes I did the three types of R breach the first one's failure to perform
Beverley	no that's not an R breach
Rachel	isn't it just a breach of the term
Beverley	no it's not an R breach This is a different (..) one
Rachel	failure to perform is a different breach
Beverley	yeah the repudiatory breach it has 'expressly refusing to perform the contract' failure to perform is different yeah no no no the 3 types 'expressly refusing to perform insisting on non-contractual forms and claiming it's been discharged' it's not repudiatory breach it's failure to perform
	good
Rachel	isn't it just a breach of the term normal breach of the term [several talk at once]
Rachel	breach of the condition
Margaret	will somebody tell her please I can't convince her
Marilyn	they're just going to say they failed to perform because there wasn't structural integrity and we just argue that there was structural integrity
Peter	yes
Marilyn	simple
Rachel	it's because their engineers[

Margaret	[all they know is how to do
Beverley	yeah but we need to be able to figure out what sort of one it is so we can figure out what remedies they're going to be claiming and what remedies [
Peter	[but we don't need to figure that out though they'll figure it out for themselves
Rachel	who knows what remedies they're going to claim (...) [all talk at once]
Marilyn	they want 2 million over 2 million
Peter	a holiday [laughter] a law degree [laughter]
Margaret	oh yeah I wish I had one so I wouldn't have to go through this well another four years of this umum [groan] (17 sec pause)
Rachel	are you going to type things out
Beverley	yeah
Margaret	its all right for you you can touch type I sit there like this it's a pity I can't type
Beverley	all right well do you want so what else are you stressed about [laughter]
	you can do it if you want
	no I'm just going to make notes
	just about a year before
Beverley	what are you stressed about [laughs] (..) you worried [about
Marilyn	[you only have to humiliate yourself [laughter] humiliate yourself Beverley ok
Peter	we'll be watching
Marilyn	oh sure
Peter	we'll be watching
Marilyn	ali right for you [laughter]
Marilyn	thanks
Beverley	do you want me to give you what I've changed on this I didn't change much [I just
Marilyn	[I have to go last too
Beverley	I'll read over your brief I mean the other thing the facts
Margaret	may as well give it all to me at once
Beverley	all right
Margaret	let you do the
Marilyn	I'm going to have a problem speaking for 15 mins it's just so (...) I feel so nervous I hate being asked questions cause I'm scared of them ( ) [all talking at once]
Marilyn	thank you (.) thank you [laughing]
	what was that
Marilyn	I'm not going to sleep tonight (...) it's going to be a real life judge a real life judge out in the real world
Beverley	it might not be
	it might not be
	it might be what
Beverley	it might just be a lawyer
	well still
Margaret	it's still the same

Peter	you just got to sit there
	it's different having a lawyer
Margaret	I got to do the brief do bits and pieces of that yeah I know and I've got to look up books if they ask me it's all I've got to get dressed up
Marilyn	you just have to sit there and look good
Margaret	yeah its going to be ace
Rachel	you're going to have to get dressed and ( )
Margaret	you do no you do seriously you're not allowed in court unless you're wearing a skirt
Marilyn	oh you are so I've been in courts in jeans
Margaret	oh that was bad
Rachel	they hold it against you what you wear
	not quite [all talking at once laughter] (22 sec Pause)
Rachel	that's what I tried to say before when I asked what you're stressed about now if you go and guess that you're doing it
	well
	well I've got it under control
	I think
	no we
Beverley	I've got the Goods Act under control
Marilyn	oh yeah that's the easy part like we can do Goods Act no problems but the easy part that we can't do which is meant to be the easy part we can't do it which is like the structural integrity it's going to be hard to prove it all we can rely on is the expert reports
Rachel	but that's all they can rely [n
Beverley	[but they have to prove it
Cathy	isn't it going to come up for them too
Beverley	but I want to find something that says that they have to prove it
	isn't said something like have to prove
	the plaintiff always [talking at once]
Beverley	yeah we made that up
	the onus is on the plaintiff
	you made it happen
	we just hope
Cathy	isn't it in commercial or civil or something it'd have to be
Marilyn	in contract
Beverley	it should have been in contract but I went through all today all my notes trying to find somewhere where it said the onus of proof is on somewhere I looked in the book I looked in my big thick contract book (.....)
Marilyn	they're the one's bringing the action so the onus of proof should be on them it should be (....)
	innocent until proven guilty [*sotto voce*] (.....)
Beverley	our engineers are better so they should believe them both of them say they can't figure out what the actual cause was
Marilyn	although theirs do say that in conclusion we believe that it was probably more likely

Beverley	and ours say that it was not due to structural integrity
Marilyn	except they're not structural engineers
Rachel	they don't say it was probably more likely say it was
Marilyn	no that's what it says it in the letter
Rachel	yeah well that's in the conclusion
Beverley	I think that we should say that both of them are inconclusive
	yeah all right and therefore it cannot be shown that our client is
Marilyn	ours shows more weight because ours are structural engineers
	I dunno
	that's about all we can do should go and write it
	but we'll make one up
	you also have to show exhibits which is I don't know how to do that how do you do that don't you just say we present exhibit A to the court
	and then it gets handed up to the judge
	we'll have to make heaps of copies
	all right
	should have one called little waddle called Angry Penguins
	like what Brett did that night when we were going to the thing he didn't have a good model but he had like a chip container and dropped
	ok
	next year
	when will you have the thing done tonight
	not till 2 though
	I want to come and see you before that
	ah that's all right I have to go at 5
	we can come and give it to you
	that'll probably be easier
	how long are you going to be out here tomorrow
	I don't know it depends what when we get it done
	um we've got a class at 3
	is that
	well I'll be in that
	I won't be coming to lunch
	I actually did some reading for it
	I was quite proud I'm reading Hanks and highlighting and thinking wow
	you're reading Hanks
	this is a new thing
	I like Hanks I think he's good
	see there's someone else who likes Hanks it's not just me
	cases
	yes the engineers case I didn't read the engineers case

Appendix 4: Transcript of Beverley's moot submission

(excerpts read aloud are **bold**)

Adam	can I limit you to 35 minutes	
Beverley	35 minutes yes Your Honour (40 sec pause)	
Adam	all right let's hear what you say	
Beverley	**Your Honour if it pleases the Court we submit that the collapse of Close Encounters of the Worst Kind and the subsequent damage caused by this was not a result of fault or breach of contract on our client's behalf we further submit that the plaintiff is required to pay our client the $350000 debt owing in respect of Angry Penguins and is liable to indemnify her for loss of potential earnings our defence focuses on certain key principles I will show in approximately ten minutes that the fall of the sculpture Close Encounters of the Worst Kind was not due to a lack of structural integrity and therefore our client is not in breach of her contract with the plaintiffs and no damages can be claimed in respect of this incident**	Navy suit white blouse. Hands flat on table. Looks up and down from text to Adam.
Adam	um It will be interesting to hear that	B smiles
Beverley	**in addition I will show that neither part I nor part IV of the *Goods Act 1958* Victoria are applicable in this action and the claims based on these parts are unfounded. In the alternative I will show that if either part I or part IV of the Goods Act are found to be applicable the provisions contained therein are not effective to provide for a claim of damages in this action also in the alternative my learned junior will show in approximately ten minutes that if there was a breach of contract or if any sections of the Goods Act do apply to render our client liable for damages those damages are significantly less than those claimed by the plaintiff. in addition to this my learned junior will show that the Victorian Development Corporation is liable to pay $350000 in debt for the Angry Penguins sculpture and that the Victorian Development Corporation is liable to compensate our client for loss of potential earnings resulting from the collapse of this sculpture if it pleases the Court the defence will conclusively show that our client did not breach a contract with the plaintiff and no provisions of the Goods Act apply and thus damages are not recoverable further [we will demon**	Hands holding edges of paper
Adam	[why did the thing fall down	
Beverley	sorry	
Adam	why did the thing fall down	

Beverley	your Honour it's no-one's been asc been able to ascertain exactly the cause of the falling down there have been two expert reports submitted ah one report from F Turnbull & Associates structural engineers employed by the plaintiff ah and they they acknowledge that no-one can say for certain what caused the sculpture to fall to fall however they did conclude that in all probability the accident could not have resulted from a lack in structural integrity and they went further to say that the plaintiff's engineer's job in organising and directing suspension would have included checking and providing specifications for all suspension points	
Adam	but I mean as far as I understand the evidence the the guys and the hooks were still in place after the ah unfortunate (.) demise of Close Encounters which seems to suggest doesn't it that uh (...) they'd done their part and you say you say there's no evidence of structural failure but it's either that's not it's either got to be doesn't it the guys and ropes that held it up or it's got to be some weakness in the thing itself it's got it can't be anything else can it apart from an act of God how could in that scenario aren't you fixed with that it must have been structurally (...) [failing	Left hand point at B. in open handed gesture
Beverley	[your honour on I mean I don't have experience in engineering=	
Adam	=no but your engineers do=	
Beverley	=yes that's right and they have not been able to come to a conclusion the engineers employed for the plaintiffs were also unable to come to a conclusion they concluded that it was most probably due to structural integrity but acknowledged that that they couldn't really tell as with our engineers we believe that our engineers should be given more weight because they specialise in structural engineering [and they weren't able to (....)	Lifts right hand. Straightens wrist to turn over palm
Adam	[isn't your report sorry isn't your report incomplete or wasn't there some problem with your report	
Beverley	the report was not necessarily incomplete it was not completed by the person who initially set out on it due to a heart attack but it was still an expert who reported on it	
Adam	um (..) all right (...) the problem for you as far as I see it is (...) it's a bit like I don't think you've done tort yet	
Beverley	no your honour	
Adam	*res ipsa loquitur* if something goes dreadfully wrong and you can't explain the part there's only one possible explanation of what went wrong but you haven't got the evidence then that's sufficient to get you over the line in relation to tort it seems to me that if the guys are intact the thing is on the floor smashed into thousands of pieces then the person who created that (...) sculpture is fixed there is no way they're they're impaled on the evidence the facts the thing's lying smashed on the floor and the guys are still intact	

Beverley	Your Honour it could possibly be due to where suspension cables were hooked on the sculpture perhaps that was the ah the plaintiff's engineers were directed to organise that aspect of it and perhaps they weren't hooked in the right place	Lifts both hands. Moves each hand at wrist alternately up and down twice.
Adam	but doesn't the evidence say that all those things were intact the guys the pulleys the whole thing was intact after it fell	
Beverley	they were intact but they weren't necessarily connected where they should have been connected to enable the sculpture to remaining hanging	Lifts right hand and moves it laterally.
Adam	um all right (..) I'm not completely convinced but let's hear about are you going to talk about the Goods Act or is your learned junior going to talk about the Goods Act	
Beverley	ah I will show why the Goods Act does not apply and my learned junior will proceed to show why the if it does apply why the provisions in it=	
Adam	=oh good well tell me about the Goods Act	
Beverley	the Goods Act	
Adam	why it do you think it doesn't apply	
Beverley	ok (.....) we will show **that the goods supplied by our client do not fall within the description of sale of goods under sections 3 subsection 1 and 6 subsection 1 of the Goods Act ah we** need only look **we need look no further than the order form provided by the plaintiff to our client which is Exhibit A before the Court to see that it was clearly an order for goods and services as the contract in this case was in substance for the exercise of skill and it was only incidental to that skill that some materials were passed from the defendant to the plaintiff the contract is not one for the sale of goods but for work labour and materials supplied**	Turns pages
Adam	for services is that the same thing	
Beverley	yes Your Honour	
Adam	um and therefore that takes it outside the realms of Part IV or not	
Beverley	outside the realms of Part I Your Honour	
Adam	Part I and how does Part IV sit with that	
Beverley	Part IV	
Adam	um Part IV presumably is to do with consumer contracts isn't it	
Beverley	yes Your Honour=	
Adam	=yeah tell me about why (.) the plaintiffs say it fits into Part I and Part IV and you say it doesn't fit into Part I and it doesn't fit into Part IV	
Beverley	yes Your Honour	
Adam	why doesn't it fit into Part IV	

Beverley	**because subsection ah 85 ah section 85 subsection 1a places a price limit on goods covered by this part at $20000** and ah **section 85 1b** ah says that those goods can exceed this amount when they **are ordinarily acquired for personal domestic or household use or consumption**	
Adam	and were these done for that purpose	
Beverley	we don't believe they were Your Honour	
Adam	why not	
Beverley	because according to certain ah although **although sculptures may be usually considered to be purchased** ah for the **for the household** or may be purchased for the household if you **take into account the weight size and price paid for this sculpture it is not one of a kind ordinarily acquired for the household**	
Adam	hold on so you're narrowing the proposition that the plaintiff put down to say that sculptures of this (..) quality are not normally acquired for personal domestic use yours is a narrower proposition than the plaintiff's that would say generally sculptures are normally acquired for personal domestic use you say hang on ones in this value couldn't possibly because people couldn't afford to put in the front room would you say	
Beverley	yes Your Honour	
Adam	all right	
Beverley	we also use cases such as Jillawarra Grazing Co and=	
Adam	=What's the citation for that	
Beverley	That's **1984 Australian Trade Practices Reports at pages 44 40 to 44.**	
Adam	Are they authorised reports	
Beverley	(..) um I'm not sure your Honour	
Adam	uh let it go anyway	
Beverley	**and Atkinson and Hastings Queensland Pty Ltd 1985**	
Adam	yes	
Beverley	**Federal Court Reports page 33 and also Minchillo and Ford Motor Co 1994 the Victorian Reports where an air seeder a large tractor and a truck respectively were not considered to be goods of a kind ordinarily acquired for personal domestic or household use.**	
Adam	what were they again a tractor	
Beverley	they were an air seeder....	
Adam	an AIR seeder	
Beverley	yes a large tractor and a truck	
Adam	what is an air seeder	
Beverley	I'm not exactly sure Your Honour	B smiles. Laughter elsewhere

Adam	neither am I not something you can anyway is it (……..) for seeding (.) the clouds is it	B smiles and looks sideways at Marilyn. Laughter elsewhere
Male	seeding the ground with air	
Adam	oh really all right thank you what else an air seeder and a tractor and what else	
Beverley	(..) and a truck it was conceded that these goods normally had a private or domestic use but that but that in these in these particular cases they were not ordinarily acquired for [personal domestic or household use	Clasps hands loosely in front
Adam	[so they rather than look at a class of (….) items they said they look at the circumstances in which they were acquired did they	
Beverley	they did in those in those situations	
Adam	my understanding of the law was that you had to look at the circumstances of the purchase rather than as the plaintiff suggested you had to look at the anyway sorry go on	
Beverley	yes your honour the plaintiffs did make reference to the case of Carpet Call Pty Ltd and Chan...	
Adam	they did yes	
Beverley	yes **in this case it was held that carpet for a nightclub was a sale of goods ordinarily acquired for personal household or domestic use**	
Adam	yes	
Beverley	**however considering that almost every household has carpet and carpet in substance is mainly the same whether purchased for the house or elsewhere looking at the situation in question** as Your Honour has earlier stated **a unique piece of art work is quite distinct from a roll of carpet such as this one**	
Adam	good point	
Beverley	sorry	
Adam	that's a good point	
Beverley	(.) I will now refer you to my learned junior Miss [Marilyn]	
Adam	ok (…….) just bear with me a minute	

Appendix 5: FCT v Peabody

FCT *v* Peabody by the Full High Court [(1994) 28 ATR 344] as excerpted by (Kobetsky & Dirkis 1997) pp. 525-526

FCT v Peabody

Full High Court: Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ

(1994) 28 ATR 344 (181 CLR 359; 94 ATC 4663)

[See [17.13] for facts and decision]

Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ: [352] The Commissioner ... argued that, if the Kleinschmidt shares had not been converted to "Z" class preference shares, a proportion of the amount of profit which would have been derived from their sale, made necessary because of the float, might reasonably be expected to have been included in Mrs Peabody's assessable income for the year ended 30 June 1986.

The difficulty faced by the Commissioner in making that submission was not in establishing that a tax benefit was obtained by reason of the conversion of the Kleinschmidt shares to "Z" class preference shares, but in establishing that the tax benefit was obtained by Mrs Peabody in the relevant year of income. As O'Loughlin J observed at first instance:

> The Peabody interests had negotiated the purchase of a large parcel of shares in the group based on the group having a net worth of about $24m. Within a period of 12 months of that purchase there was to be a public float based on the group having a net worth of $30m. Somebody (the particular taxpayer or taxpayers within the Peabody family who would purchase the Kleinschmidt shares) stood to make a capital gain that was equivalent to about 38% of $6m. However that taxpayer or those taxpayers would be liable to tax on that capital gain unless some lawful avoidance measure could be implemented.

[353] The purchase of the Kleinschmidt shares was necessary for the purposes of the float. The actual purchaser of those shares was Loftway and it is apparent that Loftway, or some other company performing the same role, was required to be the purchaser in order to obtain the cheaper finance for the purchase, regardless of the subsequent devaluation of the shares. It was not contested by the Commissioner that the decision to finance the purchase of the Kleinschmidt shares through Loftway was other than a rational, commercial decision. The scheme for cheaper finance required both the purchaser of the Kleinschmidt shares and the financier holding the redeemable preference shares in the purchaser to be entitled to a rebate under s 46 of the Act in respect of dividends received by them. The Commissioner contended that the purchaser might reasonably be expected to have been TEP Holdings had there been no devaluation of the Kleinschmidt shares. A reasonable expectation requires more than a possibility. It involves a prediction as to events which would have taken place if

---

If a section reference includes a dash (-) (eg s 6-5), it is a reference to the 1997 Act.

the relevant scheme had not been entered into or carried out and the prediction must be sufficiently reliable for it to be regarded as reasonable (See *Dunn v Shapowloff* [1978] 2 NSWLR 235 at 249 per Mahoney JA).

There were difficulties in the way of TEP Holdings itself financing the purchase of the Kleinschmidt shares, regardless of any subsequent devaluation. Even if it had been possible for that company to issue and pay dividends upon redeemable preference shares having regard to its status as a trustee, it is far from clear that it could have established any entitlement to a rebate in respect of the dividends paid on the Kleinschmidt shares acquired by it. In order to establish an entitlement to a rebate, it would have been necessary for TEP Holdings, a trustee, to acquire the Kleinschmidt shares beneficially so that it was entitled beneficially to the dividends. If the shares were acquired by TEP Holdings on behalf of the trust, the dividends would not have been included in its taxable income (see the Act, s 96) and there would have been no rebate in respect of them (s 46(2)). Since the purchase of the Kleinschmidt shares had to be financed whether or not they were subsequently devalued, any uncertainty as to the entitlement of TEP Holdings to a rebate in respect of dividends upon those shares made it unlikely that TEP Holdings would have been chosen as the purchaser of the shares. The Full Court was correct in its conclusion that there was no reasonable expectation that TEP Holdings would have acquired the Kleinschmidt shares as part of the exercise involved in the float. It may be added that, in any event, even if TEP Holdings had been able to acquire the Kleinschmidt shares in its own right and not as trustee, it would appear that there would have been no present entitlement on Mrs Peabody's part to any proportion of any profit arising from the sale of those shares.

It necessarily follows that any profit obtained from the sale of those shares, had the devaluation not taken place, would have been obtained by Loftway so that any tax benefit in connection with the devaluation and subsequent disposal of the Kleinschmidt shares was obtained by that company. There is no reason to suppose, and the Commissioner was unable to demonstrate, that, had the devaluation not taken place and had that profit been made by Loftway, it would have flowed, or could reasonably be expected to have flowed, to TEP Holdings and hence to Mrs Peabody in the year ended 30 June 1986. In other words, and quite apart from any income tax which Loftway might have been liable to pay in respect of the profit, [354] there was no reasonable expectation that Loftway would have declared dividends which would have reached the Peabody Family Trust in that year of income.

The Commissioner advanced examples in an effort to show that, even assuming that finance was raised by Loftway by the issue of preference shares, the acquisition and disposal of the Kleinschmidt shares might have taken place in a manner which would have resulted in Mrs Peabody obtaining a tax benefit in the relevant year of income. But the method adopted by Loftway, apart from the devaluation of the Kleinschmidt shares, was found below to be entirely explicable upon a commercial basis and it could not be said of any of the examples advanced that, even if commercially possible, they would have been adopted in the absence of the devaluation as a matter of reasonable expectation.

For these reasons, it cannot be said that the amount which the Commissioner included in Mrs Peabody's assessable income for the year ended 30 June 1986 was an amount which would have been included or might reasonably be expected to have been included in her assessable income for that year had the devaluation of the Kleinschmidt shares not taken place. Mrs

Peabody did not, therefore, obtain a tax benefit in connection with a Pt IVA scheme and, accordingly, the appeal must be dismissed.

Appendix 6: William's summary of Part IVA of the *Income Tax Assessment Act 1938* (Cth)

PART IVA · SCHEMES TO REDUCE INCOME TAX

Definitions

177A. (1) In this Part, unless the contrary intention appears: 1981 on same day as s.15AA AIA.

"scheme" means:

(a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings; and

(b) any scheme, plan, proposal, action, course of action or course of conduct.

(1) Unilateral schemes

(5) A reference in this Part to a scheme or a part of a scheme being entered into or carried out by a person for a particular purpose shall be read as including a reference to the scheme or the part of the scheme being entered into or carried out by the person for 2 or more purposes of which that particular purpose is the dominant purpose.

Taxpayer obtaining or not obtaining a tax benefit

177C. (1) Subject to this section, a reference in this Part to the obtaining by a taxpayer of a tax benefit in connection with a scheme shall be read as a reference to:

(a) an amount not being included in the assessable income of the taxpayer of a year of income where that amount would have been included, or might reasonably be expected to have been included, in the assessable income of the taxpayer of that year of income if the scheme had not been entered into or carried out; or

(b) a deduction being allowable to the taxpayer in relation to a year of income where the whole or a part of that deduction would not have been allowable, or might reasonably be expected not to have been allowable, to the taxpayer in relation to that year of income if the scheme had not been entered into or carried out;

and, for the purposes of this Part, the amount of the tax benefit shall be taken to be:

(c) in a case to which paragraph (a) applies—the amount referred to in that paragraph; and

(d) in a case to which paragraph (b) applies—the amount of the whole of the deduction or of the part of the deduction, as the case may be, referred to in that paragraph.

(2) A reference in this Part to the obtaining by a taxpayer of a tax benefit in connection with a scheme shall be read as not including a reference to:

(a) the assessable income of the taxpayer of a year of income not including an amount that would have been included, or might reasonably be expected to have been included, in the assessable income of the taxpayer of that year of income if the scheme had not been entered into or carried out where:

had not fallen in the Act

(i) the non-inclusion of the amount in the assessable income of the taxpayer is attributable to the making of a declaration, election or selection, the giving of a notice or the exercise of an option by any person, being a declaration, election, selection, notice or option expressly provided for by this Act; and

(ii) the scheme was not entered into or carried out by any person for the purpose of creating any circumstance or state of affairs the existence of which is necessary to enable the declaration, election, selection, notice or option to be made, given or exercised, as the case may be; or

(b) a deduction being allowable to the taxpayer in relation to a year of income the whole or a part of which would not have been, or might reasonably be expected not to have been, allowable to the taxpayer in relation to that year of income if the scheme had not been entered into or carried out where:

(i) the allowance of the deduction to the taxpayer is attributable to the making of a declaration, election or selection, the giving of a notice or the exercise of an option by any person, being a declaration, election, selection, notice or option expressly provided for by this Act; and

(ii) the scheme was not entered into or carried out by any person for the purpose of creating any circumstance or state of affairs the existence of which is necessary to enable the declaration, election, selection, notice or option to be made, given or exercised, as the case may be.

(3) Not allowable if specifically for tax avoidance.

Application criteria

Section 177D Schemes to which Part applies

This Part applies to any scheme that has been or is entered into after 27 May 1981, and to any scheme that has been or is carried out or commenced to be carried out after that date (other than a scheme that was entered into on or before that date), whether the scheme has been or is entered into or carried out in Australia or outside Australia or partly in Australia and partly outside Australia, where:

(a) a taxpayer (in this section referred to as the "relevant taxpayer") has obtained, or would but for section 177F obtain, a tax benefit in connection with the scheme; and

(b) having regard to:

(i) the manner in which the scheme was entered into or carried out;

(ii) the form and substance of the scheme;

(iii) the time at which the scheme was entered into and the length of the period during which the scheme was carried out;

(iv) the result in relation to the operation of this Act that, but for this Part, would be achieved by the scheme;

(v) any change in the financial position of the relevant taxpayer that has resulted, will result, or may reasonably be expected to result, from the scheme;

(vi) any change in the financial position of any person who has, or has had, any connection (whether of a business, family or other nature) with the relevant taxpayer, being a change that has resulted, will result or may reasonably be expected to result, from the scheme;

(vii) any other consequence for the relevant taxpayer, or for any person referred to in subparagraph (vi), of the scheme having been entered into or carried out; and

(viii) the nature of any connection (whether of a business, family or other nature) between the relevant taxpayer and any person referred to in subparagraph (vi);

it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for the purpose of enabling the relevant taxpayer to obtain a tax benefit in connection with the scheme or of enabling the relevant taxpayer and another taxpayer or other taxpayers each to obtain a tax benefit in connection with the scheme (whether or not that person who entered into or carried out the scheme or any part of the scheme is the relevant taxpayer or is the other taxpayer or one of the other taxpayers).

FCT Discretion to include in assessable income

SECT 177F Cancellation of tax benefits etc.

(1) Where a tax benefit has been obtained, or would but for this section be obtained, by a taxpayer in connection with a scheme to which this Part applies, the Commissioner may:

(a) in the case of a tax benefit that is referable to an amount not being included in the assessable income of the taxpayer of a year of income determine that the whole or a part of that amount shall be included in the assessable income of the taxpayer of that year of income; or

(b) in the case of a tax benefit that is referable to a deduction or a part of a deduction being allowable to the taxpayer in relation to a year of income determine that the whole or a part of the deduction or of the part of the deduction, as the case may be, shall not be allowable to the taxpayer in relation to that year of income;

and, where the Commissioner makes such a determination, he shall take such action as he considers necessary to give effect to that determination.

Appendix 7: Skills exercise, extracts of transcript of evidence and instructions to mooters

This appendix reproduces the assessment tasks given to final-year students in relation to the case of 'Freg Bloggs'. It also includes the support materials given to students in the form of instructions and a transcript of evidence. This information was included in the Practical Legal Skills study guide given to each student at the start of the semester, apart from the transcript of evidence which was handed out later to make the task more manageable for students.

Skills exercise

Fred Bloggs is a licensed surveyor. For many years Fred worked as an employee for the largest company of surveyors in the Geelong district, Lots of Dough Pty Ltd. On 1 July 1992 Fred decided it was time to "make his big break" and start his own business.

Fred went to his accountant who advised him to establish a private company, Mega Bucks Pty Ltd (Fred and his wife Sheila being the sole shareholders and directors) and a family trust, "Bloggs Family Trust" (the beneficiaries under the trust being Fred, Sheila and their ten year old son Jock.) Mega Bucks Pty Ltd is the trustee of the Bloggs Family Trust.

On 1 July 1992 Fred walked into his boss' office and offered his resignation. Fred's boss, Mr. Monies, pleaded him not to leave. When, however, he realised Fred was intent on leaving, Mr. Monies suggested Fred at least act as a consultant for Lots of Dough Pty Ltd. Fred agreed and a two year contract was entered into between Lots of Dough Pty Ltd and Fred's new company, Mega Bucks Pty Ltd.

Over this two year period Fred worked through Mega Bucks Pty Ltd, mainly for Lots of Dough Pty Ltd but, on occasions, for other surveying companies as well. When Fred was working on a Lots of Dough Pty Ltd job he wore a bright tartan striped jacket with "Lots of Dough Pty Ltd" printed boldly on the back.

Each week over the two years, Fred drew a nominal weekly salary of $250 per week from Mega Bucks Pty Ltd.

After the two year contract expired on 1 July 1994, Fred (through Mega Bucks Pty Ltd) rarely worked for Lots of Dough Pty Ltd, but still accepted contracts from many and varied surveying companies. He also still continued to draw his $250 per week salary.

Prior to the expiration of the contract with Lots of Dough Pty Ltd, Sheila had little to do with the business. She would meet Fred at his office each day for lunch and perhaps answer the phone if it was ringing; but otherwise she had no involvement in it. From 1 July 1994, however, Sheila assisted Fred with the business by acting as a receptionist and typing up his survey reports but she did not receive any salary for her efforts.

At the end of each financial year the corporate trustee's profit was calculated and it was distributed so that Sheila and Fred each finished up with the same annual income. No distributions were made to Jock.

Fred is worried sick. On the basis of this information prepare an objection to the Commissioner's assessment.

The taxpayer's tax file no. is 322 280 296.

The Amended Assessment (no. 73652380 / 1995) against which you are objecting was issued on 24 February

The adjustment sheet indicates that all income distributed to Shiela has been excised from her assessable income and included in the taxpayer's assessable income.

The objection should be 2,000 words.

The objection should be lodged with the ATO agent (assignment box for on-campus students or for off-campus students through AASD by 4 pm on Monday 14 April

The objection may be prepared in firms or for off-campus students may be prepared individually. If the objection is prepared in a firm, please indicate the firm members' names and / or student numbers on the cover sheet.

This assignment is worth 20% of your interim assessment and will form the basis of the moot in week 9.

Good luck

EXTRACTS OF TRANSCRIPT OF EVIDENCE

CROSS EXAMINATION OF FRED BLOGGS

Counsel for the Commissioner: Mr Bloggs, did you set up your company Mega Bucks Pty Ltd on the advice of your accountant?

Fred Bloggs: Yes.

Counsel: Did the accountant explain to you the tax benefits of a family trust?

Fred Bloggs: Yes, but ...

Counsel: Just answer the question.

Fred Bloggs: I am answering the question. My accountant explained a number of advantages of a family trust with a private company as trustee including limited liability which I thought would be important.

Counsel: Why did you think limited liability would be important?

Fred Bloggs: I could be sued.

Counsel: Have you ever been sued in the past?

Fred Bloggs: No, but there's always a first time.

Counsel: When you left the employment of Lots of Dough Pty Ltd, you were asked to remain as a consultant, weren't you?

Fred Bloggs: Yes.

Counsel: They didn't want a company did they, they just wanted you?

Fred Bloggs: I made it clear in that conversation that I would be starting my own business through a family trust. I am sure my former boss understood this when he spoke to me about being a consultant. Certainly the arrangement we entered into was with my trust company.

Counsel: Why do you say "my" trust company?

Fred Bloggs: That was just an expression.

Counsel: For the first two years nothing virtually changed did it other than you using a family trust.

Fred Bloggs: That is not true. Certainly we did most of our work for Lots of Dough Pty Ltd but I did do work for other surveying companies as well.

Counsel: But you were wearing company clothing when you worked for Lots of Dough Pty Ltd.

Fred Bloggs: When I am doing a job for a particular client I am happy to fit in with their own particular requirements.

Counsel: Was the nominal weekly salary of $250 per week a fair and reasonable figure for the work you did?

Fred Bloggs: In the early days the company might not have obtained any clients so the figure would have been generous. It is certainly lower than the fee I was earning as an employee for Lots of Dough Pty Ltd.

CROSS EXAMINATION OF SHEILA BLOGGS

Counsel for the Commissioner: Mrs Bloggs, why were you a director of Mega Bucks Pty Ltd?

Sheila Bloggs: Fred asked me to sign some documents.

Counsel: Do you always do what Fred tells you?

Sheila Bloggs: I generally do what he asks me for business issues.

Counsel: Do you know what a family trust is for?

Sheila Bloggs: Our accountant understands it all. I think it was he that advised us to set it up this way.

Counsel: Are you a licensed surveyor?

Sheila Bloggs: No.

Counsel: What work have you done in the business?

Sheila Bloggs: I would meet Fred, answer the phone, learn the business and eventually act as receptionist and secretary.

Counsel: This is just an elaborate tax minimisation exercise isn't it?

Sheila Bloggs: Not in the slightest. I am entitled to work in the family business. My work is just as valuable as Fred's. I object to the sexist connotations of your question.

Counsel: Even if you are working in the business, surely you would concede that Fred is the more valuable employee being the licensed surveyor and should have received a higher percentage of the profits if the transaction is truly to be seen as commercial?

Sheila Bloggs: Again I object. We have a fully equal relationship. If Fred wants me to work in the business I expect to be treated equally to him.

Counsel: Do you and Fred have separate bank accounts?

Sheila Bloggs: No.

Counsel: That means that regardless of the way the profits are divided between you for tax purposes they all end up in the same bank account?

Sheila Bloggs: I agree that they end up in the same bank account but I do not concede that they are broken up for tax purposes.

INSTRUCTIONS TO MOOTERS

The following are general instructions to assist you in preparation for the Moot in Taxation.

FORMAT

Each participant will have approximately 15 minutes to present their argument. You should expect to be interrupted for a considerable portion of that time. For some part of your argument you will be allowed to present your case in an uninterrupted fashion. For the majority of time, however, you will be asked to meet the specific concerns of the Tribunal. This may necessitate you dealing with issues in a different order to the order you would have preferred. To fully prepare yourself you need to be able to accommodate to the directions of the Tribunal. In real life situations, this is not done to test your mooting ability but rather to draw your attention to those key issues that the Tribunal believes are the most appropriate to be dealt with in order to resolve the dispute. You will often find that you have prepared a particular issue at great length only to find that the Tribunal agrees completely with you on the point and does not wish to hear any detailed argument. This is the crucial difference between a moot and a debate. In a debate you present your argument uninterrupted by the adjudicator. In a moot you are seeking to convince a Tribunal or judge about the relative merits of your client's case. As the tribunal member or judge considers the facts and legal arguments, he or she is likely to form a preliminary view about the relative importance of different issues for the determination of the final outcome. Thus it is a more dynamic process and an important skill of mooting is to show an ability to respond in a similarly dynamic fashion.

ASSESSMENT

Whether you are counsel for the taxpayer or the Commissioner, there are three things we will be looking for in assessing the exercise. They are roughly equal in weight. These are:

1. Knowledge of the legal issues and arguments.

2. Ability to present the arguments in an eloquent and coherent fashion.

3. Ability to handle questioning from the Tribunal.

In a moot that is only conducted over a relatively short period of time, it is difficult to form a fair and accurate assessment. It is important for students to be aware that the aim is to be as positive as possible and use the interaction to find a mark that accurately reflects the student's mooting ability. In particular, if you are unable to answer a particularly challenging question or if the line of questioning appears harsh, this does not imply that you will get a lower mark. The aim of the questioning is to get progressively more challenging to find out the appropriate level for assessment purposes.

2

Where you are faced with difficult questions, the first thing to try and do is to come up with an answer to the question. If you feel unable to do so, the next thing to consider is an argument as to why the particular question and its answer are not important in terms of your client's ultimate success in the case. In the final analysis, if you are unable to come up with either of these forms of responses, there is no shame in saying that you are unable to answer the particular question at that stage and seek permission to move on to the balance of your argument.

Too often advocates enter a mooting situation preparing the best possible argument for their client without understanding that this involves considering the best contrary argument and having responses to each of the strong points in that argument. Thus to best prepare yourself, you might consider how your opposing counsel will be arguing his or her case, and what possible challenges the Tribunal might make to your key arguments.

Finally, in order to make the moot more consistent with the way an actual Tribunal hearing would be conducted, we have enclosed an extract from a transcript of evidence. Because the Tribunal hearing is a first instance challenge to the assessment, it would in reality have witnesses and both examination and cross examination. We have merely extracted certain parts of the Transcript of Evidence for your consideration. Your moot will be the final summing up in the hearing. You may choose to draw attention to the Transcript of Evidence or you may find that the Tribunal includes some questions in relation to the evidence as well as general questions about issues of law.

Finally, while you would be aware that you will be limited to arguments raised in your own Notice of Objection, the Tribunal will feel free to ask any questions of relevance to the issues in dispute. Certainly for those who are acting for the Commissioner, the same limitations do not apply.

Please do not hesitate to contact us if you have any further queries in relation to the moot.

Regards,

Appendix 8: Edited transcript of William and Emily's moot preparation meeting

William	most of it anyway
Emily	what I was thinking about before is how we should actually approach this whether we should you know how when we were discussing it um the and doing the statement
William	mm
Emily	how we talked about who was the taxpayer whether Fred Bloggs was just the taxpayer or whether it was um the company or whether it was Sheila Bloggs
William	yeah yeah
Emily	whoever um should we take that same approach this time or just centre on Fred himself
William	I think we have to
Emily	because it's still it's still open there's nothing here that assumes that we are going after just Fred I just figured that might be something extra that that we can pull out that the other party may not necessarily
William	jump I think we should I think we should uh
Emily	at least as an alternative just
William	well I think we should pitch it against all three of them we should find a way to make the issue the taxpayer depending on how they shift the money around who derives the tax benefit uh yes I think that's a good idea and even if it doesn't become a substantial part of our argument we should just make sure that Peter knows that we're aware that
Emily	yeah that you can shift it around
William	yeah you can shift it around
Emily	yeah that's the main
William	so we'll we'll pitch it that way Rod do you need a do you need like us to fill you in on what the problem is
Rod	yeah that would be great yeah if I could get a copy of it perhaps
William	or I could give you just like a very brief summary of what's going on because the actual problem itself is a bit of a pain really
Rod	I can probably pick up a copy of that booklet
William	sure
Rod	what's the name of the booklet Practical Legal Skills Stage 5
William	where do we start the Commissioner basically has to overcome the fight is going to be on this idea of purpose
Emily	the dominant purpose
William	and why it was set up and
Emily	just have to write down what the basic elements are again just so I can keep it in my head
William	I wonder if we might in our statement of claim did we oppose on the ground that there was no tax benefit at all

Emily	I think we did
William	we did probably have to address that as well I can't
Emily	just trying to remember yeah
William	can't remember how we did it though
Emily	I know we did um [leafing over pages] 77 in front of me (...) OK (...) scheme we've got tax benefit
William	that's right we had 3 schemes which was the one that we said that we didn't derive a tax benefit the only way that we argued that we didn't derive a tax benefit was that the Commissioner couldn't say which person
Emily	adequately who [Tape problem 3-4 sec gap]
William	derive a tax benefit somewhere along the line it was just that the Commissioner couldn't reasonably [verify the person
Emily	[could never which is what the test is in Peabody it's got to be reasonably identified OK we've got our parts which are scheme and the other thing I was going to say is that would there be any merit in (.) um going through ordinary income (.) at all in terms of like other than just seeing it as a Part IVA scheme could we somehow just bring it under ordinary income just one of the very basic argume ts [which is
William	that's great yeah [put that down we should look at that
Emily	because I remember in our discussion of Peabody Peter was saying that you know the Commissioner could have just simply run the argument that um (.) Mrs Peabody would have received the money whatever scheme that was imposed or you know even if there wasn't a scheme she would have still got that money eventually and so therefore placing the burden of proof back on the Peabodies to try and say no that wasn't necessarily true um
William	yeah I see
Emily	on the balance of probabilities
William	cause what we don't want to do is walk into court and say that
Emily	start having to come up with with all these examples
William	well hypothetical
Emily	( )
William	um
Emily	yeah
William	because that's what Peter said that the Commissioner did in Peabody
Emily	yeah exactly and that was his own doing because he couldn't you know say with any certainty which one was the one that um was most likely
William	do you income has Peter was Peter advocating income on a very broad concept to get around that
Emily	no not
William	we should look at it anyway
Emily	but I'm saying that it's applicable to both we can run it under the Part IVA part that is that um they're just on a straight definition of it that yes there was a scheme and but for the scheme you know um it would have gone the money would have gone to Fred Bloggs

William	yea
Emily	which in fact it did do anyway because of the joint account and what have you um (...) and than again on yeah on ordinary income
William	do you reckon that
Emily	that is that the fact that he's done all the work that it really operates as a fiction the company and the trust operate as fiction
William	that's that's I'm trying to think about it whether you say that the dominant purpose is to achieve a tax benefit via the scheme or whether you say that the money would have come to him anyway it's almost the same argument ordinary income it's almost a just the other side of the coin really
Emily	mm oh yeah
William	to ahh Part IVA argument itself so we'll run that
Emily	it's just yeah
William	together
Emily	I think part IVA merely exists in a little bit more complexity so that it could cover a lot more instances where ordinary income if you take an interpretive approach wouldn't have been said to apply
William	if you don't if you using Part IVA then you're going to have to come up with the dominant purpose and I think we can agree that the accountant's dominant purpose is reckon that'd be the (.) [shiftiest
Emily	well this is the main thing [they probably won't take into account the um the liability of the accountant
William	the liability of the accountant
Emily	yeah in terms of he's another
William	[person in the scheme yeah
Emily	[person in the scheme what now there was something I remember in our preparation we were talking about you know homing in on the liability or the fact that it doesn't have to be ah necessarily Fred's dominant purpose but
William	yeah yeah that's something
Emily	so long as it's one person which is that[in a case or
William	[think it's section no it's section 177 ...ah C D it basically says (.) [leafing pages] where is it (.)
Emily	ah OK down in the bullet points under there
William	no it's not one of those things it's just trying to find it for you (.) after the bullet points 'it would be concluded that a person or one of the persons who entered into or carried out the scheme or any part of the scheme did so for the purpose of enabling the taxpayer to obtain a tax benefit' so the part of the scheme that we're concerned with here is the accountant saying well let's set up this company let's set up this trust and so if the accountant did that for the dominant purpose of achieving a tax benefit then we've got it we've sewn it up so we have to argue by inference
Emily	I think yeah well we can use that then
William	well that's where Fred's testimony comes into it as well because it talks about his accountant where [leafing over pages]
Emily	yeah right here

William	and we have to pitch the argument to Peter about what's dominant you know 30% 40% all that sort of business cause what they're going to argue is um is that there are several different reasons why he did it limited liability blah blah blah blah and Fred surprisingly emphasises that in his testimony so we have to say that
Emily	I think that's really just a um I think we can just say I think of it just this morning I was just trying to think of the phraseology I used um um um
William	we're going to have to explain it away somehow
Emily	um I think we can attack her argument where she said um um where is it where she is directly asked is this just an elaborate tax minimisation exercise isn't it and that really got her back up obviously because 'not in the slightest I've been told to work in family business my work is just as valuable as Fred's I object to the sexist connotations of your question' um not
William	what Peter's getting at there is that this idea of freedom of contract and that sort of stuff that if they want to regard her work as important as his then they've got the right to
Emily	um
William	and we shouldn't step in and say that no your work isn't as important as his and he should be getting more of the income than you
Emily	well this is this is where we counter it with the argument well if her work was that um was equally important how come she didn't derive a direct income from the company
William	that's good
Emily	that would be more commensurate with that argument
William	yeah
Emily	I mean he's got the the minimal minimal wage coming out of the $250 per week if that was really the (...) the dominant purpose they'd be creating an environment for her to earn money then the logical step is that she would also derive a wage from the company whereas she doesn't and that picks up on the fact that he admits that the $250 a week is only a nominal salary um and he says in the other days the company might not have obtained any clients so the figure would have been generous but I mean that's given it is certainly lower than the figure I was earning working as an employee for Lots of Dough Pty Ltd which then post 1994 when the company actually seems to expand and has lots more clients other than lots of dough and what have you his justification for not taking out um a bigger wage well it isn't justified um so loosing track of where I'm going here um
William	just going to try and get down the main arguments here against it you're going to say that the ah you're going to say that there's a several purposes (..) for the scheme (.) that's why I think it's important for us to so long as we can convince Peter that this scheme is not so defined as to loose all meaning that the smaller the scheme is the better and the scheme that we should try and rely on is the idea of the discretion to as the trustee discretion of the director which would have been Fred um to split the income of the trust that that small part there was the scheme because in Peter's terminology there's no other way to explain it other than to achieve a tax benefit
Emily	uh huh do you reckon we need to go that narrow
William	I reckon we should go that narrow whether we can actually the problem there is [( )

Emily	[cause I think the arguments still apply whether we just take that little segment of the scheme or whether we take the whole thing it still applies that at that particular point this is where the dodgy things happen um like you look at Peabody um (.) the Commissioner ran the argument that it was quite a wide concept of the scheme that included quite a few different elements um and while yes on the whole well individually they could all be explained it was the combination of the lot in this particular
William	the commissioner in Peabody also that's why the commissioner had so much trouble trying to find the purpose of it because it was quite large so there was a lot of different purposes there so the commissioner had to go to great lengths to try and explain them all away hypothetically the smaller it is the less variables we have but then we're going to come up against Peter's going to draw us on this idea well this scheme's just you've given me something that's not really that's only a part of the scheme that's what Peter will say ok we'll take a l we'll take a larger scheme because if that's part of the scheme then section 177C D sorry says that as long as the purpose is evident in one part of that scheme it's ok
Emily	yeah exactly you don't need to necessarily
William	hmm [so what
Emily	[I suppose the difficulty I'm having with it all is that every individual transactional element can be explained on reasonable grounds but it's just a matter of defining those in a way that helps our argument and getting my head around that that's the hard part and then trying to put it in some sort of a logical framework
William	yeah
Emily	without trying to trying to rely on hypotheticals too much because that would alter that may be the downfall=
William	=so that's what=
Emily	=the argument because then once you start using hypotheticals you're closing your options
William	um OK (....) several purposes [writing]
Emily	we've got scheme we've got tax benefit (...) we've got what's the other element of it dominant purpose
William	tax benefit do you reckon they're going to oppose us on the idea that we can't show a tax benefit (.) they might
Emily	they might who knows what they'll throw at us they might [they'll try and do everything
William	[so what are we going to say what are we going to say in the light of Peabody
Emily	well Peabody's only useful to a certain degree I've discovered after rereading it this morning it's really (..) it's definitive only for the reasons that Peter pointed out in class that is you know the definition of the scheme and how far you can go in defining a scheme and then the reasonable test so on its facts though it's really quite different to what we've got here so we can't really rely on any other um ( )
William	so you don't reckon he's going to pull us up on the idea that the Commissioner couldn't identify the tax benefit in Peabody that if the point is run if they run that argument surely Peter'll [see the mistake
Emily	[what's the what did they say in Peabody in regards to that

William	well isn't it that was the business about they sued Mrs Peabody but they picked the wrong taxpayer because they couldn't show that she was going to [get a tax benefit
Emily	[oh yeah that's right
William	within that period within that year (.) they came up with all sorts of ideas about how she [one year
Emily	that was about relating it back to the fact to she hadn't got it via the trust the trust well they could have hung onto the money it's all right I can't remember what they
William	well Loftway I think they should have assessed Loftway instead of Mrs Peabody because Loftway was the shelf company that sold the shares blah blah blah Emily and because she was the I don't know how it works either because there's too many companies involve Loftway um their family trust owned majority shares in Loftway and she was beneficiary of the family trust so the Commissioner said that she would have got it in the end and the court turned around and said well she had you have to show that she would have got it this year and all that sort of business
Emily	I suppose that relates back to what we were talking about dominant purpose before I suppose they're inextricably linked talking about um that she was going to receive the money well in this case Fred would receive the money whatever
William	in fact Sheila Sheila can't be a taxpayer because she didn't have any income at the start so if but for the scheme if we take the scheme as being the company trust and all that sort of stuff
Emily	the whole lot yeah
William	she probably wouldn't have received any money at all if the company and the trust weren't there and now that she's received some money she hasn't got a tax benefit because made a tax (...) it's not a tax benefit
Emily	well this is the thing she's not the one that we're going after we're going after Fred we're saying that he's the one her income is his and should be assessed as part of his
William	so she can't be a taxpayer in our little scenario there's no point in getting up in court and saying that she could be a possible taxpayer
Emily	no because she already is she's (.) [
William	well she
Emily	well she um yeah as you say she hasn't derived a tax benefit
William	the issue's between the company and him cause the company might derive a tax benefit or so I think Mark was the one who said that that that that's only true if you know how we had three schemes and one of the schemes was just a trust by itself if the trust didn't exist then the company might have retained some of the profits and that was a way I think Mark said the company would
Emily	well we were deliberately trying to do that to try on so that you can't come up with a definitive
William	yeah I don't think that they aren't going to run that are they I don't think they're going to run it
Emily	they could well do
William	first of all they have to come up with the idea that the scheme could be just the trust by itself and then you didn't if you took away that

	then it was reasonable that the company might retain profits and blah blah blah well why don't we just say we just say it's you're running off on the we could use the Peabody argument against it because they're trying to explain how the company could be the taxpayer instead and they're using hypotheticals to get to it
Emily	mhhuh
William	and so we could say that this is exactly what the Commissioner was doing on the other side of the fence in Peabody he was trying to use hypotheticals to explain how the money could possibly have been there
Emily	OK so we could turn it around
William	do I think our main contention should be to assess Fred yeah
Emily	uhhuh
William	and if they try and it with the company we're going to have run this hypothetical business on them we also have to come up by the end of discussions as to how we're going to split it up
Emily	oh that's the reason why I suggested that we look at the company as well because just in case they use that issue as a way of deferring liability away from Fred if they say we'll just say well in the alternative we tax the company benefit
William	yeah yeah we we can do that do because we don't give anything away from our hand we're the respondents so we can
Emily	are we acting as respondents are we
William	yeah
Emily	oh cool
William	so [you
Emily	[bonus I was thinking we'd be standing up first
William	no no it means you get to because theirs is the they're appealing so the appellant always goes first even though normally we'd go first
Emily	I wasn't clear from the facts that was what was going on
William	oh no either was I but just what Peter said because it was an objection in AAT and then it would go in Federal Court
Emily	I thought this was AAT
William	um
Emily	this is if you read this (...) oh I that
William	don't want to read that
Emily	that one there (...) OK um duh duh duh duh OK yeah it's this is the tribunal hearing because we're um yeah 'your moot will the final summing up in the hearing fr choose to draw attention to the transcript of evidence so this as though this is after
William	OK
Emily	this is our cross examination and what have you
William	have I messed something up that's funny because when you sum up you usually don't get any questions from the bench but Peter has something for all occasions (.)
Emily	normally you to get to actually see you I mean I wouldn't be asking them these questions I'd be going for the jugular

William	this Rod this is a this is something that Peter gave us before like uh last week which is supposed to be the parties in this problem have sort come to court and barristers or us this is supposed to a transcript of the questions that we've asked them
Emily	cross examination
Rod	is this supposed to be you
William	pretty much yeah [laughs] but Peter provided just to clarify some of the facts stuff like that anyway we're going second I suppose because they objected and we disallowed the objection and they appealed to the AAT so as appellants they go first and we go second and they may or may not have a right of reply
Emily	OK then so when do
William	afterwards
Emily	OK so result yeah they're appealing to the AAT well they're not appealing
William	yeah
Emily	it's effectively first instance but yeah they'll be the um
William	well if they're not appealing then they're then they're just plaintiffs because [they initiated the action
Emily	[they're just plaintiffs yeah
William	um so
Emily	replying to the fact that we're trying to reassess them
William	which means uh they only have a right of reply to us if we've raised something that they haven't dealt with that they want to deal with and I'm pretty sure that we don't get a right of reply a right of reply to them to their right of reply so we just get [to sit there
Emily	[do you know if we can make objections and stuff
William	um
Emily	so if they're going off at a tangent I mean Peter would probably pull them up on it but if they're going off at a tangent which would or they make an assumption which we don't think is correct or they misinterpret our arguments
William	uh generally not
Emily	generally
William	I've never I've never made an objection in moot before and never apart from I hit Richard in his and he gave an example I've never seen anybody make an objection in a moot before it's only
Emily	I just can't wait to use that line
William	no you can't [laughs] I'm not going to do it I usually because Peter is sharp enough to know whether they might be on the ball or whether they're you know
Emily	too busy looking out the window anyway to notice what they're saying
William	oh yeah objections are usually (.) I think I dunno you talk to Peter about it because we talked about it in evidence last year they only use it when they're trying to pull some really shady evidence off and cast aspersions on the witness and make them draw inferences that they can't draw from the witness and things like that when you're cross

	examining that they usually use it I wouldn't but feel free
Emily	feel free to stand up I doubt that I will but I [just like to think of it that yeah I have that option
William	[it's only especially because ah yeah you might one of the reasons is because the moots are you've only got 15 minutes
Emily	yeah
William	so if you object then the other person's time then you're just cutting into their time and they get really shirty with you because they can't get through their argument and stuff which doesn't really happen in court because you can go for weeks on end
Emily	yes
William	um
Emily	seeing it's a tribunal you don't obviously say your honour
William	no no you can't I was [really looking forward to using
Emily	[how do you address how do you address there's no bench you don't
William	just what do you say you say
Emily	you can't walk in and say if it pleases the court
William	mm you can say if it pleases the tribunal
Emily	oh I think they might just think that's a little bit too formal for a tribunal
William	or Peter in the end you won't really cause once Peter asks you a few questions you'll get into a really conversational mood and sort of just you'll say but hang on and he'll say but hang on and you'll just go like that after a while
Emily	[laughs]
William	Peter's pretty good with that
Emily	does anybody violently object to
William	I dunno like learned members of the tribunal learned members or something like that member so the tribunal is good enough it was the same in [competition] cause it wasn't a court there either it was an arbitration and so we had to get
Emily	so how did you address the [arbitrators
William	yeah we like learned learned arbitrators or learned members of whatever body I can't remember what it was any more
Emily	learned colleagues will probably do
William	colleagues yeah OK
Emily	given that it's a commercial environment
William	Fred's our taxpayer (..) we're assessing him on a half of his income (.) ah [
Emily	[ok so we're going for Fred and saying that whatever income went to Sheila is actually part of his assessable income or we're going for the company and we're saying that even if the money did not get passed on to either Fred or Sheila it would have had to have been taxed at the company level
William	yeah we can say that (..) so it's Fred and in the alternative company
Emily	yeah

William	it's our taxpayer (.) our that's point one and in the alternative it's ordinary income in Fred's hands anyway (…) and then (…) the scheme (.) which at its widest in the alternative again cause Peabody says we can put in an alternative the widest would be company
Emily	company and trust=
William	=trust (..) and on that on a wider scheme (..) we're going to have to deal with both of them we're going to have to deal with this idea of dominant purpose smallest
Emily	just the trust
William	discretion yeah discretionary
Emily	that sort of defence is going to be hard because I mean a trust is a discretionary trust is a discretionary trust you can't fetter the powers of the trustee I [suppose
William	[I I don't think we're though
Emily	yeah what we have draw attention to is the fact that he is the beneficiary he is the trustee he is the settlor he is the he is everything
William	[laughs] the settlor
Emily	yeah well that's the
William	put it this way if he had got his income and paid tax on it and then given the money over to the trust he could distribute it any way he wanted like he could give it to the family dog for all it mattered and we're definitely not pulling him up because he exercises his discretion in trust law and (.) yeah ugly we're just saying that you can distribute it however way you want it but it's going to draw tax consequences sometimes if you do it one way and not another so as a as a trustee you can do whatever you want we're not fettering your discretion um (.)
Emily	but that's that's I suppose what the problem I have with it is that um if you say um (.) if you take the line that using your trust powers to distribute income in this particular way is avoiding income whereas doing it this way is not then you are sort of getting into that murky water of trying to um (.) yeah (.) it's=
William	=think we're still encroaching on their but the [artificiality is
Emily	[it's not so much that it's encroaching but that it just like well there's consistency as it were in the treatment it's sort of like why in these circumstances will you be considered um have to be you know taxed on I'm just taking it to its logical conclusion if say yes[you did try and
William	[well that's I think that's Peter's tax policy argument he's saying that any tax system is based on purposes of paying because you can do exactly the same thing but if you don't have the purpose you're going to get taxed his Myer Emporium thing I mean it's a bit of a pain and this whole purpose thing's a bit of a pain now because it's a evidentiary problem for us and for them as well this idea of whose (.) purpose and all that sort of business
Emily	yeah we'll just have to give them a persuasive argument
William	so we're going [to have to argue sorry
Emily	[we'll draw on rely on just our yeah our um wording of the facts and so on and the particular slant that we take on it rather than any substantive law that we come out with
William	yeah I think that's what he wants anyway

Emily	yeah
William	he's not going to ask us to give him all the cases back on dominant purpose we're going to have to find some way to say that somehow it can be less than 50% and because if he doesn't accept that it was a larger purpose than limited liability which is going to our main adversary then we're going to have to convince him that it doesn't have to be over or at 50 51% for it to sort of work
Emily	I think we should probably not work in um
William	numbers
Emily	yeah in metric terms because I think yeah just on the balance of probabilities
William	on the balance of probabilities is fine when there's only two but when there's three or four reasons
Emily	yeah but as a whole
William	yeah but that's what but Peter was getting at that stuff what if one was 20% but the rest were only like 15% or something like that
Emily	mm
William	numbers is just an easier way to illustrate it
Emily	yeah that's true
William	yeah I dunno this [whole
Emily	[but I just yeah I just find that you can't reduce it to numbers that easily
William	even in words what you say is it more likely is it more likely than not or is it less likely than not and that still I dunno to me it connotes a 50 51 sort of thing
Emily	yeah
William	how are we going to say either way we have to make the argument that
Emily	yeah
William	that it can operate as a dominant purpose even though there are some other purposes there as well cause he says what does he say
Emily	I suppose what the most effective argument would be to say not that there is dominant purpose to avoid tax but that the purposes which they did use can be construed as a (.) um sorry um so yeah not so much that (.) there was a they sort of you know woke up that morning and said yes we're going to set up this scheme to avoid paying tax but just sorry go on I'm loosing the track of what I was thinking
William	hmm
Emily	um um just this is the one I particularly have difficulty with because as you say the evidentiary problem
William	it's definitely a pain
Emily	there's nothing concrete we can really put our finger on to um it one way or the other
William	if they say that the dominant purpose is limited liability then we say that to achieve that purpose you don't need a trust
Emily	um
William	you can get limited liability just by getting a company and if your wife is doing just as much work as you are then you can pay her a

	wage you don't need any trust so in that situation what we're really saying is that the scheme is the trust by itself because if you take that as a scheme then it can't be the dominant purpose of that particular scheme for limited liability because the trust's got nothing to do with limited liability
Emily	yeah
William	is that good enough
Emily	yeah well that's good and then from the other side it's um if they argue well the dominant purpose for setting up the trust is to provide for um family
William	family
Emily	which doesn't come up in the
William	in the evidence
Emily	in the evidence so that the other side really don't have anything to support that sort of an argument but [I think
William	[yeah but if they say that
Emily	I think they're going to have to run with it
William	what'll what'll we say we say you should have given the money to the kid
Emily	um no don't say that um if it was again you don't need a trust to provide for the wife if she's doing work that is considered to be of value then you pay her a wage out of the company
William	mm
Emily	um or as a shareholder she'd get dividends
William	I don't know enough about trusts when do people use these things if we can't use them in this situation when
Emily	[when do they use them
William	[when do they use them
Emily	oh
William	do you have a family trust Rod
Rod	um well I have a trust for my daughter which has money that was left to her by her grandmother and it's being held for until she's old enough to look after it herself
William	gosh that's a
Emily	I mean that's a [where most trusts are used
William	[different situation mm mm
Emily	the only other time they tend to be used is in complex situations like this to avoid paying tax I mean
William	all right well so then in that situation their dominant purpose argument runs like (.) to the end to limited liability we say that doesn't explain the trust trust inexplicable to family what do we way when they say the trust is because of the family
Emily	that she could have it's still um a fiction they don't need the trust the the operation of the company is enough they could just give her wages or give her dividends
William	all right
Emily	they could have structured it so that they could have done the Peabody

	instance of whereby his shares were devalued and hers were increased in value so therefore she got more dividends than he did and you know there's a hell of a lot of things they could have done
William	it's a family trust we say just as easy to pay wage or
Emily	given that they're trying to justify the existence of the company on well the evidence (turning pages) what does it say OK (..) yeh to the question is this just an elaborate tax minimisation exercise she says not in the slightest I'm entitled to work in the family business so therefore on the facts there's a small hint that it's the business side of things it's not the trust
William	OK so we say wage wage is made more reasonable from evidence in other words we're saying that
Emily	OK
William	you want if you wanna be[why getting a wage
Emily	[I think sorry I just thought of something here I think yeah this is what Peter is really wanting us to look at is the trust because there's nothing in here that supports the trust the existence of the trust
William	mm
Emily	um
William	what about he say that ( ) he just
Emily	for either the Commissioner or the plaintiff in which case I think that's what he really wants us to home in on with the arguments for and against the trust
William	hmhuh yeah
Emily	sorry I should have stopped I didn't mean to interrupt you there
William	oh no that's all right
Emily	I just noticed [that
William	[the great thing is that we we we're going to be able to tell when they're doing their argument whether or not they're going to rely on which scheme they're going to rely on basically which is a it's a real pain in the ass for them actually because they the problem doesn't tell them what scheme the Commissioner's going to rely on and the evidence doesn't tell them either so I mean notwithstanding that they've got a right of reply they're going to have to be prepared for most of them I mean if they harp on about limited liability a lot and about the company and blah blah blah blah blah we just sit up and well that's fine you know we can almost accept that but that's not our scheme
Emily	mm
William	this is our scheme here this one [and run with that I shouldn't think
Emily	[the trust that's ultimately where Peter's leading towards is the trust
William	mm it's a bit of a pain because we should know more about trusts than we do probably just trying to think of a good way to split it up like if the person that goes first what are they going to say and then the person that goes second what are they going to say and if they rely a lot on the company and limited liability then we have to be flexible enough to deal with that so we have to no matter what they say we have to respond to them because we're not here to stake our claim on why we want the money we're just here to we've already staked out claim in the old assessment and they've staked their claim in the objection and we're just here to make sure that their objection doesn't

	get up and if the objection doesn't get up then unless they appeal then our assessment will stand
Emily	mm
William	so he's not going to he's going to be disappointed if we get up and just try to run through every single argument that the commission has open to it only that we run to the ones that are relevant to refuting what the taxpayer's already said so that's really important to stay flexible and stuff because it's something that he drilled into us a lot while we were preparing for Vienna and we still weren't as flexible as we should have been because our briefs the stuff that we wrote at Vienna like this there I basically put all the legislation into this thing and had this big thing in front of me and I'd be like um you know when the judge saying um I'd say hold on a second let me just turn the page you know 50 and all that sort of business (to me) this was something that we did in went to Europe with Peter a couple of a year and a half ago
Rod	yeah Peter mentioned it to me that yeah he'd done
William	yeah so we'll have to sort of get really [but I think we should be OK
Emily	[um I'm ( ) yeah um I mean um prepared for that
William	mm
Emily	to a degree not probably physically but mentally I'm prepared for that
William	yeah I think we are because we've spent so time on it from the taxpayer's point of view
Emily	mm
William	we've we've [( ) it
Emily	[we've sort of nutted it out
William	yeah we've got the we've got some of the factual arguments down pat
Emily	I much prefer working in the commissioner's position than the um the taxpayer's position
William	yeah
Emily	yeah
William	I thought [you and John were pro taxpayer the other
Emily	[cause at least we precisely that's why I like being the commissioner because I know exactly what I was going to run as the taxpayer
William	yeah ha ha ha
Emily	it's more work on our behalf so
William	so how would you move as a taxpayer then if you had to
Emily	how precisely as we did in our um
William	thing
Emily	our um objection
William	hmm that's the good thing I really think that that's [good because
Emily	[yeah you're continually trying to turn it around onto the Commissioner to try and come up with reasons and therefore the fact that they can't come up with a definitive reason for why it ended up in um ended up in Fred's hands just again focussing on the dominant purpose and the reasonableness that we've just got [to
William	[I think we were almost clutching at straws we're trying to say that it

	was Sheila or um that's how we said that she was going to get the income because if the trust if the scheme was just a trust yeah it was you that came up with the idea if the scheme was just a trust and the company was and but for the thing only the company existed they wouldn't have paid it by a dividend
Emily	mm
William	and that's how
Emily	but this is where the argument comes in that that's not necessarily a logical conclusion they could have um oh doesn't work out I haven't read it uh we can it can be turned around it can be just at the moment got um cause yeah I remember I argued it wouldn't necessarily go to Fred because it would still be wrapped up in the company and so if the company yeah the company could have distributed its shares as wages or whatever but I suppose Fred Bloggs as director of the company um and Sheila as co director of the company the money never really leaves their hands even if the company decides not to distribute the money um via a trust or decides to distribute the money via shares the money's still is in Fred's control
William	so what are we saying that end up the personal exertion argument
Emily	no no no not not so much the actual money itself is in his control not the work or whatever the fact that he is the company cause the personal exertion was whether the company the fiction in regards to working for the old employer that really doesn't apply in this case because yes he has got other contracts we can't argue that we can just walk in there [I'm sure
William	[so what are they going to argue
Emily	I reckon they're going to argue that they're going to try and pull out and we can just say well yeah we can you know concede that that's fine we're not arguing that the company is not legitimate [what we're saying is that control
William	[I never really understood I didn't really understand the personal exertion argument to be like that but I never really understood the personal exertion income anyway that whole argument but to me it was like if you earn income via personal exertion then the income's always income in your hands no matter what you do with it
Emily	oh well this is I agree with you and that's what we're it's sort of what we're arguing here but I suppose what John and I were trying to tell you when we were going through that case is that's not what the court said
William	mm
Emily	the court said it was using personal income or personal exertion income as a specific term to describe specific circumstances that are very limited that is when a person is working as an employee then decides no hang on stuff it I'll start up a company in my own name still do exactly the same job I was doing yesterday but just have a company as an intermediary
William	mm
Emily	instead and so therefore um you know
William	um well I hope the doctrine runs that way and it wasn't that just wasn't a particular application of like [the case study 95 or whatever it was
Emily	[no I mean I looked through W95 and I looked through the other one Tubi um Tubicoff the same case or the similar case I've got it right

	here actually (turning pages) um yeah it's very its application is very narrow but we can still distinguish it and say that the same reasoning still applies here that um although we're not attacking the existence of the company in this instance we're saying yes the company is legitimate that's fine you can and he is not um yeah the link is not from his old employee to the company the link is from the company to Fred Bloggs we're looking at that part of the transaction not the first part whereas Tubicoff and W58 were looking at that first part of the transaction we're looking at the second part and we're saying it is as trustee as director as sole employee
William	isn't that it sounds to me like a corporate veil argument like it
Emily	yeah I suppose it is [but I haven't done buslaw and I haven't done company directors yet so that's why I'm sort of coming to you for help
William	[like um use buslaw oh you haven't done buslaw oh they just argue that oh me oh no you can't ask me to help I got no idea I only got a pass in buslaw I got no idea what's going on
Emily	[laughs]
William	basic argument is that if you take on a company and you act as if you everything stays the same and you don't carry on business in the company name and all that sort of stuff and you just do exactly what you doing prior to obtaining your company um and you [you know you
Emily	[which is the Tubicoff and W8(...)[that's the
William	[yeah the buslaw one's for limited liability so if you did it only because you wanted people to sue the company who you but you don't basically use the name of the company then lift the corporate veil and we're basically we can sue you instead of suing the company sort of thing
Emily	mm
William	which is sort of a similar argument anyway
Emily	but again that's looking at that end of the transaction between employer or lots of dough or anybody else
William	I I I I like the way you're segregating the transaction and I don't understand that so I [think you [laughs] argue it
Emily	[you don't understand [laughs] oh great
William	yeah I I I don't I don't quite understand why the significance of doing the company versus the employer and the company was him
Emily	well this is this is we're looking in isolation of the trust as a scheme a um when we were breaking it down before you said that you know the company the existence of the company dominant purpose was limited liability
William	mm
Emily	and we just say well no we don't we don't dispute the existence of the company full stop
William	right fine[mm

Emily	[the scheme is the trust um if they say well providing for the providing for um his wife was um the dominant purpose for the trust then we say it's fine but you didn't need the trust family trust the money if they then run the argument well if it wasn't for the family trust this is stemming from what we came up with that is if the trust doesn't exist then we can't um with any umm consistent sort of probability say that this is where the money would go or that the money would stay in the company or that it would be disbursed through dividends well we can say that doesn't matter because ultimately Fred is still in control of the is still the controlling force of the company and so wherever the money went it would effectively be coming straight back to Fred even if it did go via dividends and whatever the trick here is that if it went via dividends they'd still have to pay tax on it
William	sounds like an ordinary income argument then
Emily	yeah I suppose it is
William	so but OK even if we run that Peter's going to say you're assessing them on a Part IV as well and we'll say yes and then he'll turn around and [say
Emily	Part IV and ordinary income are effectively the same thing just[
William	[do we want to get up in front of Peter and say they're the same thing like even though there's two separate legislative provisions[for them
Emily	[I'd say that we could um very happily stand up and say the intention of Part IV A and ordinary income whichever section it is are the same thing
William	um]
Emily	cause if you look at the progression um ordinary income came first then section 260 came second which was the idea of just slotting in contracts
William	yeh
Emily	to um frustrate the rules of ordinary income and then that later progressed to becoming 177 74 so therefore they are just the same thing you're just getting a narrower and[narrower
William	[see what Peter's going to get to he's going to get to the point where he's going to say they could be the same thing in theory and you know I agree with you because I've said that in lectures and blah blah blah blah [Emily laughs] and if you properly use an ordinary income section then you wouldn't need any more provision in the first place and all that sort of stuff but since we're talking about Part IVA and since Part IVA talks about tax benefit he's going to say show me a tax benefit and that's something that I didn't realise but if the trust is the our scheme and she receives half of Fred's income via the trust and if the scheme hadn't been entered into
Emily	um
William	just say she would have drawn a wage from the company
Emily	there's no[tax benefit
William	[there's no tax benefit
Emily	I know I know I thought of that before and I[
William	[well how are we going to deal with that
Emily	I dunno I dunno I'm trying to think

William	if trust is scheme but for scheme (slow thinking aloud reading) Sheila[
Emily	[Sheila is not the tax benefit Sheila is not the one who's supposed to be getting the tax benefit it's Fred
William	OK
Emily	it's Fred that's what we keep on forgetting but it still may not work but we've got to think it through [both laugh]
William	all right yeah OK
Emily	but I'm just putting it back on to the fight person that Fred is the taxpayer
William	yeah but that's the whole thing isn't it though
Emily	what
William	you're right because we still might be able to get around it because if
Emily	yeah
William	she's receiving the (s) just say was exactly the same money as a wage and then we're still in the trust and instead of receiving it as a wage she receives it via the trust Fred hasn't received a tax benefit via the imposition of the trust because Fred is receiving he's always receiving half his wage in the first in the first instance he's receiving his he's splitting his wage the company wage if there's no trust he's splitting his wage between him and his wife just say that it would be reasonable to conclude that his wife would draw a wage that was exactly the same as his so his wage is like 50% of what it actually is in the problem and they have the trust and the money that she did get from the wage goes via the trust to her again and so he's still got the same amount of money so they could still argue that there's no tax benefit to him let alone to her
Emily	[very softly] still haven't quite followed
William	[softly] uhh [normal volume] it's like you know how I just said that she doesn't receive a tax benefit because she's getting the same amount of money on both sides of the coin she either gets it as a wage or she gets it from the trust either way
Emily	the she wouldn't necessarily get it as a wage we're just saying that that's a possibility
William	so let's say she gets it as a dividend it's exactly the same it doesn't matter how you give the money to her
Emily	but this is what I'm saying ultimately it still ends up in Fred's purse the fact is that it doesn't matter what happens being that he has control of the company um the whole kit and caboodle is the sole worker you know and what have you
William	um
Emily	it just indicates that he has power he controls the whole company the trust everything so therefore it doesn't matter how[you send the money
William	[hang on hang on a sec you've got the legislation that says that ah you you're doing well [Emily laughs]
Emily	oh thank you
William	there's that piece there's that piece in which section is it
Emily	I dunno you tell me

William	it says [leafing pages] that income is ordinary income in the hands of the tax payer notwithstanding even if the taxpayer directs that it be dealt with in a certain way in other words if I owe money and I say I've got a debt to Rod and I never see the money and I tell my secretary or whatever to pay it over to Rod straightaway it's still my income even though I've never seen it
Emily	um huh
William	which is the same because he can tell he can pay it to the kid and to the family dog and but he's the one that's you're saying he's got the power
Emily	mnh
William	and he's the one that's directing it
Emily	exactly
William	legally speaking though she's got just as much power as he does
Emily	yeah
William	because she's got occupies all the same [positions
Emily	[all the same roles but [she
William	[here here look Section 19
Emily	Section 19
William	you know when money should be deemed to have been derived by a person or those not actually paid over to him but is reinvested accumulated capitalised reserve sinking fund or insurance fund however designated or otherwise dealt with on his behalf or as he directs
Emily	Ok so that's under the ordinary income
William	yeah that's an ordinary income sort of argument
Emily	and I think there is an equivalent under 177
William	is there and so what we argue is that yes she holds the same office as he does and all the same positions but he's in effective control of the whole the company and the trust
Emily	and that is
William	well it's brought out in the evidence
Emily	it's evidenced by her as well because she says you know what do you do
William	yeah she listens to everything that he says is what the evidence says
Emily	yeah she said " I would meet Fred answer the phone learn the business and eventually act as receptionist and secretary" bingo not as company director
William	yeah yeah we can do that
Emily	make a tax lawyer yet
William	[laughs] I got to make one next year
Emily	I know [laughs]
William	this is really driving me up the wall
Emily	this is this is this you're training
William	I don't think so which reminds me I got to send a job application today Rod won't be interested in that Rod could be part of the

	education I've got a lot to learn when it comes to job applications ordinary income section 19 of the tax act
Emily	Ok so if just to bring it up again if in the myriad of possibilities that could happen if the trust hadn't existed if they said oh you know they could do it by dividends um to blah blah blah then section 177E could apply that[
William	what does that say
Emily	is the stripping stripping of company profits where as a result of a scheme that is in relation to a company a scheme by which the … dividend stripping basically
William	dividend stripping
Emily	yeah
William	that's a nice little cute argument that Peter will say oh that's cute but huh move on [both laugh] to the conceptual he just wants the concepts but we'll put that in
Emily	the 177E is that post um um Peabody
William	post as in
Emily	just because you know how they reclassed the shares and stuff like that that effectively disposed of property by um [stripping the shares
William	wasn't wasn't yeah wasn't
Emily	and that's effectively what that section is
William	yeah what does it say stripping of company profits
Emily	as a result of a scheme yeah scheme by which of the nature of dividend stripping or a scheme having substantially the effect of a scheme by way of you know what
William	dividend stripping you see dividend stripping might not be the same as this other area of creating z-class shares and things like that
Emily	but I just know that the last bit [any property of the company is disposed of and[shares are
William	[any property of the company is disposed of
Emily	[could be could be but anyway that's a side issue anyway so
William	mm the CTH (…) one I've got is got has actually got the amendment dates and the insertion dates and all that sort of stuff
Emily	mm this is what I don't understand is what
William	this is that hideous piece of legislation the income tax assessment act (to me)
Emily	you know when you the income tax [assessment
William	[this is the summarised version (to me) (all laugh)
Emily	this is the fundamental
William	it's only the fundamental parts to that all the rubbish parts have actually been taken out of there
Emily	the bits that nobody ever looks at
William	yeah
Emily	the income tax assessment bill
William	yeah as in the new[the softy one the softy one
Emily	[the new bit yeah the warm fuzzy part that um it hasn't rewritten

	everything yet
William	no
Emily	but up to what point has it rewritten
William	oh not much
Emily	not much
William	just the the some of the things that all this rubbish that we're not going learn like all this business I dunno I don't even know what it is but I know that it hasn't rewritten things like capital gains and tax avoidance and Part IVA Fringe Benefit Tax all that sort of stuff
Emily	oh that's all right so [they still apply
William	[so it's all the other stuff
Emily	now the fact that um Section 260 still [exists here
William	[does it
Emily	well I've got it highlighted
William	it still exists but it only says that it applies to like only
Emily	let's have a look [reads] contracts to evade tax
William	it definitely doesn't apply though (.) to our situation
Emily	no it doesn't apply it applies in the [
William	[the reason why it still exists is because [there are some transactions
Emily	[hasn't actually been repealed though is what I was trying to get at
William	yeah yeah
Emily	it hasn't been repealed
William	but there's a good reason for that because there's some just say you and me were in business in the 70s
Emily	yeah and this doesn't apply yet because it's
William	yea it doesn't apply yet
Emily	because it's only applies post yeah post [
William	[if they dig up something really hideous that we've done and they want to assess us on it they're going to need a provision that sort of applies and all that sort of [rubbish
Emily	[mhhuh but technically you can still use it
William	do you reckon I [
Emily	[oh not in this particular instance
William	oh yeah certainly yeah
Emily	like Tubicoff() they used it
William	Tubicoff and even that W95 isn't that a
Emily	that's right and again that's because you're looking at that part of the transaction that is between X employer and the taxpayer that is creating a faction between them whereas we're looking at between the company and the taxpayer that part of the transaction not
William	it's very philosophical really [
Emily	[pictures
William	[because if you're x employer versus the employee then the company is sort of necessary no has intervened [Emily laughs] the company

	like cuts down through the middle and becomes the pane of glass[
Emily	[frustration
William	[at which they look at each other and all that sort of rubbish
Emily	let's not bring in panes of glass and mirrors because that's like my jurisprudence assignment
William	is it
Emily	yeah
William	is see how you're going to tie that in sort of
Emily	I haven't told you what I'm doing it on yet though
William	so you're not doing it on fiction any more
Emily	yeah
William	you're writing it on fiction
Emily	I'm not writing a fiction per se but
William	I tell you what Rod's not interested in that
Emily	yeah (.....)
William	Ok section 90 dealt with ordinary income idea that's our ordinary income argument about him paying it over to anyone he pleases but at the end of the day it's his
Emily	yep
William	um was just going to
Emily	yeah he never looses control over it
William	yeah he's always got control
Emily	we can just plead ignorance of company law because we haven't
William	well you can that's why you should run it "Peter look I haven't studied company law I've got no idea"
Emily	look I can just well the fact that it's a tax moot we're not expected to know anything else outside of tax he said that that many times
William	he'll Peter's[like
Emily	[so we'll just ignore
William	he'll just turn around and sit right here and turn around and say you don't know anything but let me tell you
Emily	(laughs) let me tell you
William	that blah blah blah blah blah
Emily	this is the cul de sac of the moot court we don't the real world doesn't apply here it's only just the facts in hand
William	Ok
Emily	can't go beyond the facts
William	so what's our argument again that he hasn't do you follow my argument about this uh
Emily	yeah oh that's right that's what I was supposed to be doing was looking for an equivalent section of 19
William	I don't think there's one that exists not in Part IVA itself cause we're doing the
Emily	OK 'it will be concluded ' ahh this is where we'll bring in that topic

	of it will be that the person or one of the persons
William	yeah who carried the scheme or part of the scheme
Emily	yeah so we don't have to worry about her the fact that um Sheila was um a director because
William	yeah all right yeah
Emily	because ultimately it's Fred that makes the decisions even if it you know(.....) Ok so what was the argument again
William	the argument was um the argument was it was like oh if that's like Fred and that's like Sheila (drawing diagrams through next section)
Emily	[both laugh] do you want me to do it for you
William	that's like Sheila then say if he gets [laughs]
Emily	oh no
William	50% of the income and she gets it she gets it
Emily	hold it the right way around it can read it
William	if she gets a wage or a dividend or even a gift or something like that
Emily	I suppose you know remember what when ;we were going through it initially you kept on saying that the trust is the income splitting it's this last little bit [the fact that
[illegible]liam	[mmh
Emily	It's just at the very last minute he goes whitsht and sends it either way
William	yeah
Emily	well the fact is that it doesn't actually divide at all it just goes straight into the household that is the Bloggs family
William	mmm
Emily	and this is evidenced by the fact that they only have one account
William	mmm
Emily	but whether on paper it goes here or by the [( )
William	[ok so what you're really saying
Emily	it still ultimately ends up in the same pocket
William	[yeah so what we're really saying though is like this just say the tax question is like ttttt dotted line here right
Emily	mm
William	but what they're doing is splitting it up for the tax and then bring it back together [after tax you [see
Emily	[mm [mm
William	so you say is what they really should be doing is going one line all the way through because it's his all the way through but what they've done here is because this is the this is the only spectrum of light that tax can [see and
Emily	[mm
William	tax is sort of forgotten about the idea that they're all together like this and what they're really going to do is to they're sort of going to split it up just for that purpose
Emily	umm
William	and then brought it back together again

Emily	umm (.....)
William	so
Emily	which although that um which the fact that they have the one account is evidence of it it's not proof of it but it's evidence of it
William	mm
Emily	and the fact that they don't um make any disbursements to the kid you know tax assessment tax you know impositions aside that relates back to the fact that well hey well actually if we can bring that up if we can say well why didn't you make any disbursements to the son and they say well because you know the family Fred and Sheila were you know um
William	providing for him
Emily	providing for him we'll just say well ha ha you've got yourself in this position now the fact that you've admitted that Sheila and Fred work together and the fact that the money Fred's money and Sheila's money
William	they're the same thing
Emily	they're yeah is the same thing
William	yeah so presumably the kid gets the kid supported under this fund as well and she's supported out of this fund and he's supported out of this fund so
Emily	the household is [supported
William	[the household
Emily	you couldn't necessarily
William	[well that's right
Emily	[divide it wouldn't need to necessarily divide it up
William	but you'd divide it up for the purposes of saying that (....) it doesn't matter to them as far as supporting the household's concerned as long as the money gets to this account it doesn't matter how it really gets there
Emily	mm
William	and so that's that's a good factual argument to say that it's inexplicable this whole idea of splitting the income between him and her is inexplicable on any other grounds except to fool Mr T (....)
Emily	taxpayer
William	yeah
Emily	Tax Commissioner
William	Tax Commissioner at this point to to
Emily	yeah
William	yeah and thereby gives him a larger sum of money at the end because Mr Tax Commissioner hasn't got as much as he should have got
Emily	yeah write that down
William	write that down I'm just trying I'm trying I'm gong to try and pitch it into the words of Part IV
Emily	mnh huh
William	words were

Emily	fit into that equation um but this is precisely what you were arguing that day that John and I were beating our heads against the wall saying NO NO NO
William	is it I dunno
Emily	well sort of
William	sort of
Emily	we're taking it to another[
William	[that's another way that's I think it's a stronger way[of saying
Emily	[I think we should words and pictures
William	words and pictures
Emily	here we go
William	um[(we could always use)
Emily	[if I just go across to my overhead
William	yeah
Emily	I would like to submit evidence
William	you should study the supreme I went into the supreme court last year and they had there was a case where I think it was someone had a boat and it was like going on the Yarra or some like Port Phillip or something like that and it hit the bottom of the river or the sea or whatever it was and there was a big hooha about that and they had a boat had a wooden boat in the courtroom there um constructed really really well I was really impressed with this boat and it had the shape of the keel and everything like that and you know they admitted it into evidence to say this is a true and accurate model of the said boat in the case and everything like that and they used this diagram and they had the lawyers pointing at this wooden boat and smashing around with it and stuff and saying well this is the boat here and they're arguing about the bow and arguing about the this that and the other and so they had all these really modern aids to and there were some judges who were sleeping on the bench anyway doesn't care
Emily	[laughs]
Rod	that's really big in America I think
Emily	yeah Americans especially the OJ Simpson thing this is the gun this is this is the murder scene and we've drawn dead bodies everywhere and
Rod	there are companies that specialise in just sort of
William	in making exhibits like that for court
Rod	yeah
William	that's amazing in America it's a roaring industry there's so much money involved I'm sure it's be a lucrative business over there
Emily	get out the Lego and build something
William	there's no exhibits for this type of case like a company's just a thing that sits in your as Peter says just sits in your filing cabinet and a trust sits in your filing cabinet and
Emily	they don't exist
William	that's about it if I could the overhead up draw away (..) so that's a stronger way of arguing what I was arguing that time was just to say that
Emily	and it explains both the um it can be used as an argument against the

	trust or if we can't go that narrow it works as an argument against the trust and um
William	the decision
Emily	company combined the wider scheme
William	um
Emily	because the fact that power remains at all times with (..) um
William	Fred
Emily	Fred and that fact that yeah
William	we don't always we don't always want to confuse our we don't always want to use our Fred's role of power argument
Emily	oh yeah I'm just that's the only way I can verbalise this I don't know how else to describe it
William	all right
Emily	I'm necessarily cause the power connotes you know as you say corporations law and all that sort of stuff
William	well even if Fred and Sheila both had the power
Emily	I don't know how to describe it yeah this is [this is
William	[yeah as long as they
Emily	doesn't matter
William	as long as they both decide that their income should be split even if your kids have got the power doesn't really matter how many people have got the power if they all decide that this is the way income should be split and then brought back together again in the account that's still [
Emily	[it doesn't matter
William	it's still inexplicable on any other reason but to avoid the tax
Emily	um
William	so that's the stronger way because now we've got this added fact that it goes to the same account it's a stronger way of arguing that arguing that really it's a scheme of big (....) then this [points to diagram] particular part of the scheme is the part that we're really concerned about and this particular part of the scheme was entered into well there's no other reason at all but to avoid tax and that's good for 177D which says
Emily	mm
William	a scheme or a part of a scheme and so on is the purpose of only one person and if your accountant had ever envisaged that this could be done and if the accountant had spent more than five second thinking about it the accountant would have realised that they could derive some sort of tax benefit here and so long as the accountant has thought that went through that mental process we can say that he's part of the scheme or she is part of the scheme and the scheme you know whether it's a really huge scheme or whether this is the scheme itself um the dominant purpose or the[only purpose
Emily	[result yeah there's still the same result as the fact at the end of the day all the money winds up in the same account and they all draw on it as they need
William	mm mm

Emily	um and it is evidenced again by the fact that he only ever draws the nominal sum weekly sum that's because he knows he has direct access to all the funds of the company anyway via this account so he doesn't need to via the books say that he's been paid any more money because he knows that he has full access to those funds anyway in reality
William	so I think we should I think we should actually invite Peter to consider the accountant in a hypothetical world it has to be hypothetical as Peter said in the lectures because um you're asking about something that hasn't actually occurred and you take your average accountant and you say what has gone through this accountant's mind here you know has he and then basically ask Peter to consider has he would the accountant have thought that the income if you're setting up a trust you're obviously thinking about distributing and so you're dividing money and if you're dividing money it's the accountant you know the accountant lives for the idea of being able to get some sort of tax benefit whether or not it's avoidance or not like it should be struck down is a different story but your accountant's surely open to those sort of opportunities in other words the accountant considered it all we have to do is convince Peter that that's part of the scheme which it has to be discretionary decision to split and then ultimately as far as the evidence is concerned bring back together
Emily	um
William	and then we can invite Peter to try and think of another reason why they would have wanted it just with the income that way and then bring it back to the same account and then after Peter has paused and scratched his head for five seconds we're going to submit to him that there's no other reason learned members of the tribunal that this could occur blah blah blah and
E nily	and the rests bang
William	BANG and walk out and go down to the pub I think that's a good that's I think we've that's really good we've in less than and hour and a half we've sufficiently identified I think that's the strongest that's the apex of our case
Emily	mm
William	I think cause it doesn't rely on [
Emily	[it's still very much theoretical we're still [sigh] I'm sure you can come out it's not as ..
William	you're[thinking about peripherals like the whole peri [like the whole the complete argument
Emily	[concrete [yeah I'm thinking about peripherals because they can just pull out stuff and say well hey well that's not necessarily a bad thing maybe they're bad money managers and so if they have several accounts then they might loose bits and loose track of things and blah blah blah and etc etc but
William	[let's say you
Emily	[suppose again
William	[looks out of window] look there's a pig flying there's a pig it's flying
Emily	I suppose we just have to emphasise that this is what .. is [reasonable
William	[most reasonable on the facts
Emily	yeah the reasonable thing is that the money will go to the household

William	mm
Emily	whether that be called um for Bloggs family or Fred Bloggs as taxpayer ..
William	ah yeah
Emily	this is the problem linking it back to the fact that the household this account is effectively Fred Bloggs the taxpayer (.) we're saying that yes it is all one income ultimately it ends up as being um (...) one thing. but whether or not that is actually Fred we can say that is Fred is another thing (..)
William	that's an ordinary income that's an ordinary income argument
Emily	mm
William	yeah
Emily	right and I still think it's within the realms of section um Part IVA
William	it's within the realms of Part IVA because Part IVA
Emily	is a [subset of . ordinary income
William	[it doesn't yeah but it also Part IVA doesn't (.) see you you've got a conceptual sort of challenge the challenge is to make everything look like it's Fred like the household itself is Fred and the company is Fred in a different name and the trust is Fred's puppy dog in another name
Emily	mm
William	Part IVA may it sort of renders it so you don't have to go to those extents to pin Fred because it sort of what you're really saying is that but for the company you've got Fred and but for the trust you've got Fred and Fred's just he controls the account and everything like that and Part IVA is inviting the judge to
Emily	the reason why I say that is because he is ultimately the one we're trying to pin for this
William	yeah yeah we that's fair and that's fair enough Part IVA is also also asking you to it basically tells you to do the same thing as you said because it says but for the scheme so as long as you identify the scheme if the scheme's the company and the trust and blah blah blah but for the scheme is money would have gone to Fred and so you don't have to stand up and say that it always Fred's income in his hands and blah blah blah blah blah and ordinary income all you have to say is that the money would have gone to him but for the scheme and Part IVA is satisfied
Emily	and the fact and Sheila well I suppose yeah it would have gone to him as the household account because you could then run the argument but oh but it may not go to Fred because it may go to Sheila it may go to you know dividends or whatever in which case it's still going to the household which is Fred that's my problem with it that we've got to um ..
William	I think we should [invite
Emily	[that's why I was bringing in the issues of control just to show that=
William	=well I I think I think what we should do is argue concrete Part IVA arguments like this idea of that being the scheme and you know no other reason and dominant purpose and accountant and parts of schemes and then say and invite the tribunal also to consider it on a conceptual level on an ordinary incomes level on a commonsense level and say look whose money is this at the end of the day these are our strong considered Part IVA arguments

Emily	that's exactly what Peter was saying that people that the Commissioner [didn't do
William	[that the Commissioner didn't do in Peabody
Emily	in Peabody
William	yeah
Emily	so that's yeah this is our
William	so we've got we've got two sort of lines
Emily	[and I don't think
William	[it could well be that I if you want me to run the the
Emily	Part IVA
William	Part IVA and you do you want to run the
Emily	ordinary income
William	ordinary income and
Emily	would that be a fair
William	and common sense [um
Emily	[I dunno cause the ordinary income is quite a small part but as you say it's conceptual so I'll need to crap on a fair bit and
William	it also gives you a better I think it gives you a better as far as leaving a good impression on Peter I think gives you a better um
Emily	[laughs]
William	well well well
Emily	this is what we're here for
William	no we'll let we'll let we'll let Rod we'll let Rod in on our little arrangement Emily her is going to try out for this year's this coming year's [competition] moot
Rod	ohh
William	she's [never actually mooted in front of Peter before so we have to because it's becoming increasingly difficult to get on to the team we have we have to make sure um [that we present ourselves in the best possible light on Wednesday
Emily	[oh yes [intelligent
Rod	Peter was telling some of the history of that about when he first started he was scratching around to get people to do it
William	yeah [uh now he can't he's just turning them away yeah he really is fighting people off I think I got in when it was still easy I wouldn't want to try out again for it
Emily	[he's fighting them off don't say that
William	so and then then you run those argument because [they're sort of
Emily	[um it's a corollary that yeah
William	they're the sorts of arguments most Commissioners aren't going to run
Emily	um and I think it's going to be=
William	=besides you came up with the[idea
Emily	[I'm hoping that they won't the others won't even think about it [to the extent that

William	[I don't think they will they'll try try and rely to it I think they would if they yeah let them reply
Emily	yeah OK I'm happy to do that cause I like the ordinary income bit
William	I mean it may turn out that we may have to give you one of your criterion for Part IVA
Emily	mm
William	like
Emily	blah blah blah yeah
William	one of the arguments anyway depending on how much there is for you to argue umm (....) hmm (..) and so the way you pitch yours is important in that you're inviting the court to consider both at the same time and I suppose as we're trying we're really trying to tell them that the theory matches up with the concrete and the concrete meshes with this and everything you know
Emily	and the fact that yeah
William	it's it's it's
Emily	it's both sections=
William	=it's good in spirit=
Emily	=177 and it's both Section 19 and 260 it's all of these things it's the do
William	yeah
Emily	it's the intentional interpretation of the legislation and that is that
William	there's nothing in the actual (..) pleadings or anything that actually says that we're confined to Part IVA is there
Emily	no exactly
William	you're saying that the spirit and the letter of the law you know are on our side and all that sort of business blah blah blah blah blah and you know it's ordinary income just as much as it is tax avoidance and um you could even say something like conceptually speaking as a piece of legislation Part IVA and ordinary income are not mutually exclusive
Emily	umm
William	blah blah blah blah
Emily	yeah well that's yeah
William	all that sort of stuff you know conceptually speaking they do overlap and um you wouldn't say this in these terms but you'd make the argument that Part IVA was introduced simply to cover some of the holes in ordinary income concepts and that was what Peter was saying that was what Peter was saying
Emily	look at specific yeah specific subsets of ordinary income (...)
William	oh yeah I think that's good that's unique anyway
Emily	we hope are we one of the last moots because we may not be so unique
William	oh well it's not like we've sat in on anybody else's moot
Emily	no that's true
William	oh boy
Emily	oh dear (.....)

William	what else are we going to say in Part IVA cause if what I'm saying is that this scheme can either be broad or large and so long as it was part of a scheme
Emily	basically what you're taking is what we prepared for the taxpayer but we are just slightly changing the emphasis it's effectively exactly the same that's what we gave to the Commissioner um in our yeah the same as our objection
William	I'm going to copy this thing off John
Emily	just get him email it to you
William	yeah I will but he never he doesn't check his email [both laugh] it's a pain apart from the fact that it's down about every second day anyway
Emily	oh god yeah
Rod	you can't get in
William	I know it's shocking well you guys get it really you've got a computer in your office and that sort of stuff
Rod	oh yeah well that's networked but I try from home
William	oh home well home's shocking
Emily	so unreliable
William	the network in the office is so good like I did research with Peter a while using his computer so quick
Rod	I'm ethernetted you see so it's really good
William	cause the whole part IVA thing is sort of still up the air a bit ..we should get a better plan before we wrap up
Emily	yeah I think we probably do need to sit down and then just (.) type it out
William	type it out
Emily	unfortunately
William	Rod's looking for us to use visuals we have to draw things
Emily	we've got I think we've pretty much got all the ideas and we've got all the things we need to come up with um it's just a matter of now doing the physical just getting it written out working out a logical sequence of arguments
William	do you know what Peter said do you know what we have do deal with something you might want to think about Peter's going to say ordinary income great idea blah blah blah blah what you want to it's not hypothetical so to speak but what you want to do is be able to explain how (...) see for me now I'm thinking about this situation where if Rod's had enough of [his job] and he wants to go and start up his own educational consultancy and sets up a company how can you ever have one person who has a family goes solo and sets up a company and not have the Commissioner say that it's his ordinary income his or her ordinary income there must be a situation where it can work otherwise all companies which represent sole proprietors
Emily	this is sort of funny because this is exactly the argument I threw back at you when you were coming up with this
William	was it
Emily	yeah um it's amazing yet you were so adamant
William	yeah no that's exactly right because the that that fazes me too and it

	fazed me then it that if you have a trust when can you that's why I asked Rod today when can you have a trust where you actually split it and not be thing and his situation's completely different because it's like your grandma [leaving it to your kids
Emily	can we take the pessimistic view that well they're probably not all explicable or justified as legitimate trusts um it's just the fact that the Commissioner hasn't got around to getting them all and so you know as Peter said there's a 15 year lapse between when a commissioner actually um um picks up on
William	thing
Emily	um some a particular assessment in a particular light and then you know reassesses that takes it to the high court blah blah blah
William	you see the other thing we can do is I can give this to my mum and she can take it to work get one of the queens' counsels there to figure out an argument for us [laughs] yeah we can say that that's sort of like a
Emily	I mean we can say I don't think we
William	that's actually submitting to the court not to the tribunal that there is no such valid scheme and all of them are invalid but we just haven't got around to
Emily	[yeah exactly
William	[stamping them out but as soon as we get that new office policy then we'll be getting on to it [laughs]
Emily	it's like um apparently Kerry Packer [spent about 600,000 going to the high court about some particular tax assessment that's worth about 4 grand [
William	[but conceptually it must be [oh well
Emily	and he has to yeah I mean spending that much money for 4 grand is seems ridiculous but if he doesn't win the Commissioner has the um can then reassess him completely for the last ten years or something like that
William	really
Emily	and he stand to have to pay back something like 40 billion or something like to the Tax Commissioner
William	um
Emily	maybe not 40 billion but probably 40 million but even so it's a lot of money lot of money that should have been could have been in the Australian economy
William	in the coffers already yeah
Emily	well have to say I think we to just leave it there we've come up to too much of a high for me to babble on to some lowlife argument that we're probably not going to be able to make anyway but we have to go and write up it has to flow logically once we put it onto a computer we don't actually have to give a brief to the other side or anything like that but so that we can look at and well at least so that then I can look at have something to refer to um just in case I get asked equivalent comments or whatever and I mean just in case that you know it turns out that um I'm got a lot less to say than you do so therefore I can pull across
William	for what we're going to do is we're going to go home tonight and write these things up

Emily	um
William	in as full and logically persuasive way as we can and then we'll as soon as I do it then I'm going to email it to you right and then you're going to edit it for me and like put it on word write it up as a word document attach it to an email and then write it up as a word document then like you can highlight things and do strike throughs and brackets and all that sort of stuff and
Emily	yes as you say
William	edit it and [I mean my
Emily	[could do hyperlinks to high court cases [both laugh]
William	well my one's not going to be
Emily	just hold that up as a work of art to Peter
William	Max's in the habit of writing it about verbatim like he writes his moots verbatim
Emily	I usually
William	which is really funny because Max doesn't is not the sort of person to actually read his speeches out but he writes them verbatim anyway and
Rod	I do that with my lectures
Emily	do you you write them verbatim
Rod	I don't use them
William	you don't use them only for the sake of the writing itself that's really ( ) and you also find yourself using the same phrases that you've actually used in your writing
Emily	that's precisely why because the phrases you use are
William	they're impo[illegible]
Emily	they're imperative cause I mean just changing one word can change your whole argument so that's why writing it all out is not such a silly thing to do after all
William	but my first one
Emily	don't get caught up on things like that
William	my first one that's going to go to you is only going to be ball pointed it think like if I write it up at all I'll write it up in point form
Emily	what are you doing tomorrow have you got
William	I'm not doing anything in particular
Emily	cause I've set aside today tomorrow and
William	Wednesday
Emily	Wednesday
William	I don't think you wouldn't have to use all that time
Emily	oh no I just merely set it aside just so I won't make any specific plans for this time just in case we need to work on this
William	well we could meet if you want to

Emily	so I'm happy to work together just because I really would appreciate having some help cause I know what I want to say um I have problems with the concepts it's just getting the detail [short section deleted] oh I'm happy to come over to your place just so we can get it down on paper cause I'd feel a lot more confident if I've got something physically there so even in case of complete mental breakdown I can at least refer to what's written in front of me just
William	it's funny in a moot psychologically when you're the respondent you're nervous at the start because you're because they're talking but nervous because you're thinking oh no get up and talk but by the time you see the other team make complete fools of themselves at the end you just couldn't care any more nerves are all gone I've been a respondent actually that's why I mooted for the respondent in [a competition moot]
Emily	I used to like being first in debating just cause
William	debating
Emily	untouchable
William	you've got right of reply in a debate
Emily	no etc
William	um ok well I'll go and through all this stuff and tonight anyway and get together tomorrow
Emily	I'll get about this ordinary income concept
William	the ordinary income concept
Emily	I might be what I'll probably do is I'll just
William	obviously we should
Emily	steal slabs from um um Peabody because I think the rationale is there from Peabody for using just the conceptual level as you say just the arguments the rationale that they use in Peabody is I think useful in this case
William	remember to tie it back into your ordinary income is your income from earning activity not capital not whatever that last criterion was like whose earning activity is it is it the company's earning activity or is it Fred's earning activity and all that sort of stuff and you can hone it back to Fred using those sort of concepts
Emily	the fact that it doesn't well either instance it doesn't matter really because even if it's the earning capacity of the company who is the company Fred is the company
William	the problem with that argument is that the law doesn't say the law says that companies the law deems that the company is the company that's why it's given a separate legal personality
Emily	in that case we'll just reassess the company
William	and when we assess the company then he'll start crapping on about tax benefit we don't want to swap we don't want to have Peter like dragging us from ordinary to Part IVA to ordinary to Part IVA and like leading us around by the nose like that so we have to like when we pitch it to him we have to say you know this is ordinary income is the backdrop and if you want to consider the backdrop you consider the backdrop and if want to consider the foreground then consider the foreground but if he starts jumping backwards and forwards you can get to this absurd
Emily	oh no we won't necessarily have to jump backwards and forwards I

	don't think
William	well I hope he doesn't
Emily	the company can be assessed under ordinary income so
William	oh yeah
Emily	so it's just a matter of you have Part IVA ordinary income Fred Company Fred company
William	so that means it's the company that derives the tax benefit
Emily	oh I'm just I'm just thinking brainstorming in terms of whatever he's going to throw at me or question me
William	yeah I see I see what you mean
Emily	I'm just going to have to throw it back at again well and just say well in that case we just the tax benefits help the company blah blah blah but for the
William	OK good very good
Emily	hope so
William	leave it there for the tape

Appendix 9 Transcript of William and Emily's taxation moot

William	Sir if you are well pleased ah I'd like to seek leave to enter an appearance for the commissioner
Peter	[laughs] certainly
William	my name is William XX and I appear with my learned colleague Miss Emily XX on behalf of the commissioner sir my submission will deal uh with the response that the commissioner has to the taxpayer's submissions relating to Part IVA of the Income Tax Assessment Act and my learned colleague will deal with the commissioner's contentions in relation to ordinary income uh and at this stage we'd only like that to say that we believe that our submissions are mutually exclusive in the sense that if one of us fails then the other may still well succeed dealing with Part IVA we note that the taxpayer has somewhat conceded that a tax benefit does arise from a scheme although if the tribunal is would like I could I could still go over the commissioner's grounds for those areas
Peter	Yes this isn't a c a matter of civil litigation where you can concede things and settle it the way you like I am bound by the statute and I do want you to convince me but firstly I want you to tell me what you think your scheme is to see if there is any disagreement between you um and then tell me what you think the tax benefit is and why
William	very well sir in our in our submission uh the scheme first of all the commissioner notes that in the case of Peabody the High Court did envisage a situation where the commissioner could plead several different schemes in the alternative and this is indeed what we do today the largest or the most broad scheme which the commissioner wishes to put to the tribunal today uh starts from around about the time that Mr Fred Bloggs went to see his accountant and the advice which ensued from their uh consultations all the way down through all the steps basically until the discretionary decision of the corporate trustee to distribute the income that's the largest scheme sir that we would rely upon the smallest scheme or the most narrow scheme which we would rely upon is the actual discretionary decision itself is the trustee to distribute the trust moneys to Fred and Sheila Bloggs uh
Peter	how many schemes have you got in between those two extremes
William	there could be many but ah for present purposes two roughly and that would be the setting up of the trust and the discretionary decision within that trust uh and the setting up of the company and the trust and the subsequent decision
Peter	OK the narrowest surely falls foul of the High Court's view in Peabody doesn't it it's only a part of a scheme what what doesn't it's incapable of meaning to just say you distribute money equally between two beneficiaries I don't know ( ) wider circumstances don't you
William	Yes I think I think that we have to at this stage agree with that construction only because the commissioner does view it it's difficult for it to stand on its own two feet the commissioner does believe that the purposes of identifying uh a scheme for Part IVA is to provide some sort of context in which particular actions can be assessed and it would be difficult on that most narrow construction

	of the scheme to do that
Peter	and if I allow you to argue it at that level anyway won't your client go round and assess every family discretionary trust in Australia cause every year a trustee makes one of these discretionary decisions
William	indeed our client may assess every discretionary trust in Australia but the way in which it assesses such a trust is debatable trusts are set up for different purposes and the type of trust as an example perhaps that may not be caught under Part IVA is trust where money is left by a deceased person or a relative or indeed where money income taxes are even paid on a specific portion of money and then given over to a trust um those situations there are obviously in the view of the commissioner Part IVA wouldn't apply the only reason which the commissioner is assessing this particular trust is because um of the circumstances surrounding it.
Peter	OK if I allow you to explore further your narrowest version of scheme what's the tax benefit
William	the tax benefit in our submission if that is the scheme is basically income splitting it's the idea uh of giving
Peter	well that's ordinary English I mean tax benefit is is specifically defined in 177C you've got to tell me
William	yes sir
Peter	that but for the thing that you describe as a scheme somebody would have got more assessable income or but for a decision to distribute money equally in a trust why would Fred have got anything maybe the trustee would have on to all the money and maybe you should be assessing the trustee company
William	sir we can make two statements in relation to that the first statement which begging the tribunal's pardon I should have made at the start was that the commissioner in this case is assessing a number of taxpayers in the alternative one being Mr Fred Bloggs one being his wife one being Megabucks and the other being the trust
Peter	well I cannot concern myself with that because today I am only concerned with your assessment against Fred and if at the end of the day you tell me you really should have assessed Megabucks you've got another action going on elsewhere then by all means you can win that one try and tell me today why you think Fred's got a tax benefit
William	yes I suppose we put to the tribunal today that the assumption that has to be made is that the money would have gone to Fred Bloggs if the decision had not I suppose ( ) on that path and therefore the tax benefit which we would submit to the tribunal that is the relevant tax benefit here is the assessable income which was in the hands of Mrs Sheila Bloggs should have been in the hands of Mr Fred Bloggs
Peter	well it's a possibility that he would have got it why is it a reasonable expectation that he would have got it
William	..hmm (...) we think it's a reasonable expectation it's difficult to say this within the within the definition of the current scheme because of the imposition of the company itself and because Mr Fred Bloggs has basically earned the income himself and that if it weren't for him then it's quite it's quite reasonable indeed to conclude that no income at all would have been earned at all by any company or any person
Peter	um that doesn't accord with your narrow view of scheme that's fine if you're saying that the whole thing is a scheme and you want to throw all that out and say it's his money but we're now talking about

	your assertion the mere discretionary distribution of money from what otherwise is a valid trust is itself a scheme well under 177C if you take that discretionary distribution away what's your reasonable hypothesis that a trustee that can give money to anyone he or she likes would have necessarily given it to Fred
William	well perhaps because uh if we take into account ancillary facts and these facts we don't submit form part of the scheme but they definitely uh are circumstantial facts the fact that there was one bank account afterwards the fact that where the money came from in the first place was the company is under the effective control of Mr Fred Bloggs because he set up the company on such advice and in our submission the whole process of events allowed Mr Fred Bloggs to lead himself to this situation where he could distribute that money as trustee or as the sole effective director of a corporate trustee to his wife as well
Peter	what about on your widest scheme what would be the tax benefit there
William	uh in the widest scheme we submit that it's exactly the same sir
Peter	you might not under the widest scheme get rid of this whole business he might have done anything he might have gone surfing I mean anything's possible
William	oh the very widest scheme
Peter	yeah
William	the very widest scheme we submit that we should reasonably expect that if he did not enter into that scheme um its widest sense then he would have become uh a sole proprietor by himself in his own right
Peter	why couldn't couldn't he have been a partner and equal partner with his wife in which case the money would have been split down the middle anyway
William	he may have been if we were to go directly to the actual facts at hand and if he hadn't even gone to to see his accountant which we include as the first step in wider scheme then he may not even know about the situation with partnerships or the idea of entering into one with his wife
Peter	again that's a possibility but why is that on balance a probability as the more logical reasonable hypothesis I mean wouldn't I presume that an accountant would talk about the relative benefits of each type of structure
William	well that's exactly right uh sir but if we assume that he didn't go to the accountant because that was the first stage in the scheme [so but for the scheme
Peter	[oh I see I see your argument
William	then he was he was it was most reasonable that um that would have been the sole proprietor ah if I could deal with the issue of dominant purpose especially in regards to the largest scheme sir I wish to emphasise uh section 177D and the words which occur after oh section 177D B sorry and the words which occur after the actual the enumeration of the factors which we should consider um in in particular this idea of a part of a scheme we believe that on on at the apex of the submission of the commissioner that the relevant intention the relevant dominant purpose can most easily be be found in the mind of the accountant and we believe that the particular part of the scheme which is most cogent towards our argument is this idea of splitting the money in the trust

Peter	so you're saying the person that triggers 177D is accountant
William	we're saying that we're saying that um it's very very arguable that Fred Bloggs himself could trigger it as far as a state of mind is concerned but at the apex of our case it's the accountant
Peter	but isn't the accountant's dominant purpose to get professional fees that's why accountants give tax advice to get money not to get clients tax benefits
William	you could envisage a situation sir where a professional person being a lawyer or accountant was giving advice and the advice could be the most blatant form of tax avoidance uh which one could envisage but of course the professional person is seeking fees and probably very large fees if the advice is that good um that we would submit is not the relevant purpose which we should be looking at what we're looking at here is um a situation where a private individual has sought the help of another and the other has given him a scheme or just a course of events which to follow which can benefit him in this case benefit him because of tax and that's the purpose we're talking about here he's employed to provide a specific type of advice and the advice is happens to have a very large tax we would submit and this is the purpose that we're talking about
Peter	I can see the value in your client pursuing this line of arguments but if I accept it means that any lawyer and accountant who advertises that they're in a speciality of giving tax advice would automatically mean every client would loose under a Part IVA assessment
William	only if the
Peter	under( ) my door I'm presumed to have a dominant purpose of giving you a tax benefit that's surely not what parliament intended is it
William	but we wouldn't submit that every lawyer and accountant is purely giving tax advice it's [all round business advice
Peter	[those that advertise that they do
William	right
Peter	if I say that's all I want to do in my job is give professional tax advice as I'm freely entitled to do in this democratic society you're trying to tell me that that in and of itself is going to trigger Part IVA every time
William	(...) It may well be sir it may well be uh the other considerations which you've got to take into account of course um I suppose what part the particular person had to play in the scheme and um in the overall if it weren't the dominant purpose of the person yes he could be specialising in giving tax advice but if he saw other more cogent reasons why this particular scheme should have been taken then in that situation you're not going to have the um Part IVA transgression
Peter	well there was professional adviser in Peabody wasn't there and they didn't trigger it and there was a professional adviser in Spotless and they didn't trigger it so I don't think the High Court accepted that argument in each of those two cases and whilst it's an elegant argument I don't think I'm disposed to find in your favour on that point so I'd be interested to know what you think about Fred Bloggs as the triggering person
William	all right on the facts and we have to note at this stage there aren't many facts at all sir and so when we're talking in the realms of reasonable expectation and what we can hypothetically construct it's difficult to conclude with any type of certainty as to as to what really

	would have happened um simply speaking you can simply impute what the accountant intended into Fred because if you have a situation where a client really doesn't know anything at all and is completely ignorant but is
Peter	the accountant talked about limited liability and a whole host of other things we don't know exactly what they said he would have given him financial advice as to how to do books of return and all sorts of things
William	certainly sir
Peter	um well I you know I dragged your opponent to 177D and invited him to look at the particular factors what do you say about each of those particular factors
William	we say that especially factors (iv) and (v) which the tribunal has already pointed to regarding the taxpayer uh certainly indicate that um the financial position which was to be achieved on the facts anyway the tax consequences were comprise the entire financial position which we have to pay regard to
Peter	why weren't there other financial changes I mean what one minute he could have been a sole proprietor of a business with a 100% ownership and now he's a trustee with all the obligations that trust law imposes on him he can't treat this money in a cavalier fashion without being dragged off to court and accused of breaching fiduciary duty
William	but he's in the peculiar perhaps not the peculiar situation but the situation where is is trustee and beneficiary as well and a lot of the obligations in trust law between
Peter	potential beneficiary he's [and power of
William	potential beneficiary yes but in the the other beneficiaries if there are to be any beneficiaries at all are the members of his family especially the child which he would have to almost control the financial position of anyway either way I I I think it's reasonable on the facts to assume that not only does he have control of the money when it resides with the trustee but he has control of the money if it ever leaves the trustee as well
Peter	what about the change in the financial position of Lots of Dough they don't have to pay payroll tax any more they don't have to pay long service leave holiday pay sick pay pretty significant change of them isn't it
William	we don't submit here that Fred that Fred Bloggs has any interest in those types of financial changes
Peter	no but doesn't 177D (vi) demand that I consider the change in the financial position of any person who has any connection to the relevant tax payer
William	certainly but we don't believe that it should be regarded the same type of weight as the um the change in the financial position as the actual person whom you're looking [at as far as the state of mind
Peter	[but it's relevant
William	oh it's relevant
Peter	and is it relevant that Fred and his company now have a direct liability for negligence and doesn't have the same protection that he had as an employee of Lots of Dough in the past so these are changes aren't they
William	not in the financial position so to speak (...) yeah but it simply changes in um possible legal consequences of possible um actions or

	non-actions on his behalf in the future which um as a hypothetical enquiry sir we would regard as a little bit too extraneous for present considerations
Peter	well again that's an elegant argument but but point 7 says any other consequence for the relevant taxpayer so if I hold that it it technically can't be change of financial position it can be another consequence can't it
William	certainly sir and if you hold that then we would still submit that those considerations are by their very language in and the actual way in which 177D is set out intended to be not as important as the ones that have proceeded it
Peter	how do I decide what's more important and what's less important
William	well there's two things that we would submit would um would colour your decision there one is um our submission as we just have submitted that uh this idea of financial position of the relevant taxpayer is one of is the central criterion there and um also the actual facts at hand that you have and um in these particular facts of our case here today we would also submit that um what was going through Fred Bloggs' mind if Fred Bloggs is the person we're looking at is um of far more importance than other consequences for people he really doesn't have an obligation to um or probably didn't even consider (.) the last thing I think in relation to dominant purpose which we'd like to stress whether or not the tribunal is disposed to consider the accountant or Mr Fred Bloggs is this is this idea of part of a scheme and our submission perhaps the High Court hasn't yet given us very clear uh guides in relation to this but we would invite the tribunal today to regard Mr Fred Bloggs's intention only um as in relation to uh the distribution of trust money in other words we consider that to be a part of the scheme and section 177D talks about a part of a scheme and they talk about a dominant purpose in relation to the scheme or a part of it we would invite the tribunal today to consider the dominant purpose in relation to that particular part of the scheme it's our submission that if that particular part of the scheme hadn't been carried out then the tax benefit would have lain with Mr Fred Bloggs or at least with the company and this is reason why we assess the company in the alternative
Peter	I'm not going to hold in your favour on that point because I read the provision to mean that when it says person who enters the scheme or part of it as talking about two different types of people it wants to catch people who entered the whole scheme which in your case is Fred or it want to catch people who only in parts as well but it's not really meant to be allowing you to look at a person who entered the whole thing and then put a microscope on only one little part of what he or she did so you can appeal on that point but I won't
William	all right
Peter	I won't hold
William	then in that case ah sir our submission is that uh that whether it be Fred Bloggs or whether it be the accountant uh you have very very hard evidence in front of you um and basically the only the only most cogent evidence that there is before this tribunal is the tax benefit which was achieved we have the monetary figures or we assume that we have anyway and the benefit the benefit is there to be achieved if our arguments are accepted whether or not uh the relevant people considered all these other considerations and whether or not these things would have even occurred in the future is very hypothetical it's the type of um the type of uh line of

	argument that the commissioner undertook in Peabody which we don't seek again before this tribunal to take again um and we would discourage the tribunal if we could from embarking on on on too many strands of hypothetical argument because indeed uh no conclusion can be reached in that manner so it's our submission that Part IVA of the Income Tax Assessment Act applies that there is a scheme however the tribunal wishes to construe it that a relevant tax benefit did arrive and that a tax payer has um has acquired that tax benefit I now pass on to my learned colleague Miss Emily XX to deal with uh ordinary income the rest of our case.
Emily	OK As an alternative to our application to the commissioners application that Part IVA in these circumstances um would also like to submit on behalf of the commissioner that the reassessment of Mr Bloggs is in conformity also with the ordinary application of the ordinary concepts of income which is under Section 65 which is the new wording of the old Section 25 at this point we would like to consider the income consider income on ordinary terms at a more conceptual and purposive rather than a strict black letter law interpretation of the provision and if you'll just bear with me I hope that I can explain why both the provisions that is Part IVA and Section 65 operate from the same premise that is which is in very broad terms to outline or define the incidence of taxation Section 65 can be considered the general or basic catchall provision and part IVA um as a specific subset of that the two provisions are not mutually exclusive they can um they can yeah they do not limit the operation of the other but in one instance they can be alternatives I suppose OK and thus um because they are not mutually exclusive some of the concepts raised by William and the concepts underlying those are also applicable in this instance to the discussion that I'm going to embark on OK at its most basic level assessable income is defined as a gain from an earning activity not being capital for money or money's worth um and we can draw attention to the famous and oft quoted um Chief Justice Jordan um in Scott v Commissioner of Taxation which is actually a NSW case the word income is not a term of art and what forms of receipts are comprehended within it and what principles ought to be applied to ascertain how much of those receipts ought to be treated as income must be determined in accordance with the ordinary concepts and usages of mankind
Peter	no one's disputing here that there is some income you know the question is whether it's Fred's or whether it's the company's
Emily	mm OK then if you'd like me to go onto that point then yep OK so
Peter	that's the case isn't it
Emily	yes
Peter	everyone would agree that this was someone's [
Emily	[yes so yes
Peter	someone's earning real income from surveying
Emily	and what we're trying to s yes OK um yes we're not denying that there's a source of income um more the second requirement that there is an earning activity and that it's bringing in money and money's worth ( ) OK As you have quite rightly pointed out the difficulty of the application of this section arises because it's not normally applied to commercial situations of the kind we're discussing today such as where there is the combined structure of a company which is Megabucks Pty Ltd a trust the Bloggs Family

	Trust and the individual Mr Bloggs in this instance
Peter	what is normally isn't it isn't it in most family run businesses there is a company or a trust there all of the contracts as your opponent said are made by that company with outside customers and clients and *prima facie* it is the money of the company what do you say changes things in this circumstance
Emily	I suppose the element we're focussing on is that of control and this is where I'm um drawing on the conceptual level of um the concepts of ordinary income as opposed to a strict interpretation of the black letter law so it is a leap of faith on the tribunal's behalf but if you follow my arguments[hopefully
Peter	[remember I'm only a tribunal member I'm not a High Court Judge it might appeal you know that sentiment might appeal to me that's a pretty hefty leap of faith isn't it I mean do I have any authorities that can that I can hang my hat on
Emily	um well I think the essence of the law itself is a factor that must be taken into account
Peter	would you want me to hold that all family businesses don't count that everyone who runs a business through a family company or trust I should look behind the corporate veil and just say its really the people that mum and dad really run the business and its really their income under Section 25
Emily	I suppose um that could be a logical conclusion of what I am arguing I would say that in this particular circumstance the facts really do indicate that there is something really not so much awry but there is some there is a certain element of artificiality that isn't normally present in most cases
Peter	that being
Emily	that being well the fact that Fred Bloggs in this instance um occupies the position of almost like a holy trinity that is he is not only the director of the company well employee of the company director of the company he is um trustee of the trust he is also beneficiary of the trust and he operates in that environment without the although his wife is related in that she is also an director um and thus of the company and thus effectively a trustee and a beneficiary because by her own admission in the um her testimony she said you know I follow um I generally follow what Fred tells me to do you can sort of see that um the facts allude to that Fred really is operating on his own he's not really drawing on the opinions of um extraneous third parties he is sort of um operating for his own benefits and his own you know um uh yeah at his own discretion which [as a trustee
Peter	[isn't that going to be the case with every small family business I mean every plumber every carpenter and every glazier and whatever in society that's operating a business and has a company structure and a family trust and a spouse
Emily	I suppose again we go back to the issue of the purpose for that and in this instance the artificiality seems to stem from a purpose of attempting to avoid tax rather than really genuinely wanting to provide for his family
Peter	well if what you're concerned about an attempt to avoid tax then obviously your colleague's argument about Part IVA are relevant because that's where parliament said that's important you're really asking me to do something more fundamental you're asking me to say that that that the real essence of income means that if it really is his effort and his control it ought to be his money and I ought to ignore what other branches of the law don't ignore which is

	companies and contracts and things like that now I'm not now I'm not now I may be politically disposed to that but give me something to hang my hat on I can't find in your favour unless you give me dividing line that
Emily	uh huh
Peter	lets all of the ordinary plumbers go and catches what what you think's wrong with Fred tell me what distinguishes him what or what what legal proposition do you want me to adopt that would allow you to win this case and not allow every other person running a family business to be caught
Emily	I suppose it's the (..) the I suppose you could almost consider it a before and after situation um on the facts you have Fred going out and earning the money and then in the end you have the one joint account where the money actually ends I suppose when we look at um
Peter	if they had separate bank accounts it's OK
Emily	oh not necessarily I mean that's not (indicia) I would say but it's just an element that should be taken into account um within the context of all the facts what I suppose my argument is leadi... towards is that the result of the way they have organised their affairs can be seen as a fiction because ultimately the money only ends up in one place and that is ultimately at Fred's control to do with as he pleases and on an ordinary [conc
Peter	Sheila takes issue with that she doesn't think it's his money to do with what he pleases it's a joint bank account and I'm sure she'd be a bit miffed if he spent all the money and didn't give her access to it
Emily	I'm sure she would be but I think he still has the power to do that
Peter	what evidence allows you to conclude that what evidence before me suggests that
Emily	um I think just the nature of a joint bank account and the fact that um he does actually control all the finances it would seem from the facts we have before us um he would control all the accounts related to the business and what have you the family etc I mean the joint account has it is a joint account but that doesn't stop him from actually drawing the money and say running off to Fiji or what have you
Peter	nor does it stop her doing the same thing
Emily	exactly but this
Peter	you're not trying to assess her you're trying to assess him
Emily	no I'm trying to assess Fred because I would say the fact that she has access to the money does not does not vitiate the fact that he also has control of the money and that money is um really apart from going from the position of employee into the company into trust into their joint bank account if you look at that chain of transactions um well his control is um evident at all elements of that chain um and sorry I've just lost track of what I was saying um ..
Peter	if Kerry Packer has a joint bank account with his wife that doesn't stop the money that he earned in the company name really being in the company name I mean Kerry Packer is not assessed personally on the profits of his company that owns various newspapers and TV stations
Emily	mm
Peter	why should it really be different here

Emily	I suppose
Peter	I'm sure Kerry's got a lot of control over what happens in that company in the way Fred does here
Emily	but in that instance you would actually have a separate assessment of the company's income in this particular instance there is nothing actually being left in the company as far a income goes it is all being taken out at the end of the financial year which to all intents and purposes is merely just a book um a bookkeeping exercise is not really a reflection of the reality of the situation
Peter	well that's why your colleague said that that whole trust situation is is is caught by Part IVA and I'll reserve my decision on that but you're trying to say to me you're trying to go back a step earlier than that and say that this whole company is a nonsense as well it's really all Fred's money and why is it Fred's money if Kerry Packer's company profits are not really Kerry's I mean your client allows Kerry to put in a company tax return why don't you allow Fred to put in a company tax return
Emily	um well I would allow him to put in company tax return if indeed um
Peter	so if he ran it as a company you'd be happy but the fact that he's got a trust in there as well makes you unhappy
Emily	it's the combination of all the elements that just I suppose on the smell test as we've often discussed is it just the combination of all these elements just means that it just um it's legitimacy is questioned I think the fact that um say drawing and example to some of the other cases I think in particular ah Leidig's case you have um they were talking about the issue of personal exertion um and Justice Hill I think it was yes um concluded that um in that instance you couldn't designate the income of the business I think it was a company as being that of the individual taxpayer because there are certain things associated with a business that don't have which cannot be directly derived from personal exertion such as um good will and so on in that particular case I think we're looking at a business which actually had um it had a real um practical existence to it now I'm not denying that you must well (..) I understand that um in order for there to be smooth transactions in the commercial world you have to have legal force to certain entities which are not human beings such as companies but what I would distinguish in this particular instance is that um the business arrangement in Leidig actually had other elements to it in that they had employees and so on it was
Peter	yes but Fred employees in a few years time you can't pick on someone while they're starting off in a small business he's on his own his wife's doing nothing she gets more interested gets involved in the business if he's got enough clients sooner or later he'll [start employing people
Emily	[this is I think this is where other elements of the the um transactions really come into play which is the element such as the fact that um he didn't he only drew a nominal sum of income now while [yes that can be explained
Peter	[get lots more later
Emily	that can be explained by saying well he was starting out so he doesn't want to draw any you know too much money on it and um hamper the growing business ah fiscally um but later on when it does become established cause we're talking quite a few years now into the actual establishment of the business he is still only drawing

	a nominal sum and I would say that you could construe from that that um there was a deliberate decision there because of say tax benefits and so on that um it was better for him to just draw that nominal sum knowing he was just going to have the benefit of the profits anyway via his role as trustee and beneficiary and so later on when the company could have paid him um commensurate wages for his work they chose not to because of a possible tax benefit or there was a tax benefit um
Peter	don't you have a bit of a problem with Leidig's case I mean again it's Federal Court decision this is merely the tribunal and Mr Justice Hill was scathing of this line of argument that you're currently embarking on the whole idea that there's this thing called personal services income and he looks around at the cases and he says I can't find this broad proposition that the commissioner's asserting
Emily	hmmhuh
Peter	well if he says he can't find it well why should I find it
Emily	well I think um there is a number of ways that we can distinguish Leidig um and one
Peter	well you can distinguish the facts but [you've got to give me a proposition
Emily	[yeah mmhuh
Peter	you've got to give me a legal principle from somewhere you either find one directly from the statute and your colleague's dealt with Part IVA or you pluck a common law one of the air as the commissioner tried in Leidig and Mr Justice Hill says it's not there I can't find it I can't find cases that establish it I can't find words in the act that establish it uh it might be a nice philosophical idea but it's not law so where do I find this proposition even if you tell me there are many distinguishing facts between this and Leidig what's the proposition and where does it come from
Emily	I suppose the proposition I'm getting at is what is I well the commission um the Commissioner of Taxation would hold is at the the base of all tax cases and that is that you are looking at what actually happens at the end of the chain of transactions that is in who in whose hands does the benefit ultimately lie I suppose um not dissimilar to what could possibly have been an argument that could possibly be been run in the Peabody's case that is the assumption that ultimately or in this case you could conclude with um I suppose almost 100% certainty although that's very strong um figures that um all the money earned as a result of his activities as a licensed surveyor um going via the company or whatever um would have ultimately have ended up in the bank account and at his control and discretion regardless of what chain of events took in the middle it ultimately would have um come yeah ended up in his hands and I suppose that's um what um the Commissioner could have argued in the Peabody's case whereby he could have said that um ultimate rather than having to come with hypothetical situations of where um of possible options he could have said well just on the basis of reasonableness you could assume that Mrs Peabody would have got the money in the end
Peter	but the High Court didn't come up with a ruling along those lines if the High Court would have bought that argument you would have had a much better chance of convincing me to adopt that argument but I can't really do it if the High Court
Emily	perhaps it is a case such as this that um could possibly progress to the High [Court and hold that sort of

Peter	[certainly valid for you to present it and that that that's certainly appropriate and it could it certainly would be a ground for appeal but you'd appreciate my difficulty [faced with the authorities that I've got
Emily	[mm yes yeah this is why I emphasised that it really is a conceptual argument and it is a leap of faith and I understand that it does um there is difficulty in finding it within the actual statutes itself but it's nevertheless something that I think that the tribunal and courts should take into account OK well here endeth the lesson [laughs]
Peter	well thank you all um I do ( ) weak bits of your argument and it's to try and create create an understanding that being well prepared in a case is not given in an adversarial system going in and actually having an extreme argument but it's actually having a well thought out and balanced argument and that's the same thing in an exam and in a court case that you can actually think what are my best arguments what are my worst what are my opponents best arguments what's the court likely to ask me and really ultimate preparation is knowing the answers to all of those questions and having it ranked accordingly and as I say the more the more extreme you try and be the more on thin ice you are and the more you actually get challenged by um by whoever you're debating with in whatever forum and so um for all of you you can often stop me interrupting you by actually conceding some of the weaknesses in your argument so there's a difference between saying this was solely done for commercial reasons rather than tax reasons in which case I'll jump on you or you could say um I realise how the tribunal will see there are certain tax benefits there was saving but we say at the end of the day after you look at 177B these are the four commercial factors and it's a difficult question but on balance for the following reasons I say that these will predominate so you try and be more convincing by meeting the concerns of the person before they even get there themselves uh and ultimately the main thing I'm trying to do the main difference between this and the lectures is in the lectures I ask a lot of questions but I don't pick on individual people to answer here you're stuck up at the podium for 15 minutes and you're there but my main aim is to convince you that you you do have brains and and they're good brains and they're worth exercising and we usually discourage you from using them and your natural original reaction was to say hang on I didn't prepare to talk about 177D I don't want to do it uh but then you did a fine job in 15 seconds of actually reading it and thinking and that's really what very much oral communication in all walks of life is you do an articles interview you can't walk in with a screed and present it someone's going to ask you a question and you're actually going to have 5 seconds to think of an answer and present it and it's the same think when you're ringing another solicitor trying to settle a case or talking to a client or appearing in court so all aspects of of of these professions that we feed into have a lot of dynamic forms of oral communication and it's about thinking and not you know giving it a go and thank you for your uh involvement in it I better boot you out so that the next gang

References

Antaki, C., Condor, S. & Levine, M. 1996, 'Social identities in talk: speakers' own orientations', *British Journal of Social Psychology*, vol. 25, no. 4, pp. 473-92.

Baker, B. K. 2000, 'Language acculturation processes and resistance to in"doctrine"ation in the legal skills curriculum and beyond: a commentary on Mertz's critical anthropology of the Socratic, doctrinal classroom', *John Marshall Law Review*, vol. 34, no. 1, pp. 131-61.

Bakhtin, M. M. 1981, *The Dialogic Imagination: Four Essays*, University of Texas Press, Austin.

---- 1986, *Speech Genres and other Late Essays,* University of Texas Press, Austin.

Bartholomae, D. 1988, 'Inventing the university', in *Perspectives on Literacy*, eds E. R. Kintgen, B. M. Kroll & M. Rose, Southern Illinois University Press, Carbondale, pp. 273-85.

Bazerman, C. 1996, *Students being disciplined: getting confused, getting by, getting rewarded, getting smart, getting real*, Technical Report No. 12, Center for Interdisciplinary Studies of Writing, University of Minnesota, Minneapolis.

Bell, D. & Pether, P. 1998, 'Re/writing skills training in law schools – legal literacy revisited', *Legal Education Review*, vol. 9, no. 2, pp. 113-41.

Benveniste, E. 1971, *Problems in General Linguistics*, University of Miami Press, Coral Gables.

Bernstein, B. 1986, 'On pedagogic discourse', in *Handbook of Theory and Research for the Sociology of Education*, ed. J. G. Richardson, Greenwood Press, New York, pp. 205-40.

Berrill, D. P. 1988, 'Anecdote and the development of oral argument in sixteen-year-olds', in *Oracy Matters: the Development of Talking and Listening in Education*, eds M. MacLure, T. Phillips & A. Wilkinson, Open University Press, Milton Keynes, pp. 57-68.

Bhatia, V. K. 1993, *Analysing Genre: Language Use in Professional Settings*, Longman, London.

Billig, M. 1999, 'Whose terms? Whose ordinariness? Rhetoric and ideology in Conversation Analysis', *Discourse and Society*, vol. 10, no. 4, pp. 543-58.

Bizzell, P. 1982, 'Cognition, convention, and certainty: what we need to know about writing', *Pre/Text*, vol. 3, no. 2, pp. 13-44.

Bloor, M. 1997, 'Techniques of validation in qualitative research: a critical commentary', in *Context and Method in Qualitative Research*, eds G. Miller & R. Dingwall, Sage Publications, Thousand Oaks, pp. 37-50.

Bogoch, B. 1999, 'Courtroom discourse and the gendered construction of professional identity', *Law and Social Inquiry*, vol. 24, no. 2, pp. 329-75.

Bourdieu, P. 1977, *Outline of a Theory of Practice*, Cambridge University Press, Cambridge.

---- 1987, 'The force of law: toward a sociology of the juridical field', *Hastings Law Journal*, vol. 38, no. 5, pp. 814-53.

---- 1990. *The Logic of Practice*, Polity Press, Cambridge.

Brand, N. & White, J. O. 1976, *Legal Writing: the Strategy of Persuasion*, St. Martin's Press, New York.

Burns, S. 1997, 'Practicing law: a study of pedagogic interchange in a law school classroom', in *Law in Action: Ethnomethodological and Conversation Analytic Approaches to Law*, eds M. Travers & J. F. Manzo, Dartmouth, Aldershot, pp. 265-87.

Butler, J. P. 1993, *Bodies that Matter: on the Discursive Limits of "Sex"*, Routledge, New York.

---- 1997, *The Psychic Life of Power: Theories in Subjection*, Stanford University Press, Stanford.

Callon, M. 1991, 'Techno-economic networks and irreversibility', in *A Sociology of Monsters? Essays on Power, Technology and Domination*, ed. J. Law, Routledge, London, pp. 132-61.

Cameron, D. 1992, 'Not gender difference but the difference gender makes — explanation in research on sex and language', *International Journal of the Sociology of Language*, vol. 94, no. 1, pp. 13-26.

Caudill, D. S. 1997, *Lacan and the Subject of Law: Toward a Psychoanalytic Critical Legal Theory*, Humanities Press, Atlantic Highlands.

Cazden, C. B. 1988, *Classroom Discourse: the Language of Teaching and Learning*, Heinemann, Portsmouth.

Chouliaraki, L. & Fairclough, N. 1999, *Discourse in Late Modernity: Rethinking Critical Discourse Analysis*, Edinburgh University Press, Edinburgh.

Cole, J. O. 1984, 'The Socratic method in legal education: moral discourse and accommodation', *Mercer Law Review*, vol. 35, no. 3, pp. 867-90.

Collins, A., Brown, J. S. & Newman, S. E. 1989, 'Cognitive apprenticeship: teaching the crafts of reading, writing, and mathematics', in *Knowing, Learning, and Instruction: Essays in Honor of Robert Glaser*, ed. L. B. Resnick, Lawrence Erlbaum, Hillsdale, pp. 453-494.

Collins, A. & Stevens, A. 1983, 'A cognitive theory of inquiry teaching', in *Instructional-Design Theories and Models: An Overview of their Current Status*, ed. C. Reigeluth, Lawrence Erlbaum, Hillsdale, pp. 247-78.

Conley, J. M. & O'Barr, W. M. 1998, *Just Words: Law, Language and Power*, University of Chicago Press, Chicago.

Cramton, R. C. 1982, 'The current state of the law curriculum', *Journal of Legal Education*, vol. 32, no. 3, pp. 321-35.

Deleuze, G. 1988, *Foucault*, Athlone Press, London.

Deleuze, G. & Guattari, F. 1987, *A Thousand Plateaus: Capitalism and Schizophrenia*, University of Minnesota Press, Minneapolis.

Dias, P., Freedman, A., Medway, P. & Paré, A. 1999, *Worlds Apart: Acting and Writing in Academic and Workplace Contexts*, Lawrence Erlbaum, Mahwah.

Dingwall, R. 2000, 'Language, law, and power: ethnomethodology, conversation analysis and the politics of law and society studies', *Law and Social Inquiry*, vol. 25, no. 3, pp. 885-911.

Duranti, A. 1997, *Linguistic Anthropology*, Cambridge University Press, New York.

Edwards, D. & Potter, J. 1992, *Discursive Psychology*, Sage Publications, Thousand Oaks.

Fairclough, N. 1989, *Language and Power*, Longman, London.

---- 1992a, 'Discourse analysis: linguistic and intertextual analysis within discourse analysis', *Discourse and Society*, vol. 3, no. 2, pp. 193-217.

---- 1992b, 'The appropriacy of "appropriateness", in *Critical Language Awareness*, ed. N. Fairclough, Longman, London, pp. 33-56.

---- 1992c, *Discourse and Social Change*, Polity Press, Cambridge.

---- 1996, 'A Reply to Henry Widdowson's "Discourse Analysis: A Critical View"', *Language and Literature*, vol. 5, no. 1, pp. 49-56.

Feinman, J. M. 1995, 'Simulations: an introduction', *Journal of Legal Education*, vol. 45, no. 4, pp. 469-79.

Fish, S. E. 1989, *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies*, Clarendon, Oxford.

Flower, L. S. 1979, 'Writer-based prose: a cognitive basis for problems in writing', *College English*, vol. 41, no. 1, pp. 19-37.

Foucault, M. 1990, *The History of Sexuality*, Vintage Books, New York.

Fowler, R. 1996, 'On critical linguistics', in *Texts and Practices: Readings in Critical Discourse Analysis*, eds C. R. Caldas-Coulthard & M. Coulthard, Routledge, London, pp. 3-14.

Freedman, A., Adam, C. & Smart, G. 1994, 'Wearing suits to class: simulating genres and simulations as genre', *Written Communication*, vol. 11, no. 2, pp. 193-226.

Gee, J. P. 1999, *An Introduction to Discourse Analysis: Theory and Method*, Routledge, London.

Giddens, A. 1984, *The Constitution of Society: Outline of the Theory of Structuration*, University of California Press, Berkeley.

Goffman, E. 1974, *Frame Analysis*, Harvard University Press, Cambridge.

---- 1981, *Forms of Talk*, University of Pennsylvania Press, Philadelphia.

---- 1990, *The Presentation of Self in Everyday Life*, Penguin, Harmondsworth.

Goldring, J. 1987, 'Academic and practical legal education: where next? An academic lawyer's response to Noel Jackling and Neil Gold', *Journal of Professional Legal Education*, vol. 5, no. 2, pp. 105-15.

Goldsmith, A. J. 1993, 'An unruly conjunction? Social thought and legal action in clinical legal education', *Journal of Legal Education*, vol. 43, no. 3, pp. 415-53.

Goodrich, P. 1990, *Languages of Law: from Logics of Memory to Nomadic Masks*, Weidenfeld and Nicolson, London.

---- 1996, *Law in the Courts of Love: Literature and other Minor Jurisprudences*, Routledge, London.

---- (ed.) 1997, *Law and the Unconscious: A Legendre Reader*, Macmillan, Basingstoke.

Goodwin, C. 1994, 'Professional Vision', *American Anthropologist*, vol. 96. no. 3, pp. 606-33.

Goodwin, C. & Duranti, A. 1992, 'Rethinking context: an introduction', in *Rethinking Context: Language as an Interactive Phenomenon*, eds A. Duranti & C. Goodwin, Cambridge University Press, Cambridge, pp. 1-42.

Goodwin, C. & Goodwin, M. H. 1992, 'Assessments and the construction of context', in *Rethinking Context: Language as an Interactive Phenomenon*, eds A. Duranti & C. Goodwin, Cambridge University Press, Cambridge, pp. 147-89.

Goodwin, M. H. 1990. *He-said-she-said: Talk as Social Organization Among Black Children*, Indiana University Press, Bloomington.

Grbich, J. 1997a, 'Reading the phantom: taxation law, psychoanalysis and apparitions', *Australian Feminist Law Journal*, vol. 8, no. 2, pp. 81-109.

---- 1997b, 'Taxation narratives of economic gain: reading bodies transgressively', *Feminist Legal Studies*, vol. 5, no. 2, pp. 131-68.

Gubrium, J. F. & Holstein, J. A. 2000, 'Analyzing interpretive practice', in *Handbook of Qualitative Research*, 2nd edn, eds N. K. Denzin & Y. S. Lincoln, Sage Publications, Thousand Oaks, pp. 487-508.

Guinier, L., Fine, M. & Balin, J. 1997, *Becoming Gentlemen: Women, Law School, and Institutional Change*, Beacon Press, Boston.

Hall, C., Sarangi, S. & Slembrouck, S. 1999, 'The legitimation of the client and the profession: identities and roles in social work discourse', in *Talk, Work and Institutional Order: Discourse in Medical, Mediation and Management Settings*, eds S. Sarangi & C. Roberts, Mouton de Gruyter, Berlin, pp. 293-322.

Halliday, M. A. K. 1985, *Spoken and Written Language*, Deakin University, Geelong.

---- 1994, *An Introduction to Functional Grammar*, 2nd ed, Edward Arnold, London.

Halliday, M. A. K. & Hasan, R. 1985, *Language, Context, and Text: Aspects of Language in a Social-Semiotic Perspective*, Deakin University, Geelong.

Heritage, J. 1984, *Garfinkel and Ethnomethodology*, Polity Press, Cambridge.

Hughes, G. E. & Cresswell, M. J. 1968, *An Introduction to Modal Logic*, Methuen, London.

Iijima, A. L. 1998, 'Lessons learned: legal education and law student dysfunction', *Journal of Legal Education*, vol. 48, no. 4, pp. 524-38.

Ivanic, R. 1998, *Writing and Identity: The Discoursal Construction of Identity in Academic Writing*, John Benjamins, Amsterdam.

Kamler, B. & Maclean, R. 1997, '"You can't just go to court and move your body": first year students learn to write and speak the law', *Law Text Culture*, vol. 3, pp. 176-209.

Kearney, M. K. & Beazley, M. B. 1991, 'Teaching students how to "think like lawyers": integrating Socratic method with the writing process', *Temple Law Review*, vol. 64, no. 4, pp. 885-908.

Kelley, D. 1990, *The Human Measure: Social Thought in the Western Legal Tradition*, Harvard University Press, Cambridge.

Kincheloe, J. L. & McLaren, P. L. 1994, 'Rethinking critical theory and qualitative research', in *Handbook of Qualitative Research*, eds N.K. Denzin & Y. S. Lincoln, Sage Publications, Thousand Oaks, pp. 138-57.

Kobetsky, M. & Dirkis, M. J. 1997, *Income Tax: Essential Cases and Materials*, Federation Press, Leichhardt.

Laclau, E. & Mouffe, C. 1985, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics*, Verso, London.

Lather, P. 1991, *Getting Smart: Feminist Research and Pedagogy with/in the Postmodern*, Routledge, New York.

Latour, B. 1990, 'Drawing things together', in *Representation in Scientific Practice*, eds M. Lynch & S. Woolgar, MIT Press, Cambridge, Mass, pp. 19-68.

Law, J. 1994, *Organizing Modernity*, Blackwell, Oxford.

Lea, M. R. & Stierer, B. (eds) 2000, *Student Writing in Higher Education: New Contexts*, The Society for Research into Higher Education & Open University Press, Buckingham.

Lipton, J. D. 1998, 'Role-playing exercises in first year legal process classes', *Journal of Professional Legal Education*, vol. 16, no. 1, pp. 97-121.

Lundeberg, M. A. 1987, 'Metacognitive aspects of reading comprehension: understanding in legal case analysis', *Reading Research Quarterly*, vol. 22, no. 4, pp. 408-32.

Martineau, R. J. 1981, 'Moot court: too much moot and not enough court', *American Bar Association Journal*, vol. 67, no. 10, pp. 1294-7.

Maurer, N. M. & Mischler, L. F. 1994, 'Introduction to lawyering: teaching first-year students to think like professionals', *Journal of Legal Education*, vol. 44, no. 1, pp. 96-115.

Mead, G. H. 1934, *Mind, Self and Society from the Standpoint of a Social Behaviorist*, University of Chicago Press, Chicago.

Mehan, H. 1979, *Learning Lessons: Social Organization in the Classroom*, Harvard University Press, Cambridge.

Mertz, E. 1996, 'Recontextualization as socialization: text and pragmatics in the law school classroom', in *Natural Histories of Discourse*, eds M. Silverstein & G. Urban, University of Chicago Press, Chicago, pp. 229-49.

---- 2000, 'Teaching lawyers the language of law: legal and anthropological translations', *John Marshall Law Review*, vol. 34, no. 1, pp. 91-117.

Meyer, P. N. 1993, '"Fingers pointing at the moon": new perspectives on teaching legal writing and analysis', *Connecticut Law Review*, vol. 25, no. 3, pp. 777-96.

Miller, G. 1997, 'Building bridges: the possibility of analytic dialogue between ethnography, conversation analysis and Foucault', in *Qualitative Research: Theory, Method and Practice*, ed. D. Silverman, Sage Publications, Thousand Oaks, pp. 24-44.

Milovanovic, D. 1994, 'The postmodernist turn: Lacan, psychoanalytic semiotics, and the construction of subjectivity in law', *Emory International Law Review*, vol. 8, no. 1, pp. 67-98.

Minnis, M. 1994, 'Toward a definition of law school readiness', in *Sociocultural Approaches to Language and Literacy: An Interactionist Perspective*, eds V. John-Steiner, C. P. Panofsky, & L. W. Smith, Cambridge University Press, Cambridge, pp. 347-90.

Morgan, J. 1989, 'The Socratic method: silencing cooperation', *Legal Education Review*, vol. 1, no. 2, pp. 151-64.

Murphy, T. 1994, 'As if: *camera juridica*', in *Politics, Postmodernity and Critical Legal Studies: the Legality of the Contingent*, eds C. Douzinas, P. Goodrich & Y. Hachamovitch, Routledge, London, pp. 69-106.

Nathanson, S. 1997, 'Bridging the divide between traditional and professional legal education', *Journal of Professional Legal Education*, vol. 15, no. 1, pp. 15-30.

Phelps, T. G. 1989, 'In the law the text is king', in *Worlds of Writing: Teaching and Learning in Discourse Communities of Work*, ed. C. B. Matalene, McGraw-Hill, Manchester, pp. 365-74.

Poynton, C. 1993, 'Grammar, language and the social: poststructuralism and systemic-functional linguistics', *Social Semiotics*, vol. 3, no. 1, pp. 1-21.

Quirk, R., Greenbaum, S., Leech, G. & Svartvik, J. 1985, *A Comprehensive Grammar of the English Language*, Longman, London.

Resnick, L. B. 1983, 'Toward a cognitive theory of instruction', in *Learning and Motivation in the Classroom*, eds S. G. Paris, G. M. Olsen & H. W. Stevenson, Lawrence Erlbaum, Hillsdale, pp. 5-38.

Roberts, C. & Sarangi, S. 1999, 'Hybridity in gatekeeping discourse', in *Talk, Work and Institutional Order: Discourse in Medical, Mediation and Management Settings*, eds C. Roberts & S. Sarangi, Mouton de Gruyter, Berlin, pp. 473-503.

Rose, N. S. 1996, *Inventing Our Selves: Psychology, Power and Personhood*, Cambridge University Press, Cambridge.

Sacks, H. 1972, 'On the analyzability of stories by children', in *Directions in Sociolinguistics*, eds J. Gumperz & D. Hymes, Holt, Rinehart & Winston, New York, pp. 325-145.

Sarangi, S. & Candlin, C. N. 2001, '"Motivational relevancies": Some methodological reflections on social theoretical and sociolinguistic practice', in *Sociolinguistics and Social Theory*, eds N. Coupland, S. Sarangi & C. N. Candlin, Pearson Educational, Harlow, pp. 350-88.

Scardamalia, M., Bereiter, C. & Steinbach, R. 1984, 'Teachability of reflective processes in written composition', *Cognitive Science*, vol. 8, no. 2, pp. 173-90.

Schegloff, E. A. 1997, 'Whose text? Whose context?' *Discourse and Society*, vol. 8, no. 2, pp. 165-87.

Schlag, P. 1991, 'The problem of the subject', *Texas Law Review*, vol. 69, pp. pp. 1627-743.

Schön, D. A. 1983, *The Reflective Practitioner: How Professionals Think in Action*, Temple Smith, London.

Schutz, A. 1962, *Collected Papers I: The Problem of Social Reality*, vol. 1, Martinus Nijhoff, The Hague.

Schwandt, T. A. 2000, 'Three epistemological stances for qualitative inquiry', in *Handbook of Qualitative Research*, 2nd edn, eds N. K. Denzin & Y. S. Lincoln, Sage Publications, Thousand Oaks, pp. 189-213.

Smith, D. E. 1990, *Texts, Facts, and Femininity: Exploring the Relations of Ruling*, Routledge, London.

---- 1999, *Writing the Social: Critique, Theory, and Investigations*, University of Toronto Press, Toronto.

Stake, R. E. 2000, 'Case studies', in *Handbook of Qualitative Research*, 2nd edn, eds N. K. Denzin & Y. S. Lincoln, Sage Publications, Thousand Oaks, pp. 435-54.

Stratman, J. F. 1990, 'The emergence of legal composition as a field of inquiry: evaluating the prospects', *Review of Educational Research*, vol. 60, no. 2, pp. 153-235.

Tannen, D. 1990, *You Just Don't Understand: Women and Men in Conversation*, Morrow, New York.

Thorne, B. 1993, *Gender Play: Girls and Boys in School*, Open University Press, Buckingham.

Toolan, M. 1997, 'What is critical discourse analysis and why are people saying such terrible things about it?' *Language and Literature*, vol. 6, no. 2, pp. 83-103.

van Leeuwen, T. 1996, 'The representation of social actors', in *Texts and Practices: Readings in Critical Discourse Analysis*, eds C. R. Caldas-Coulthard & M. Coulthard, Routledge, London, pp. 32-70.

Vaughn, R. G. 1995, 'Use of simulations in a first-year civil procedure class', *Journal of Legal Education*, vol. 45, no. 4, pp. 480-6.

Voloshinov, V. N. 1973, *Marxism and the Philosophy of Language*, Seminar Press, New York.

Wenger, E. 1998, *Communities of Practice: Learning, Meaning, and Identity*, Cambridge University Press, Cambridge.

Wetherell, M. 1998, 'Positioning and interpretative repertoires: conversation analysis and poststructuralism in dialogue', *Discourse and Society*, vol. 9, no. 3, pp. 387-412.

White, J. B. 1983, 'The invisible discourse of the law: reflections on legal literacy and general education', *Colorado Law Review*, vol. 54, no. 2, pp. 143-59.

Widdicome, S. 1998, 'Identity as an analysts' and a participants' resource', in *Identities in Talk*, eds C. Antaki & S. Widdicome, Sage, London, pp. 191-206.

Widdowson, H. 1995, 'Discourse analysis. A critical view', *Language and Literature*, vol. 4, no. 3, pp. 157-72.

Williams, D. 1995, 'The phantom', *Taxation in Australia*, vol. 29, no. 10, pp. 520-522.

Woolever, K. R. 1987, Critical thinking and legal discourse, paper presented to Annual Meeting of the Conference on College Communication and Composition, Atlanta.

Young, P. W. 1986, *Civil Litigation: A Practice Guide for Advocates*, Butterworths, Sydney.