

# EVALUATING THE PEDAGOGIC VALUE OF MOOTING AND 'NOOTING' AT THE ADMINISTRATIVE APPEALS TRIBUNAL (CTH)

PETER BILLINGS\*

*This article explains and evaluates how the National Administrative Appeals Tribunal Moot Competition, and its younger sibling, the Negotiating Outcomes on Time ('NOOT') Competition, afford law students an important and unique opportunity to develop; distinctive advocacy skills, superior analytical skills directed to resolving complex questions of fact and law, enhanced knowledge and understanding of public law, and an appreciation of relevant professional standards. The article reveals how the competitions can challenge students to think beyond the 'doing' and the 'knowing', to deeply and critically reflect on administrative law and administrative justice principles, practices and procedures. It is argued that the two AAT competitions are highly effective vehicles for student learning that do not suffer from the deficiencies associated with traditional moots based on appellate court proceedings. Therefore, the article demonstrates that the AAT competitions are realistic and highly relevant for future lawyers.*

## I INTRODUCTION

Moot competitions generally simulate adversarial adjudicative processes, traditionally affording law students an opportunity to display their advocacy skills and understanding of the law in a mock appellate court.<sup>1</sup> The simulated appeal hearing is characterised by fervent advocacy on behalf of clients, largely based on case analysis and/or interpretation of legal instruments directed to resolving pure questions of law. Certainly, obtaining experience and insight into appellate procedures and advocacy techniques in public and private law litigation is beneficial. Indeed, typically the educational literature documents the pedagogic value of appellate moot court competitions.<sup>2</sup> Scholars have persuasively argued

\* Associate Professor, TC Beirne School of Law, The University of Queensland. I acknowledge and thank my colleagues Russell Hinchy and Jacqui Lynagh, and the two anonymous reviewers, for their helpful feedback on earlier drafts of this article. Thanks to Thomas Palmer (Librarian, University of Queensland) for his assistance with the literature review. Also, I gratefully acknowledge Le Hoa Phan and Kristin Childs, Institute of Teaching and Learning Innovation (ITaLI), for their support in administering the survey and data analysis. Finally, thanks to my research assistant, Kirra Uren, for her assistance with formatting the article.

1 I do not overlook the moot competitions that simulate trial proceedings or arbitral proceedings; for example, the ICC Moot Court Competition, the Willem C Vis International Commercial Arbitration Moot, and the International Maritime Law Arbitration Moot.

2 Cf Alex Kozinski, 'In Praise of Moot Court — Not!' (1997) 97 *Columbia Law Review* 178; for an effective rebuttal, see Michael V Hernandez, 'In Defense of Moot Court: A Response to "In Praise of Moot Court — Not!"' (1998) 17 *Review of Litigation* 69.

that moots offer the potential to: (i) develop students' legal analytical and research skills; (ii) enhance legal writing and oral communication skills; (iii) prompt the development of substantive (doctrinal) legal knowledge; (iv) foster the development of effective teamwork with peers; and (v) support a participative, learner-centred approach with an emphasis on personal experience and self-reflection.<sup>3</sup> However, the traditional approach to mooting has its limitations.

Wolski, among others, has noted several concerns with appellate moots, including their inauthenticity, over-emphasis on skills development and performance techniques to the detriment of substantive legal knowledge acquisition and understanding, neglect of factual disputes, and that moots present a limited opportunity to gain an understanding of legal ethics, values and professional obligations.<sup>4</sup> This article fills a gap in the Australian legal education literature. It does so by addressing the distinctive educational value of two co-curricular, 'non-traditional', advocacy competitions that overcome several limitations associated with traditional appellate moots identified above. Two advocacy competitions organised annually by the peak Australian tribunal — the Administrative Appeals Tribunal ('AAT') — offer a limited cohort of law students valuable alternatives to the traditional moot that embrace diverse areas of public law.<sup>5</sup> These competitions closely relate to topics covered in Administrative Law and, to a more limited degree, correlate to Civil Dispute Resolution ('ADR'), and Ethics and Professional Responsibility — prescribed core areas of legal knowledge ('Priestley 11') — that students must complete to satisfy jurisdictional admitting authorities.<sup>6</sup>

This article investigates the pedagogical value of two legal competitions. This article explains how the two competitions afford law students a unique opportunity to actively and collaboratively develop certain capabilities, including those specified as Threshold Learning Outcomes ('TLOs') for law graduates.<sup>7</sup> Notably,

- 3 See, eg, Andrew Lynch, 'Why Do We Moot? Exploring the Role of Mooting in Legal Education' (1996) 7 *Legal Education Review* 67; Alisdair A Gillespie, 'Mooting for Learning' (2007) 5 *Journal of Commonwealth Law and Legal Education* 19; Jennifer Yule, Judith McNamara and Mark Thomas, 'Mooting and Technology: To What Extent Does Using Technology Improve the Mooting Experience for Students?' (2010) 20 *Legal Education Review* 137, 138–9.
- 4 Bobette Wolski, 'Beyond Mooting: Designing an Advocacy, Ethics and Values Matrix for the Law School Curriculum' (2009) 19 *Legal Education Review* 41, 47–60. See also Mary E Keyes and Michael J Whincop, 'The Moot Reconceived: Some Theory and Evidence on Legal Skills' (1997) 8 *Legal Education Review* 1.
- 5 The national AAT moot competition permits the entry of up to 32 teams (with each team comprising either two or three students) with a maximum of three teams from any given university. The negotiation competition has been conducted in two states: trialed initially in Queensland since 2014, and expanded to include South Australia since 2017.
- 6 Law Admissions Consultative Committee, 'Model Admission Rules 2015' (Rules, Law Council of Australia, December 2016) <[https://www.lawcouncil.asn.au/files/web-pdf/LACC%20docs/212390818\\_8\\_LACC\\_Model\\_Admission\\_Rules\\_2015.pdf](https://www.lawcouncil.asn.au/files/web-pdf/LACC%20docs/212390818_8_LACC_Model_Admission_Rules_2015.pdf)>. The two competitions also necessitate limited consideration of forms of evidence and evidentiary principles, as applicable in the AAT.
- 7 Sally Kift, Mark Israel and Rachael Field, 'Learning and Teaching Academic Standards Project: Bachelor of Laws Learning and Teaching Academic Standards Statement' (Report, Australian Learning and Teaching Council, December 2010) (the report defined TLOs). Subsequently, TLOs were developed for the Juris Doctor. See further Anna Huggins, 'Incremental and Inevitable: Contextualising the Threshold Learning Outcomes for Law' (2015) 38 *University of New South Wales Law Journal* 264.

effective communication skills, analytical skills directed to resolving complex questions of fact and law, doctrinal knowledge and understanding (public law), and an appreciation of distinctive statutory duties and related professional standards. The competitions' realistic structure and environment facilitate students' learning. The general hypothesis is that students perceive the National Administrative Appeals Tribunal Moot Competition, and the Negotiating Outcomes on Time Competition ('NOOT'), as highly effective simulations for promoting substantive learning, effective collaboration, the attainment of practical lawyering skills and enhanced employability.<sup>8</sup>

Furthermore, it is hypothesised that the two competitions help develop and deepen substantive legal knowledge and promote deeper intellectual inquiries, for example, by serving to encourage student reflection on the contested meaning of 'administrative justice' and normative standards associated with that concept.<sup>9</sup> Moreover, this study explores and evaluates how the two competitions foster a comprehensive understanding of the differences, in theory and practice, between administrative and judicial decision-making procedures. Accordingly, the study examines whether the two competitions stimulate students to think beyond the "doing" and the "knowing",<sup>10</sup> to critically reflect on their understanding of administrative law and administrative justice principles, practices and procedures.

Part Two sketches the function of administrative review at the AAT for the benefit of readers who are unacquainted with that Tribunal's role. It continues by introducing the central role and importance of ADR at the AAT. Part Three surveys the educational literature pointing to, and evidencing, the value of simulations as a form of experiential, problem-based, learning that contributes to enhanced student learning and as an aid in transitioning to legal practice. Situated in the context of that literature, Parts Four and Five examine the observed pedagogic benefits and value of 'NOOTing' and mooting before the AAT. Part Six details and analyses the results of a student survey that measured students' perceptions about the benefits and value of participation in the NOOT and moot, with a view to determining students' opinions about the competitions' efficacy for their learning, skills development and employability. The data obtained from the empirical study provides valuable and reliable support for my hypothesis about positive learning outcomes.

8 While the two competitions are 'extra-curricular', several law schools award course credit for participation.

9 See Robert French, 'Administrative Justice — Words in Search of Meaning' (Paper presented at the Australian Institute of Administrative Law Annual Conference, Sydney, 22 July 2010) <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj22july10.pdf>>.

10 Here I draw upon Jill Hunter, 'Teaching Plumbing with Periclean Ideals: Should It Be Done? Can It Be Done? Advocacy and Courtroom Scholarship' (1996) 30 *Law Teacher* 330, 353, writing in the context of clinical legal education courses within law schools. See also Kris Franklin, 'Sim City: Teaching "Thinking Like a Lawyer" in Simulation-Based Clinical Courses' (2009) 53 *New York Law School Law Review* 861, 875.

## II ADMINISTRATIVE REVIEW

### A *Merits Review*

The AAT functions as an independent, accessible, user-friendly alternative to the courts for resolving matters arising out of government decision-making. There are aspects of the AAT's work where procedures and methods are akin to a court but 'the work of the AAT is designed to produce through fair processes the best and preferable decision that a sound administrator ought to have arrived at with the least delay in cost. It is not to replicate the processes and work of the courts.'<sup>11</sup> Strictly, administrative review tribunals are not resolving parties' disputes, but dealing with proper, lawful, public administration. The AAT has a wide jurisdiction over government decision-making and its statutory objectives are exhortations to deal with matters in a 'fair, just, economical, informal and quick [manner] ... proportionate to the importance and complexity of the matter'.<sup>12</sup> 'Merits review' is an expression that captures the role of the AAT, and this task 'extends beyond a review for legal error, to a consideration of the facts and circumstances relevant to the decision'.<sup>13</sup> The object of review is to determine afresh what the 'correct or preferable' decision is: 'correct' meaning a decision rightly made where there is only one possible outcome as a matter of law, and 'preferable' in instances where there are discretionary considerations and there are a range of permissible outcomes.<sup>14</sup> The Tribunal stands in the shoes of the original decision-maker because it may exercise all the powers and discretions of the original decision-maker.<sup>15</sup> Importantly, the AAT has more than a supervisory role; its remedial powers enable it to affirm, vary, or set aside and substitute, the decision under review.<sup>16</sup>

Pre-hearing, the AAT makes extensive use of ADR to enable parties to resolve their dispute in an economical, informal and quick manner, while being procedurally fair and substantively just. There is express statutory provision for ADR in the resolution of administrative review applications. The Tribunal's President may direct that a proceeding, or part thereof, is referred for an ADR process and the legislation includes a requirement that parties act in 'good faith' (see further, below).<sup>17</sup> The AAT has published ADR 'process models' that clearly define and describe how each form of ADR is conducted. These guidelines enable parties to readily comprehend ADR procedures and promote consistency in practice across

11 Transcript of Proceedings, *Ceremonial Sitting of the Tribunal for the Swearing In and Welcome of the Honourable Justice Kerr as President* (Administrative Appeals Tribunal, O/N H-59979, 16 May 2012) 15 (Kerr J).

12 *Administrative Appeals Tribunal Act 1975* (Cth) s 2A ('AAT Act').

13 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, 327 [140] (Kiefel J).

14 *Ibid*; *Re Visa Cancellation Applicant and Minister for Immigration and Citizenship* [2011] AATA 690 (6 October 2011) [53] (Downes J).

15 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, 324–5 [134] (Kiefel J).

16 *AAT Act* s 43(1).

17 *Ibid* s 34A.

the Tribunal.<sup>18</sup> The majority of applications (almost 80 per cent) lodged with the AAT are finalised without a decision on the merits following a formal hearing.<sup>19</sup> Evidently, ADR is a core feature of the Tribunal's processes, and so the NOOT competition offers student advocates a valuable chance to appreciate the theory, procedures, techniques and professional requirements of 'new advocacy' in a tribunal setting.<sup>20</sup>

### III THE VALUE OF LEGAL SIMULATIONS AS A FORM OF EXPERIENTIAL LEARNING

A logical starting point is to define simulations. Maharg and Nicol construe simulation 'as any heuristic that involved the *simulation of any aspect of legal theory or practice within a legal education context and for an educational purpose*'.<sup>21</sup> Feinman describes lawyering simulations as an exercise that 'resembles the activity of lawyers; the essential attribute of a simulation is that students do something like what lawyers do. More specifically, in a simulation students are presented with a situation that might confront a practicing lawyer.'<sup>22</sup> Feinman locates simulations between the 'typical doctrinal hypothetical' used in class and a clinical experience.<sup>23</sup> He explains that, in the case of the former activity, 'the student is presented with a problem that requires the manipulation of doctrine largely divorced from context or client concerns'.<sup>24</sup> Contrarily, with clinical courses, 'the doctrinal issue involved may be the least important concern, because the student must deal primarily with the concerns of an actual client'.<sup>25</sup>

Batt explains that simulation courses 'teach lawyering skills by putting students in hypothetical role-play situations to assume the role of lawyers and perform

18 Administrative Appeals Tribunal, 'Alternative Dispute Resolution (ADR) Guidelines' (Guidelines, June 2006) <<http://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/ADRGuidelines.pdf>>; for details about the ADR process models, see Administrative Appeals Tribunal, *Alternative Dispute Resolution* (9 November 2017) <<http://www.aat.gov.au/steps-in-a-review/alternative-dispute-resolution>>.

19 Administrative Appeals Tribunal, 'Annual Report 2014/15' (Annual Report, 28 September 2015) 3 <<http://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR201415/AAT-Annual-Report-2014-15.pdf>>. Not all of the matters are finalised (prior to a final hearing) as a direct result of ADR processes.

20 Donna Cooper, 'The "New Advocacy" and the Emergence of Lawyer Representatives in ADR' (2013) 24 *Australasian Dispute Resolution Journal* 178, 179, citing Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (UBC Press, 2008) ch 5. 'New advocacy' concerns the roles of practitioners when representing clients in negotiation, mediation and conciliation processes. See also Kathy Douglas and Becky Batagol, 'The Role of Lawyers in Mediation: Insights from Mediators at Victoria's Civil and Administrative Tribunal' (2014) 40 *Monash University Law Review* 758.

21 Paul Maharg and Emma Nicol, 'Simulation and Technology in Legal Education: A Systematic Review' in Caroline Strevens, Richard Grimes and Edward Phillips (eds), *Legal Education: Simulation in Theory and Practice* (Ashgate Publishing, 2014) 17, 19 (emphasis in original).

22 Jay M Feinman, 'Simulations: An Introduction' (1995) 45 *Journal of Legal Education* 469, 469–70.

23 *Ibid.*

24 *Ibid.*

25 *Ibid.* Indeed, one perceived benefit of simulations, relative to clinical activities involving real clients, is that simulations permit mistakes in more forgiving circumstances.

certain tasks'.<sup>26</sup> Batt points to the following skills as commonly taught through simulations: interviewing, counselling, fact investigation, negotiation, mediation, and advocacy on both trial and appellate levels. Moreover, Waters states that simulations 'are based on case studies or scenarios, and include role-play and activity, often collaborative, in an authentic environment that in some way or other reconstructs aspects of real-life tasks'.<sup>27</sup> For the purposes of legal education, authentic tasks mean those activities resembling those undertaken by lawyers in practice.<sup>28</sup> Lastly, as Gutman, McCormack and Riddle note, the 'doing' is one important part of situated learning, however practice-based learning is not simply 'a matter of acting out real world scenarios within a physical environment; it also involves text, photographs or pictures, video or interactive computer-based learning materials'.<sup>29</sup>

Barton, McKellar and Maharg champion authentic simulations as unquestionably necessary for legal education in the twenty-first century; equally, Batt and Kam et al respectively have stressed the importance of providing authenticity in legal practice simulations.<sup>30</sup> Moreover, the literature establishes the importance of experiential learning opportunities for students. As Stickley notes, they offer the prospect for students 'to develop professionally and assist in the transition from law school to legal practice'.<sup>31</sup> Concurring with Kift's analysis, Castles, Goldfinch and Hewitt view practical legal exercises as a direct application of Kolbian theory;<sup>32</sup> they claim that '[t]he value of engaging students in the process of lawyers work (usually by simulation) has the advantage of integrating theory and practice, and combining academic inquiry with actual experience'.<sup>33</sup> Accordingly, '[t]he practical implications of experientialism are that teachers

26 Cynthia Batt, 'A Practice Continuum: Integrating Experiential Education into the Curriculum' (2015) 7 *Elon Law Review* 119, 142.

27 Ben Waters, "'A Part to Play": The Value of Role-Play Simulation in Undergraduate Legal Education' (2016) 50 *Law Teacher* 172, 174.

28 See Sharon Christensen and Sally Kift, 'Graduate Attributes and Legal Skills: Integration or Disintegration?' (2000) 11 *Legal Education Review* 207, 208 n 7.

29 Judy Gutman, Silvia McCormack and Matthew Riddle, 'ADR in Legal Education: Evaluating a Teaching and Learning Innovation' (2014) 25 *Australasian Dispute Resolution Journal* 100, 103. As Barton, McKellar and Maharg note, well-designed simulations offer more than a mirroring of real life tasks; there can be reflection, variation, feedback and negotiated learning: Karen Barton, Patricia McKellar and Paul Maharg, 'Authentic Fictions: Simulation, Professionalism and Legal Learning' (2007) 14 *Clinical Law Review* 143, 148.

30 Barton, McKellar and Maharg, above n 29, 191; Batt, above n 26, 157; Linda Kam et al, 'Get Real! A Case Study of Authentic Learning Activities in Legal Education' (2012) 19(2) *Murdoch University Law Review* 17.

31 Amanda Stickley, 'Providing a Law Degree for the "Real World": Perspective of an Australian Law School' (2011) 45 *Law Teacher* 63, 80, n 36.

32 Margaret Castles, Maureen Goldfinch and Anne Hewitt, 'Using Simulated Practice to Teach Legal Theory. How and Why Skills and Group Work Can Be Incorporated in an Academic Law Curriculum' (2007) 26 *University of Tasmania Law Review* 120, 131, citing David A Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (Pearson Education, 1984) 20–1. See Sally Kift, 'Lawyer Skills: Finding their Place in Legal Education' (1997) 8 *Legal Education Review* 43, 61–71, discussing teaching and learning processes associated with each stage of Kolb's Experiential Learning Cycle; Waters, above n 27, 173 noting, with reference to Kolb, that '[r]ole-play simulation exercises are arguably an effective way of engaging students in the experiential learning paradigm'.

33 Castles, Goldfinch and Hewitt, above n 32, 132.

ought to allow students to engage in concrete experience and to encourage reflection by students'.<sup>34</sup> Consistent with cognitive apprenticeship theory (a synthesis of situated cognition and experiential learning), Keyes and Whincop emphasise the importance of authentic tasks for effective student learning.<sup>35</sup> Likewise, Lynch relates simulations (specifically moots) to the prescriptions of particular educational theories. Appraising the value of moots, Lynch argues that moots reflect several approaches to learning at once: constructivist, experiential and problem-based.<sup>36</sup>

Keyes and Whincop have also pointed to the potential for mooting (particularly *formative* moots) to develop a range of skills, because moots require legal research and analysis, legal writing and team work, as well as advocacy (rhetorical) requirements.<sup>37</sup> Reflecting on moots as a tool for learning that involves a constructive process based upon experience and reflection, Lynch states that 'the next best thing after real world experience are role plays — into which category moots clearly fall'.<sup>38</sup> Moreover, simulation-based pedagogy involves thinking, reasoning and decision-making, requiring students to exercise professional judgment over strategies and actions; to 'act, choose, reflect on the efficacy and consequences of their choice, and then choose again'.<sup>39</sup> By contrast, there is no such opportunity via traditional casebook methods of teaching and learning involving the reading and discussion of appellate opinions. In summary, moots and negotiation competitions 'integrate the simultaneous application of doctrinal theory, fact, and skill in advocacy'.<sup>40</sup>

Over thirty years ago, Duncan pointed to the increasing use of simulations in all legal practice courses in Australian and American universities,<sup>41</sup> adding that research on the perceived educational benefits of simulation and simulation games was in its infancy.<sup>42</sup> Over two decades later, Castles, Goldfinch and Hewitt cited 'ample evidence that the deep appreciation of theory in areas as varied as contract, family law, human rights, administrative law, tort and property ... can be enhanced by evaluating the theory in context, via skills based exercises'.<sup>43</sup> Likewise, Horan and Taylor-Sands' claim that role-playing was highly beneficial rested on several studies conducted during the 1990s. They argue that the

34 Keyes and Whincop, above n 4, 4 (citations omitted).

35 Ibid 5.

36 Lynch, above n 3, 74–81.

37 Keyes and Whincop, above n 4, 39. On the virtues of virtual learning environments and virtual moots, see Jennifer Yule, Judith McNamara and Mark Thomas, 'Virtual Mooting: Using Technology to Enhance the Mooting Experience' (2009) 2 *Journal of the Australasian Law Teachers Association* 231. A virtual mooting trial at Queensland University of Technology, where *Second Life* was used as a platform for mooting, concluded that *Second Life* had limited utility for supporting mooting: see Yule, McNamara and Thomas, 'Mooting and Technology' above n 3.

38 Lynch, above n 3, 78

39 Susan B Apel, 'No More Casebooks: Using Simulation-Based Learning to Educate Future Family Law Practitioners' (2011) 49 *Family Court Review* 700, 704.

40 Batt, above n 26, 163.

41 Robyn M Duncan, 'Teaching Legal Skills for Transfer of Learning: Is Simulation the Answer?' (1984) 2(1) *Journal of Professional Legal Education* 64.

42 Ibid 71.

43 Castles, Goldfinch and Hewitt, above n 32, 131.



recognised benefits of role-playing include ‘bringing the subject to life, promoting active learning, developing basic interpersonal skills, encouraging constructive student interaction and involvement, increasing student confidence, and providing a framework within which to raise ethical issues’.<sup>44</sup> Recently, Waters has pointed to an abundant cross-disciplinary evidence base that supports the view that simulations serve to bridge the gap between theory and practice. Furthermore, he cites evidence indicating that simulations promote deeper learning and help motivate student learning.<sup>45</sup> Daly and Higgins’ literature survey on legal simulations (such as moot courts and mock trials) prompted their assessment that ‘it is generally held in legal education that such activities are positive and beneficial to students’.<sup>46</sup> However, aside from the work by Lynch, and Keyes and Whincop respectively, scholars have lamented the dearth of empirical research, and reliance on, largely, anecdotal evidence used to support positive views about the value of those types of experiential learning.<sup>47</sup>

Lynch’s phenomenographical research on the practical effects of mooting on students’ learning at Griffith University reveals that students thought mooting enriched their learning experience by fostering general, life-long skills which would be of use in the real world.<sup>48</sup> He found that students valued mooting for the practical dimension it added to their education. Lynch reported that students understood that moots offered the potential for meaningful group work. Moreover, students appreciated that moots served as an excellent way to learn deeply about substantive law, reinforcing theoretical learning about legal doctrine, and that moots stimulated interest and enthusiasm for substantive law.<sup>49</sup> Daly and Higgins’ investigation into the efficacy of simulations undertaken at Dublin City University found, among other things, that mooting: (i) honed students’ legal reasoning and argumentative skills; (ii) improved students’ critical analysis skills; (iii) helped develop students’ oral presentation skills; (iv) assisted in confidence building; (v) promoted team work; (vi) enabled students to appreciate the practical

44 Jacqueline Horan and Michelle Taylor-Sands, ‘Bringing the Court and Mediation Room into the Classroom’ (2008) 18 *Legal Education Review* 197, 199; Law Admissions Consultative Committee, ‘Model Admission Rules 2015’, above n 6.

45 Waters, above n 27, 177.

46 Yvonne Marie Daly and Noelle Higgins, ‘The Place and Efficacy of Simulations in Legal Education: A Preliminary Examination’ (2011) 3(2) *All Ireland Journal of Teaching and Learning in Higher Education* 58.1, 58.2.

47 See Yvonne Daly and Noelle Higgins, ‘Simulating the Law: Experiential “Techniques” in the Modern Law Curricula’ (2010) 84(1) *Research in Education* 79, and the papers cited therein. See also Madeleine Fraser et al, ‘Transition from Legal Education to Practice: Extra-Curricular Competitions Offer the Missing Link’ (2013) 23 *Legal Education Review* 131, 135 flagging the limited number of empirical studies.

48 See also Pam Watson and Jonathan Klaaren, ‘An Exploratory Investigation into the Impact of Learning in Moot Court in the Legal Education Curriculum’ (2002) 119 *South African Law Journal* 548. The authors found that student evaluations of their moot experience were very positive, indicating that participation in mooting is a valuable learning experience. However, the data did not support the conclusion that moot participation benefitted students’ academic performance (results) in formal law courses.

49 Lynch, above n 3, 84–93.



application of the law and procedure; and (vii) promoted students' understanding of substantive principles of law.<sup>50</sup>

Equally, Waters qualitative study into the perceived benefits of ADR role-play (mediation) conducted at Canterbury Christ Church University yielded similar findings and aligned with educational literature regarding the valuable role of simulations in 'helping students establish the important link between theory and practice'.<sup>51</sup> Waters concluded that students' 'responses in relation to motivation, increased confidence and deeper learning show that role-play simulation does have a part to play in undergraduate legal education'.<sup>52</sup>

This article proceeds on the premise that, when carefully designed and administered, mooting and NOOTing are authentic forms of simulation,<sup>53</sup> and that legal simulations are one type of experiential learning methodology essential to a balanced educational environment that also includes clinical legal education courses and simulation courses (such as capstone projects).<sup>54</sup> This article will demonstrate how the two legal simulations offered by and through the AAT function to encourage active learning<sup>55</sup> and effectively serve modern legal educational objectives in Australia. Specifically, the development of 'higher order professional skills that include critical thinking and analysis, problem-solving, advocacy and persuasion, research, communication and collaboration, ethical and professional responsibility'.<sup>56</sup>

50 Daly and Higgins, 'The Place and Efficacy of Simulations in Legal Education', above n 46, 58.12.

51 Waters, above n 27, 192.

52 Ibid 193; see also Jacqueline D Lipton, 'Role-Playing Exercises in First Year Legal Process Classes' (1998) 16 *Journal of Professional Legal Education* 97.

53 Other types of authentic learning activities include performing directed research tasks as instructed by a 'Senior Partner' in a law firm, drafting a letter of advice to a client, and the drafting of court documents or client interviewing.

54 Other types of valuable experiential learning outside of law school curricular include paid paralegal employment, pro bono community legal service and placements (internships).

55 On the importance of active learning, and experiential learning opportunities, see Council of Australian Law Deans, 'The CALD Standards for Australian Law Schools: As Adopted 17 November 2009 and Amended to March 2013' (Standards, 17 November 2009) 4 [2.2] <<https://cald.asn.au/wp-content/uploads/2017/11/CALD-Standards-As-adopted-17-November-2009-and-Amended-to-March-2013.pdf>>.

56 Kift, Israel and Field, above n 7, 8. For employer perspectives on the legal knowledge, professional skills and attributes considered essential for law graduates, see Duncan Bentley and Joan Squelch, 'Employer Perspectives on Essential Knowledge, Skills and Attributes for Law Graduates to Work in a Global Context' (2014) 24 *Legal Education Review* 93, 109. The five most commonly cited attributes identified were: effective communication and presentation, problem solving (critical thinking, analysis, interpretation, synthesis and evaluation), good legal research skills, relationship building (including effective teamwork) and adaptability and resilience.

## IV ADR AT THE AAT: NOOTING FOR LEARNING

### A *The Conciliation Process*

The NOOT competition is based on the AAT's conciliation process model. Simulating the conciliation process is intended to hone students' communication skills and to prepare them for ADR via an authentic negotiation experience managed by tribunal conference registrars and AAT members. The competition aims to promote the valuable role of ADR at the AAT and the importance of early settlement discussions, and raise awareness of the high standards expected of legal practitioners involved in the conduct of Tribunal ADR processes. Moreover, the competition increases the transparency of processes that, in practice, are conducted in private. This Part explains how simulated conciliations serve to enable students to gain a richer understanding of ADR procedure and practice at the AAT. Moreover, I argue that NOOTing develops students' analytical abilities in respect of legal and non-legal issues, cultivates critical, and creative, thinking and research skills, and promotes the use of effective and appropriate communication skills. Additionally, this Part explores how the competition functions to enable students to acquire an appreciation of the distinctive statutory obligations and professional responsibilities of parties appearing at the AAT.

A NOOT is an abridged version of a conciliation lasting 90 minutes and requires four students to role-play; alternately acting as applicant, respondent, government agent, and the respective parties' legal advisors. The NOOT competition is coordinated by the Director of ADR at the AAT, with the problems and materials developed by the AAT. The simulated conciliation process follows the five-stage process used in practice. The process begins with the conciliator's opening statement that explains the rules and roles of parties to the process. The parties' statements about their perspective on the matter follow this initial step. Subsequently, there is a joint exploratory session where parties directly engage and discuss options for agreement. Brief private meetings between the conciliator with each party to reality test options and comment about the merits of each party's case are then followed by a concluding session. The conciliator and a neutral observer score each NOOT, with progression through two preliminary rounds to the final round of the competition (and overall winner) determined by the teams' cumulative score.

As Douglas and Batagol have stated, the education of lawyers about ADR processes is essential.<sup>57</sup> The NOOT competition offers students an opportunity to discover non-adversarial theory and practices through experiential learning, in contrast to traditional teaching and learning methods.<sup>58</sup> Competent participants will be able to demonstrate the following graduate learning outcomes:

57 Douglas and Batagol, above n 20, 792.

58 Kathy Douglas, 'The Role of ADR in Developing Lawyers' Practice: Lessons from Australian Legal Education' (2015) 22 *International Journal of the Legal Profession* 71, 75.

- (i) a theoretical and applied understanding of the concept of ADR, and ADR principles as applicable to administrative reviews (TLO 1: Knowledge);
- (ii) a deeper substantive knowledge and understanding of the law and practice governing the AAT (and of public laws more broadly) (TLO 1: Knowledge);
- (iii) an appreciation of the distinctive statutory obligations and professional responsibilities of parties before the Tribunal (TLO 2: Ethics and professional responsibility);
- (iv) a capacity to identify and articulate pertinent legal and non-legal issues (TLO 3: Thinking skills)
- (v) effective research skills (TLO 4: Research skills);
- (vi) a capacity to engage in critical analysis of the problem and make reasoned choices about alternative ways of addressing the matter satisfactorily (TLO 3: Thinking skills);
- (vii) creative thinking directed toward the generation of ideas and appropriate resolution of issues (TLO 3: Thinking skills);
- (viii) empathy for participants in the review process (TLO 5: Communication and collaboration);
- (ix) enhanced and appropriate communication skills (including active listening), effective collaborative and interpersonal skills (TLO 5: Communication and collaboration); and
- (x) self-reflection, self-assessment and effective use of peer, academic and professional feedback (TLO 6: Self-management).

## **B Preparing to Negotiate (or 'NOOT')**

The first learning activity for participants is to recognise and appreciate the several steps involved in the management of applications for administrative review.<sup>59</sup> With guidance from academic mentors (typically a full time academic, but also peers (past NOOTers)), participants undertake directed research, consulting relevant readings and recordings.<sup>60</sup> This endeavour facilitates students' understanding of the basic nature and function of procedures at the AAT, including case conferencing, conciliation and other forms of ADR employed at the Tribunal. In so doing, the students can gain an understanding of the differences between, and respective virtues of, the full spectrum of non-adversarial processes employed at the AAT and their role and potential contribution to each process.

59 Administrative Appeals Tribunal, *Overview of the Review Process* (9 November 2017) <<http://www.aat.gov.au/steps-in-a-review/overview-of-the-review-process>>.

60 See, eg, Administrative Appeals Tribunal, *Steps in a Review* (9 November 2017) <[www.aat.gov.au/steps-in-a-review](http://www.aat.gov.au/steps-in-a-review)>; Administrative Appeals Tribunal, *The AAT Review Process* (25 September 2015) <[www.aat.gov.au/applying-for-a-review/national-disability-insurance-scheme-applicants/the-aat-review-process](http://www.aat.gov.au/applying-for-a-review/national-disability-insurance-scheme-applicants/the-aat-review-process)>.

In practice, the government decision-maker prepares s 37 documents ('T documents') and forwards these on to the AAT and the other party to the application. Essentially, T documents are the statement of reasons for the administrative decision and relevant material.<sup>61</sup> This disclosure of documents serves a comparable function to the pre-trial step of discovery in civil litigation. For the purposes of the competition, participants receive a basic fact scenario and T documents that resemble those disclosed to parties in practice. The T documents supply the material containing the basic issues to address in the simulated conciliation. The fact scenario will disclose a problem based on matters commonly before the AAT, such as social security payments or taxation decisions. This offers a welcome opportunity for students to discover and develop their substantive legal knowledge and understanding of aspects of public law that may not get exposure in their degree program, such as social security law.

The conciliation process commences on the shared understanding that an initial conference between the parties has not yielded a negotiated settlement of the matter. Conciliation is a process defined as one

in which the parties to a dispute, with the assistance of (the conciliator) ... identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator has no determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of conciliation whereby resolution is attempted, may make suggestions for terms of settlement and may actively encourage the participants to reach an agreement which accords with the requirements of the statute.<sup>62</sup>

The applicant and their representative usually take part in conciliations at the AAT, as does an instructing officer from the government agency and their representative. The NOOT imitates this practice, with team members role-playing as the legal representative and client/government agent respectively; all actors are expected to participate actively in negotiations.

In practice, the T documents may sometimes constitute the only material on which the AAT reaches a decision,<sup>63</sup> and this is so for the purposes of the simulated conciliation. In order to appreciate the nature of the situation, students must read, comprehend and analyse the T documents closely and repeatedly. Only by combing the documents carefully can students ascertain (and check) the relevant legal framework governing the decision under review, understand the statement of reasons relating to the reviewable decision and, importantly, identify the issues and analyse the critical findings of fact and the material/evidence on which those findings rest. Accordingly, the conciliation experience can prove

61 *AAT Act s 37*; Administrative Appeals Tribunal, *Lodgement of Documents under Sections 37 and 38AA of the AAT Act* (30 June 2015) <<http://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/Practice-Direction-Lodgement-of-Documents-under-sections-37-and-38AA-of-the-AAT-Act.pdf>>, detailing the materials to be included in the T document bundle provided to the applicant.

62 Administrative Appeals Tribunal, *Conciliation Process Model* (9 November 2017) <<http://www.aat.gov.au/steps-in-a-review/alternative-dispute-resolution/conciliation-process-model>>.

63 Robyn Layton, 'Advocacy in a Tribunal Hearing' (Paper presented at Law Society of South Australia Continuing Legal Education Seminar, 4 April 1992) 28 (discussing social security matters).

to be particularly revealing for students more used to studying appellate court decisions, insofar as it reveals the relevance and significance of facts (and their slipperiness) in the resolution of public law matters.

Preparing thoroughly for the negotiation demands that students do more than read and comprehend the T documents. Students must devise a plan for their conciliation in order to research effectively, and identify and analyse relevant legal instruments and policy/guidelines that govern the decision under review. Proficient advocates before the Tribunal are, of course, cognisant of relevant statutory provisions, their meaning, and potential application.<sup>64</sup> In an age of statutes, the examination, interpretation and application of statutory provisions are, necessarily, essential tasks for the Tribunal and those appearing before it.<sup>65</sup> Accordingly, the NOOT (and moot) provides an authentic context in which students are engaged in the task of statutory interpretation and application. Student-negotiators must understand the applicable legislative scheme, appreciate how it inter-relates and functions, and the rationale for certain legislative provisions. Depending on the complexity of the legislation embedded in the problem scenario, that task may require students to revisit rules and principles of statutory interpretation taught in their first year of legal studies. Accordingly, the NOOT (and moot) can function to 'bring alive' statutory interpretation. Moreover, this interpretive task may warrant reading secondary sources to assist with understanding the primary sources. This interpretive activity obliges students to critically reflect on, and refine, their own research plans and methods for locating and retrieving the relevant law efficiently. It bears repeating that effective legal research skills and methodologies are not intuitive; they are skills and methods that must be taught carefully by educators, reflected upon, and rehearsed by students.<sup>66</sup>

In order to identify, access and assess the relative value of particular primary and secondary legal sources, students need to search relevant databases and libraries for reliable sources efficiently. University library personnel can support students' experiential learning by reinforcing basic research training and help to, progressively, develop their legal research literacy. This entails guiding students on legal research techniques and processes, and the effective use of online legal research services, tailored to particular types of research tasks. A failure to devise and execute an effective research plan for the problem-solving exercises presented in the NOOT compromises students' capacity to comprehend the regulatory framework and the relevance/probity of evidential material contained in the record. A failure to grasp the matter will be revealed in the course of communicating with the other parties to the simulated conciliation, serve as a

64 Joan Dwyer, 'Advocacy before the Administrative Appeals Tribunal' (Paper presented at the Australian Institute of Administrative Law Seminar Series, 16 June 1994).

65 On the prominence and importance of legislation in modern legal practice, and for the associated need for this importance to be reflected in legal curricula, see James Duffy, Des Butler and Elizabeth Dickson, 'Engaging Sex: Promoting the Statutory Interpretation EXperience in Legal Education' (2015) 40 *Alternative Law Journal* 46 and the literature cited therein.

66 See also Terry Hutchinson, 'Developing Legal Research Skills: Expanding the Paradigm' (2008) 32 *Melbourne University Law Review* 1065.

barrier to creating appropriate solutions and compromise the timely and effective resolution of the matter.

Understanding the regulatory framework governing the decision is critical. However, legal arguments about the respective rights of the parties are not the focus of the conciliation. Preparatory work, formative exercises (eg role-playing and rehearsing the conciliation process before an academic, adjuncts, practitioners and/or peers) and then appraisal and self-reflection enable students to understand what the focus of the simulated conciliation will be: the underlying interests/needs of the parties, effectively communicating the main points with the other party, and offering up (subject to ‘reality testing’) ideas and options for settlement that cater to the underlying interests/needs identified.

Reality testing ideas and options, and commenting upon them, is an important task of the conciliator and involves asking hard questions about each party’s ideas and options for settlement, and the consequences for each side if there is no negotiated settlement. For instance, if the government department agrees to the applicant’s request to conduct further investigations into a relevant matter, are the associated costs of that additional inquiry to be borne by the department, the applicant, or shared between the parties — and, if shared, on what basis? Therefore, students are encouraged to consider and reflect on these sorts of questions in the planning stages and are then able to test their ideas and obtain feedback during formative, experiential exercises. In exercising judgment and fashioning their ideas, students’ autonomy is limited by what is lawful and practicable, as opposed to being limited by the parameters set by the authors of the hypothetical problem, as is often the case with traditional moots.

### **C *Written Preparation***

Parties are required to lodge a concise negotiation sheet, addressing specific questions, with the competition organisers at the AAT in advance of the simulated conciliation. The written component tasks students with identifying and communicating succinctly the key issues and critical questions, and articulating in outline form the contentions (resembling pre-hearing conference obligations at the AAT). The written work enables the conciliators to consider the parties’ respective positions beforehand, and serves as an important educational tool. This is because it obliges the parties to think about alternative dispute resolution advocacy. Students are required to consider and comprehend their respective roles and interests as representatives or clients, to contemplate and then plan for how they are going to effectively discharge those roles and collaborate effectively, and to reflect on how best to overcome barriers to communication and settlement with the other side when negotiating. Therefore, this preparatory work functions, uniquely, to prompt students to identify, understand and effectively summarise in writing: the legal and non-legal issues arising, the essential questions that need addressing in light of the relevant legal framework, and the respective parties’ underlying interests and needs.

Moreover, students are expressly required to research, generate and then communicate in writing, alternative options for the settlement of the matter without recourse to a formal hearing. This aspect of the written task encourages the students to play devil's advocate and to, critically, analyse whether they are being realistic about the strength of their position and the reasonableness and viability of their ideas and proposals for resolution. Students must also table proposals for the best alternative(s) to a negotiated settlement at the Tribunal if negotiations fail. Tasked with thinking carefully about alternatives to negotiated outcomes, this prompts students to identify and understand alternative mechanisms for redressing individual grievances against the state. For instance, the best alternative could be to pursue matters via the Commonwealth Ombudsman. Therefore, students must identify and make reasoned choices about particular alternatives. This requires them to exercise critical judgment about the potential application and utility of alternatives for the matter at hand and demonstrate awareness of any associated costs and risks. This part of the learning process offers the potential to broaden and deepen students' knowledge and understanding of administrative justice (the 'integrity branch' of government, as Chief Justice James Spigelman designated it) and associated institutions.<sup>67</sup>

Effective, appropriate and persuasive communication between parties is necessary if an agreement is to be reached. Importantly, students are required to think about, reflect upon and plan, the appropriate presentation of their issues and needs — mindful that at least one of the parties to the simulated conciliation (the applicant) may, effectively, be barred (or resile) from participating if matters are not appropriately framed, or if legalistic language is employed by either or both parties' legal representatives.

## **D Understanding the Other Party's Position and Perspective**

'An understanding of the position of the opposing party is a key element to reaching an agreed outcome.'<sup>68</sup> Well-prepared student-negotiators will grasp the broader context and possibly deeper aspects of an administrative review matter: that is, demonstrate an awareness of the underlying needs and interests of each party to the dispute even if they are not of central relevance to the review determination. Understanding the broader context surrounding the matter shows 'good faith' (see further below) by the parties in the conduct of ADR. The importance of students imagining the situation of another party to an administrative matter is illustrated with reference to a routine social security matter. For the social welfare payment recipient who has lost income following

67 J J Spigelman, 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 724; several papers published in (2012) 70 *ALAL Forum*.

68 Philip Hack, 'Experiences of ADR in the AAT: Current Practicalities and Future Developments' (Paper presented at the Bar Association Mediators Conference, 28 August 2010) 11 [26]. See also Kathy Douglas and Clare Coburn, 'Students Designing Role-Plays: Building Empathy in Law Students?' (2010) *Journal of the Australasian Law Teachers Association* 55, 61 noting that '[c]onsideration of the perspective of the other party is a significant aspect of preparation in negotiation.'



cancellation of a pension, there is a financial interest in the decision. However, there may be subtler interests affected, such as reputation, for example, where the welfare recipient believes that the government views them as dishonest for (ostensibly) inaccurately declaring assets and obtaining a pension. Conversely, from the official decision-maker's perspective, coherence and consistency are important values infusing administrative justice; distributive justice requires that matters involving disputes of a similar nature be treated alike. Where students in a simulated negotiation are unaware of, or indifferent to, the policy considerations and practical consequences related to regulatory decision-making, this compromises the likelihood of a timely, successful, conciliation.

In summary, empathy is an important part of the simulated conciliation experience; recognising and addressing the sorts of issues and needs outlined above removes impediments to a successful negotiated settlement. Experiential learning, involving careful preparation and planning, role-playing and self-reflection, coupled with peer/academic appraisal, can effectively facilitate the development of law students' empathy with the claimants and various government parties (their situation, attitudes and motivations) involved in the range of matters over which the AAT has jurisdiction. Therefore, through NOOTing, students can acquire a fuller understanding of both the legal and factual nature of a matter arising between an individual and government party and furthermore, how it interrelates with the position, perspective and principles of those involved.

## **E Statutory Obligations: The 'Good Faith' Requirement**

Section 34A(3) of the *AAT Act* provides that parties must act in 'good faith' in relation to the conduct of the ADR process they have been referred to. The *AAT Act* does not define the tenets of good faith. Therefore, in order to comprehend what the obligation requires of parties, students must identify and analyse relevant policy. AAT rules provide the necessary guidance, stressing that '[a]n important aspect of the success of ADR processes is the ability of parties to rely on each other to act honestly and fairly when seeking to resolve or narrow the terms of their dispute'.<sup>69</sup> The Tribunal equates the concept of good faith with a 'genuine effort' to uphold ADR principles. This means parties have a responsibility to take steps to resolve or clarify disputes in the simplest and most cost-effective way. Additionally, '[p]eople who attend a dispute resolution process should show their commitment to that process by listening to other views and by putting forward and considering options for resolution'.<sup>70</sup> This final edict alerts students to the fact that listening is one of the core components of effective communication skills.

69 Administrative Appeals Tribunal, 'The Duty to Act in Good Faith in ADR Processes at the AAT: Guidelines for Applicants, Respondents and Representatives' (Guidelines, 11 December 2013) <<http://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/DutyToActInGoodFaith.pdf>> 1.

70 Ibid. See also Tania Sourdin, 'Good Faith, Bad Faith? Making an Effort in Dispute Resolution' (2012) 2 *DICTUM* 19, 24–6.

Through careful and effective listening a legal representative is able to identify what is important to the other party to a conciliation and to the conciliator. An effective representative does more than 'hear' the other side; rather they 'listen' with an open-mind and they are empathetic.<sup>71</sup> Cohen explains that open-minded listening means people being prepared to face the possibility that on some points the other side is right and, therefore, being willing to change their mind.<sup>72</sup> Open-minded listening requires concentration and humility is a prerequisite. It requires people to view their beliefs as provisional, malleable and adaptable to new information, and to accept that listening may well complicate matters.<sup>73</sup> Cohen notes, '[m]uch like empathy, open-minded listening often involves suspending one's judgment and leaving one's internal frame of reference, at least for a period of time'.<sup>74</sup> Effective (or active) listening challenges students to acknowledge other speakers when responding to their points, to organise the material imparted by the speaker as it is received, and to exercise restraint by not interrupting the speaker and reacting to what is said, however provocative or misguided the speaker (or their points) may seem to them.

The good faith requirement dictates that participants: (i) treat all parties to the ADR process respectfully; (ii) are prepared to make suitable concessions; (iii) endeavour to limit the scope of proceedings by making partial concessions where appropriate; (iv) have an open mind and a willingness to consider the interests of the other side, understand their position and to actively consider options generated by the other side/conciliator; (v) display a willingness to propose options for the resolution of the dispute and discuss those position in detail; and (vi) explain the rationale behind an offer of settlement, or the refusal of the other party's offer of settlement.<sup>75</sup> The requirement to negotiate in good faith is an obligation that students can uncover through careful study, attempt to exhibit the projected behavioural standards in a formative, experiential, role-playing environment and, finally, display in the NOOT.

In summary, the NOOT requires students to appreciate the purposes of good faith obligations, and the environment and expected behaviours that the obligation's main tenets are designed to foster at the AAT. The need for a genuinely collaborative and respectful engagement with ADR processes and each party is, arguably, the most important precept.

71 Hamilton has pointed to empirical studies that provide strong support for the importance of listening and seeing things through the eyes of others, or empathising in order to be effective in the practice of law: Neil Hamilton, 'Effectiveness Requires Listening: How to Assess and Improve Listening Skills' (2012) 13 *Florida Coastal Law Review* 145, 148.

72 Jonathan R Cohen, 'Open-Minded Listening' (2014) 5 *Charlotte Law Review* 139, 146–7.

73 *Ibid* 149–52.

74 *Ibid* 154–5.

75 Administrative Appeals Tribunal, 'The Duty to Act in Good Faith in ADR Processes at the AAT', above n 69, 2.

## **F The Duty ‘to Assist’ the Tribunal**

Section 33 of the *AAT Act* requires that government decision-makers, who made the decision under review, must use their ‘best endeavours to assist the tribunal to make a decision in relation to the proceeding’.<sup>76</sup> A party to a proceeding before the Tribunal must also use their best endeavours ‘to assist the Tribunal to fulfil [its statutory] objective’.<sup>77</sup> These provisions serve to encourage parties and their representatives to conduct themselves in a manner that facilitates the ‘fair, just, economical, informal and quick’ resolution of the matter.<sup>78</sup> Section 33 reinforces the nature of merits review as an accessible process, designed to yield the best decision ‘with the least possible attendant cost and delay’.<sup>79</sup> This provision is buttressed by ‘model litigant’ rules, incumbent on public officials and their representatives under the *Legal Services Directions 2005* (Cth). These directions are a set of binding rules about the performance of legal work for the Commonwealth whether performed in-house or by external legal service providers.

For NOOT participants, discovering the meaning of the obligation ‘to assist’ the Tribunal is part of the exploratory process. Developing a capacity to demonstrate awareness of that statutory obligation and professional responsibility effectively is crucial. However, whilst the good faith requirements are the subject of AAT guidelines that can be easily located, studied and rehearsed, the duty to assist requirements are, comparatively, more obscure. Students can be encouraged to locate relevant case law that establishes the principle that the role of a government agency is, constitutionally, to act in and serve the public interest.<sup>80</sup> Furthermore, the public interest is served by the parties aiding the Tribunal to reach the best (‘correct or preferable’) decision on the facts and under the law, as properly understood and applied. Relatedly, the obligation to assist the Tribunal intersects with the need for students to appreciate both the parties’ narrower legal interests and their broader interests/needs connected to the statutory decision (discussed above).

## **G Effective and Appropriate Communication**

NOOTing can serve to inspire students to consider and apply appropriate forms of plain and direct communication that are not overbearing, formal and replete with legalese. Participants come to appreciate that the opening statements — that focus on underlying interests and issues — must be clearly and succinctly

76 *AAT Act* s 33(1AA); Attorney-General’s Department (Cth), Office of Legal Services Coordination, ‘The *Administrative Appeals Tribunal Act 1975*: Obligation to Assist the Tribunal’ (Guidance Note No 1, July 2015) <[www.ag.gov.au/LegalSystem/LegalServicesCoordination/Documents/Administrative-Appeals-Tribunal-Act-1975-obligation-to-assist-the-tribunal.pdf](http://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Documents/Administrative-Appeals-Tribunal-Act-1975-obligation-to-assist-the-tribunal.pdf)>.

77 *AAT Act* s 33(1AB).

78 *Ibid* s 2A.

79 Explanatory Memorandum, *Tribunals Amalgamation Bill 2014* (Cth) 51.

80 See, eg, *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, 191 (McHugh JA); *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151, 196 (Finn J).

delivered, and they learn not to confuse these statements with formal opening addresses in court proceedings. Students learn to actively listen to the other party, respond courteously, and directly address their points to the other party. Experience of mock conciliations, and reflection, enables students to discover that this is a meeting between the parties and it is not the conciliator that the parties are seeking to persuade, in contrast to other forms of adjudication or appellate moots with which they may be more familiar. Consequently, the parties' views and ideas are directed towards each other and not the conciliator with whom the parties are cooperating.

In summary, lawyers and representatives have an important role to discharge in working with the AAT to assist parties to reach an agreed outcome in a timely fashion, and to prepare the case for a formal hearing in the event that the parties do not negotiate a settlement. The high rate of finalisation at the AAT, without a formal hearing and determination, underscores the importance of ADR. It is, therefore, clear that a critical awareness of ADR processes and a thorough comprehension of the art of ADR advocacy and related statutory/professional responsibilities are vital for future lawyers. The NOOT competition facilitates that understanding and awareness, promotes the acquisition of problem-solving skills and demands effective collaboration. This is achieved by offering students an authentic learning environment in which to develop and test their learning across a range of administrative decision-making contexts.

## **V MOOTING AT THE AAT**

### ***A Appearing at the AAT: Simulated Hearings***

The moot competition affords students an opportunity to address assorted public law matters in a simulated, abridged hearing. Applicants and respondents are represented by two advocates (senior/junior counsel) who may be supported by an instructing solicitor, with a total of 40 minutes allocated to both sides for oral submissions, including 10 minutes assigned for rebuttal by the applicant. For the purposes of the moot, advocates assume that all material has been tendered and evidence given. There is no examination or cross-examination of witnesses. Oral arguments take the form of closing submissions and submissions in reply directed to the main issues arising in relation to the material exhibited in the T documents and applicable law/policy framework. The moot competition is carefully and professionally managed by the AAT. Registry officers and full-time Tribunal members with many years of experience craft realistic moot problems, and simulated hearings are presided over by serving AAT officials, including presidential members. The members skilfully discharge the multiple roles of presiding member, moot 'judge' and educator, effectively breaking out of character at the end of the simulated hearing to provide details of their overall

assessment, and individual feedback to students.<sup>81</sup> This feedback functions both summatively, for all mooters, and formatively, for the team that progresses to the next round of the knockout competition.<sup>82</sup>

The moot competition's mission is to expose law students to administrative justice, the rules, procedures and practices governing merits review, and appropriate advocacy techniques. The experiential learning process enables students to uncover the critical differences between tribunal and curial processes for dispute resolution. This Part explains how simulated hearings enable students to gain a deeper substantive and applied understanding of administrative law, procedure and practice, and provide exposure to highly credentialed legal practitioners who fairly and effectively gauge students' understanding. Additionally, it is argued that the competition enhances participants' legal research skills, analytical abilities, and an appreciation of statutory obligations. Mooting at the AAT also requires students to read and digest literature on effective written/oral arguments and the inter-relationship between those two forms of advocacy, and then to apply the theories derived from that wider reading in simulated hearings.

Competent moot participants will be able to demonstrate the following learning outcomes:

- (i) a theoretical and applied understanding of the concept of administrative justice (TLO 1: Knowledge);
- (ii) a deeper substantive knowledge and understanding of the law, practices and procedures governing the AAT (TLO 1: Knowledge);
- (iii) a deeper understanding of the differences between administrative review and judicial resolution of administrative law matters (TLO 1: Knowledge);
- (iv) knowledge and understanding of specialised areas of public law (TLO 1: Knowledge);
- (v) an appreciation of the distinctive statutory obligations and professional responsibilities of parties before the Tribunal (TLO 2: Ethics and professional responsibility);
- (vi) a capacity to analyse complex problems and exercise professional judgment (TLO 3: Thinking skills);
- (vii) effective research skills (TLO 4: Research skills);
- (viii) a capacity to engage in critical analysis of the problem and make reasoned choices about alternative ways of addressing the matter satisfactorily (TLO 3: Thinking skills);

81 Based on my observations over nine years, invariably the moot judge's questioning is very effective, enabling a fair assessment of the depth of students' understanding.

82 On formative assessment in moots, see Keyes and Whincop, above n 4, 19–21. The moot competition consists of two preliminary rounds (at state/territory level) and three national rounds, with up to 32 teams participating annually.

- (ix) enhanced and appropriate communication skills (including active listening), effective collaborative and inter-personal skills (TLO 5: Communication and collaboration); and
- (x) self-reflection, self-assessment and effective use of peer, academic and professional feedback (TLO 6: Self-management).

## **B Preparation for a Hearing**

The task of the student-advocate in a simulated AAT hearing is to persuade the AAT of the substantive merits of their client's case. This entails focusing on facts in quite complex cases, and formulating and submitting arguments that prove the existence of material facts to the Tribunal's satisfaction. As noted above, in respect of the NOOT competition, it is only by thoroughly reading and comprehending primary legal sources that students can appreciate the material facts.<sup>83</sup> The identification of material facts informs the arguments put before the Tribunal in the simulated hearing. Therefore, students are challenged to locate and understand relevant legislative criteria (and policy) specifying the material facts to be established. Then, by combing the T documents, students must tease out relevant facts; that is, those facts that inform and support assessments about whether a material fact exists. There may be factual errors in the decision-making record, and/or the facts may be complicated and uncertain, accordingly the moot's fact matrix needs mastering. As noted in Part Four, by contrast with appellate moots, the facts are central to the problem. Therefore, the moot is a beneficial vehicle for learning how to analyse the legal significance of facts.

If there is an agreed statement of facts between the parties (eg, as to chronology and occurrence of events) the task of the student-advocate is to persuade the Tribunal that the conclusions to be drawn from those facts logically support their claims when examined in conjunction with relevant legal rules. This task challenges the students to read the T documents forensically and evaluate what is immaterial and what material is legally significant. More testing for students is the circumstance where there are disputed facts (perhaps because of conflicting or equivocal material/evidence) and so the parties are in disagreement. In such a situation students learn to invite the Tribunal to make particular factual findings (either directly or by reasonable inference). Then, with reference to established facts, student-advocates are tasked with inviting the Tribunal to reach rational conclusions about material facts. These tasks differentiate the AAT moot from the more limited briefs given to students in traditional moots, and the traditional tutorial problem-based questions employed at law school where facts are settled.

In order to address the challenges outlined above successfully, students are charged with uncovering the critical differences, in theory and in practice,

83 In addition, material facts can be implied from the scope and purpose of legislation, and agency guidelines (policy) can speak to what constitutes material facts. A material fact can be defined as anything needed to prove/establish one party's case, or tending to establish a point that is crucial to a person's position.

between the law and procedures governing administrative reviews and civil litigation. Procedural and evidential flexibility characterises the AAT's processes. This stems from key operative provisions in the *AAT Act*, notably the statutory injunction that proceedings be 'conducted with as little formality and technicality ... as the requirements of [the] Act and ... other relevant [legislation] and a proper consideration of the matters before the Tribunal permit'.<sup>84</sup> But appreciating what that means in practice for simulated hearing purposes compels students to closely engage with relevant primary and secondary sources.

Former AAT President, Justice Garry Downes, has explained that the Tribunal operates 'on a scale between formality and informality'.<sup>85</sup> While hearings follow the basic structure used in court proceedings, procedures are capable of being adapted to cater to the type of case and the parties' circumstances in order to ensure there is an effective hearing in which all relevant evidence is elicited.<sup>86</sup> There is no one level of formality or informality that is appropriate for all cases; it turns on the exigencies of the particular case.<sup>87</sup> However, whilst appreciating that there is procedural and evidential flexibility at the Tribunal, students learn that key aspects of the Tribunal's procedures bear the hallmarks of curial proceedings by studying the *AAT Act*. For example, parties are usually entitled to legal representation; typically, hearings are in public; procedural fairness must be afforded to the parties; and reasons given.<sup>88</sup>

A careful examination of the statutory provisions governing the AAT's procedures, and related superior court jurisprudence, reveals that concepts drawn from the practice and procedure of the courts of law in civil litigation are not strictly analogous and applicable in an administrative tribunal setting. Thus, the AAT enjoys the freedom to depart from rules governing admissibility of evidence. Subject to the requirement of procedural fairness, the AAT can inform itself on any matter as it thinks appropriate. Consequently, students come to appreciate that unlike civil procedures questions of admissibility of evidence are not laboured upon in an administrative review setting.<sup>89</sup> Moreover, the direct

84 *AAT Act* s 33(1)(b).

85 Garry Downes, 'The Tribunal Dilemma: Rigorous Informality' (Speech delivered at the Professor Harry Whitmore Lecture, Sydney, 17 September 2008) 11 <<http://www.aat.gov.au/AAT/media/AAT/Files/Speeches%20and%20Papers/WhitmoreLectureSeptember2008.pdf>>; Robin Creyke, 'Pragmatism v Policy: Attitude of Australian Courts and Tribunals to Inquisitorial Process' in Laverne Jacobs and Sasha Baglay (eds), *The Nature of Inquisitorial Processes in Administrative Regimes* (Ashgate, 2013) 29.

86 Garry Downes, 'Practice, Procedure and Evidence in the Administrative Appeals Tribunal' (Paper presented at the NSW Land and Environment Court Annual Conference, Sydney, 5 May 2011) <<http://www.aat.gov.au/AAT/media/AAT/Files/Speeches%20and%20Papers/PracticeProcedureEvidenceMay2011.pdf>>

87 *Re Hennessy and Secretary, Department of Social Security* (1985) 7 ALN 113, 117.

88 *AAT Act* ss 32, 34J, 35(1), 39, 39AA, 43(2)–(2B). With the Tribunals' permission a party to a proceeding in the Social Services and Child Support Division can be represented by another person: at s 32(2).

89 Common law and statutory principles guiding the *evaluation of weight* placed on relevant material are not to be disregarded entirely. Pragmatism dictates that these rules offer a *guide* for administrative decision-makers, but they are not strictly binding: *Re Pouki and Australian Telecommunications Commission* (1984) 6 ALD 324.



application of evidential principles,<sup>90</sup> terms such as 'standard of proof', and the concept of 'onus of proof',<sup>91</sup> are inapposite in administrative proceedings.<sup>92</sup>

In short, through careful study, experiential learning activities, including practice hearings and feedback, and subsequent simulation at the Tribunal itself, students can appreciate that an uncritical assimilation of judicial and administrative review processes is impermissible.<sup>93</sup> Students can obtain a theoretical and applied understanding of how, and to what extent, curial procedures are distinguishable from the AAT's procedures, and appreciate what procedural flexibility and procedural fairness means, in practice, for Australia's peak administrative tribunal.

### C Checking the 'T documents'

As outlined in Part Four, rigorously combing the decision record and material is an essential pre-requisite of effective advocacy. As Constance advised:

I urge those ... who may in future appear as counsel in the Tribunal to carefully consider the 'T' documents at the earliest opportunity available in order to check that section 37 has been properly complied with. In addition it is the practice of some members of the Tribunal to ask Counsel to identify specifically which of the 'T' documents are being relied upon in support of the case being argued.<sup>94</sup>

This combing exercise is essential at the outset when identifying and framing the issues before the AAT. The record will enable students to ascertain the reviewable decision, and the materiality and relevance of certain facts for that decision. The record may indicate that the facts identified as relevant by the decision-maker do not supply logical support for material findings of fact. Alternatively, the record may reveal an arguable jurisdictional mistake or error of law (such as statutory misinterpretation) that the Tribunal can address in the course of conducting its merits review.

Effective legal research is tailored to the nature of the specific research task. An effective research strategy enables students to prepare an administrative review matter in a timely and thorough fashion. Given students are subject to strict time constraints — they are only afforded one week from the release of the moot

90 *Sullivan v Civil Aviation Safety Authority* (2014) 226 FCR 555, 583 [107] (Flick and Perry JJ in obiter). Strictly applying *Briginshaw v Briginshaw* (1938) 60 CLR 336 would effectively serve to reintroduce procedural rules of evidence excluded by the *AAT Act*.

91 *Sun v Minister for Immigration and Border Protection* (2016) 243 FCR 220, 241 [67] (Flick and Rangiah JJ), citing *Sullivan v Department of Transport* (1978) 20 ALR 323, 342 (Deane J). A tribunal will 'be best advised to be guided by the parties in identifying the issues and to permit the parties to present their respective cases in the manner which they think appropriate'.

92 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 282 (Brennan CJ, Toohey, McHugh and Gummow JJ); *Bushell v Repatriation Commission* (1992) 175 CLR 408, 424–5 (Brennan J); *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 341–2 [10] (French CJ).

93 *Sullivan v Civil Aviation Safety Authority* (2014) 226 FCR 555, 570 [60] (Flick and Perry JJ).

94 James Constance, 'Administrative Law Update' (Paper presented to the Public Sector In-House Counsel Forum, Canberra, 24 September 2007) 10.

problem to lodge written submissions with the AAT — the value of an effective research strategy and methodology is clear.

### **D Written Submissions: Statement of Issues and Contentions**

The function of the written statement of issues and contentions is similar to pleadings; ‘the exchange of these statements is a further very important step in assisting the parties to identify the issues and to prepare adequately for the hearing of the application’.<sup>95</sup> As in practice, students are obliged to exchange a statement of issues and contentions, putting the other party on reasonable notice in advance of the simulated hearing.<sup>96</sup> Students are required to produce a 10 page written outline of their submissions and an additional list of authorities. The 20 per cent weighting attached to the assessment of the written submissions reflects the importance attached to the written aspect of advocacy in Australian legal practice.

Through this aspect of the moot competition, students may acquire an awareness of how submissions provide a platform for dialogue between a party and the Tribunal. Written submissions can assist (or hinder) the Tribunal as it navigates through the issues and mixed questions of fact/law arising in the simulated hearing. Students discover that well-written and logically structured submissions facilitate the task of deciding, are informative and, in reality, aid the writing up of reasons by the adjudicator. Student-advocates, preparing for an AAT hearing, require appropriate levels of guidance on written advocacy and opportunities to develop draft submissions. With appropriate (and not overly prescriptive) levels of mentoring from academic staff, students can become progressively adept in the preparation of written submissions that are fit for the Tribunal’s purposes. Students can distil essential ideas about authoring persuasive written submissions from reading the work of leading practitioners and judges.<sup>97</sup>

Engaging with the literature on legal writing enables students to appreciate, among other things, that written submissions provide the shape of a party’s argument, serve as an anchor for oral submissions and are not a discursive essay of the arguments to be advanced at a hearing.<sup>98</sup> Students can learn, through

95 D G Jarvis, ‘Procedural Fairness as it Applies in the Administrative Appeals Tribunal’ (2007) 81 *Australian Law Journal* 465, 468.

96 Exchanging submissions in advance enables diligent students to identify (inter alia) the key weaknesses in the other party’s position.

97 See, eg, David Jackson, ‘Evidence, Practice and Procedure: Persuasion’ (2008) 28 *Hearsay* <[http://www.hearsay.org.au/index.php?option=com\\_content&task=view&id=360](http://www.hearsay.org.au/index.php?option=com_content&task=view&id=360)>; G T Pagone, ‘Written Advocacy: Writing with Effect and Persuasion’ in Tom Gray, Martin Hinton and David Caruso (eds), *Essays in Advocacy* (Barr Smith Press, 2012); Michael Kirby, ‘Ten Commandments for Plain Language in Law’ (2010) 33 *Australian Bar Review* 10.

98 Conveying ideas through a discursive form of writing is not reader-friendly. So students require guidance on ‘point-first’ (or, ‘point early’) techniques of expression. These succinct forms of written presentation begin with the main point and then articulate the process of reasoning underpinning that point, and are a more effective style of writing submissions.

directed and self-directed reading, that framing the issues logically and precisely at the outset is an important element of persuasive writing.<sup>99</sup> Moreover, students learn that the body of the written argument ought, logically, to follow on from the overview of issues, and that key contentions must be clearly and concisely stated, before arguments are developed with accurate references to relevant material. Finally, effectively written submissions require students to articulate precisely the statement of orders sought. The task of identifying the remedial powers of the AAT and reflecting upon the particular remedy sought, if the students' arguments are accepted, is critical. What follows if the Tribunal accepts that the decision under review was incorrect or, if not incorrectly decided, that there is a more preferable outcome? Precisely what decision is to be set aside and substituted, and in the alternative, precisely what order is sought from the Tribunal? These sorts of questions warrant careful consideration. In summary, mooting at the AAT enables students to come to appreciate and apply key elements of effective written advocacy.

Before turning to oral advocacy at the AAT, some brief observations about statutory interpretation. Statute law is fundamental to each of the Priestley 11 areas, and statutory interpretation lies at the heart of 'public law', as Chief Justice Robert French observed.<sup>100</sup> The volume, prolixity and complexity of legislation today, poses a considerable challenge for lawyers, judges and administrative decision-makers. Assisting the Tribunal to reach the best decision in a merits review will require parties before the AAT to address questions of construction before applying the law to the facts, and this task may entail grappling with the meaning of labyrinthine legislation (and dense soft law).<sup>101</sup> Accordingly, questions of statutory construction can often be the point of departure in simulated hearings before the AAT. Where there are disputed questions of construction, necessarily, students must first re-examine, reflect on, and strengthen their understanding of relevant common law principles, presumptions and canons of statutory interpretation and the *Acts Interpretation Act 1901* (Cth).

Consequently, the AAT moot competition provides an authentic setting in which to consolidate and supplement the foundational study of statutory interpretation offered at an early stage of law school. The moot serves to advance students'

99 The AAT directs students to the following reading: Andrew H Baida, 'Writing a Better Brief: The Civil Appeals Style Manual of the Office of the Maryland Attorney General' (2001) 3 *Journal of Appellate Practice and Process* 685.

100 Robert French, 'Statutory Interpretation in Australia: Launch of 8<sup>th</sup> Edition' (Speech delivered at University House, Australian National University, Canberra, 24 October 2014) 4 <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchjcf/frenchjcf24oct2014.pdf>>; Jeffrey Barnes et al, 'The Council of Australian Law Deans Good Practice Guide to Teaching Statutory Interpretation' (Council of Australian Law Deans, June 2015) 6 <<http://www.cald.asn.au/assets/lists/Resources/GPGSI-June15.pdf>>; see also Law Admissions Consultative Committee, 'Statement on Statutory Interpretation' <<https://www.lawcouncil.asn.au/files/web-pdf/LACC%20docs/StatementonStatutoryInterpretation.pdf>>.

101 Duncan Kerr, 'Challenges Facing Administrative Tribunals: The Complexity of Legislative Schemes and the Shrinking Space for Preferable Decision Making' (Speech delivered at the Council of Australasian Tribunals (COAT) Victoria Twilight Seminar, Melbourne, 18 November 2013) <<http://www.aat.gov.au/AAT/media/AAT/Files/Speeches%20and%20Papers/ChallengesAdministrativeTribunals18Nov2013.pdf>>.

knowledge and applied understanding of the general rules and principles that condition how decision-makers construe legislation and divine meaning. This helps the students prepare for the important and complex task that will likely occupy much of their time over the course of their professional lives.<sup>102</sup> The task of re-engaging with principles of statutory interpretation can enable students to, satisfactorily, address the following essential questions identified by Justice Kenneth Hayne: What precisely is the asserted construction? How exactly does that construction follow from the particular words/passage of the statute? How do the statutory words work? How does that fit in with the rest of the Act in question? Is there anything in the extrinsic material that really does assist, or is nothing to be gained from that extrinsic material?<sup>103</sup> Very clear thought and exposition is required to formulate arguments about the proper meaning of legislative provisions situated in their proper context. So, the AAT moot competition offers a very important opportunity for participating students to ensure they have a solid grounding in statutory interpretation, which will be to their advantage (and that of their clients) in future practice.

## **E Oral Submissions**

Students must aim to succeed on the merits ‘by showing how, when all facts are on the table, the application of the legislation to those facts means that your client should succeed’.<sup>104</sup> How best to engage in that task is a considerable challenge for student-advocates. In rising to the challenge students require practical guidance on suitable advocacy techniques. The pre-conditions of effective oral advocacy, helpfully identified by Justice Dyson Heydon, can be summarised as vocal aspects, procedural aspects, customary aspects and oratory style.<sup>105</sup> Suggested verbal techniques, such as speaking audibly and deliberately, and at an even pace, are helpful propositions on effective vocal presentation. So too the adoption of a lucid and sinewy oratory style, ensuring that every utterance makes a point efficiently. In addition to these performance techniques the ‘procedural aspects’ of oral advocacy speak to the importance of remembering the nature of the *venue*, and the *rules* regulating the procedure and practice of the decision-making body and appropriate forms of *address*.<sup>106</sup> In summary, through careful reading,

102 See Michael Kirby, ‘Statutory Interpretation: The Meaning of Meaning’ (2011) 35 *Melbourne University Law Review* 113.

103 K M Hayne, ‘Written Advocacy’ (Paper presented at the Continuing Legal Education Program of the Victorian Bar, 5 and 26 March 2007) 26 <[www.hcourt.gov.au/assets/publications/speeches/current-justices/haynej/haynej\\_05mar07.pdf](http://www.hcourt.gov.au/assets/publications/speeches/current-justices/haynej/haynej_05mar07.pdf)>.

104 Dwyer, above n 64, 4.

105 J D Heydon, ‘Aspects of Rhetoric in Forensic Advocacy Over the Past 50 Years’ in Justin T Gleeson and Ruth C A Higgins (eds), *Rediscovering Rhetoric: Law, Language, and the Practice of Persuasion* (Federation Press, 2008), 222–49.

106 Recall the quotation cited at the beginning of this article, conveying the view that methods of persuasion are context dependent. Relatedly, Rossner and Tait have noted that distinctive forms of representation have developed in the context of protective (guardianship and mental health) tribunals, with lawyers ‘adjust[ing] their lawyering style to the needs of the jurisdiction’: Meredith Rossner and David Tait, ‘Contested Emotions: Adversarial Rituals in Non-Adversarial Justice Procedures’ (2011) 37 *Monash University Law Review* 241, 255–6.

rehearsal and feedback, student-advocates can develop and project an 'ethical appeal' by presenting as reliable and trustworthy figures.<sup>107</sup> This stems from their command of all the relevant materials and oratory skills.

## **F The Duty 'to Assist' the Tribunal, and Model Litigant Principles**

The duty to assist equates to 'the obligation of counsel assisting an enquiry',<sup>108</sup> or a prosecutor with a duty of fairness to the other party and to the Tribunal. The statutory obligation to assist accommodates model litigant rules, but it goes further imposing a higher obligation. By preparing thoroughly for mootings, students can uncover and grasp the distinctive statutory obligation to assist that is incumbent on all parties to an administrative review, and the particular demands that the duty places on public agencies and their representatives before the AAT. This includes the provision of special assistance in circumstances where applicants are unrepresented. Through mootings, students can unearth model litigant principles, and learn (or perhaps consolidate) what that ethical framework prescribes for counsel appearing on behalf of the Commonwealth.<sup>109</sup> In turn, students can be encouraged to investigate what model litigant principles mean when understood in conjunction with the statutory obligation to assist.<sup>110</sup> That particular line of inquiry opens up challenging theoretical questions, about lawyers' ethical and professional duties, on which to reflect. For example, could the Commonwealth's representatives be required to take steps that might be regarded as assisting an applicant, by supplementing their case when, through lack of understanding or inability to obtain or present relevant material, the applicant is incapable of effectively presenting their case?

## **VI EMPIRICAL STUDY, ANALYSIS AND EVALUATION**

The student survey aimed to investigate, empirically, the degree to which the two AAT competitions promoted the development of legal knowledge, analytical, research, collaborative and communication skills and understanding of professional standards. The survey aimed to measure competition participants' perceptions about their development of a range of competences, reflected in large part in the TLOs, by gauging the perspectives of the students and recent graduates

107 Heydon, above n 105, 227–8.

108 Garry Downes, 'The Obligation to Assist' (Paper presented at the Model Litigants in Administrative Appeals Tribunal Proceedings Seminar, 26 August 2009) 5 <[www.aat.gov.au/AAT/media/AAT/Files/Speeches%20and%20Papers/AATSeminarModelLitigantsAugust2009.pdf](http://www.aat.gov.au/AAT/media/AAT/Files/Speeches%20and%20Papers/AATSeminarModelLitigantsAugust2009.pdf)>.

109 Deidre O'Connor, 'Appearing before the AAT: A Non-Adversarial Approach' (Paper presented at the New South Wales Bar Association Seminar, 10 May 1999) <<http://www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-honourable-justice-deidre-oconnor-former-pr/appearing-before-the-aat-a-non-adversarial-appro>>.

110 Administrative Appeals Tribunal, *The Obligation to Assist: Model Litigants in AAT Proceedings Seminar* (25 September 2015) <[www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-obligation-to-assist-model-litigants-in-aat-p](http://www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-obligation-to-assist-model-litigants-in-aat-p)>.

who had been involved in the competitions in the recent past. The Business, Economics and Law Faculty (The University of Queensland ('UQ')), Low and Negligible Risk Ethics Sub-committee provided research ethics approval. The study employed two online surveys, emailed directly to those UQ students and recent law graduates who had participated in, respectively, the AAT NOOT since its inception in 2014, and in the AAT moot competition since 2013. The UQ Institute of Teaching and Learning Innovation ('ITaLI') administered the survey on behalf of the author. Participants received the survey by email and participated after informed consent was given.<sup>111</sup> Subjects evaluated their experiences by responding to 14 statements using a five-point Likert scale that enabled them to express how much they agreed or disagreed with a particular statement (ranging between 1 = strongly disagree, 3 = neutral and 5 = strongly agree). One open-ended question permitted qualitative feedback on participants' views about their experience.<sup>112</sup>

In total 36 people were surveyed with participants divided into two groups, comprising mooters (24) and NOOTers (12),<sup>113</sup> with a 75 per cent response rate for moot participants (18) and an 83 per cent response rate for the NOOT population (10). Of those people who responded to the moot survey (18), there were 12 currently enrolled students and six graduates. In respect of the population who responded to the NOOT survey (10) there was an equal split of current students and graduates. Of the current students surveyed all were in at least their third year of undergraduate legal studies. No participants were identified as Aboriginal or Torres Strait Islander. Females formed the great majority of the sample populations, with females (16) comprising 89 per cent of respondents to the moot survey and 90 per cent of respondents (nine) to the NOOT survey. The gender bias in the population sample was reflective of the gender bias in the cohort of students who self-nominated and then participated in the two competitions. Of the mooters surveyed (24) 83 per cent were females and of the NOOT participants surveyed 92 per cent were females. Collected data were analysed using IBM SPSS Statistics Version 24 and Excel (2013 Version) software. Table 1, below, provides a summary of the moot survey results.

111 Prior to commencing the survey subjects were advised that no individually identifiable information would be disclosed in any way and that limited demographic information would be sought relating to their gender, program of study and enrolment status.

112 See Appendix A and B for the survey questions. I acknowledge the support of Le Hoa Phan, Manager, Evaluations, ITaLI, UQ, in drafting the survey questions.

113 The small survey size resulted from two factors beyond the author's control; first, the competition rules limit the number of students eligible to participate in the annual AAT competitions, and second, the fact that the NOOT is a new competition.

**Table 1: Survey data relating to individuals' perceptions of learning outcomes and experience (AAT moot)**

<b>Learning outcome or experience</b>	<b>Valid responses</b>	<b>Mean</b>	<b>Median</b>	<b>Standard deviation</b>
Q1 Provided an authentic learning experience	18	4.50	5.00	0.78
Q2 Deepened legal knowledge and understanding of administrative justice	17	4.59	5.00	0.71
Q3 Linked theoretical knowledge to legal practice	18	4.39	4.00	0.60
Q4 Deepened knowledge and understanding of administrative law practice and procedures at the AAT	18	4.78	5.00	0.42
Q5 Deepened understanding of differences between administrative and judicial review	18	4.44	5.00	0.70
Q6 Prompted acquisition of knowledge and understanding of niche areas of public law	17	4.65	5.00	0.49
Q7 Required me to fulfil the role of a lawyer	17	4.12	4.00	0.78
Q8 An opportunity to acquire, develop and apply skills required in the work environment	18	4.67	5.00	0.76
Q9 An opportunity to analyse and research a complex problem and display professional judgment	17	4.65	5.00	0.60
Q10 Required me to work effectively — autonomously and collaboratively	18	4.72	5.00	0.46
Q11 Opportunity to acquire, develop and display an appreciation of lawyer's professional duties	17	3.76	4.00	0.83
Q12 Institutional (teacher) support helped my learning and development	18	4.47	4.00	0.51
Q13 Formative exercises (role-playing) helped with preparation and prompted critical self-reflection	18	4.50	5.00	0.61
Q14 Moot participation enhances graduate employability	18	4.00	4.00	0.84

The survey's limitations must be acknowledged before the data is analysed. The first limitation is the small survey population. However, while the sample size is modest the data is reliable. Colleagues from ITaLI tested the reliability of the quantitative moot data, and this test revealed that there was a high level of internal consistency as determined by a Cronbach's alpha of 0.870. The second limitation is selection bias, insofar as the sample population comprised law students and graduates who had self-nominated to participate in the moot competitions. As others have noted, it can be hypothesised that these types of students are 'better' insofar as they are inherently more engaged, competent and confident than many



other students.<sup>114</sup> Therefore, the issue of self-selection bias may adversely affect the validity of the findings. The third limitation is that participants may have been able to detect the study's hypotheses, and perhaps encouraged to provide desirable responses. Notwithstanding those methodological limitations, the data provides valuable empirical support for the claims made in this article about the value of the AAT moot competition.

Participants perceived the moot to be an authentic legal simulation (Q1), which is important for effective student learning as the literature survey revealed. Moreover, students' responses validate the premise that the moot helps link theory to practice in the 'real world' (Q3). Several of the responses to question 15, which asked participants to record the best and worst aspects of their moot participation, reinforce both of these aspects of the quantitative data. One female respondent, currently enrolled in a dual degree, wrote:

The fact that every moot required engagement with a different aspect of Administrative [Law] made it all the more challenging and in so, all the more rewarding. The quick turn-around between moots, and moot problems, also meant that the moot simulated 'real-life' in a way that other moots often don't.

Another, male, participant (graduate) wrote:

Now that I am a practising [sic] lawyer, I can say with confidence that my participation in the AAT moot was by far the most directly relevant and useful experience during my studies as preparation for legal practice. I think the best aspect of the competition is its closeness to 'real world' case preparation and advocacy. This closeness obviously derives, in large part, from the fact that the competition is held in the Tribunal itself before actual members, but other factors also contribute: For example, the moot structure demands effective collaboration by a 'legal team' in a very short time frame, a deep understanding of realistic and fact-intensive scenarios, and an appreciation for the practical workings of the Tribunal (eg its forms, the different 'styles' of members, the format of hearings).

As hypothesised participation in the moot deepened individuals' knowledge and understanding of the fundamental concept of administrative justice (Q2), the law and procedure relating to administrative 'merits' reviews (Q4) by contrast with judicial reviews (Q5), and knowledge and understanding of specialised areas of public law (Q6). Additionally, the proposition that participating in the moot competition facilitates student's acquisition of effective communication skills is sustained by participants' perceptions of their progression and learning outcomes (Q8). Participants were in strong agreement with the hypothesis that the competition promotes autonomous and collaborative learning, and that it enables the development of inter-personal skills (Q10). The qualitative feedback buttresses the quantitative data, with one current female student writing in response to question 15: 'I found the competition intense but incredibly fun. It helped develop my time management skills and I found it was one of the best instances of team/group work that I have ever had.'

114 Bentley and Squelch, above n 56, 144.

Another female student, currently enrolled, wrote in response to question 15:

I thoroughly enjoyed my time participating in the AAT Moot and greatly enhanced by [sic] research and drafting skills. The quick turn arounds on receipt of the problem and submissions also improved my ability to work effectively with team members under pressure to meet tight deadlines.

Moreover, the premise that the educational value of the moot competition is promoted by appropriate support from within the legal academy, adjuncts drawn from the profession and via peers, including through provision of formative moots, is a view supported by the quantitative data (Q12/Q13). In summary, the survey reveals that (perhaps uniquely in Australia) the AAT moot is an authentic legal simulation that facilitates a deeper understanding of the law, fosters self-reliance and effective teamwork while working under tight time constraints, and enables the acquisition of essential lawyering skills (legal research, written and oral advocacy). As one female graduate respondent wrote: 'The AAT Moot was one of the most valuable experiences of my time at law school as (unlike exams) there could be no 'fudging' of knowledge and I had to take responsibility for my own learning.'

**Table 2: Survey data relating to individual's perceptions of learning outcomes and experience (NOOT)**

Learning outcome or experience	Valid responses	Mean	Median	Standard deviation
Q1 Authentic learning experience	10	4.30	4.00	0.48
Q2 Deepened legal knowledge and understanding of ADR at the AAT	10	4.90	5.00	0.31
Q3 Enabled understanding of how ADR interplays with formal hearing processes	10	4.30	5.00	01.05
Q4 Enabled me to appreciate the relevance and importance of ADR	10	4.50	4.50	0.52
Q5 Prompted acquisition of knowledge and understanding of niche areas of public law	10	4.60	5.00	0.51
Q6 Required me to fulfil various roles, as a lawyer, client, government agent	10	4.70	5.00	0.48
Q7 Opportunity to acquire, develop and apply effective communication skills	10	4.80	5.00	0.42
Q8 Opportunity to develop a capacity to analyse complex problems, exercise judgment and display creative thinking	10	4.30	4.00	0.48
Q9 An opportunity to develop an appreciation of lawyer's professional duties	10	4.20	4.00	0.42
Q10 Required me to work effectively — autonomously and collaboratively	10	4.50	4.50	0.52
Q11 Institutional (teacher) support helped my learning and development	10	3.80	4.00	0.63

Learning outcome or experience	Valid responses	Mean	Median	Standard deviation
Q12 Formative exercises (role-playing) helped me prepare and prompted critical self-reflection	10	4.20	4.00	0.63
Q13 Experiencing a simulated conciliation prompted self-reflection about legal knowledge, understanding and skills	10	4.50	4.50	0.52
Q14 NOOT participation enhances graduate employability	10	3.80	4.00	0.78

Again, at the outset, it is important to acknowledge the methodological limitations (as noted above), and again, although the sample was small the reliability of the data is high. The NOOT survey had a high level of internal consistency as determined by a Cronbach's alpha of 0.840. Broadly, the survey results are consistent with the moot survey and evidence that students perceived that the NOOT experience enhanced their theoretical knowledge and understanding of the law and legal processes. The survey participants agreed with the proposition that the NOOT presented them with an authentic simulation (Q1), and that this stimulated effective learning. A female student wrote in response to question 15:

I think it is an extremely effective learning tool. I think the NOOT competition is very unique in its structure, by putting competitors in a situation where 'learning a script' is simply not possible, and therefore really tests competitors in their ability to think effectively and creatively on the spot, while balancing the client interest and statutory duties. I think this is the real strength of the competition, and is something I have not experienced in any other environment.

The survey results demonstrate that participating in the mock conciliation enabled students to appreciate the relevance and importance of ADR and its interplay with other processes employed at the AAT (Q3/Q4). As hypothesised participants proffered strong agreement with the idea that the NOOT enabled them to deepen their knowledge and understanding of ADR and public law (Q2/Q5), and with the premise that the NOOT enabled students to develop and apply effective communication skills (Q7). One male (graduate) respondent praised the educational benefits of the distinctive nature of the learning environment created by the NOOT competition:

The NOOT format is a fantastic alternative to mooting. It allows students to develop their skills as advocates in a less formal and more collaborative setting. The less confrontational style of advocacy allows students who are perhaps less assertive to learn and develop their skills in a lower pressure environment.

The survey also revealed that participants were in agreement with the hypothesis that the NOOT required them to develop analytical skills and exercise professional judgment (Q8), and signalled strong agreement with the suggestions that they had to discharge various roles — acting and thinking as a lawyer, government agent and/or aggrieved citizen (Q6). It was a distinguishing feature of the two surveys that that there was stronger support among NOOT participants for the proposition that the simulation presented an opportunity to appreciate lawyer's professional duties (Q9). Importantly, and consistently with the academic literature on

experiential learning, the students perceived that the opportunity to participate in a simulated conciliation, with academic staff and adjuncts, encouraged them to engage in self-reflection about their legal understanding and skills (Q13). In both surveys students signalled their agreement with the proposition that participating in the AAT competitions enhanced their employability (Q14).

## VII CONCLUSIONS

The AAT competitions depart from the traditional mooting model that requires students to argue about points of law arising from a hypothetical case before a simulated court of appeal. The AAT competitions expose students to alternatives to courtroom adjudication and adversarial litigation paradigms. Via real-world hypothetical problems, both competitions promote a more complete understanding of administrative law and practice, and of pertinent advocacy styles. Conceptually, the competitions connect with Administrative Law and, parenthetically, link to other niche areas of public law, to statutory interpretation and, to a limited degree, to Civil Dispute Resolution, and Ethics and Responsibility. In so doing, the competitions encourage students to think holistically and reflect on the conceptual linkages between areas of substantive law and procedure that can often be siloed at law school.

The AAT competitions incorporate several, cooperative, activities that facilitate students' knowledge, applied understanding and an appreciation of certain professional lawyering standards. The competitions demand that students collaborate effectively in order to identify and articulate legal and factual issues, interpret and analyse complex materials, evaluate and reason logically, in order to make persuasive (and reasonably creative) points. Students learn to manage their work under tight time constraints, and grasp communication skills that are appropriate and adapted for ADR and/or administrative review hearings respectively. Additionally, the competitions open up broader theoretical inquiries for the willing, beyond the specific parameters of the hypothetical problems, such as examination of the uncertain meaning of 'administrative justice', and the significance and efficacy of ADR in resolving administrative law matters infused with a 'public interest' component.<sup>115</sup> In short, typically students emerge from their simulated experiences at the AAT feeling better prepared for the practice of law.

This article has claimed that the two competitions are highly efficacious learning devices, in part because they are not vulnerable to some of the criticisms levelled at traditional (appellate) moots. The empirical evidence lends weight to support my claims and hypotheses about student-centred learning, critical thinking and judgment, skills acquisition and self-reflection, revealing that students highly

115 This is the author's strong impression based upon many years of supervising and engaging with students, but this premise was not subject to testing and, therefore, not verified by the student survey.

appreciate and value the particular educational benefits of experiential learning activities hosted by the AAT.

## **APPENDICES**

### **THE AAT MOOT SURVEY QUESTIONS**

1. The AAT Moot Competition offered me an authentic learning ('real world') experience.
2. The AAT Moot Competition deepened my knowledge and understanding of the concept of administrative justice.
3. The AAT Moot Competition helped me link my theoretical study of administrative justice with legal practice by situating the study of legal institutions, systems and doctrine in the 'real world'.
4. The AAT Moot competition required me to obtain enhanced knowledge and deeper understanding of the nature of administrative law, practice and procedure at the Tribunal.
5. The AAT Moot Competition enabled me to acquire a deeper understanding of the differences between administrative review and judicial review.
6. The AAT Moot Competition's fictional fact scenarios and related artefacts (T documents) prompted me to acquire knowledge and understanding of specialised areas of public law.
7. The AAT Moot Competition required me to fulfil the role of administrative lawyer, rather than administrative law student.
8. The AAT Moot Competition provided me with an opportunity to acquire, develop and apply the skills and attributes required in the professional work environment; such as, effective communication skills (legal writing and oral advocacy).
9. The AAT Moot Competition provided me with an opportunity to analyse and research complex problems, and exercise professional judgment.
10. The AAT Moot Competition required me to work effectively both independently and collaboratively, and to develop my inter-personal skills (through interactions with academic staff, fellow students, legal practitioners, and Tribunal personnel).
11. The AAT Moot Competition provided me with an opportunity to acquire, develop and display an appreciation of lawyer's professional responsibilities and statutory duties (including legal representatives' duties under the AAT Act 1975).
12. Institutional (teacher) assistance and support (scaffolding), provided through face to face meetings, directed reading, and/or video, and/or

organised Tribunal visits, helped my learning and progressive development of legal skills.

13. The experience of appearing before academic staff, practitioners and/or peers in a simulated 'merits review' (i.e. role-playing/rehearsing submissions) at Law School, before and during the AAT Moot Competition, helped me prepare for the competition moot and prompted me to reflect on my level of knowledge, understanding and advocacy skills.
14. Participation in the AAT Moot competition enhances graduate employability.
15. Are there any other comments you wish to make about the best (or worst) aspects of the AAT Moot competition?

### **THE AAT NOOT SURVEY QUESTIONS**

1. The AAT NOOT Competition offered me an authentic learning ('real world') experience.
2. The AAT NOOT Competition deepened my theoretical and applied understanding of alternative dispute resolution practices at the Tribunal.
3. The AAT NOOT Competition helped me to appreciate how ADR processes (notably conciliation) interplay with more formal adjudication (hearing) processes at the Tribunal.
4. The AAT NOOT Competition helped me appreciate the relevance and importance of ADR in the administration of justice at the AAT by situating the theoretical study of legal institutions, systems and doctrine in the real world.
5. The AAT NOOT Competition's fictional fact scenarios and related artefacts (T documents) prompted me to acquire knowledge and understanding of discrete areas of public law not otherwise taught at the TC Beirne School of Law.
6. The AAT NOOT Competition required me to fulfil several roles, as legal representative, or client, rather than administrative law student.
7. The AAT NOOT Competition provided me with an opportunity to acquire, develop and apply the skills and attributes required in the professional work environment, such as effective communication skills (oral communication and active listening).
8. The AAT NOOT Competition provided me with an opportunity to acquire, develop a capacity to analyse and research complex problems, exercise judgment, and evidence creative thinking in the course of problem solving.
9. The AAT NOOT Competition provided me with an opportunity to acquire, develop and display an appreciation of lawyer's professional

responsibilities and statutory duties (including parties' duty to act in good faith in relation to the conduct of the ADR process).

10. The AAT NOOT Competition required me to work effectively both independently and collaboratively, and to develop inter-personal skills (through interactions with academic staff, fellow students, legal practitioners, Tribunal personnel and other parties to the negotiation).
11. Institutional (teacher) assistance and support (scaffolding), provided through face-to-face meetings, directed reading, and/or video, helped my learning and progressive development of legal skills.
12. The experience of simulating the negotiation process (i.e. role playing before academic staff, practitioners and/or peers at Law School) before the competition, helped me prepare for the competition and prompted reflection on my levels of understanding and acquisition of legal skills.
13. The experience of actively participating in a simulated conciliation at the AAT, including the provision of feedback by AAT members at the conclusion of the NOOT, prompted me to reflect on my levels of knowledge, understanding and acquisition of legal skills. Participation in the AAT NOOT competition enhances graduate employability.
14. Participation in the AAT NOOT competition enhances graduate employability.
15. Are there any other comments you wish to make about the AAT NOOT competition, including its effectiveness as a learning tool?