

**School of Business Law and Taxation**

***Consumers of Higher Education in Australia: do the unfair contract term provisions in the Australian Consumer Law provide effective protection for students as consumers of educational services?***

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**Declaration**

To the best of my knowledge and belief this thesis contains no material previously published by any other person except where due acknowledgment has been made.

This thesis contains no material which has been accepted for the award of any other degree or diploma in any university.

Signature: .....

Date: .....

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## Chapter 1: Introduction

*Consumers of Higher Education in Australia: do the unfair contract term provisions in the Australian Consumer Law provide effective protection for students as consumers of educational services?*

### Abstract

Extensive consumer protection legislation has existed in Australia for nearly four decades. The new Australian Consumer Law ('ACL') in schedule 2 of the *Competition and Consumer Act 2010* (Cth) ('CCA')<sup>1</sup> is the most significant change to consumer rights since the introduction of the *Trade Practices Act 1974* (Cth) ('TPA'). Over a corresponding period of time, the landscape of the higher education sector has been transformed into a culture of consumerism with the student at the centre as the consumer. However, students have seldom sought redress in relation to infringement of their rights as consumers under consumer protection legislation and more rarely successfully. It is recognised that some rights do accrue to students as consumers of educational services under the ACL, principally with regard to promotional activities of higher education institutions ('HEI').<sup>2</sup> It is not certain that the ACL can provide effective protection for students as consumers of educational services beyond this known application to address issues regarding the nature of the

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<sup>1</sup> Schedule 2 of the *Competition and Consumer Act 2010* (Cth), formerly the *Trade Practices Act 1974* (Cth) as amended *Trade Practices Amendment (Australian Consumer Law) Act (No.1) 2010* (Cth); and *Trade Practices Amendment (Australian Consumer Law) Act (No.2) 2010* (Cth). The first tranche of reforms received assent on 14 April 2010, operative from 1 July 2010. The second Bill was passed on 24 June 2010 and took effect on 1 January 2011.

<sup>2</sup> The nomenclature 'higher education institution' ('HEI') is adopted as this is seen as a broad definition consistent with policy and international literature. University: 'noun: a high-level educational institution in which students study for degrees and academic research is done' Angus Stevenson (ed) *Oxford Dictionary of English* (Oxford University Press, 2010) *Oxford Reference Online*, Oxford University Press, Curtin University of Technology <<http://www.oxfordreference.com.dbgw.lis.curtin.edu.au/views/ENTRY.html?subview=Main&entry=t140.e0906710>> or tertiary: 'chiefly (*Brit.*) relating to or denoting education at a level beyond that provided by schools, especially that provided by a college or university' (at e0854390) clearly encompasses private providers of post-secondary qualifications. See Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (Oxford University Press, 2008): at e2272. The use of HEI is also consistent with the terminology used in the *Bradley Review of Australian Higher Education December 2008*: see Denise Bradley, Peter Noonan, Helen Nugent, Bill Scales, *Review of Australian Higher Education Final Report*, 2008 Australian Government (28 September 2010) <<http://www.deewr.gov.au/HigherEducation/Review/Pages/ReviewofAustralianHigherEducationReport.aspx>> chapter 1, nn 1, 2, 1-2. If the word 'tertiary' is used, following the OECD adoption of the terminology in the ISECD standards, this would have the effect that tertiary only relates to degree programmes and above. The phrase 'higher education' is broader and encompasses associate degrees and diplomas. It is also used by the Department of Education, Employment and Workplace Relations ('DEEWR') and academic commentators in the UK in the field of higher education law, a less developed area of specialty in Australia. On the development of education law in Australia see generally Ralph Mawdsley, and J Joy Cumming, 'The Origins and Development of Education Law as a Separate Field of Law in the United States and Australia' (2008) 13(2) *Australia & New Zealand Journal of Law & Education* 7. The legal status of HEI in Australia also bears a resemblance to that of the UK (with the exception of Cambridge and Oxford), particularly since the commencement of the *Education Reform Act 1988* (UK) and *Higher Education Act 2004* (UK). See generally Oliver Hyams, *Law of Education* (Jordans, 2<sup>nd</sup> ed, 2004).

service provided. This research is specifically concerned with whether the introduction of an Unfair Contract Terms ('UCT')<sup>3</sup> regime in the ACL overcomes identifiable barriers faced by students using consumer protection as a means to ensure they receive services as promised and advances their rights as consumers.

The ACL saw the introduction of an UCT regime, which previously had only existed in limited jurisdictions in Australia, notably Victoria, as a means of protection in consumer contracts. Now any term in a consumer contract that is an unfair term as defined under the ACL is void. The application of these provisions in the context of the student as a consumer of educational services will require first an assessment of whether there exists in Australia a contract between the student and HEI. Further, for the UCT to apply, the student-HEI contract must be a 'standard form' 'consumer contract'<sup>4</sup>, for 'services' occurring in 'trade or commerce'<sup>5</sup>. Importantly the analysis will identify any connection between the UCT provisions regarding substantive unfairness and the protection this affords students in the context of the provision of educational services, such as the design and delivery of courses, as distinct from promotional activities.

Ordinarily, claims concerned with the nature of the educational service provided are considered matters that involve questions of academic judgement. Courts have been consistent in their reluctance to examine matters relating to the exercise of academic judgement and accordingly such matters are considered non-justiciable. The significance of the UCT provisions is that rather than just focusing on procedural unfairness, they attempt to deal with substantive unfairness.<sup>6</sup> In the context of the student-HEI contract and provision of educational services, the UCT provisions have the potential to ensure that the student-HEI contract does not contain terms that are substantively unfair. Consequently, HEIs may now be obliged to provide educational services in a manner students might reasonably expect upon entering the student-HEI contract. Thus the new UCT regime may deal with claims concerning the provision of educational services more effectively than other actionable rights that require the court to examine matters of academic judgement in relation to the nature of educational services provided. The analysis will evaluate the implications for the

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<sup>3</sup> ACL Part 2-3.

<sup>4</sup> ACL ss 23, 27.

<sup>5</sup> ACL s 2 (definition of 'services', 'trade or commerce').

<sup>6</sup> Jeannie Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts' (2009) 33(3) *Melbourne University Law Review* 934.

higher education sector and make recommendations for change in the current practice.

## **Objectives**

### *Research problem*

A review of the literature and case law reveals a number of barriers faced by students seeking redress under consumer protection legislation in relation to claims made against HEIs regarding the nature of the educational service supplied.<sup>7</sup> Predominantly these are a reluctance to categorise the provision of educational services as being a service supplied in 'trade or commerce', and that matters of academic judgement are non-justiciable. Even if students have been able to overcome these barriers, proving loss or damage has been problematic.<sup>8</sup> It is recognised that some rights do accrue to students as consumers of educational services under the ACL, principally with regard to promotional activities of HEIs.<sup>9</sup> This work seeks to identify whether there is an application of the protections afforded by the ACL beyond this known application as a result of the new UCT regulation so as to overcome the identified barriers faced by students in legal challenges. The principal research question that is addressed in this thesis is whether the introduction of an UCT regime in the ACL advances students' rights as consumers by providing effective protection for students regarding the nature of educational services supplied.

In order to answer the research question, the objectives of this research are to:

1. Review the case law, legislation and literature to establish how student complaints are currently resolved to situate the research within the legal framework of the student-HEI relationship and potential avenues for redress. The examination of the various areas of law will identify the significance of the research within a broader legal context.

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<sup>7</sup> See especially Megumi Ogawa, 'The Courts' Jurisdiction Over Student/University Disputes In Australia', (2012) 2(1) *International Journal of Public Law and Policy* 96, an article by a student herself involved in protracted and bitter litigation with the University of Melbourne.

<sup>8</sup> Ibid 96-7, where the author and student complainant identifies the reluctance of the courts to consider complaints that relate to academic judgement and adequacy of available orders as significant issues preventing or influencing students' decisions to bring their disputes with their HEI to court.

<sup>9</sup> Despite judicial affirmation that the provision will apply to the promotional activities of a HEI, in general claimants have been unable to successfully prove their case in the higher courts: *Plimer v Roberts* (1997) 150 ALR 235; *Fennell v Australian National University* [1999] FCA 989. There has been mixed success at the tribunal level. The student was unsuccessful in the matter of *Kwan v University of Sydney Foundation Program P/L* (General) [2002] NSWCTTT 83. Claimants were successful in *Jones v Academy of Applied Hypnosis P/L* (General) [2005] NSWCTTT 841 and *Cotton v Blinman Investments P/L & Blinman* (General) 2004 NSWCTTT 723. See further Jim Jackson, 'The Marketing of University Courses under Section 52 and 53 of the *Trade Practices Act 1974* (Cth)' (2002) 6 *Southern Cross University Law Review* 106.

2. Examine and analyse the case law and literature to determine whether claims made by students in relation to academic matters are justiciable. In order to assess the effectiveness of the UCT provisions of the ACL in relation to claims regarding the educational service provided by a HEI, the research will examine whether courts will adjudicate on claims relating to the same.
3. Examine and analyse the new national uniform consumer protection legislation, the ACL, with reference to case law, to determine the threshold issue of whether the ACL applies to the provision of higher education services to students in Australia. Specifically, the research will assess whether the supply of educational services is a 'service'<sup>10</sup> that occurs in 'trade or commerce'<sup>11</sup> as defined by the ACL.
4. Undertake an analysis of the case law, legislation and literature to establish whether there exists in Australia a contract between the student and HEI, the nature and terms of any such contract and available remedies on a breach. A detailed analysis and examination of the specific legislative provisions will ensue to determine whether the protections available under the UCT of the ACL are enlivened. In addition to the requirement that the contract for the supply of educational services must be in 'trade or commerce', for the UCT regime to apply the contract must also be a 'standard form' 'consumer contract'.<sup>12</sup> The research will also consider whether any terms in the contract for the supply of educational services are potentially unfair terms and consequently void.
5. Analyse the specific UCT provisions of the ACL to evaluate the efficacy of these provisions as a mechanism to ensure students receive services as promised and advances their rights as consumers. Consideration will also be given to the impact of the findings of this research on the higher education sector and recommendations for change in current practice.

## **Background**

Fundamental reforms to the higher education system in Australia began in the late 1980s with the Dawkins Report.<sup>13</sup> The provision of higher education is now a significant industry in Australia and rivals established industries in its contribution to the Australian economy. Official figures indicate that international education

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<sup>10</sup> ACL s 2 (definition of 'services', which are 'provided, granted or conferred in **trade or commerce**').

<sup>11</sup> ACL s 2 (definition of 'trade or commerce').

<sup>12</sup> ACL s 23.

<sup>13</sup> J. Dawkins, (1988) *Higher Education: A Policy Statement*, Australian Government Publishing Service (AGPS), Canberra.

contributes in excess of AUD\$10 billion to the Australian economy.<sup>14</sup> The higher education sector is Australia's third largest exporter.<sup>15</sup> Expenditure by consumers of higher education is not insignificant. Students (or their parents or employers) invest heavily in post-secondary education. The average cost of a three-year undergraduate degree in Australia is substantial.<sup>16</sup>

Since the Dawkins' reforms, participation in higher education has also undergone dramatic change<sup>17</sup>. Student cohorts undertaking higher education study are diverse

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<sup>14</sup> Australian Government, Department of Education, Science and Training, *The Higher Education Report 2005*, (1/2007) [3.6.1]. There has been considerable growth in the sector since this report, see DEEWR Higher Education, Statistics publication (8 August 2012). Some press reports put this figure as high as AUD \$17 billion in 2010. See Luke Slattery, 'Soul-Searching for a Liberal Curriculum', *The Australian* (online), 30 June 2010 <<http://www.theaustralian.com.au/higher-education/soul-searching-for-a-liberal-curriculum/story-e6frgcjx-1225885869499>>. Although there have been noteworthy falls in that number, some commentators suggest that by semester one 2013 the decline may be reversed. See, eg, Stephen Connelly, 'Data Confirms 2020 For Return to Student Peak' *The Australian* (online), 9 May 2012 <<http://www.theaustralian.com.au/higher-education/opinion/data-confirms-2020-for-return-to-student-peak/story-e6frgcko-1226350097162>>; Bernard Lane, 'Gloom With Glimpses of Light in Latest Student Figures', *The Australian* (online), 27 April 2012 <<http://www.theaustralian.com.au/higher-education/gloom-with-glim>>; Bernard Lane, 'Overseas Student Market Still in Decline', *The Australian* (online), 2 July 2012 <<http://www.theaustralian.com.au/higher-education/decline-continues-in-overseas-student-market/story-e6frgcjx-1226412198477>>; Stephen Matchett, 'Education Exports Slump', *The Australian* (online), 18 November 2011 <<http://www.theaustralian.com.au/higher-education/education-exports-slump/story-e6frgcjx-1226197702736>>.

<sup>15</sup> The higher education sector is now Australia's third largest exporter: Bradley, above n 2, 4 and 148, detailing higher education revenue by source. See also Australian Government, *Transforming Australia's Higher Education System* Department of Education, Employment and Workplace Relations (2009) 6 (29 August 2011) <<http://www.deewr.gov.au/HigherEducation/Documents/TransformingAusHigherED.pdf>>. However in relation to recent concerns regarding the downturn in the international student market, see Deloitte Access Economics, *Broader Implications from a Downturn in International Students* (2011) Universities Australia, (11 July 2011) <<http://www.universitiesaustralia.edu.au/resources/618/1100>> .

<sup>16</sup> For a domestic student with a Commonwealth supported place, the fees in 2010 were as follows (per year of full time study): BAND 1: \$5310 (fields such as humanities, social studies, languages, visual and performing arts); BAND 2: \$7567 (fields such as agriculture, built environment, computing, health, engineering, surveying); BAND 3: \$8859 (fields such as law, medicine, dentistry, veterinary science, accounting, administration, economics, commerce); National Priority: \$4249 (nursing, education, mathematics (including statistics and science)). Full fee courses are set by the institution and vary across the sector. An indication of how much these course can cost is the limits on FEE-HELP for student borrowing. There is a limit on how much students can borrow, indexed annually. In 2010 the maximum was \$85 062 (or \$106 328 for medicine, veterinary science and dentistry). Some courses cost more than these amounts. The Good Universities Guide, *Degree Costs and Loans* (28 September 2010) <<http://www.gooduniguide.com.au/School-Leavers/Paying-Your-Way/Degree-costs-and-loans>> Detailed costs are available at Australian Government, Study Assist (7 August 2012) <<http://www.goingtouni.gov.au/main/coursesandproviders/gettingstarted/costsandentrancerequirements/provider-tuition+costs.htm>>. In 2012 a band 3 course (law, medicine, commerce etc.) was advertised on the Curtin University website as costing \$9425 for the year at Curtin University: FEES@CURTIN (14 June 2012) <[http://fees.curtin.edu.au/scheduledfees2012\\_cs.cfm](http://fees.curtin.edu.au/scheduledfees2012_cs.cfm)>. In 2012 the capped student places (quota system) was removed in Australia; however, at this time tuition fees will remain set at statutorily prescribed amounts for HECS students, although Universities are able to determine their own student contribution fees: Stephen Corones, 'Consumer Guarantees and the Supply of Educational Services by Higher Education Providers' (2012) 35(1) *UNSW Law Journal* 1, 6. In the UK, HEIs are now permitted to charge top-up fees: Glyn Jones, 'Managing Student Expectations: The Impact of Top-up Tuition Fees' (2010) 14(2) *Perspectives: Policy and Practice in Higher Education* 44. See generally Anthony Stokes and Sarah Wright, 'Are University Students Paying Too Much for Their Education in Australia?' (2010) 65 *Journal of Australian Political Economy* 5.

<sup>17</sup> For a discussion of policy changes under the Howard and Rudd governments see Simon Marginson, 'Universities — Where to now? Conditions for an Education Revolution' (2008) 27(1) *Academy of the Social Sciences* 3.



and no longer consist primarily of school-leavers accepting publically funded places via traditional pathways to entry.<sup>18</sup> The number of providers of higher education has increased<sup>19</sup> and can now operate solely in an online environment with no entry requirement other than a payment of fees,<sup>20</sup> or accept a significant number of international students who, while subject to entry requirements, pay handsomely for the opportunity to study in Australia.<sup>21</sup> As all academics know, these fundamental shifts in the sector have had significant impact of the nature of academic work and heralded substantial organisational change.<sup>22</sup>

Equally, the character of the relationship between the student and HEI has been subject to change, shifting from the traditional *in loco parentis* to a more clearly

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<sup>18</sup> Bradley, above n 2, xi, 70–1.

<sup>19</sup> There are 39 Australian universities, 37 are publically funded and 2 are private. There is one Australian branch of an overseas university, 3 other self-accrediting higher education institutions and more than 150 non-self-accrediting higher education providers (that is, it offers at least one course of study that is accredited as a higher education award) extracted from DEEWR Higher Education, Overview (14 June 2012) <<http://www.deewr.gov.au/HigherEducation/Pages/Overview.aspx>>. For a full list of higher education providers see Australian Government, Study Assist, (14 June 2012) <<http://studyassist.gov.au/sites/studyassist/mytertiarystudyoptions/providers-that-offer-commonwealth-assistance/pages/universities-and-other-higher-education-providers>>. In 2010, 93.2% of students were enrolled at public universities. Public university enrolments increased 5% in 2010 (1 111 352 students in 2010, up from 1 058 399 students in 2009), while private provider enrolments increased 6.3% (81 305 students at 87 providers in 2010, up from 76 467 students at 77 providers in 2009). Department of Education, Employment and Workplace Relations Higher Education, Statistics publication (20 September 2012) <<http://www.deewr.gov.au/HigherEducation/Publications/HEStatistics/Publications/Pages/Students.aspx>>; Bernard Lane, 'Private Providers Surge Ahead', *The Australian* (online), 27 June 2012 <<http://www.theaustralian.com.au/higher-education/private-providers-surge-ahead/story-e6frgcjx-1226409533778>>.

<sup>20</sup> See, eg, the Open Universities Australia scheme (20 September 2011) <<http://www.open.edu.au/public/home?gclid=CNmfgdz1q6QCFQdLbwod2EmCcA>>.

<sup>21</sup> In 2008 there were 771 932 domestic students in 2008 — comprising 72.4% of all enrolments — an increase of 2% from 2007. Overseas student enrolments increased 7.7% over the same period to 294 163 in 2008. In 2010 there were 1 192 657 domestic and international students enrolled at higher education providers ('HEPs'), an increase of 5.1% from 2009. There were 857 384 domestic students in 2010 (71.9% of all students) an increase of 5.3% from 2009. Overseas student enrolments increased 4.5% from 2009 to 335 273 in 2010. Department of Education, Employment and Workplace Relations Higher Education, Statistics publication (14 June 2012) <<http://www.deewr.gov.au/HigherEducation/Publications/HEStatistics/Publications/Pages/Students.aspx>>. The recent and notable downturn in international student enrolments has been well documented in the press. See, eg Lane, 'Overseas Student Market Still in Decline', above n 14; Matchett, 'Education Exports Slump', above n 14. In 2011, there were 557 425 enrolments by full-fee paying international students in Australia on a student visa. This was a 9.6% decline on the same period in 2010: Australian Education International, *End of Year Summary of International Student Enrolment Data — Australia — 2011* (14 June 2012) <[https://www.aei.gov.au/research/International-Student-Data/Documents/Monthly%20summaries%20of%20international%20student%20enrolment%20data%202011/12\\_Dec\\_2011\\_MonthlySummary.pdf](https://www.aei.gov.au/research/International-Student-Data/Documents/Monthly%20summaries%20of%20international%20student%20enrolment%20data%202011/12_Dec_2011_MonthlySummary.pdf)>.

<sup>22</sup> See, eg, Emmaline Bexley, Richard James and Sophie Arkoudis, 'The Australian Academic Profession in Transition: Addressing the Challenge of Reconceptualising Academic Work and Regenerating the Academic Workforce', Centre for the Study of Higher Education, The University of Melbourne, September 2011 (Commissioned report prepared for the Department of Education, Employment and Workplace Relations) (14 June 2012) <[http://www.cshe.unimelb.edu.au/people/bexley\\_docs/The\\_Academic\\_Profession\\_in\\_Transition\\_Sept2011.pdf](http://www.cshe.unimelb.edu.au/people/bexley_docs/The_Academic_Profession_in_Transition_Sept2011.pdf)>; Julie Hare, 'Academe Faces Looming Crisis' *The Australian* (online) 21 September 2011 <<http://www.theaustralian.com.au/higher-education/academe-faces-looming-crisis/story-e6frgcjx-1226142093440>>.

commercial relationship.<sup>23</sup> Commentators are divided on the nature of the relationship and the literature discloses the competing notions of students as members of the university (corporators) and as parties to a contract, consequently a consumer.<sup>24</sup> The academe oft laments the rise of the student as a consumer<sup>25</sup> and the popular press postulates a view of students, particularly international students, as vulnerable consumers<sup>26</sup> exposed to exploitation by HEIs.<sup>27</sup> The recommendations of

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<sup>23</sup> Helen Fleming, 'Student Legal Rights in Higher Education: Consumerism is Official, but is it Sustainable?' *Sustainable Education, Schools, Families and Communities — Education Law and Policy Perspectives, Proceedings of the 2011 ANZELA Conference* 115, 115.

<sup>24</sup> Fleming, above n 23. See also Francine Rochford, 'The Relationship Between the Student and The University' (1998) 3(1) *Australia & New Zealand Journal of Law & Education* 28; Francine Rochford, 'The Contested Product of a University Education' (2008) 30(1) *Journal of Higher Education Policy and Management* 41. Much has been written on this and is discussed fully in Chapter 5. As a starting point see Mike Molesworth, Richard Scullion and Elizabeth Nixon (eds), *The Marketisation of Higher Education and the Student as Consumer* (Routledge, 2011); R Brown (ed), *Higher Education and The Market* (Routledge, 2011).

<sup>25</sup> Again much has been written on this issue, see, eg, Tim Kaye, Robert D Bickel and Tim Birtwistle, 'Criticizing the Image of the Students as Consumer: Examining Legal Trends and Administrative Responses in the US and UK' (2006) 18(2–3) *Education and the Law* 85; Margaret Thornton, 'The Law School, the Market and the New Knowledge Economy' (2007) 17(1–2) *Legal Education Review* 1; paper given by Margaret Thornton 'Universities: The Governance Trap And What To Do About It' Wednesday Night at the New International Bookshop, Australian Fabian Society, Association for the Public University/Akados, Melbourne, 16 March 2005 (26 September 2010) <<http://www.fabian.org.au/876.asp>>; Slattery, 'Soul-Searching for a Liberal Curriculum' above n 14; Jennifer Oriol, 'Profit Trumps Plato in the Consumer-Driven University' *The Australian* (online) 6 July 2011 <<http://www.theaustralian.com.au/higher-education/opinion/profit-trumps-plato-in-the-consumer-driven-university/story-e6frgcko-1226088278082>>. Many commentators are supportive of the use of consumer protection law in the higher education setting. See, eg, Patty Kamvounias and Sally Varnham, 'Getting What They Paid For: Consumer Rights of Students in Higher Education' (2006) 15 *Griffith Law Review* 306; Lynden Griggs, 'Knowing The Destination Before the Journey Starts — Legal Education and Fitness For Purpose' (2007) *Murdoch ELaw Journal* 315 <[https://elaw.murdoch.edu.au/archives/issues/2007/1/eLaw\\_knowing\\_destination.pdf](https://elaw.murdoch.edu.au/archives/issues/2007/1/eLaw_knowing_destination.pdf)>; David Palfreyman, 'The Trials of Academe: The New Era of Campus Litigation' (2011) 15(2) *Perspectives: Policy and Practice in Higher Education* 73.

<sup>26</sup> For a discussion about vulnerable consumers see Chris Field, *Current Issues in Consumer Law and Policy* (Pearson Education, 2006), 1–15. See also Australian Government Productivity Commission, *Review of Australia's Consumer Policy Framework*, Final Report No 45 2008, Canberra <<http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport>>, 304, the submission made to the Productivity Commission by the National Children's and Youth Law Centre (NCYLC).

<sup>27</sup> See, eg, Australian Broadcasting Commission Television, 'International Student Market Corrupt, Industry Says', *The 7.30 Report*, 20 March 2007 (Heather Ewart) <<http://www.abc.net.au/7.30/content/2007/s187721.htm>>; Australian Broadcasting Commission Television, 'International Students a Lucrative Market In Australian Tertiary Institutions', *The 7.30 Report*, 3 April 2007 (Heather Ewart) <<http://www.abc.net.au/7.30/content/2007/s1888001.htm>>; Larry Anderson, 'Rethink Needed as International Students Caught in Safety Undertow' *The Australian* (online), 17 August 2011 <<http://www.theaustralian.com.au/higher-education/opinion/rethink-needed-as-international-students-caught-in-safety-undertow/story-e6frgcko-1226115975371>>; Amit Banerjee, 'Indian Students Exploited in Aus?', *The Times of India* (online), 26 April 2007 <<http://www.timesofindia.com/articleshow/msid-1960961,prtpage-1.cms>>; Sarah Elks, 'Ill-feeling for Nursing Students', *The Australian* (Canberra), 3 January 2008, 4; Dorothy Illing, 'Deliver Service or We'll Sue', *The Australian* (Canberra) 21 July 2004, 33; 'India Raps Colleges and Greedy Bosses', *The West Australian* (Perth), 11 January 2010, 6; Debra Jopson, 'Unis Face Legal Challenge From Students' *Sydney Morning Herald* (Sydney), 6 June 2005; Eric Jensen, 'Overseas Pupils Losers In Scramble For Fees', *The West Australian* (Perth), 18 July 2007, 18; Adam Morton, 'Creating a Degree of Unrest', *The Age* (online), 17 March 2007 <<http://www.theage.com.au/articles/2007/03/16/1173722744906.html>>. For an analysis of the portrayal of students as consumers in the UK press see Joanna Williams, 'Constructing Consumption: What Media Representations Reveal About Today's Students' in Molesworth, above n 24, ch 14, 170. See also Hon Senator Chris Evans, Minister for Tertiary Education (Cth), 'Better Consumer Protection for International Students' (Media Release, 23 September 2011) <<http://www.aei.gov.au/Pages/default.aspx?2>> to provide a system for refunds for international students in the event of a higher education providers closing.

the recent *Bradley Review of Australian Higher Education* focus on the assurance of high quality education services through accreditation and standards frameworks.<sup>28</sup> The Federal Government's response, *Transforming Australia's Higher Education System*, acknowledges the need for a high quality education system, with students at the centre of the reforms designed to increase participation, assure quality of the learning experience and maintain international rankings.<sup>29</sup>

The legal relationship between the student and HEI is multifaceted, overlaid by principles at common law and under statute. Similarly, complaints made by students against HEIs are varied in their diversity of causes of action, reflective of the complex nature of the relationship. Frequently claims brought against HEIs by students can be categorised as 'omnibus litigation (there being an unwieldy bundle of claims)'.<sup>30</sup> Two significant studies have recently been undertaken to determine the nature of student litigation with HEIs and the outcomes and trends in this regard.<sup>31</sup> The studies also disclose the difficulties students face when bringing their complaints to the courts, both procedurally and substantively.<sup>32</sup> Despite this, these studies report an increase in the number of cases being brought before courts and tribunals by students.<sup>33</sup> However, many of the claims do not involve consumer protection legislation despite considerable regulation in the sector and for consumers generally. Extensive provisions protecting the rights of consumers have existed in Australia for nearly forty years.<sup>34</sup> There also exists a plethora of legislative regulation apart from consumer

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<sup>28</sup> Bradley, above n 2. See in particular recommendations 19, 20, 21, 23 and 24 relating to a national accrediting body, quality assurance and a standards framework and 26 with regard to funding for teaching and learning in higher education.

<sup>29</sup> Australian Government, *Transforming Australia's Higher Education System*, above n 15, 31–3 and the establishment of TEQSA; Bradley, above n 2, 78–80.

<sup>30</sup> *Hanna v University of New England* [2006] NSWSC 122, [2].

<sup>31</sup> Jim Jackson et al, 'Student Grievances and Discipline Matters Project' (Final Report, Australian Learning and Teaching Council, May 2009); Hilary, Astor, 'Australian Universities in Court: Causes, Costs and Consequences of Increasing Litigation' (2008) 19(3) *Australasian Dispute Resolution Journal* 156; Hilary Astor, 'Why do Students Sue Australian Universities?' (2010) 21 *Australasian Dispute Resolution Journal* 20; Patty Kamvounias and Sally, Varnham, 'Legal Challenges to University Decisions Affecting Students in Australian Courts and Tribunals' (2010) 34 *Melbourne University Law Review* 141. For a comparative study see Lelia Helms, 'Comparing Litigation in Higher Education: The Unities States and Australia in 2007' (2009) 14(2) *International Journal of Law & Education* 37.

<sup>32</sup> Astor, 'Why do Students Sue Australian Universities?', above n 31, 31; Jackson et al, above n 31. The authors state that the most common reason why students were unsuccessful in their claims was because the allegations made were not supported by the facts or the court/tribunal lacked jurisdiction: at 13.

<sup>33</sup> Astor, 'Australian Universities in Court', above n 31. Astor notes that despite the increase in the size of the higher education sector and therefore a corresponding increase in student numbers, the increase in litigation is not a proportionate increase: 'Roughly speaking, the number of Universities has doubled and the number of students tripled but the levels of the litigation have increased about eightfold': at 166.

<sup>34</sup> Previously the *Trade Practices Act 1974* (Cth) and state equivalents, now the *Competition and Consumer Act 2010* (Cth) and in particular schedule 2 to the CCA, the *Australian Consumer Law*.

protection law that includes sector specific legislation,<sup>35</sup> dispute resolution processes<sup>36</sup> and various codes of conduct.<sup>37</sup>

Reasons as to why so few consumer protection matters are brought before the courts, when anecdotal evidence would suggest that students are in fact vulnerable or disadvantaged consumers, are varied. One explanation for this may be that students as 'consumers' is a relatively new phenomenon in Australian society.<sup>38</sup> A proportion of the consumers affected may be simply unaware of their legal rights<sup>39</sup>, as is typical in younger people.<sup>40</sup> There is also likely to be an element of practical consideration given that a large number of students are impecunious and therefore unable to afford access to the legal system. Further, dispute resolution or complaint-handling processes in place at HEIs may be effective in addressing the majority of students concerns.<sup>41</sup> Alternatively, it appears that when students do turn to the legal system for protection and redress they do so under other legislative regimes, such as anti-discrimination legislation based on grounds of gender, race or disability. Examination of the case law and literature in these areas suggests that while some

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<sup>35</sup> *Educational Services for Overseas Students Act 2000* (Cth), which draws on consumer protection language considerably, see Jim Jackson, 'Regulation of International Education: Australia and New Zealand' (2005) 10(2) & (2006) 11(1) *Australia & New Zealand Journal of Law & Education* 67. All universities in Australia are enacted under legislation (see, eg, the *University of Western Australia Act 1911* (WA)). Each state regulates providers of higher education under the various state Higher Education Acts and the Commonwealth under the *Higher Education Act 2001* (Cth). There are of course other statutory protections that students have sought redress under, such as the various anti-discrimination legislative regimes at both state and federal level, and other legislation such as Freedom of Information Acts.

<sup>36</sup> Standard 8 *Educational Services for Overseas Students Act 2000* (Cth); NSW Ombudsman, *Complaint Handling at Universities: Best Practice Guidelines*, December 2006, A-6. Note now also a specific ombudsman for international students studying with private providers of higher education, see Overseas Student Ombudsman, (21 September 2011) <<http://www.oso.gov.au/>>. See also Hilary Astor, 'Improving Dispute Resolution in Australian Universities: Options for the Future' (2005) 27(1) *Journal of Higher Education Policy and Management* 49; Jackson et al, above n 31.

<sup>37</sup> See, eg, Australian Vice-Chancellors' Committee, *Provision of Education to International Students Code of Practice and Guidelines for Australian Universities*, 2005. The Code specifically refers to the provisions of the *Trade Practices Act 1974* (Cth). Most institutions also have their own codes of conduct and students charters of rights. See, eg, Curtin University Codes of Conduct for both students (21 September 2011) <<http://students.curtin.edu.au/rights/conduct.cfm>> and staff (21 September 2011) <<http://policies.curtin.edu.au/local/docs/Code%20of%20Conduct%2020Approved%2030%20June%202009.pdf>>.

<sup>38</sup> Although students as 'consumers' now appears to be a more commonly held perception by both students and staff in Australia. See Jackson et al, above n 31, 38, 54, 60.

<sup>39</sup> The recent *Australian Consumers Survey 2011* confirmed that while there is a general awareness within the wider Australian community regarding the existence of consumer rights, there is much less detailed knowledge of these rights and business obligations: Department of the Treasury, *Australian Consumer Survey*, (2011) Australian Government.

<sup>40</sup> For example, The Shopfront Youth Legal Centre, *The Shopfront Story* (27 September 2010) <<http://www.theshopfront.org/9.html>> regarding young people's lack of awareness of their legal rights. This lack of knowledge of specific as opposed to general rights under consumer legislation is not limited to younger people. Department of the Treasury, *Australian Consumer Survey*, above n 39.

<sup>41</sup> Discussed further in Chapter 2.

applicants were unsuccessful in their claims based on discrimination, there may well have been a cause of action arising under consumer protection legislation.<sup>42</sup>

There may also have been barriers within the regulatory framework. The recent introduction of a single national consumer protection law, the ACL, has the potential to improve the protection afforded to students as consumers.<sup>43</sup> The ACL is the most significant change to consumer rights since the introduction of the *Trade Practices Act 1974* (Cth). The impetus for a new national consumer law was the review by the Productivity Commission into Australia's consumer policy framework.<sup>44</sup> The first tranche of reforms resulted in the imposition of an unfair contract terms law from 1 July 2010. Now any term in a consumer contract that is unfair as defined by the ACL is void.<sup>45</sup> It is arguable that universities' arrangements with their students falls within the definition of standard form consumer contracts, to which the law attaches.<sup>46</sup> The significance of the UCT provisions is that rather than just focusing on procedural unfairness, they attempt to deal with substantive unfairness.<sup>47</sup> In the context of the student–HEI relationship and provision of educational services, the UCT provisions have the potential to ensure that the student–HEI contract does not contain terms that are substantively unfair.

In evaluating the efficacy of the UCT provisions, this research is particularly concerned with legal challenges involving matters of academic judgement. Usually challenges pertaining to academic judgement are not entertained by the courts on the basis that the merits of the decision are not within the purview of the courts.<sup>48</sup> Historically courts have been reluctant to disturb decisions that have been seen as within the domain of the learned academic.<sup>49</sup> Matters of academic judgement include decisions made by the HEI relating to the marking of student work; content of

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<sup>42</sup> See, eg, *Lina Obieta v New South Wales Department of Education and Training* [2007] FCA 86. This is also consistent with the findings in the studies identified in above n 31 and is discussed in more detail in Chapter 2.

<sup>43</sup> Indeed UK commentator David Palfreyman recently advocated increasing the use of consumer protection by students as other mechanisms employed by HEI had failed, such as quality assurance measures. Palfreyman, 'The Trials of Academe', above n 25, 74.

<sup>44</sup> Australian Government Productivity Commission, *Review of Australia's Consumer Policy Framework*, above n 26. This is discussed more fully in Chapter 5.

<sup>45</sup> ACL s 23.

<sup>46</sup> ACL pt 2–3.

<sup>47</sup> Paterson, above n 6.

<sup>48</sup> *Clark v University of Lincolnshire and Humberside* [2000] 3 All ER 752; *Griffith University v Tang* [2005] HCA 7; (2005) 221 CLR 99, 156 [165] (Kirby J); Mark Davies, 'Challenges to "Academic Immunity" — The Beginning of a New Era?' (2004) 16(2–3) *Education and the Law* 75.

<sup>49</sup> *Clark* [2000] 3 All ER 752 and the exclusive purview of the university Visitor. See a more detailed discussion in Chapter 2. Note that this may still be an issue for students studying in Western Australia where the university Visitors' jurisdiction is still alive and potentially extensive.

courses; styles of teaching;<sup>50</sup> methods and modes of course of delivery (format and availabilities of online resources, laboratories); and academic progression.<sup>51</sup> It may also include decisions regarding attribution of credit for previous studies or relevant work experience (recognised prior learning).<sup>52</sup> Other claims made by students relate to disciplinary decisions regarding students' behaviour in relation to HEI property or, most usually, academic misconduct. As will be seen, the student–HEI contract contains terms relating to *all* of these types of decision making, that is, terms regulating disciplinary decision making as well as matters of academic judgement. Decisions involving disciplinary issues are complex in their interrelation with administrative law principles and will only be examined to the extent that terms in relation to disciplinary issues form part of the student–HEI contract and are therefore subject to the UCT provisions.<sup>53</sup>

Not all of the examples of academic judgement given above will necessarily be a term of the standard form contract for the supply of educational services. It is the proposition of this research that to the extent matters of academic judgement are terms of the standard form consumer contract for the supply of educational services they will be subject to the UCT provisions. Therefore, as the UCT provisions address issues of substantive unfairness, it is possible that judicial scrutiny of the actual effect of a HEI relying on an unfair term that is concerned with matters of academic judgement will be countenanced. A common example is a term that enables a HEI to unilaterally vary the delivery and content of individual units if the term relied on alters the characteristics of the services supplied.<sup>54</sup> This, it is suggested, circumvents the principle that academic matters are non-justiciable, thus advancing students' rights as consumers. As the UCT looks to the substantial fairness of terms, the provisions rely less on a determination by the courts in relation to the quality and standard of educational services with reference to analogous principals from other areas of law, such as professional negligence.<sup>55</sup> It is arguable that the new UCT regime can deal with claims in relation to the provision of the service more effectively than other

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<sup>50</sup> Patty Kamvounias and Sally Varnham, 'In-House or in Court? Legal Challenges to University Decisions' (2006) 18(1) *Education and the Law* 1, 2.

<sup>51</sup> Martin Davis, 'Students, Academic Institutions and Contracts — A Ticking Time Bomb?' (2001) 13 *Education and the Law* 9, 8.

<sup>52</sup> See, eg, *Dudzinski v Kellow* [1999] FCA 390.

<sup>53</sup> A similar approach was taken by Davis, above n 51, 18. For more on the interrelation between the two see Simon Whittaker, 'Public and Private Law-making: Subordinate Legislation, Contracts and the Status of "Student Rules"' (2001) 21(1) *Oxford Journal of Legal Studies* 103.

<sup>54</sup> Discussed in Chapter 5.

<sup>55</sup> See Davies, above n 48; David Palfreyman, '£400K for Educational Malpractice by University Academics' (2006) 18(2–3) *Education and the Law*, 217; David Palfreyman, 'HE's 'Get-Out-of-Jail-Free Card' (2010) 14(4) *Perspectives: Policy and Practice in Higher Education* 114.

actionable rights where the courts have declined to examine matters of academic judgement in relation to the educational services provided.

### **Significance**

As the corporatisation of universities and export of education continues to grow, protection of consumers of higher education in Australia is an important one.<sup>56</sup> Despite considerable regulation, evidence suggests that consumers of higher education services do not seek redress under legislative regimes specifically designed to protect the rights of consumers.<sup>57</sup>

This work will contribute to the field of research by an examination and analysis of the case law, legislation and the literature in respect of this area of the law. The UCT became operative nationally in 1 July 2010. Such consumer rights have existed in other jurisdictions such as the UK for some years and applied to the higher education sector, albeit not extensively.<sup>58</sup> A search of the literature shows that the impact of the new provisions has not been considered in any detail in the context of the Australian higher education sector. The work will determine whether the introduction of a UCT regime in the ACL overcomes identifiable barriers faced by students using consumer protection as a means to ensure they receive services as promised and advances their rights as consumers. The research will make a contribution to knowledge in the field by the identification of changes required to current practice in the higher education sector.

### **Research Method**

Legal research involves an application of two broad categories of legal source materials, that is, examination of both primary and secondary sources.<sup>59</sup> Primary sources of law are found in legislation and the reported legal cases. Secondary

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<sup>56</sup> Bradley, above n 2, recommendations 19, 20, 21, 23 and 24 relating to a national accrediting body, quality assurance and a standards framework and 26 with regard to funding for teaching and learning in higher education. See also Australian Government, *Transforming Australia's Higher Education System*, above n 15; Bradley, above n 2, 31–3 and the establishment of TEQSA.

<sup>57</sup> See Jackson et al, above n 31; Astor, 'Why do Students Sue Australian Universities?', above n 31; Kamvounias and Varnham, 'Legal Challenges to University Decisions Affecting Students', above n 31; Helms, above n 31.

<sup>58</sup> *Unfair Terms in Consumer Contracts Regulations 1999* (UK). See, eg, Office of Fair Trading, *Unfair Contract Terms* (1999) 6, 8 [1.15], 72; Office of Fair Trading *Unfair Contract Terms* (1998) 5; Office of Fair Trading, *Unfair Contract Terms Bulletins* 27, 28 (2004) September (5 August 2012) <<http://www.offt.gov.uk/OFTwork/publications/publication-categories/guidance/unfair-terms-consumer/>>.

<sup>59</sup> See Catriona Cook, Robin Creyke, Robert Geddes and David Hamer, *Laying Down the Law* (Butterworths, 2008); Bruce Bott, Jill Cowley, Lynette Falconer, Irene Nemes and Graeme Coss *Effective Legal Research* (LexisNexis Butterworths, 2007); Terry Hutchinson, *Researching and Writing in Law* (Lawbook Co, 2010); John Farrar, *Legal Reasoning* (Lawbook Co, 2010); Margaret McKerchar, *Designs and Conduct of Research in Tax, Law and Accounting* (Thomson Reuters, 2010).

sources of law are found in scholarly works such as textbooks and monographs, legal encyclopaedias and journal articles. Further explanation of the research method is outlined below.

#### *Primary source material*

The research of primary source material of information on the law will involve a detailed explanation of the application and interpretation of the various sections of Commonwealth and state legislation regarding consumer protection and how the legislation has been interpreted in court proceedings.<sup>60</sup>

#### *Secondary source material*

This research will include a thorough investigation of all available secondary source materials pertaining to tertiary education and consumers. Many legal publications have restricted access and lending protocols and are more easily accessed in law libraries in Australia. Well established protocols for undertaking this research of legal materials will be followed.

#### *Analysis and Compilation*

Due to the interpretative function of the courts with respect to legislation, consideration of legislation involves analysis of relevant case decisions. A comparison of associated decisions will then be undertaken with reference to secondary source content, outlining the views of legal scholars and judges who refer to those cases in subsequent decisions. The information obtained from the views of authors on secondary sources as well as the reasoning made by judges will then be compiled. The compilation will be done in such a way as to interpret whether there is evidence that supports or contradicts the view that consumers of education services in Australia are effectively protected in the delivery of quality of those services.

### **Outline and structure**

#### **Chapter 1: Introduction**

This chapter describes the research problem, explains the objectives of the thesis, the research methodology and identifies the significance of the work within the legal framework of the higher education sector.

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<sup>60</sup> A search of all available court and tribunal databases in Australasian Legal Information Institute (AustLII) <<http://www.austlii.edu.au/>> was undertaken up to 18 July 2011 using the search term student!. A Boolean search of all case and journal data bases using student\* and consumer\* was also undertaken up to 21 July 2011. The use of 'student' as opposed to 'university' was significant as this ensured that claims against private providers of higher education services were captured in the results.



## **Chapter 2: The Student–HEI Relationship**

A review of the case law, legislation and literature will be undertaken to establish how student complaints are currently resolved to situate the research within the legal framework of the student–HEI relationship and potential avenues for redress. The examination of the various areas of law will identify the significance of the research within a broader legal context. (Objective 1)

An examination of what matters courts consider justiciable in the context of HEI decisions in other areas of the law will also be undertaken in an attempt to ascertain whether claims made by students in relation to academic matters are justiciable. In order to assess the effectiveness of the provisions of the UCT in the ACL in relation to claims regarding the nature of the educational service provided by a HEI, the research will examine whether courts will adjudicate claims relating to the same. (Objectives 2, 4 and 5)

## **Chapter 3: Application of the ACL to HEI’s in Australia**

This chapter will examine and analyse the new national uniform consumer protection legislation, the ACL, with reference to case law, to determine the threshold issue of whether the ACL applies to the provision of higher education services to students in Australia. Specifically the chapter will identify any barriers preventing students from utilising the consumer protection legislation that relates to the contract for educational services. In particular the effect of the new extended definition of ‘trade or commerce’, which includes activities carried on in a business or professional services, will be considered.<sup>61</sup> In order to attract the UCT provisions, the contract for services must be services provided, granted or conferred in trade or commerce.<sup>62</sup>

Specifically the research will assess what matters of academic judgement are activities that fall within the scope of the legislative requirement that the services supplied must occur in ‘trade or commerce’ as defined by the ACL. Previously under the *Trade Practices Act (1974)* (Cth) matters going to issues of academic judgement (as opposed to promotional activities) have been considered matters internal to the student–HEI relationship. Therefore, academic activities, such as statements made in lectures, while conducted in relation to the trade and commerce of a HEI, are not

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<sup>61</sup> ACL s 2.

<sup>62</sup> ACL s 2.

within the scope of the legislation as conduct *in* trade or commerce.<sup>63</sup> Attention will also be given to whether HEIs can avail themselves of Crown immunity<sup>64</sup> or if there are any jurisdictional issues arising for particular categories of students, including international students, students studying at Australian HEIs at campuses located overseas, and online students who may enrol in Australian courses but be resident outside the jurisdiction.<sup>65</sup> (Objectives 2, 3 and 4)

#### **Chapter 4: The Student–HEI Contract**

The protections available under the UCT of the ACL require the existence of several factors before the provisions are enlivened. First there must be a contract between the supplier of the services (the HEI) and the consumer of those services (the student). This chapter is firstly concerned with an analysis of the case law and literature to establish whether a contract between the student and the HEI exists in Australia. Assuming such a contract exists, the chapter will then examine the nature of the student–HEI contract and attempt to determine the scope of the terms of the contract, with particular reference to the myriad of HEI enrolling, policy and other documents. This also assists with the determination of the exact nature of the educational service supplied, which is relevant when considering the specific UCT provisions in Chapter 4. (Objectives 3 and 4)

#### **Chapter 5: The Student–HEI Contract and the UCT**

The ACL saw the introduction of an unfair contract terms regime that previously had only existed in limited jurisdictions in Australia, notably Victoria, as a means of protection in consumer contracts. Now any term in a consumer contract that is an unfair term as defined under the ACL is void. An analysis of the case law, legislation and literature will be undertaken to establish whether the contract for the supply of educational services is a standard form consumer contract as defined by Chapter 2 Part 2–3 of the ACL. Whether students are consumers for the purpose of the relevant legislative provisions will be also considered in the light of academic commentary from other related disciplines. (Objective 4)

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<sup>63</sup> *Fasold v Roberts* (1997) 145 ALR 548; *Plimer v Roberts* (1997) 150 ALR 235; *Quickenden v O’Conner* (2001) 184 ALR 260; Francine Rochford, ‘Traders of The Lost Ark — Lecturers and Liability’ (2001) 13(2) *Education and the Law* 127.

<sup>64</sup> CCA ss 2A, 2B.

<sup>65</sup> The CCA extraterritorial reach is extended by simply requiring one party to be in Australia, see, eg, ACL s 2, the definition of *in* ‘trade or commerce’. Many providers use educational agents. Liability for the use of educational agents lies with providers and is currently governed by the *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007* and common law principles of agency.

Importantly the analysis will identify any connection between the UCT provisions regarding substantive unfairness and the protection afforded students by the legislation in the supply of educational services. Specifically the chapter will consider whether there are any terms in the student-HEI contract that are potentially unfair terms as proscribed under the ACL. The consequences and remedies available upon a term being declared unfair will be considered. The analysis will evaluate the implications for the higher education sector and make recommendations for change in current practice. (Objectives 4 and 5)

### **Chapter 6: Conclusion**

This chapter will conclude by determining whether the UCT provisions of the ACL provide effective protection for students as consumers of higher education services by overcoming the identified barriers faced by students in legal challenges as regards the nature of the educational service supplied. The identified barriers are first, that claims relating to academic matters are almost without exception, non-justiciable. Second, even if students have been able to establish their claim, proving loss or damage has been problematic. In relation claims made against HEIs in consumer protection litigation specifically, the principal barrier has been difficulties with categorising the provision of educational services as being a service supplied in 'trade or commerce'. It is arguable that the introduction of a UCT regime in the ACL overcomes the identified barriers faced by students using consumer protection legislation as a means to ensure they receive services as promised and advance their rights as consumers.

## Chapter 2: The Student–HEI Relationship

### Introduction

The principal research question addressed in this thesis is whether the introduction of an Unfair Contract Terms ('UCT') regime in the *Australian Consumer Law* ('ACL') advances students' rights as consumers by providing effective protection for students in the supply of educational services. Recent studies have considered the nature of student litigation with HEIs.<sup>1</sup> The reports disclose the difficulties students face when bringing their complaints to court, both procedurally and substantively.<sup>2</sup> A review of the case law, legislation and literature will be undertaken to establish how student complaints are currently resolved to situate the research within the legal framework of the student–HEI relationship and potential avenues for redress. In evaluating the efficacy of the UCT provisions, it is necessary to place rights accruing to students as consumers in a broader legal context.

This chapter will consider some of the barriers faced by students bringing legal challenges more widely than consumer protection alone. This will assist in the evaluation of whether these issues can be overcome by the UCT regime in the ACL. The most significant limitation faced by students is the courts' preparedness to consider the substance of their claim if it relates to questions of academic judgement or evaluation. Courts have been consistent in their reluctance to examine matters relating to the exercise of academic judgement and accordingly such matters are considered non-justiciable. The apprehension of courts to engage in review of academic decisions resonates with many of the concerns identified in the jurisprudence relating to whether the activities of a HEI are in 'trade or commerce' as required by the ACL, discussed in Chapter 3. The new UCT regime may deal with claims concerning the provision of educational services more effectively than other actionable rights that require the court to examine matters of academic judgement in relation to the nature of educational services provided.

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<sup>1</sup> Jim Jackson et al, 'Student Grievances and Discipline Matters Project' (Final Report, Australian Learning and Teaching Council, May 2009); Hilary Astor, 'Australian Universities in Court: Causes, Costs and Consequences of Increasing Litigation' (2008) 19(3) *Australasian Dispute Resolution Journal* 156; Hilary Astor, 'Why do Students Sue Australian Universities?' (2010) 21 *Australasian Dispute Resolution Journal* 20; Patty Kamvounias and Sally Varnham, 'Legal Challenges to University Decisions Affecting Students in Australian Courts and Tribunals' (2010) 34 *Melbourne University Law Review* 140. For a comparative study see Lelia Helms, 'Comparing Litigation in Higher education: The United States and Australia in 2007' (2009) 14(2) *International Journal of Law & Education* 37.

<sup>2</sup> Astor, 'Why do Students Sue Australian Universities?', above n 1, 31; Jackson et al, above n 1. The authors state that the most common reason why students were unsuccessful in their claims was because the allegations made were not supported by the facts or the court/tribunal lacked jurisdiction: at 13.

## The legal framework

The legal relationship between the student and HEI is multifaceted, overlaid by principles at common law and under statute.<sup>3</sup> Similarly, complaints made by students against HEIs are varied in their diversity of causes of action, reflective of the complex nature of the relationship.<sup>4</sup> Frequently claims brought against HEI by students can be categorised as 'omnibus litigation (there being an unwieldy bundle of claims)'.<sup>5</sup> Two significant studies have recently been undertaken to determine the nature of student litigation with HEI and the outcomes and trends in this regard.<sup>6</sup> These studies also report an increase in the number of cases being brought before courts and tribunals by students.<sup>7</sup>

One of the objectives of the research is to review the case law, legislation and literature to establish how student complaints are currently resolved to situate the research within the legal framework of the student–HEI relationship and potential avenues for redress. As indicated, the nature and volume of litigation involving students and HEI is increasing and diverse, reflecting the complex nature of the student–HEI relationship. Many of the claims brought before the courts do not involve

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<sup>3</sup> See generally Dennis Farrington and David Palfreyman, *The Law of Higher Education* (Oxford University Press, 2<sup>nd</sup> ed, 2012); Oliver Hyams, *Law of Education* (Jordans, 2<sup>nd</sup> ed, 2004); Jim Jackson and Sally Varnham, *Law for Educators: School and University Law in Australia* (LexisNexis Butterworths, 2007); Tim Birtwistle and Melissa Askew, 'The Teaching and Higher Education Act 1998 — Impact on the Student Contract' (1999) 11(2) *Education and the Law* 89; Martin Davis, 'Students, Academic Institutions and Contracts — A Ticking Time Bomb?' (2001) 13(1) *Education and The Law* 9; Lynden Griggs, 'Tertiary Education, The Market and Liability 'In Trade or Commerce' (2004) 12 *Competition & Consumer Law Journal* 1; William P Hoye and David Palfreyman, 'Plato vs Socrates: The Devolving Relationship Between Higher Education Institutes and their Students' (2004) 16(2–3) *Education and the Law* 97; Jim Jackson, 'Regulation of International Education: Australia and New Zealand' (2005) 10(2) & (2006) 11(1) *Australia & New Zealand Journal of Law & Education* 67; J Stephen Kós and Russell McVeagh, 'The View From the Bottom of the Cliff — Enforcement of Legal Rights Between Student and University' (1999) 4(2) *Australian & New Zealand Journal of Law & Education* 18; Bruce Lindsay, 'Complexity and Ambiguity in University Law: Negotiating the Legal Terrain of Student Challenges to University Decisions' (2007) 12(2) *Australian & New Zealand Journal of Law & Education* 7; Sam Middlemiss, 'Legal Liability of Universities for Students' (2009) 12(2) *Education and the Law* 69; David Palfreyman, 'The HEI–Student Legal Relationship, with Special Reference to the USA Experience' (1999) 11(1) *Education and the Law* 5; Francine Rochford, 'The Relationship Between The Student and The University' (1998) 3(1) *Australian & New Zealand Journal of Law & Education* 28; Simon Whittaker, 'Public and Private Law-Making: Subordinate Legislation, Contracts and the Status of Student Rules' (2001) 21(1) *Oxford Journal of Legal Studies* 103.

<sup>4</sup> See especially Kamvounias and Varnham, 'Legal Challenges to University Decisions', above n 1; Astor, 'Why do Students Sue Australian Universities?', above n 1; Neville Harris, 'Resolution of Students Complaints in Higher Education Institutions' (2007) 27(4) *Legal Studies* 566; Patty Kamvounias, and Sally Varnham, 'In-House or in Court? Legal Challenges to University Decisions' (2006) 18(1) *Education and the Law* 1.

<sup>5</sup> *Hanna V University of New England* [2006] NSWSC 122, [2].

<sup>6</sup> Jackson et al, above n 1; Astor, 'Why do Students Sue Australian Universities?', above n 1; Astor, 'Australian Universities in Court', above n 1; For a comparative study see Helms, above n 1.

<sup>7</sup> Astor, 'Australian Universities in Court' above n 1. Astor reports that despite the increase in the size of the higher education sector and therefore a corresponding increase in student numbers, the increase in litigation is not a proportionate increase: 'Roughly speaking, the number of Universities has doubled and the number of students tripled but the levels of the litigation have increased about eightfold': at 166.

consumer protection legislation. Lindsay<sup>8</sup> has considered in detail the legal framework applying to the student–HEI relationship and the causes of action available to students with respect to HEIs. Lindsay categorises the areas of rights arising in broadly three circumstances: within the ‘domestic jurisdiction’, under ‘public law’ and rights accruing in ‘private law’. Rights available to students under consumer protection legislation would fall into the category of private law. The classification of Lindsay is adopted below and serves as an overview for a framework for placing this research in context. The examination of the various areas of law will identify the significance of the research within the broader legal context. It is not intended to deal in detail with other causes of action available to students in bringing complaints against HEI elsewhere in the thesis, except to the extent it assists with the determination of what matters of academic judgement courts consider justiciable.

### **Domestic jurisdiction**

#### *The university Visitor*

The higher education sector and institutions in the post-secondary sector are highly regulated in their formation and operation in Australia.<sup>9</sup> All universities within the sector are special purpose statutory corporations with their own enabling acts.<sup>10</sup> Originally, all of these acts provided for a university Visitor. The jurisdiction of the Visitor to adjudicate matters in dispute within the university arises as staff and students are members of the eleemosynary corporation, on which the Australian legislative framework for universities is based, having its history in canon law.<sup>11</sup> Rochford notes:

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<sup>8</sup> Lindsay, ‘Complexity and Ambiguity in University Law’, above n 3.

<sup>9</sup> Helms, above n 1. She describes the three types of higher education providers: self-accrediting; non-self-accrediting and universities. Helms notes that the post-secondary sector in Australia is dominated by universities and all HEIs are governed by state and commonwealth legislation in the form of various state Higher Education Acts and Commonwealth funding legislation *Higher Education Support Act 2003* (Cth) and *Higher Education Funding Act 1988* (Cth). There are special regulatory provisions in relation to international students *Educational Services for Overseas Students Act 2000* (Cth): at 37, 39. There are 39 Australian universities, 37 are publically funded and 2 are private. There is one Australian branch of an overseas university, 3 other self-accrediting higher education institutions and more than 150 non-self-accrediting higher education providers (that is it offers at least one course of study that is accredited as a higher education award): extracted from <http://www.deewr.gov.au/HigherEducation/Pages/Overview.aspx 20 September 2011>.

<sup>10</sup> See Kamvounias and Varnham, ‘Legal Challenges to University Decisions’, above n 1, 143 nn 9–11 citing, eg, *Australian National University Act 1991* (Cth); *Charles Darwin University Act 2003* (NT); *Griffith University Act 1998* (Qld); *University of Adelaide Act 1971* (SA); *University of Canberra Act 1989* (ACT); *University of Melbourne Act 2009* (Vic); *University of Sydney Act 1989* (NSW); *University of Tasmania Act 1992* (Tas); *University of Western Australia Act 1911* (WA); and the two private universities *Bond University Act 1987* (Qld) and *University of Notre Dame Australia Act 1989* (WA).

<sup>11</sup> See generally J L Caldwell, ‘Judicial Review of Universities — the Visitor and the Visiting’ (1982) 1 *Canterbury Law Review* 307; J W Bridge, ‘Keeping the Peace in the Universities: The Role of the Visitor’ (1970) 86 *The Law Quarterly Review* 531.

Where students are members of the corporation, the rules of the University are binding upon them in the same manner as municipal laws are binding upon constituents of the municipality.<sup>12</sup>

The courts have repeatedly affirmed the Visitor's exclusive jurisdiction over matters internal to the membership of the university, including academic decisions made pursuant to the internal rules of the university and as such are not reviewable by the courts.<sup>13</sup> Caldwell notes that the courts have been consistently reluctant to review decisions of the Visitor outside of issues relating to the adherence of procedure and natural justice (and even then there has been limited success).<sup>14</sup> The special needs and nature of the university have resulted in universities being afforded significant autonomy under the Visitorial system.<sup>15</sup>

However, the university Visitor has been abolished for all but ceremonial functions in every state in Australia with the exception of Western Australia.<sup>16</sup> Thus there may still be difficulties for students in Western Australia bringing claims against universities, as the jurisdiction of the Visitor is exclusive.<sup>17</sup> This potentially prevents students in Western Australia from bringing claims in relation to matters considered internal to the university, including challenges to decisions considered to be purely academic in nature and possibly claims arising under the student–HEI contract. However, it is argued that the situation for students with a claim under consumer protection legislation and more particularly a claim under the UCT provisions is analogous to the case of *Murdoch University v Bloom* [1980] WAR 193. In this case the court considered a dispute in relation to a university staff member under the terms of the contract of employment. On appeal in respect of the issue of review by the Visitor, the Supreme Court:

... *distinguished rights enjoyed under the law of the land* (such rights as under contract) and matters of an intra-mural nature. Thus the Court held that the defendant's first claim was essentially a claim for a declaration of right concerning the common law question of

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<sup>12</sup> Rochford, 'The Relationship Between The Student and The University', above n 3, 29. For a discussion of the nature of the corporate status and membership of students in universities see Suzanne Corcoran, 'Living on the Edge: Utopia University Limited.' (1999) 27 *Federal Law Review* 265.

<sup>13</sup> Caldwell, above n 11, 316; Lindsay, 'Complexity and Ambiguity in University Law', above n 3, 13. See generally Anwar N Khan and Alan G Davison, 'University Visitor and Judicial Review in the British Commonwealth (Old) Countries' (1995) 24 *Journal of Law and Education* 457.

<sup>14</sup> Caldwell, above n 11, 319.

<sup>15</sup> Caldwell, above n 11, 318; See generally Rochford, 'The Relationship Between The Student and The University', above n 3.

<sup>16</sup> Kamvounias and Varnham, 'Legal Challenges to University Decisions', above n 1, 148–50 nn 58–9.

<sup>17</sup> *University of Western Australia Act 1911* (WA) s 7(1); *Curtin University of Technology Act 1966* (WA) s 27; *Murdoch University Act 1973* (WA) s 9; *Edith Cowan University Act 1984* (WA) s 42; Lindsay, 'Complexity and Ambiguity in University Law', above n 3. Citing *Murdoch University v Bloom* [1980] WAR 193: at 116.

contractual construction. Burt CJ said, at 198 '[i]t is not a matter which relates to the management of the house and it is not a matter indifference which can be resolved by the application of the law of the house'<sup>18</sup>

In considering the impact of this decision on the modern visitatorial jurisdiction Caldwell states:

... it is submitted that when an Act of Parliament is in issue then any duty under it would fall within the province of the courts — although domestic characteristics may be influential in the courts declining a discretionary remedy.<sup>19</sup>

However, Caldwell goes on to note that 'if an issue of purely domestic administration arises it is then that the Visitor would become the appropriate forum for complaint.'<sup>20</sup> The notion that a duty arising under legislation, here the ACL, is within the courts purview is consistent with the courts consideration of matters arising under the various anti-discrimination acts noted below. In this way it is arguable that a claim under the ACL is not an issue of purely domestic administration.

Direction regarding the exercise of the Visitor's exclusive jurisdiction and the ability of the court to review matters raised under statute can also be found in the decision of Drummond J in *Dudzinski v Kellow* [1999] FCA 390. In that matter, a student brought a claim against individual members of Faculty and Griffith University in negligence and misleading and deceptive conduct under the *Trade Practices Act 1974* (Cth). In considering the University's application to strike out the statement of claim, Drummond J stated at paragraph [3] (emphasis added):

Some of the applicant's complaints concern harm he alleges he suffered as a result of the misapplication to him by University staff of various of the internal rules of the University. At common law, the courts do not have jurisdiction to entertain such matters: the power to enquire into and rectify such wrongs if necessary by the award of full compensatory damages, is vested exclusively in the Visitor of the University, subject only to the supervisory jurisdiction of the appropriate superior court. See *Thorne v University of London* [1966] 2 QB 237 and to the width and jurisdiction of the powers of the Visitor see *Bailey-Jones v University of Newcastle* (1990) 22 NSWLR 424. However, there is no provision under the *Griffith University Act 1971* (Qld) for a Visitor of that University ... I think that I have jurisdiction to determine this class of matter raised by the applicant: there is no ground for holding that this Court's jurisdiction under the *Trade Practices Act 1974* (Cth), which is invoked by the applicant in respect of some of his causes of action and of

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<sup>18</sup> As cited in Caldwell, above n 11, 326–7 (emphasis added).

<sup>19</sup> Caldwell, above n 11, 327.

<sup>20</sup> *Ibid.*



which some of his complaints concerning the misapplication of the University's internal rules are associated, is impliedly excluded by the circumstance I have referred to. *In any event, it would be rare for an implication to be so clear as to exclude the general jurisdiction of a court of plenary jurisdiction.*

The position for students in Western Australia where the office of the Visitor remains operational is less clear. However, following the reasoning in the decisions above it is submitted that rights arising under the statutory 'law of the land' are not excluded from the courts general jurisdiction and are arguably justiciable by the courts notwithstanding the operation of the Visitor's jurisdiction.

### *Dispute resolution processes*

Most HEIs typically have significant processes in place for internal grievance and dispute resolution mechanisms,<sup>21</sup> although according to the recent Australian Learning and Teaching Council ('ALTC') project on student grievances and discipline matters they are perhaps not as robust as one may expect.<sup>22</sup> While HEIs have made progress in the development of internal grievance procedures, more work is required in relation to their overall soundness<sup>23</sup> as well as students' perceptions regarding the reliability and trustworthiness of outcomes.<sup>24</sup> Most commentators in this area are champions of dispute resolution processes as a cost effective and efficient way to resolve student complaints. The benefits are said to be not just in terms of measurable financial savings, but other intangible issues that arise when students and HEIs are in conflict, such as reputational issues, emotional stress and impairment to careers of faculty members.<sup>25</sup> Further, some scholars in the area have suggested the adoption of a National Student Ombudsman in much the same way as the UK system currently exists.<sup>26</sup> Some HEIs have also established their own student Ombudsman within their campus.<sup>27</sup>

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<sup>21</sup> And have statutory obligations in this regard in relation to the provision of higher education services to international students: Standard 8 *Educational Services for Overseas Students Act 2000* (Cth). See generally NSW Ombudsman, *Complaint Handling at Universities: Best Practice Guidelines*, December 2006, A-6.

<sup>22</sup> Jackson et al, above n 1, executive summary, XI.

<sup>23</sup> Jackson et al, above n 1, 83 [11.6.3]; See also Hilary Astor, 'Improving Dispute Resolution in Australian Universities: Options for the Future' (2005) 27(1) *Journal of Higher Education Policy and Management* 49.

<sup>24</sup> Jackson et al, above n 1, 85 [11.8]; Neville Harris, above n 4. Harris discusses the impact of the dispute resolution processes of the Office for the Independent Adjudicator in the UK and the resultant reduction of students' request for judicial review: at 583.

<sup>25</sup> Astor, 'Improving Dispute Resolution in Australian Universities', above n 23; Astor, 'Why Do Students Sue Australian Universities?', above n 1; Astor, 'Australian Universities in Court', above n 1; Kamvounias and Varnham, 'Legal Challenges to University Decisions Affecting Students', above n 1.

<sup>26</sup> Astor, 'Why do Students Sue Australian Universities?', above n 1. Astor observes that 'complexity' in student litigation supports the idea for national dispute resolution scheme as complexity means resource intensive plus unrepresented litigants: at 30; Astor, 'Improving Dispute Resolution in Australian

Reports in the media suggest that HEIs often settle students' claims privately,<sup>28</sup> presumably after accessing the institutions internal grievance procedures. The motivation and push for cost effective and efficient solutions needs to be moderated by the view that alternative dispute resolution mechanisms can erode rights in the long term<sup>29</sup> because of the confidential nature of the settlements.<sup>30</sup> As commentators have noted, if HEIs 'payout students who complain ... this prevents such information being available to other students or prospective students.'<sup>31</sup> It is also possible that mandatory dispute resolution clauses may in fact fall foul of the new UCT provisions in the ACL. Such a term could be an unfair term if it attempts to restrict parties' rights to bring the matter before the courts and therefore void.<sup>32</sup> This is discussed more fully in Chapter 5.

## Public law

### *Judicial review*

As noted above, private and public HEIs are incorporated by statute under establishing acts<sup>33</sup> and regulated by various commonwealth and state legislation regarding the provision of educational services in higher education. In these

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Universities', above n 23; Bronwyn Olliffe and Anita Stuhmcke, 'A National University Grievance Handler? Transporting The UK Office of the Independent Adjudicator for Higher Education (OIA) to Australia' (2007) 29(2) *Journal of Higher Education Policy and Management* 203. The OIA for higher education in the United Kingdom has been operating since it was established under the *Higher Education Act 2004* (UK) and in effect replaces the Visitor jurisdiction in UK higher education institutions. For further discussion of the effectiveness of this office see Harris, above n 4. Harris observes that judicial review of student cases have become more rare since 2005: at 583; A national student Ombudsman was not supported nor specifically rejected by Jackson et al, above n 1, 85 [11.8.3], although there does not appear to be popular support for a national student Ombudsman currently. See, eg, Guy Healy, 'Student Ombudsman Scotched', *The Australian* (online), 21 January 2010 <<http://www.theaustralian.com.au/higher-education/student-ombudsman-scotched/story>>.

<sup>27</sup> Kamvounias and Varnham, 'Legal Challenges to University Decisions Affecting Students', above n 1, 151.

<sup>28</sup> See, eg Debra Jopson, 'Unis Face Legal Challenge From Students' *Sydney Morning Herald* (Sydney), 6 June 2005; Patty Kamvounias and Sally Varnham, 'Getting What They Paid For: Consumer Rights of Students in Higher Education' (2006) 15 *Griffith Law Review* 306, 320, nn 74–7. See also Joanna Williams, 'Constructing Consumption: What Media Representations Reveal About Today's Students' in Mike Molesworth, Richard Scullion and Elizabeth Nixon (eds), *The Marketisation of Higher Education and the Student as Consumer* (Routledge, 2011) 170.

<sup>29</sup> See, eg, Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (LexisNexis, 2<sup>nd</sup> ed, 2002), 380–6. This argument is most commonly raised in the context of legal disputes involving claims of discrimination. The development of consumer rights is analogous to the development and protection of rights that prevent discrimination on unlawful grounds. See generally Claire Baylis, and Robyn Carroll, 'The Nature and Importance of Mechanisms for Addressing Power Differences in Statutory Mediation' (2002) 14(2) *Bond Law Review* 285 <<http://epublications.bond.edu.au/blr/vol14/iss2/3>>.

<sup>30</sup> Harris, above n 4, 584.

<sup>31</sup> Kamvounias and Varnham, 'Getting What They Paid For', above n 28, 320; Astor and Chinkin, above n 29, 380–6.

<sup>32</sup> See ACL pt 2-3 s 25(k) discussed in Chapter 5.

<sup>33</sup> Lindsay, 'Complexity and Ambiguity in University Law', above n 3. He notes that even those universities that are not incorporated by statute and are incorporated under the Commonwealth Corporations Act have statutory support in the form of enabling legislation: at 8. See also Corcoran, above n 12.

circumstances, administrative law remedies may be enlivened.<sup>34</sup> Rochford notes also that 'the University as a public organisation is problematic: it is clear that it may be subject to administrative remedies in many jurisdictions...'<sup>35</sup>.

Kamvounias and Varnham discuss in detail the nature of judicial review under statute and common law in relation to claims made by students against HEIs.<sup>36</sup> Their paper includes a detailed analysis of the judicial review cases before the courts, including a consideration of the nature of the claims and in particular student challenges in decisions involving academic judgement and assessment. Kamvounias and Varnham conclude that while courts have demonstrated a reluctance to interfere in academic decisions, courts will take care to determine whether the challenge is to a decision that involved academic judgement or to the process by which an academic decision was made.<sup>37</sup> 'Substance is immune from review but process is not'.<sup>38</sup>

It is also clear from the High Court decision in *Griffith University v Tang* (2005) 221 CLR 99 that a narrow interpretation of the court's jurisdiction in relation to judicial review will be taken, at least under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* and the *Judicial Review Act 1991 (Qld)*. In that case, a student brought proceedings in the Supreme Court of Queensland seeking review under the state Act (which was based on the Commonwealth Act) regarding a decision to exclude her from the PhD programme she was enrolled in at Griffith University. The student was excluded on the grounds that she had 'undertaken research without regard to ethical and scientific standards' and had thereby engaged in 'academic misconduct'.<sup>39</sup>

The student sought orders based on breaches of the requirement of 'natural justice, failures to comply with mandatory procedure requirements, improper exercises of power, and errors of law'.<sup>40</sup> The appeal turned on the issue of whether the decision made by the Assessment Board (a subcommittee of the Research and Post-Graduate Studies committee of Griffith University) was 'a decision of an

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<sup>34</sup> Lindsay, 'Complexity and Ambiguity in University Law', above n 3, 8.

<sup>35</sup> Francine Rochford 'Claims Against a University: The Role of Administrative Review in Australia and the United Kingdom' (2005) 17(1-2) *Education and the Law* 23, 37.

<sup>36</sup> Kamvounias and Varnham, 'Legal Challenges to University Decisions Affecting Students', above n 1, 157-71.

<sup>37</sup> See generally Bruce Lindsay, 'University Hearings: Student Discipline Rules and Fair Procedures' (2008) 15 *Australian Journal of Administrative Law* 146.

<sup>38</sup> Kamvounias and Varnham, 'Legal Challenges to University Decisions Affecting Students', above n 1, 164.

<sup>39</sup> *Griffith University v Tang* (2005) 221 CLR 99, 99[1].

<sup>40</sup> *Ibid.*

administrative character ... made under enactment'.<sup>41</sup> The court determined that the decision to exclude the student was not a decision made under enactment and therefore the student's claim failed. Kamvounias and Varnham suggest that this decision of the High Court should be narrowly construed as pertaining to one section of a Commonwealth Act in relation to judicial review<sup>42</sup> and:

... should not be read as limiting common law rights in anyway and that Australian students will continue to have common law rights to seek judicial review wherever there is sufficient indication of a failure on the part of a University to adhere to its published processes or lack of fairness and will be successful if they can prove unfair operative process.<sup>43</sup>

Similarly, Lindsay is of the view that the application of administrative law to the student–HEI relationship remains broad in relation to claims of abuse of process, denial of natural justice, or error of law in relation to the process, but not a determination of the fairness of the decision itself.<sup>44</sup>

#### *Office of the Ombudsman*

Students attending HEIs also have access for redress through the state Ombudsmen. It is important to note that an Ombudsman's remedial powers are limited in the sense that they can only make recommendations to a HEI regarding an appropriate course of action following review of a student complaint to their office.<sup>45</sup> Astor, Kamvounias and Varnham provide a more detailed discussion of the role of the Ombudsman<sup>46</sup> in higher education and a summary of their reports.<sup>47</sup> All authors note the advice from state Ombudsmen offices about the increasing number and complexity of student complaints to their offices and the 'extraordinary step' the Ombudsmen took in writing a joint letter to the editor of *The Australian* in April

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<sup>41</sup> Ibid 99 [3].

<sup>42</sup> Kamvounias and Varnham, 'Doctorial Dreams Destroyed: Does *Griffith University v Tang* Spell the End of Judicial Review of Australian University Decisions?' (2005) 10(1) *Australia & New Zealand Journal of Law & Education* 5. For a full discussion of the case and implications for judicial review see Daniel Stewart, 'Griffith University v Tang, "Under an Enactment" and Limiting Access to Judicial Review' (2005) 33(3) *Federal Law Review* 525.

<sup>43</sup> Kamvounias and Varnham, 'Doctorial Dreams Destroyed', above n 42, 15.

<sup>44</sup> Lindsay, 'Complexity and Ambiguity in University Law', above n 3, 9.

<sup>45</sup> See, eg, Ombudsman Western Australia (6 August 2012).

<[http://www.ombudsman.wa.gov.au/About\\_Us/Role.htm](http://www.ombudsman.wa.gov.au/About_Us/Role.htm)>; Victorian Ombudsman *Frequently Asked Questions* (6 August 2012) <<http://www.ombudsman.vic.gov.au/www/html/43-frequently-asked-questions.asp>>.

<sup>46</sup> Astor, 'Why Do Students Sue Australian Universities', above n 1, 21. See also Kamvounias and Varnham 'Legal Challenges to University Decisions Affecting Students', above n 1, 150.

<sup>47</sup> Kamvounias and Varnham 'Legal Challenges to University Decisions Affecting Students', above n 1, 150, nn 61–72; See also Olliffe and Stuhmcke, above n 26; Astor, 'Australian Universities in Court', above n 1.

2005.<sup>48</sup> Further, HEIs in receipt of public funding (and whose employees are public officers) are also subject to review by governmental agencies charged with the oversight of proper and appropriate use of public monies and conduct of public officers. Universities are increasingly finding themselves the subject of scrutiny by such agencies.<sup>49</sup>

Particular protections for international students are also available in relation to complaints by international students against their HEI. The provision of education to international students by Australian higher education providers is subject to significant regulation in the provision of education and training to these students.<sup>50</sup> In 2011 the Commonwealth Government established an Overseas Students Ombudsman for complaints relating to private providers of higher education.<sup>51</sup> This Ombudsman deals specifically with complaints from international students attending at a private HEI. This means that complaints from international students from the 37 public universities in Australia cannot be remitted to this office. It is interesting to note that the Ombudsman has no remedy beyond fee recovery<sup>52</sup> and nor does the Ombudsman have jurisdiction in relation to overseas students studying outside Australia.<sup>53</sup> The website for the Overseas Student Ombudsman contains a page entitled 'Other Complaint handling review agencies'.<sup>54</sup> The page includes information and links to the Administrative Appeals Tribunal, the Aged Care Complaints Resolution Scheme and Commissioner, the Australian Commission for Law Enforcement Integrity, the Australian Human Rights Commission, the Inspector-General of Intelligence and Security, the Migration Review Tribunal and Refugee Review Tribunal, the National Anti-Discrimination Gateway, the Office of the

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<sup>48</sup> Kamvounias and Varnham 'Legal Challenges to University Decisions Affecting Students', above n 1, 151.

<sup>49</sup> See, eg, Western Australian Corruption and Crime Commission, *Report on the Investigation of Alleged Public Sector Misconduct by Dr Nasrul Ameer Ali as a Sessional Academic Employed by Curtin University*, 2010.

<sup>50</sup> *Educational Services for Overseas Students Act 2000* (Cth); *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007* (Cth); Australian Vice-Chancellors' Committee, *Provision of Education to International Students Code of Practice and Guidelines for Australian Universities*, 2005.

<sup>51</sup> See Overseas Students Ombudsman (6 August 2012) <<http://www.oso.gov.au/>>; Bernard Lane, 'Commonwealth Ombudsman Allan Usher Already Awash with Grievances', *The Australian* (online), 6 July 2011 <<http://www.theaustralian.com.au/higher-education/commonwealth-ombudsman-allan-usher>>.

<sup>52</sup> See also Hon Senator Chris Evans, Minister for Tertiary Education (Cth), 'Better Consumer Protection for International Students' (Media Release, 23 September 2011) <<http://www.aei.gov.au/Pages/default.aspx?2>> outlining the Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Bill 2011 to provide a system for refunds for international students in the event of a higher education providers closing.

<sup>53</sup> See Overseas Students Ombudsman, above n 51. An overseas student is a student who is or is about to study in Australia on a student visa: at <<http://www.oso.gov.au/frequently-asked-questions/for-overseas-students/>>.

<sup>54</sup> Ibid <<http://www.oso.gov.au/related-sites/other-complaint-handling-review-agencies.php>>.

Australian Information Commissioner, the Privacy Commissioner, the Social Security Appeals Tribunal and the Veterans Review Board. It is curious to note that the site does not contain any reference to the Australian Consumer Law or appropriate regulating agency, such as the Australian Competition and Consumer Commission ('ACCC').

There have been very few decided cases and even less legal academic commentary in relation to the regulatory regimes for international students.<sup>55</sup> One commentator notes that a distinguishing feature of the federal Ombudsman's scheme for international students and the legislation and codes surrounding the regulation in this area is the use of consumer language by the legislator<sup>56</sup> and an emphasis on codes and audits.<sup>57</sup> It is beyond the scope of this research to consider the particular protections available for international students under this Commonwealth Scheme. Issues in relation to international students and jurisdictional matters will be considered in Chapter 3 in relation to the application of the ACL.

## Private law

### Contract

There has been considerable commentary regarding the nature of the contractual relationship between students and HEIs.<sup>58</sup> Notwithstanding the difficulties in jurisprudence surrounding the jurisdiction of courts in relation to the Visitor, or the applicability of public law remedies to the student-HEI relationship, it is generally accepted that a contract between the student and HEI exists and can in fact coexist

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<sup>55</sup> See generally Bruce Baird, Australian Government, *Review of the Education Services for Overseas Students (ESOS) Act 2000*, Final Report February 2010 (7 August 2012) <<https://aei.gov.au/Regulatory-Information/Education-Services-for-Overseas-Students-ESOS-Legislative-Framework/ESOS-Review/Pages/default.aspx>>.

<sup>56</sup> Jackson, 'Regulation of International Education', above n 3, 70, 73. He also notes the lack of equivalent remedy provisions: at 74.

<sup>57</sup> Ibid 79. See also John F Burke and Rosemary Lucadou-Wells, 'Towards Creating Sustainable Australian Education' (2010) 7 *Macquarie Journal of Business Law* 87.

<sup>58</sup> See generally Birtwistle and Askew, above n 3; Davis, above n 3; Palfreyman, 'The HEI-Student Legal Relationship', above n 3; Julia Pedley, 'The Development of a Student Contract and Improvement in Student Disciplinary Procedures at Massey University' (2007) 12(1) *Australian & New Zealand Journal of Law & Education* 73; Bruce Lindsay, 'Student Subjectivity and the Law' (2005) 10(2) *Deacon Law Review* 628, 633-4; Kós and McVeagh, above n 3; Hoyer and Palfreyman, 'Plato vs Socrates', above n 3; Middlemiss, above n 3; Rochford, 'The Relationship Between the Student and the University', above n 3; Kamvounias and Varnham, 'Legal Challenges to University Decision Affecting Students', above n 1, 142, 146; Kamvounias and Varnham, 'In-House or in Court?', above n 4, 9-12; Kamvounias and Varnham, 'Getting What They Paid For', above n 28, 312-14; Lindsay, 'Complexity and Ambiguity in University Law', above n 3, 10-11; Sally Varnham, 'Liability in Higher Education in New Zealand: Cases for Courses?' (1998) 3(1) *Australia and New Zealand of Law and Education* 3, 11-13; Ruth Gaffney-Rhys and Joanna Jones, 'Issues Surrounding the Introduction of Formal Student Contracts' (2010) 35(6) *Assessment & Evaluation in Higher Education* 711.

with students' legal standing as a corporator of the HEI.<sup>59</sup> The construction of the terms of the student–HEI contract is not without its difficulties, and its precise terms, beyond what is already contained in the relevant statutes, are difficult to discern.<sup>60</sup> It has also been noted by commentators that in practice students' success in claiming damages as a result of a breach of specific contractual promises have been limited.<sup>61</sup> The existence of and the precise nature of the student–HEI contract will be discussed more fully in Chapters 4 and 5.

### *Tort of negligence*

Students in Australia may also be able to avail themselves of the emerging cause of action in 'educational malpractice' or 'failure to teach'.<sup>62</sup> The matter of *Dudzinski Kellow* [1999] FCA 309 included a claim in negligence against the university and its staff. While the Court did not make any determination in relation to the substance of the student's allegations, at paragraph [34] Drummond J noted:

I am not prepared, as presently advised, to hold that an action might not lie at the suit of a student for damages for economic loss caused by the decision of a lecturer to fail the student in a university degree examination where that decision can be shown to have been made negligently. It may be no easy matter to prove such a case: whether a lecturer has breached any duty of care she may owe to a student in assessing the student's work may be a matter difficult of proof, given that a wide range of opinions about the quality of the student's work may each nevertheless be consistent with the exercise with the

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<sup>59</sup> *Clark v University of Lincolnshire and Humberside* [200] 3 All ER752; *Bayley-Jones v University of Newcastle* (1990) 22 NSWLR 424; *Harding v University of NSW* (2001) NSWSC 301; See also Kamvounias and Varnham, 'In-house or in Court?', above n 4, 10–11; Farrington and Palfreyman, *The Law of Higher Education*, above n 3, chapter 13 and in particular the summary of principles: at [13.04]–[13.05]; Whittaker, above n 3; Simon Whittaker, 'Judicial Review in Public Law and in Contract Law: The Example of "Student Rules"' (2001) 21(2) *Oxford Journal of Legal Studies* 193.

<sup>60</sup> See especially Rochford, 'The Relationship Between the Student and the University', above n 3; Davis, above n 3; Jim Jackson, 'The Marketing of University Courses Under Sections 52 and 53 of the *Trade Practices Act 1974* (Cth)' (2002) 6 *Southern Cross University Law Review* 106, 109; Jackson, 'Regulation of International Education' above n 3, 74–5; Whittaker, 'Judicial Review in Public Law and in Contract Law', above n 59.

<sup>61</sup> David Palfreyman, '*Phelps ... Clark ... and now Rycotewood?* Disappointment Damages for Breach of the Contract to Educate' (2003) 15(4) *Education and the Law* 237; Rochford, 'The Relationship Between the Student and the University', above n 3.

<sup>62</sup> Francine Rochford, 'Suing the Alma Mater: What Loss has been Suffered?' (2001) 13(4) *Education and the Law* 319; Rochford, 'The Relationship Between the Student and the University', above n 3; Middlemiss, above n 3; Peh Hoon Lim and Juliet Hyatt, 'Educational Accountability — Do Tertiary Students Need More Academic Protection in New Zealand?' (2009) 14(1) *International Journal of Law and Education* 23, 27; Ralph Mawdsley and J Joy Cumming, 'Educational Malpractice and Setting Damages for Ineffective Teaching: A Comparison of Legal Principles in the USA, England and Australia' (2008) 20 *Education and the Law* 25; Kathy Eivazi, 'Universities' Negligent Misstatement and Students' Admission: Opening Doors to a Worthy Claim in Educational Negligence' (Paper presented at the proceedings of the ANZELA Conference 'Education: A Risky Business', Victoria, 30 September 2009); Andrew Hopkins, 'Liability for Careless Teaching: Should Australians Follow the Americans or the British?' (1996) 34(4) *Journal of Education Administration* 39; Mark Davies, 'Universities, Academics and Professional Negligence' (1996) 12(4) *Tolley's Professional Negligence* 102.

requisite level of care. But that is no ground for denying the availability of such an action on proper proofs.

Claims in negligence by students against HEIs is a developing area and a number of commentators are of the view that in the modern higher education sector notions of academic immunity is misplaced.<sup>63</sup> This emerging area of law is well placed to provide assistance in the interpretation of the new statutory consumer guarantees in the ACL,<sup>64</sup> notably the requirement that services need to be rendered with 'due care and skill'.<sup>65</sup> It is less significant in relation to claims regarding UCT, although it does signal a willingness by the courts to entertain claims that go to more substantive matters, namely the standard of the educational service provided.

### *Statutory claims*

Statutory duties are also imposed on HEIs under various legislative regimes. Obligations arising under the ACL are the subject of this thesis and will be considered in detail in Chapters 3, 4 and 5. Other legislative regimes also impose obligations on HEIs. The statutory frameworks relating specifically to international education have been mentioned above in the context of public law (administrative review). A significant number of claims made by students relate to applications under the various freedom of information acts.<sup>66</sup> Possibly the most significant area of law where students make claims against their HEI is regarding alleged breaches of the various anti-discrimination statutes (state and Commonwealth).<sup>67</sup> Again Kamvounias and Varnham note that in all instances students have been unsuccessful in these types of claims largely because the students have been unable to establish the causal link between their complaint in relation to decisions involving academic

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<sup>63</sup> See generally Middlemiss, above n 3, 77–80; Hoyer and Palfreyman, 'Plato vs Socrates', above n 3, 105–107; Eivazi, above n 62; Mark Davies, 'Challenges to "Academic Immunity" — The Beginning of a New Era?' (2004) 16(2-3) *Education and the Law* 75; Varnham, 'Liability in Higher Education in New Zealand', above n 58, 16-17; Kamvounias and Varnham, 'Getting What They Paid For', above n 28, 310–12.

<sup>64</sup> See Russell Miller, *Miller's Australian Competition and Consumer Law Annotated* (Thomson Reuters, 33<sup>rd</sup> ed, 2011). Miller states that 'due care and skill is a common law negligence standard' and the 'effect of the section is to negate the opportunity to contract out of a claim for negligence': at [1.S2.60.10].

<sup>65</sup> ACL s 60. The emerging jurisprudence in this area will assist with an understanding of how the quality and standards of educational services could be assessed by the courts with reference to analogous principles from other areas of law, such as professional negligence in the law of torts. See especially Stephen Coronos, 'Consumer Guarantees and the Supply of Educational Services by Higher Education Providers' (2012) 35(1) *University of New South Wales Law Journal* 1.

<sup>66</sup> Kamvounias and Varnham, 'Legal Challenges to University Decisions Affecting Students', above n 1. The authors consider in detail applications that have been brought in relation to particular types of documents and circumstances at and include a consideration of the types of exemptions that university may be able to claim: at 173–9.

<sup>67</sup> *Ibid* 172–3; Sally Varnham and Patty Kamvounias, 'Unfair, Unlawful or Just Unhappy? Issues Surrounding Complaints of Discrimination Made by Students Against Their Universities in Australia' (2009) 14(1) *Australian & New Zealand Journal of Law & Education* 5; Astor, 'Why do Students Sue Australian Universities?', above n 1, 25–6.



assessment, progress or other disciplinary proceedings and the ground for the alleged discrimination.<sup>68</sup> Astor, in her article examining why students sue Australian universities comments:

There appears to be a problem that students are using discrimination law as an avenue for challenges to perceived unfair conduct by universities, including decisions relating to academic matters.<sup>69</sup>

This of course is consistent with Astor's theme in her commentary that students' lack of success in bringing claims before courts is a result of 'shoehorning'. Thus students are unsuccessful because they attempt to 'shoehorn their complaints into legal causes of action where they (do) not fit'.<sup>70</sup>

Thus it can be seen from the above overview of the legal framework applying to the student–HEI relationship and the causes of action available to students with respect to a claim against a HEI that students have wide-ranging avenues for redress. Students can seek reparation either internally through domestic procedures of the HEI, or possibly judicial review of the same. Students can bring their grievance before the relevant Ombudsman. Students also have significant private rights, albeit complex. It is however often difficult to determine the exact nature of those rights or obtain a remedy due to lack of proof of loss suffered. Students' rights are also reinforced by the considerable ancillary and supporting statutory frameworks around the regulation of the higher education sector,<sup>71</sup> and more general statutory rights, such as freedom of information legislation or anti-discrimination legislation. International students in particular now have specific protections in place.<sup>72</sup> Consequently a claim under the ACL by a student against their HEI for an alleged failure in the provision of educational services is only one option open to the student. However, in relation to all areas of law outlined above, the impediment remains that claims made by students in relation to academic matters are not justiciable. It is suggested that claims made pursuant to the UCT provisions regarding the nature of

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<sup>68</sup> Kamvounias and Varnham, 'Legal Challenges to University of Decisions Affecting Students' above n 1, 173; Varnham and Kamvounias, 'Unfair, Unlawful or Just Unhappy?' above n 67; For commentary on the equivalent provisions in the UK see Middlemiss, above n 3. Middlemiss notes that the anti-discrimination legislation is of limited use for students in their claims against HEIs as very few of the statutes are specifically structured to protect the rights of students: at 87.

<sup>69</sup> Astor, 'Why do Students Sue Australian Universities?', above n 1, 26.

<sup>70</sup> Ibid 26, 31. While some applicants were unsuccessful in their claims based on discrimination, there may well have been a cause of action arising under consumer protection legislation. See, eg, *Lina Obieta v New South Wales Department of Education and Training* [2007] FCA 86.

<sup>71</sup> See, eg, various state Higher Education Acts and Commonwealth funding legislation *Higher Education Support Act 2003* (Cth); *Higher Education Funding Act 1988* (Cth); *Tertiary Education Quality and Standards Agency Act 2011* (Cth) ('TEQSA Act').

<sup>72</sup> *Educational Services for Overseas Students Act 2000* (Cth).

the educational service provided by a HEI may not be so limited, as the legislation prevents a HEI from relying on a term in the student–HEI that is unfair. As will be seen in Chapter 5, this goes beyond issues of procedural fairness to matters that address the substantive fairness of the contractual term relied upon. As the UCT provisions address issues of substantive unfairness, it is possible that judicial scrutiny of the actual effect of a HEI relying on an unfair term that is concerned with matters of academic judgement will be countenanced.

### **What is justiciable?**

It is clear that courts are prepared to review decisions of a HEI on the basis that those decisions have been procedurally unfair or there has been an error of law.<sup>73</sup> It is also accepted that recourse to the courts should be seen as a last resort.<sup>74</sup> However, recent studies on the nature and outcomes of student-based litigation in Australia (not just those based on consumer protection legislation) reveal the difficulties students face when bringing their complaints to the courts if those complaints relate to questions of academic judgement in the course of the delivery of the educational service.<sup>75</sup> This includes claims relating to course content, design and delivery, the standards of teaching or the merits of an academic decision in the assessment of the standard of students' work or academic progression. Historically courts have been reluctant to disturb decisions that have been seen as within the domain of the learned academic.<sup>76</sup> Subject to few exceptions, academic activities involving the exercise of academic evaluation by an academic or the standard of the academics' professional services (as opposed to the process by which an academic decision is reached) will not be interfered with by the courts.<sup>77</sup> This is and continues to be, a significant hurdle for students seeking redress for what they perceive to be poor quality educational services.

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<sup>73</sup> Kamvounias and Varnham, 'In-house or in Court?', above n 4, 2–9; Kamvounias and Varnham, 'Legal Challenges to University Decisions Affecting Students', above n 1, 164, 152–169; Astor, 'Why do Students Sue Australian Universities?', above n 1, 30.

<sup>74</sup> *Hanna v University of New England* [2006] NSWSC 122; *Chan v Sellwood* [2009] NSWSC 1335, 'disputes between students and establishments of learning are ordinarily unsuitable for adjudication in the courts and ought to be resolved by internal procedure' [25]–[26] (Davies J).

<sup>75</sup> Astor, 'Australian Universities in Court', above n 1; Astor, 'Why do Students Sue Australian Universities?', above n 1; Helms, above n 1; Kamvounias and Varnham, 'Legal Challenges to University Decisions Affecting Students', above n 1; Jackson et al, above n 1.

<sup>76</sup> *Clark* [2000] 3 All ER 752. Note that the exclusive purview the university Visitor may still be an issue for students studying in Western Australia where the university Visitors' jurisdiction is still alive and potentially extensive. This is discussed further below.

<sup>77</sup> *Griffith University v Tang* (2005) 221 CLR 99, 156 [165] (Kirby J); Davies, 'Challenges to 'Academic Immunity'', above n 63; Kamvounias and Varnham, 'Legal Challenges to University Decisions Affecting Students', above n 1, 159–60.

In order to assess the effectiveness of the UCT regime as mechanism that enhances student consumer protection, this chapter will examine what academic matters, if any, have been considered justiciable both under consumer protection legislation and other areas of the law. This is relevant as the research argues that the new UCT provisions may deal with claims concerning the nature of the educational services more effectively than other actionable rights that require the court to examine matters of academic judgement.

*What do students complain about?*

There is variance in views regarding what students are in fact complaining about when bringing their claims before courts. Kamvounias and Varnham categorise student challenges into three broad types.<sup>78</sup> The first is complaints against disciplinary decisions that are unconnected to academic achievement, such as a student's behaviour in relation to university property. The second is disciplinary decisions that relate to findings of academic misconduct, for example, appeals by students against decisions involving cheating or plagiarism.<sup>79</sup> The third is complaints against decisions or conduct that involve academic judgement. In relation to this category of 'purely academic' matters, Kamvounias and Varnham give examples of the marking of student work including evaluations of academic merit and viability of research projects, the content of courses and styles of teaching.<sup>80</sup> It would also include decisions regarding methods and modes of course of delivery (format and availabilities of online resources, laboratories) and academic progression (as distinct from decisions relating to discipline or misconduct matters).<sup>81</sup> It may also include decisions regarding attribution of credit for previous studies or relevant work experience (recognised prior learning).<sup>82</sup> Claims that relate to academic judgement have had little success in the courts, as discussed in detail below. It can be said that claims in relation to matters of academic judgement involve a review of substantive matters, not just procedural. When considering the efficacy of the UCT provisions in advancing students' rights as consumers of educational services, regard should be had to what students are allegedly complaining about in relation to those services. Therefore, it is important to establish whether students' themselves are concerned with only procedural fairness in relation to the supply of educational services, or something more.

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<sup>78</sup> Kamvounias and Varnham, 'In-house or in Court?', above n 4, 1–2.

<sup>79</sup> Ibid 2.

<sup>80</sup> Ibid.

<sup>81</sup> Davis, above n 3, 18.

<sup>82</sup> Kamvounias and Varnham, 'Legal Challenges to University Decisions Affecting Students', above n 1, 160–1.

A leading commentator in this area, Astor, has suggested that student claimants are unconcerned with the impact that academic judgement has on the quality or standard of the educational service provided. In her recent study on why students sue universities she asserts that:

...the data on litigated cases does not bear out the assertion that student litigation is predominately, or even significantly, concerned with educational standards. Rather, it is concerned with the fairness of university decision-making.<sup>83</sup>

If this is so, then the concern to address substantive issues regarding the supply of educational services is less critical, as students have adequate protection in regards procedural fairness, as was seen in the earlier discussion of the legal framework. In support of her thesis that 'very few litigated cases concern complaints about educational standards', Astor notes there have only been five cases involving the Trade Practices Act.<sup>84</sup> She asserts that only three were in relation to standards of education and all were unsuccessful.<sup>85</sup> The point is that three of the five cases clearly concerned issues going beyond the fairness of the decision making process. It is also clear from the statements of claims filed by the students, albeit often poorly pleaded, that students' have been concerned with the standards and quality of the learning and teaching experience or lack thereof.<sup>86</sup> As will be demonstrated in subsequent chapters there are many reasons for students' lack of success in litigation.

Further, given the dearth of case law in relation to student claims under the consumer protection legislation, it can be argued that it is very possible students are not aware of their consumer rights in the context of educational services.<sup>87</sup> In a submission made to the Productivity Commission by the National Children's and Youth Law Centre ('NCYLC') and included in the final report, the NCYLC suggested the needs of young people should receive greater attention in consumer policy making:

... most young consumers do not know their consumer rights, nor are they aware of or equipped to access the complaints mechanisms that are available. Even if they do

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<sup>83</sup> Astor, 'Why do Students Sue Australian Universities?', above n 1, 24.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid, 24–5.

<sup>86</sup> Ibid. It is also important to note that Astor's research is focused solely on the 39 Australian universities and does not include cases involving private providers of higher education services. As will be seen, the nature of complaints made in the lower courts and those against private providers frequently concerns matters going to quality and alleged breaches of consumer protection legislation.

<sup>87</sup> See also Department of the Treasury, *Australian Consumer Survey*, (2011) Australian Government.

understand their rights, they are not likely to seek to enforce those rights or to pursue remedial action if those rights are violated, often due to a lack of confidence either in themselves or the mechanisms available.<sup>88</sup>

Alternatively, even if students are aware of their rights they may not pursue remedial action because of a lack of confidence when faced with the might of the institution or the significant financial resources required to bring an action before the courts.<sup>89</sup> HEIs should perhaps consider directing some of the funds raised by the new services levy to the strategies suggested by the NCYLC, particularly in relation to the notion of improved advocacy services for students as consumers.<sup>90</sup>

Other commentators are of the opinion that as a result of the commodification of education and the placement of the student as a consumer of educational services, students will more readily demand quality services and litigate if unsatisfied.<sup>91</sup> Students are concerned with, and make complaints about, the nature of the educational services provided. This was born out by the recent study undertaken in the Australian Learning and Teaching Council ('ALTC') project on student grievances and discipline matters.<sup>92</sup> The authors note that student survey results (826 respondents) revealed that:

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<sup>88</sup> Australian Government Productivity Commission, *Review of Australia's Consumer Policy Framework*, Final Report No 45 2008, Canberra < <http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport>>, 304. Strategies suggested included improvement of education strategies to inform young people of their consumer rights and capacity to assert the same; financial hardship programmes to assist with the payment of outstanding payments or fee waivers; trustworthy and user friendly avenues for complaint and funding for youth specific advocacy services.

<sup>89</sup> See Justice Ryan's statement in *Ogawa v University of Melbourne*: 'I am mindful of the need to ensure that an impecunious student is not shut out by a potential liability for costs from pursuing an apparently meritorious claim against a large and wealthy corporation like the University': at [2005] FCA 1139 [95] (Ryan J); Megumi Ogawa, 'The Courts' Jurisdiction Over Student/University Disputes in Australia', (2012) 2(1) *International Journal of Public Law and Policy* 96, 100–1; Kamvounias and Varnham, 'Getting What They Paid For' above n 28, 324–6; Corones, 'Consumer Guarantees and the Supply of Educational Services', above n 65, 27.

<sup>90</sup> See Stephen Matchett, 'New Uni Charge Approved', *The Australian* (online), 11 October 2011 <[http://www.theaustralian.com.au/higher-education/time-tight-for-student-service-fee/story\\_3\\_November\\_2011](http://www.theaustralian.com.au/higher-education/time-tight-for-student-service-fee/story_3_November_2011)>. Matchett discusses how the funds raised from the new levy is to be controlled by HEIs rather than student associations and concerns regarding the use to which it will be put.

<sup>91</sup> See generally Glyn Jones, 'I Wish to Register a Complaint: The Growing Complaints Culture on Higher Education' (2006) 10(3) *Perspectives: Policy and Practice in Higher Education* 69; Kamvounias and Varnham, 'Getting What They Paid For', above n 28, 324–6; Corones, 'Consumer Guarantees and the Supply of Educational Services', above n 65; Davis, above n 3; Helen Fleming, 'Student Legal Rights in Higher Education: Consumerism Is Official, But Is It Sustainable?' (Paper presented at Sustainable Education, Schools, Families and Communities Education Law and Policy Perspectives, Australia and New Zealand Education Law Association Conference, Darwin, 2011) 115; Griggs, 'Tertiary Education, The Market and Liability', above n 3; Hoyer and Palfreyman, 'Plato vs Socrates', above n 3; Jackson, 'Regulation of International Education', above n 3; Kós and McVeagh, above n 3; Lindsay, 'Complexity and Ambiguity in University Law', above n 3; Middlemiss, above n 3; Palfreyman, 'The HEI–Student Legal Relationship', above n 3.

<sup>92</sup> Jackson et al, above n 1. The Australian Learning and Teaching Council has been replaced by the Australian Government Office of Teaching and Learning (19 June 2012) <<http://www.olt.gov.au/>>. The project involved the surveying (575) and interviewing (51) staff in relation to student complaints. They

The most common type of complaint was about assessment, followed by inadequate or poor quality teaching, followed by inadequate or poor quality services or facilities.<sup>93</sup>

The authors also interviewed 22 students. 'Complaints about the quality of teaching or supervision were the second largest category, particularly from undergraduate students'.<sup>94</sup> In identifying recurrent themes the authors stated:

... the vast majority of complaints included some element of assessment, followed by quality of teaching and learning issues. Incorrect information also featured as a significant source of discontent. Moreover, we found that complaints do not always fit neatly into one category — they often have a number of aspects to them,<sup>95</sup>

Both the ALTC report on student grievances and Astor's study identify that students 'use a range of different, and sometimes inappropriate, legal avenues to challenge university decisions on academic matters'.<sup>96</sup> Both studies found that students' disputes with universities are multifarious and 'complex' due in part to the nature of the litigants themselves.<sup>97</sup> Astor remarks further of students litigating:

They appear sometimes to be attempting, without success, to shoehorn their complaints into legal categories where they do not belong.<sup>98</sup>

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note: '... the numbers of non-academic complaints (for example, disputes about fees, discrimination, harassment or bullying) were exceptionally rare ... The results are particularly interesting when compared with litigated matters, which indicate, on the face of it, that causes of action are framed around non-academic issues (such as unlawful discrimination) rather than academic issues. However ... closer analysis reveals that disputes about academic judgment are often the trigger for the complaints, and are re-framed around a particular cause of action for which there is remedy': at 54; see especially student survey results at 32; Chapter 3 generally.

<sup>93</sup> Jackson et al, above n 1, especially student survey results at 26.

<sup>94</sup> Ibid 32.

<sup>95</sup> Ibid. See especially student survey results at 35. It is curious that the results of the data collected from academic staff that were interviewed indicated that the most common complaints concerned academic progression or appeals against academic misconduct: at 60. However, indications are that the wider interviews (more than just the academic staff) demonstrate that student complaints concerning the quality of teaching supervision were equal second to complaints about academic misconduct: at 49.

<sup>96</sup> Astor, 'Why do Students Sue Australian Universities?', above n 1, 31; Jackson et al, above n 1, 54.

<sup>97</sup> Astor, 'Why do Students Sue Australian Universities?', above n 1. Astor notes that the notion of 'complexity' in cases rests in not just the nature of the claims made, but in the number of claims and appeals brought, and the characteristics of the litigant themselves. 'Complexity' can be characterised by the behaviour of unreasonable and vexatious litigants. This is represented on a scale from one to four, one being 'normal complaints' to four being 'querulant ... described as being aggrieved, having an enormous sense of entitlement, seeking vindication, being completely focused on their grievances and unable to accept a resolution of it — even if they are offered all they have asked for.' She concludes that all are present in the student cases: at 28. See also the comments in *Hanna v University of New England*: 'It could be perceived that the history of the dealings between the parties did not fall into the category of the usual. There was an avalanche of applications, decisions, appeals and other communications. The communication between the parties went well beyond what could be expected to be the norm (and included threats of litigation). It might be thought that what took place imposed an onerous administrative burden': [2006] NSWSC 122 at [52]; Cf Ogawa, 'The Courts' Jurisdiction Over Student/University Disputes', above n 89.

<sup>98</sup> Astor, 'Why do Students Sue Australian Universities?', above n 1, 31.

It is not clear why the practice of 'shoehorning' as described by Astor does not apply equally to complaints going to substantive matters impacting on the nature of the educational service supplied. Nor is the proposition that student litigation is not significantly concerned with educational standards but rather the fairness of university decision making supported by the case law or the results of the recent ALTC project. Students may well be concerned that decision making processes are fair, but this is not mutually exclusive of claims in relation substantive matters. What the case law bears out, as discussed below, is simply that prima facie academic matters are not justiciable. Given that courts have consistently refused to look at matters of academic judgement when reviewing student claims, students may have been particularly concerned to establish that their claim rests on issues regarding procedural fairness and the quality of the decision making process rather than the merits of the decision itself.<sup>99</sup> It is submitted that students are concerned with more than procedural fairness in relation to educational services and therefore the UCT provisions, which address substantive as well as procedural fairness of the contractual terms, are significant in the advancement of students' rights as consumers.

#### *Are academic decisions justiciable?*

The exclusion of academic judgement from the scrutiny of courts, the extent of the concept of academic immunity and its appropriateness has been the subject of much debate amongst legal scholars.<sup>100</sup> As noted above, academic judgement refers to decisions relating to course content, design and delivery, the standards of teaching or the merits of an academic decision in the assessment of the standard of students'

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<sup>99</sup> See, eg, in *Clark* [2000] 3 All ER 752 the appellant student was given leave to amend her pleading on appeal so that the claim in breach of contract related to procedural irregularities in the application of student regulations, rather than the merits of the decision of the university in the construction of the meaning of plagiarism. The court found that this was a matter that could then be reviewed by the court, whereas the former claim could not as it was a pure academic matter.

<sup>100</sup> See generally Farrington and Palfreyman, *The Law of Higher Education*, above n 3, 360–6 [12.40]–[12.45]; Jackson and Varnham, *Law for Educators*, above n 3, 252–3; Davies, 'Challenges to "Academic Immunity"', above n 63; J Joy Cumming, 'Where Courts and Academe Converge: Findings of Fact or Academic Judgement' (2007) 12(1) *Australian and New Zealand Journal of Law and Education* 97; Davis, above n 3; Tim Kaye, 'Academic Judgement, The University Visitor and the Human Rights Act 1998' (1999) 11(3) *Education and the Law* 165; Tim Kaye, Robert D Bickel and Tim Birtwistle, 'Criticizing the Image of the Students as Consumer: Examining Legal Trends and Administrative Responses in the US and UK' (2006) 18(2–3) *Education and the Law* 85; Hoye and Palfreyman, 'Plato vs Socrates', above n 3; Kós and McVeagh, above n 3; Lindsay, 'Complexity and Ambiguity in University Law', above n 3; Middlemiss, above n 3; Palfreyman, 'The HEI–Student Legal Relationship', above n 3; Rochford, 'The Relationship Between The Student and The University', above n 3; Francine Rochford, 'Traders of the Lost Ark — Lecturers and Liability' (2001) 13(2) *Education and the Law* 127; Francine Rochford, 'Claims Against a University: The Role of Administrative Review in Australia and the United Kingdom' (2005) 17(1–2) *Education and the Law* 23; Kamvounias and Varnham, 'Legal Challenges to University Decisions Affecting Students', above n 1; Kamvounias and Varnham, 'In-House or in Court?', above n 4; Francesca Bartlett, 'Student Misconduct and Admission to Legal Practice — New Judicial Approaches' (2008) 34(2) *Monash University Law Review* 309.

work or academic progression, and has been termed collectively academic matters. It is contended that it is issues relating to academic matters that go to the heart of the provision of the educational service with which the student will be concerned.<sup>101</sup> The research question is concerned with whether the UCT provisions will assist students making claims in relation to these types of academic matters more effectively than other actionable rights that require the court to examine matters of academic judgement. It is suggested that claims made pursuant to the UCT provisions regarding the nature of the educational service provided by a HEI may not be limited by the issue of justiciability, as the legislation prevents a HEI from relying on a term in the student–HEI contract that is substantively unfair rather than examining the quality of, or standards pertaining to, the academic activity in question.

It should be stated at the outset that an underlying tenet in much of the commentary concerning this issue is a desire to protect ‘academic freedom’.<sup>102</sup> The debate about whether educational activities should properly be subject to judicial scrutiny is often entangled with nostalgia about what a HEI might traditionally be, rather than the modern reality of the higher education marketplace. Resistance from the academe is often expressed on the grounds that any diminution of academic freedom will be deleterious to the broader goals of higher education and the public good.<sup>103</sup> It is important to be cognisant of the need to protect traditional rights of academic freedom, balanced against the assurance of the exercise of academic expertise and skill in the provision of educational services to students.<sup>104</sup> Lindsay suggests,

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<sup>101</sup> Jackson et al, above n 1. The authors state ‘complaints about the quality of teaching or supervision were the second largest category’: at 32.

<sup>102</sup> See generally Margaret Thornton, ‘The Law School, the Market and the New Knowledge Economy’ (2008) 17(1&2) *Legal Education Review* 1; Margaret Thornton, ‘The Idea of the University and the Contemporary Legal Academy’ (2004) 26(4) *Sydney Law Review* 481; Rochford, ‘Traders of the Lost Ark’, above n 100. Rochford refers to public policy reasons why s 52 of the TPA should not apply to lectures. She is of the view that the protection of the idea of academic freedom should be as critical as that for the reasons given for exclusion for newspapers: at 138–9; Rochford, ‘The Relationship Between The Student and The University’, above n 3; Francine Rochford, ‘Academic Freedom Insubordination: The Legalisation of the Academy’ (2003) 15(4) *Education and the Law* 249; Francine Rochford, ‘The Contested Product of a University Education’ (2008) 30(1) *Journal of Higher Education Policy and Management* 41; Francine Rochford, ‘Academic Freedom and the Ethics of Marketing Education’ in Tripathi, Purnendu and Siran Mukerji, (eds) *Cases on Innovations in Educational Marketing: Transnational and Technological Strategies* (IGI Global, 2011) 160; Francine Rorke (now Rochford), ‘The Application of the Consumer Protection Provisions of the *Trade Practices Act 1974* (Cth) to Universities’ (1996) 12 *Queensland University of Technology Law Journal* 176; Thomas T A Schweitzer, ‘Academic Challenge Cases: Should Judicial Review Extend to Academic Evaluations of Students’ (1992) 41 *American University Law Review* 267; Kaye, Bickel and Birtwistle, above n 100; Mike Molesworth, Elizabeth Nixon and Richard Scullion, ‘Having, Being and Higher Education: The Marketisation of the University and the Transformation of the Student into Consumer’ (2009) 14(3) *Teaching in Higher Education* 277; Patrick. D Pauken, ‘Academic Freedom and Institutional Autonomy in American and Australian Universities: A Twenty-First Century Dialogue and a Call to Leaders’ (2007) 12(1) *Australian & New Zealand Journal of Law & Education* 7.

<sup>103</sup> See also the discussion of ‘marketisation’ of the higher education sector in Chapter 5.

<sup>104</sup> Lim and Hyatt, above n 62, 28.



however, that the changing nature of the higher education sector itself opens the prospect for judicial review of academic judgement and evaluation.<sup>105</sup> It is suggested that it is to the benefit of HEIs to establish exactly the extent of what is to be considered matters of academic freedom and ensure that this is not entangled with administrative issues<sup>106</sup> or incompetent teaching.<sup>107</sup> Varnham observes that academic freedom is not commensurate with protection from incompetence:

The court will be required to examine the extent to which academic freedom preserves the ability of an institution to vary the terms of the agreement formed on enrolment as it thinks fit, in light of circumstances as they arise, and the resources available at any point during a student's term of study. It is difficult to imagine that such an argument would be sustained in the current consumerist environment. Once a contract is formed for the supply of any service or product the parties must perform those terms save their mutual agreement to vary those terms in any way. The better argument must be that academic freedom in this context relates to the prior planning and resourcing of courses and to the exercise of academic judgement in the manner of delivery and assessment of a course. It would be hard to sustain an argument on this basis in defence of poor teaching, supervision or assessment.<sup>108</sup>

Varnham's comments and her focus on the contractual arrangements between the HEI and the student are noteworthy in light of the introduction of the UCT regime. The cases discussed below, although not always concerned with action pursuant to consumer protection law, are significant in as much as they give an indication of the courts' attitude regarding judicial review of academic matters. An examination of the case law reveals few exceptions to judicial reticence in appraising academic matters. It is clear that a court is more willing to review academic matters when the HEI is a private provider in the higher education sector. This is particularly evident when one reviews the claims made by students in small claims tribunals.<sup>109</sup> An emerging area of law where it would appear the courts are prepared to examine the merits of an academic decision is in admissions law. The focus of the discussion for the purpose of this chapter will be on the extent to which the court will review academic matters. A more detailed discussion of the substance and merits of the claims made in those

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<sup>105</sup> Lindsay, 'Student Subjectivity', above n 58, 637.

<sup>106</sup> See also *Forster, Ex Parte; Re University of Sydney* [1964] NSW 723, 728. The court made obiter comments in relation to the limited resources and need for efficient administration in universities and the possibility that this would be compromised should decisions of academic judgement and evaluation be open for scrutiny for the courts. Even in 1963 such matters were problematic in the higher education sector.

<sup>107</sup> Kaye, Bickel and Birtwistle, above n 100, 122.

<sup>108</sup> Varnham, 'Liability in Higher Education in New Zealand', above n 58, 12–13.

<sup>109</sup> See below pages 28–9, nn 136–46.

cases where it relates to the student–HEI contract will be considered in Chapters 4 and 5.

The seminal English case relating to the justiciability of academic matters is *Clark v University of Lincolnshire and Humberside* [2000] 3 All ER 752 ('*Clark*'). This decision of the Court of Appeal involved a claim for breach of contract by a student against the university. The dispute concerned the marking of an assessment that resulted in findings of plagiarism. Initially the student claimed that the university had 'misconstrued the meaning of plagiarism and that the paper had been given a mark beyond academic convention'.<sup>110</sup> On appeal, the student's claim was limited to breach of contract under the university's regulations.<sup>111</sup> Therefore, the examination by the Court was limited to the question of procedural fairness undertaken in reaching the decision. The decision was also a significant one as it confirmed the existence of a contract between a fee-paying student and a university. In an oft quoted part of the decision from the leading judgment, Sedley LJ stated:

The arrangement between a fee-paying student and ULH is such a contract: ... Like many other contracts, it contains its own binding procedures for dispute resolution, principally in the form of the student regulations. *Unlike other contracts, however, disputes suitable for adjudication under its procedures may be unsuitable for adjudication in the courts. This is because there are issues of academic or pastoral judgment which the university is equipped to consider in breadth and in depth, but on which any judgment of the courts would be jejune and inappropriate.* This is not a consideration peculiar to academic matters: religious or aesthetic questions, for example, may also fall into this class. It is a class which undoubtedly includes, in my view, such questions as what mark or class a student ought to be awarded or whether an ægotat is justified. It has been clear, at least since *Hines v Birkbeck College* [1985] 3 All ER 156, [1986] Ch 524 (approved in *Thomas's* case), that this distinction has no bearing on the availability of recourse to the courts in an institution which has a visitor. But where, as with ULH, there is none, the decision of the New Zealand Court of Appeal in *Norrie v Senate of the University of Auckland* [1984] 1 NZLR 129 and the remarks of Hoffmann J in *Hines v Birkbeck College* [1985] 3 All ER 156 at 164–165, [1986] Ch 524 at 542–543 open the way to the distinction as a sensible allocation of issues capable and not capable of being decided by the courts. It would follow, I think, that the issues which the courts remitted with obvious relief to visitors in such cases as *Thomson v University of London* (1864) 33 LJ Ch 625 (which concerned the award of a gold medal), *Thorne v University of London* [1966] 2 All ER 338, [1966] 2 QB 237 and *Patel's* case (both of which concerned the plaintiff's academic competence)

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<sup>110</sup> *Clark* [2000] 3 All ER 752, 752.

<sup>111</sup> *Ibid.*

would still not be susceptible of adjudication as contractual issues in cases involving higher education corporations.

It is on this ground, rather than on the ground of non-justiciability of the entire relationship between student and university, that the judge was in my view right to strike out the case as then pleaded. The allegations now pleaded by way of amendment are, however, not in this class. While capable, like most contractual disputes, of domestic resolution, they are allegations of breaches of contractual rules on which, in the absence of a visitor, the courts are well able to adjudicate.<sup>112</sup>

This position has been adopted repeatedly by the courts in Australia. The majority in *Griffith University v Tang*,<sup>113</sup> although deciding that judicial review under federal legislation was unavailable, noted that no claim in contract had been made by the PhD student. In their joint judgment, their Honours Gummow, Callinan and Heydon JJ stated:

Had reliance been placed upon contract, then the occasion may have arisen to consider the apparent exclusion from justiciability of issues of academic judgment, including issues of competence of students, by the English Court of Appeal in *Clark v University of Lincolnshire and Humberside*<sup>114</sup>. The basis upon which the lack of justiciability was put in *Clark* appears not to depend upon the absence of contractual relations for want of *animus contrahendi*<sup>115</sup>; rather, the basis appears to be that any adjudication would be, as Sedley LJ put it, 'jejune and inappropriate'.<sup>116</sup>

His Honour Kirby J had similar views in relation to this point (although strongly dissenting on the issue of availability of judicial review in this matter). Kirby J stated:

Of academic independence and other concerns

The special position of universities: I recognise that universities are in many ways peculiar public institutions<sup>117</sup>. They have special responsibilities, as the University Act envisages in this case, to uphold high academic standards about which members of the academic staff will often be more cognisant than judges. There are issues pertaining to the intimate life of every independent academic institution that, sensibly, courts decline to review: the

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<sup>112</sup> Ibid 756 (emphasis added).

<sup>113</sup> (2005) 221 CLR 99.

<sup>114</sup> [2000] 1 WLR 1988; [2000] 3 All ER 752.

<sup>115</sup> *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95.

<sup>116</sup> *Griffith University v Tang* (2005) 221 CLR 99, 121 [58].

<sup>117</sup> Citing Daniel Nelson, 'Judicial Review in the Community of Scholars: A Short History of *Kulchyski v Trent University*', (2004) 13 *Education and Law Journal* 367, 375.

marking of an examination paper<sup>118</sup>; the academic merit of a thesis<sup>119</sup>; the viability of a research project<sup>120</sup>; the award of academic tenure<sup>121</sup>; and internal budgets<sup>122</sup>. Others might be added: the contents of a course; particular styles of teaching; and the organisation of course timetables. As Sedley LJ noted in *Clark v University of Lincolnshire and Humberside*<sup>123</sup>, such matters are 'unsuitable for adjudication in the courts ... because there are issues of academic or pastoral judgment which the university is equipped to consider in breadth and in depth, but on which any judgment of the courts would be jejune and inappropriate'. Judges are well aware of such peculiarities. The law, in common law countries, has consistently respected them and fashioned its remedies accordingly.

However, as Maurice Kay J explained in *R v University of Cambridge; Ex parte Persaud*<sup>124</sup> (a recent English case similar to the present appeal), it is entirely 'correct' of courts 'to distinguish between the disciplinary type of case and the situation where what is in issue is pure academic judgment'. In the present appeal, the respondent's claim fell squarely within the former class. Academic judgment is one thing. But where an individual who has the requisite interest is affected by disciplinary decisions of an administrative nature made by a university body acting according to its powers under a statute, *outside the few categories peculiar to 'pure academic judgment'*, such decisions are susceptible to judicial review. They are so elsewhere<sup>125</sup>. They should likewise be so in Australia. An appeal to 'academic judgment' does not smother the duties of a university, like any other statutory body, to exhibit, in such cases, the basic requirements of procedural fairness implicit in their creation by public statute and receipt of public funds from the pockets of the people.<sup>126</sup>

The approach taken in *Griffith University v Tang* and the English and New Zealand authorities is consistent with decisions in other Australian superior courts.<sup>127</sup> In *Hanna v University of New England* [2006] NSWSC 122 Malpass AsJ of the

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<sup>118</sup> Citing *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988, 1992; [2000] 3 All ER 752, 756; *Hines v Birkbeck College* [1986] ch 524, 542 Hoffmann J. See also, *Thorne v University of London* [1966] 2 QB 237.

<sup>119</sup> Citing *Re Polten* (1975) 59 DLR (3d) 197, 206.

<sup>120</sup> Citing *R v University of Cambridge; Ex parte Persaud* [2001] ELR 64,74 [21] (QBD).

<sup>121</sup> Citing *Re Paine* (1981) 131 DLR (3d) 325, 331–3.

<sup>122</sup> Citing *Kulchyski v Trent University* (2001) 204 DLR (4th) 364, 375 [26]–[27], 377 [32], 379–80 [40].

<sup>123</sup> Quoting Sedley LJ in *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988, 1992; [2000] 3 All ER 752, 756.

<sup>124</sup> Citing [2001] ELR 64, 72–74 [20]–[21] (QBD).

<sup>125</sup> Citing, eg, *Ceylon University* [1960] 1 WLR 223 (PC); [1960] 1 All ER 631; *R v Aston University Senate; Ex parte Roffey* [1969] 2 QB 538; *R v Chelsea College of Art and Design; Ex parte Nash* [2000] ELR 686; *R v University of Saskatchewan; Ex parte King* (1968) 1 DLR (3d) 721. See also, for review on contractual grounds, *Olar v Laurentian University* (2002) 165 OAC 1.

<sup>126</sup> *Griffith University v Tang* (2005) 221 CLR 99, 156–7 [165]–[166] (emphasis added).

<sup>127</sup> Cf the matter of *Mathews v University of Queensland* [2002] FCA 414. On the issue of judicial review of academic assessment the Court referred to *Norrie v Auckland University Senate* (1984) 1 NZLR 129 and *Clark* but left open the issue of justiciability: at [25]–[27] (Spender J). Justice Spender stated that he had not 'approached these proceedings on an absence of jurisdiction for the Court to review matters of academic assessment in respect of which avenues of internal review are available to a student of the University': at [27]. Mathews was unable to establish on the pleadings that the loss he claimed was a consequence of the breach of contract or other causes of action.

Supreme Court rejected Hanna's claim for review of the University's decision regarding an application for advanced standing on the basis that it was inconsistent with another decision as misconceived. The Court could find no error in the decisions.<sup>128</sup> The Court noted that the decisions of university staff involved academic assessment, that is, the claim was concerned with the merits of the matter. The Court was persuaded by the decision in *Clark*.<sup>129</sup>

In *Walsh v University of Technology Sydney* [2007] FCA 880 ('*Walsh*'), Walsh was enrolled in a Masters of Education. He brought claims pursuant to various sections of the TPA, including s 52 (misleading and deceptive conduct) and s 74 (implied warranty although no contract was pleaded) based on the receipt of a fail grade in three assignments in one unit in the Masters programme.<sup>130</sup> He sought orders for the award of a pass grade in each of the three assignments and that he be awarded the degree. The claim was struck out on the basis that the claimant had no reasonable prospects of success and the lack of legal foundation for the Court to provide the relief he was seeking.<sup>131</sup> Justice Buchanan found that there were fundamental problems with the claim for relief. His Honour referred to *Griffith University v Tang* and various authorities in relation to judicial review of matters involving academic judgement. Of the student's claim he said:

His case, factually and legally, depends upon the suggestion that the Court can both directly and effectively substitute an opinion for that of UTS and require a different result to be awarded ...

I expressed directly to Mr Walsh during his oral submissions my reservations about the power of the Court to grant him any remedy of the kind he seeks. He was not able to draw my attention to any statutory provision, authority or legal principle which might provide a foundation or starting point for the proposition that the Court could direct UTS as to course content or requirements or require UTS to award him passing grades in either individual

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<sup>128</sup> *Hanna v University of New England* [2006] NSWSC 122, [64].

<sup>129</sup> *Ibid* [66].

<sup>130</sup> It is clear from the courts comments regarding the statement of claim that the pleading was deficient *Walsh v University of Technology Sydney* [2007] FCA 880, [50].

<sup>131</sup> This case also proffers yet another example of the difficulties faced by the courts when considering claims by self-represented litigants in cases that are 'complex': See above n 96 and accompanying text. There is certainly a significant element of complexity in the *Walsh* case, see, eg, *Walsh v University of Technology Sydney* [2007] FCA 880, [85]–[86]. The statement of claim disclosed substantial difficulties between the student and teaching staff regarding the selection of his topic for which he would be assessed. He also alleged wrongful use of his intellectual property and that the university was acting on behalf of a secret agent. See also the following comments in *Hanna v University of New England* 'It could be perceived that the history of the dealings between the parties did not fall into the category of the usual. There was an avalanche of applications, decisions, appeals and other communications. The communication between the parties went well beyond what could be expected to be the norm (and included threats of litigation). It might be thought that what took place imposed an onerous administrative burden': at [2006] NSWSC 122 [52].

assignments or a whole subject. Indeed he said he had been unable to find any case of this kind and agreed that he was asking the Court to strike out into new legal territory.

... it was open to UTS to establish the course of study in which Mr Walsh enrolled and set the requirements to be satisfied, including the academic standard to be achieved as demonstrated by assignments or other coursework. Decisions about such matters are inherently unsuited to judicial review ... The present case does not raise disciplinary issues. It raises questions of academic assessment and judgment.

At the heart of Mr Walsh's claims, and underpinning the relief sought, is an attempt to involve the Court directly in an adjudication upon a matter of both academic standards and of the assignment of specific grades to particular assignments. In addition, his claim is that the Court enforce its own view directly. In the circumstances revealed by the present case I can discern no legal foundation for doing so.<sup>132</sup>

It is noted in *Walsh* that the Court refers to the power of the institution to set standards and requirements. As indicated above, some of the difficulties in relation to what is justiciable appear to lie with the lack of clarity in relation to what can be categorised as matters of 'pure academic judgement' and in turn, academic freedom. It is argued that the inquiry of the court in relation to the determination of 'the few categories peculiar to "pure academic judgement"'<sup>133</sup> should be limited to those functions that the HEI exercises in the establishment of the various programmes, for study and research.<sup>134</sup> This could be said to be the true exercise of academic freedom and judgement. It is the proposition of this research that once the 'pure academic judgement' has been exercised in the determination of course requirements, to the extent the activities in the delivery of the educational service form part of the student–HEI contract those terms are subject to review. This is also consistent with what might be considered the 'main subject matter' of the contract for the purpose of the UCT provisions,<sup>135</sup> discussed in detail in Chapter 5.

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<sup>132</sup> *Walsh v University of Technology Sydney* [2007] FCA 880, [70]–[80].

<sup>133</sup> *Griffith University v Tang* (2005) 221 CLR 99,157 [166] (Kirby J).

<sup>134</sup> *Ibid.* Chief Justice Gleeson said of the functions of the University: 'The functions of the appellant include providing education, providing facilities for study and research, and conferring higher education awards. Its powers include the power to do anything necessary or convenient in connection with its functions. Subject to any other legal constraint, it may establish a PhD research programme, and decide who will participate in the programme and on what terms and conditions': at 109 [15] (Gleeson CJ). It is suggested that pure academic judgement is limited to the establishment of the programme, not the terms and conditions in the actual supply. This is discussed more fully in Chapter 3.

<sup>135</sup> ACL s26. Terms that are the main subject matter of the contract are exempt from the UCT provisions. See Chapter 5.

It is clear that the courts are more willing to review the nature of academic activities when the HEI is a private provider in the higher education sector and even more so if the claim is made in the small claims tribunal. In the matter of *Kwan v University of Sydney Foundation Program P/L & Ors (General)* [2002] NSWCTTT 83 ('*Kwan*') the Tribunal was prepared to scrutinise academic matters. The claim by Kwan under the state consumer protection legislation concerned the standard of the educational services and facilities supplied. The student was unsuccessful in this case as the Tribunal found on the facts the student had been supplied with what was agreed in the consumer contract. However, in reaching its findings, the Tribunal was prepared to review the standard of the educational service provided, including the nature of tuition. This is consistent with other cases<sup>136</sup> before the small claims tribunals involving private providers where courts have reviewed academic matters concerning the admission of unsuitable fellow students into the course;<sup>137</sup> the learning environment, including staff–student ratios and the condition of premises;<sup>138</sup> teaching methodologies;<sup>139</sup> assessment of students' suitability for study based on age, workload<sup>140</sup> and pre-existing knowledge;<sup>141</sup> qualifications and experience of teaching staff;<sup>142</sup> the quality and amount of tuition given;<sup>143</sup> and an award of fail grade in academic assessment.<sup>144</sup>

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<sup>136</sup> Although not a private provider of higher education, the matter of *ACCC v Henry Kaye and National Investment Institute Pty Ltd* [2004] FCA 1363 is an intriguing case. The National Investment Institute was a provider of property investment courses or programmes. The primary course was the 'Investment Mastery Programme' (IM programme) and cost \$15 000 to enrol. The ACCC prosecuted both the company and Henry Kaye as an individual involved in the promotion of seminars that promised at the end of the course participants would be property millionaires. The case was largely concerned with the nature of the representations made in the advertising of the seminars. Evidence was led, however, to establish whether the investment strategies taught and detailed in the programme course materials provided a basis for the representations made in the advertising. What is interesting is that the court was prepared to review in great detail the content of the teaching materials supplied by the private provider of what might be called a professional qualification. The court considered the content and teaching methods in each module in the IM programme and heard expert evidence in relation to the appropriateness of the finance strategies taught. Within the judgment there is a mix of language and terms. The court refers to student enrolment, the customer, clients, 'teaching and learning outcomes' and embedded strategies. The court also heard evidence from a past student, although his evidence was rejected on the basis that he was an inept graduate. The court considered the Noah's Ark case in relation to whether the advertisement promoting the seminars (and therefore the IM programme, which was the Institutes 'product') was in 'trade or commerce'. The court concluded it was and embarked on a detailed review of 'academic matters'.

<sup>137</sup> *St Clair v College of Complimentary Medicine Pty Ltd (General)* [2008] NSWCTT 1309.

<sup>138</sup> *Qayam v Shillington College (General)* [2007] NSWCTT 620.

<sup>139</sup> *Cui v Australian Tesol Training Centre (General)* [2003] NSWCTT 329.

<sup>140</sup> *Evans v Australian Institute of Professional Counsellor Laws (General)* [2004] NSWCTTT 108

<sup>141</sup> *Qayam v Shillington College (General)* [2007] NSWCTT 620.

<sup>142</sup> *Cotton v Blinman Investments P/L & Blinman (General)* [2004] NSWCTTT 723.

<sup>143</sup> *Jones v Academy of Applied Hypnosis P/L (General)* [2005] NSWCTTT 841.

<sup>144</sup> *Ibid.*

Interestingly the issue of judicial review of academic matters does not often arise in cases where claims are made under consumer protection legislation.<sup>145</sup> For example, this was so in both *Fennell v Australian National University* [1999] FCA 989 and *Shahid v Australasian College of Dermatologists* [2008] FCAFC 72.<sup>146</sup> In both cases the applicant students' claim rested on the provision of misleading or deceptive information in relation to aspects of their course, be that the nature and support provided for work placements or representations in course handbooks. The focus in those matters was on whether the conduct complained of was in 'trade or commerce' and a consideration of the factual evidence. The issue of justiciability in relation to academic matters, although forming part of the factual basis of the students' claims, was not considered by the court specifically. Similarly, in his recent article on the application of the new consumer guarantees in the ACL to the provision of educational services, Corones does not consider the intersection of the jurisprudence regarding the justiciability of academic matters and the requirement to render educational services with 'due care and skill'.<sup>147</sup> He focuses instead on the specific legislative requirements of the ACL, such as the requirement that the service be supplied in 'trade or commerce' and the impact of the regulators new standards<sup>148</sup> on the courts' examination as to whether the educational service has in fact been supplied with 'due care and skill'. It is arguable that this may not be so easily overlooked by the higher courts.

The recognition in the UK and Australia of the developing cause of action in 'educational malpractice' or 'failure to teach'<sup>149</sup> may, because of its very nature, result in courts reconsidering the prohibition on the adjudication of academic matters. It may also assist with claims made pursuant to the consumer guarantees under the ACL, as some commentators are of the view that this is analogous to the common law standard in negligence.<sup>150</sup> The matter of *Dudzinsk v Kellow*<sup>151</sup> discussed above,

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<sup>145</sup> Cf *Chan v Sellwood* 'disputes between students and establishments of learning are ordinarily unsuitable for adjudication in the courts and ought to be resolved by internal procedure': at [2009] NSWSC 1335, [25]–[26] (Davies J).

<sup>146</sup> These cases are discussed in detail in Chapter 3 in relation to whether academic matters can be said to be in 'trade or commerce'.

<sup>147</sup> Corones, 'Consumer Guarantees and the Supply of Educational Services', above n 65.

<sup>148</sup> The Australian Qualifications Framework and *Tertiary Education Quality and Standards Agency Act 2011* (Cth) ('TEQSA Act'); Corones, 'Consumer Guarantees and the Supply of Educational Services', above n 65, 11–14; Trounson, Andrew, 'Failed Students Could Hold Universities Liable Under New Consumer Laws', *The Australian* (Canberra), 14 March 2012, 35.

<sup>149</sup> Rochford, 'Suing the Alma Mater', above n 62; Middlemiss, above n 3; Lim and Hyatt, above n 62, 27; Mawdsley and Cumming, 'Educational Malpractice', above n 62; Eivazi, above n 62; Hopkins, above n 62.

<sup>150</sup> See Miller, above n 64; Cf Corones, 'Consumer Guarantees and the Supply of Educational Services', above n 65. He is of the view that it was not parliament's intention to codify the common law because the statute refers to 'due care' and not 'reasonable care': at 10.



included a claim in negligence against the University and its staff. While the Court did not make any determination in relation to the substance of the student's allegations, Drummond J held that it was possible that a claim in negligence might lie as a result of a decision by a university lecturer to fail a student. He added that this might be difficult to prove, 'given that a wide range of opinions about the quality of the student's work may each nevertheless be consistent with the exercise with the requisite level of care',<sup>152</sup> but the matter was left open. Any academic judgement, evaluation and exercise of skill relevant to such a claim would have to be examined in determining whether a breach of duty occurred, once it was established that the duty arose in the first instance.<sup>153</sup> Educational malpractice as an available cause of action is in its embryonic stages and a student would encounter considerable difficulties successfully establishing a claim, even outside of the issue of justiciability of academic matters.<sup>154</sup>

English commentator Mark Davies is strongly in favour of the removal of 'academic immunity', that is, the exclusion of 'legal challenges to their key professional services'.<sup>155</sup> In his article on this issue, Davies considered the decision in the case of *R v Higher Education Funding Council, Ex parte Institute of Dental Surgery [1994] 1WLR 242* ('*Dental Surgery*') at length. This case concerned the grading of research outputs for the purpose of funding for the HEI. The assessment of the decision making panels were final and said to be an exercise of academic judgement. The application before the Court was for orders that reasons for the decision should be provided. The Court held that 'where that which was challenged was no more than an informed exercise of academic judgement, fairness alone did not require reasons to be given'.<sup>156</sup> Davies also observed of the decision in *Dental Surgery*<sup>157</sup> that it was

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<sup>151</sup> [1999] FCA 309.

<sup>152</sup> *Ibid* [34].

<sup>153</sup> *Hanna v University of New England* [2006] NSWSC 122, [74] where no basis for damages in negligence was established. The student failed to appreciate that an error or mistake of itself is not negligent. The requisite duty of care was never specified; Kós and McVeagh, above n 3. The authors suggest that the focus should however 'not be on what is justiciable, but rather on defining the scope of the duty, establishing breach and causation of loss': at 24. It is unlikely that it will extend as far as was claimed in *Walsh v University of Technology Sydney*. Walsh asserted that UTS owed him 'a strong and non-delegable duty of care on the basis of university and student', which he submitted meant that the duty owed 'extended to ensuring that private fee paying students passed the courses in which they had enrolled' and 'at any trial the burden would fall on UTS to justify and objectively substantiate any non-passing grade assessment.' The Court understood 'the proposition to be similar to the idea of a presumptive right to passing grades given diligent application': [2007] FCA 880 at [46]. As already discussed, the Court found that there was no foundation for the substance of the claims made.

<sup>154</sup> See Rochford, 'Suing the Alma Mater', above n 62; Francine Rochford, 'The Role of Public Policy in Determining an Educator's Duty of Care' (2001) 6 *Australian & New Zealand Journal of Law & Education* 63; Gary Slapper, 'Judging the Educators: The Forensic Evaluation of Academic Judgment' (1997) 9(1) *Education and the Law* 5.

<sup>155</sup> Davies, 'Challenges to "Academic Immunity"', above n 63, 77. See also Slapper, above n 154.

<sup>156</sup> Davies, 'Challenges to "Academic Immunity"', above n 63, 77.

unclear, in as much as it left unexplained why a court will not consider academic expertise when they are prepared to scrutinise other areas of complex expertise, such as engineering or medicine aided by expert witnesses.<sup>158</sup> One issue noted by Davies is the difficulty of the courts reviewing academic decisions based on a lack of formalised professional identity and clearly defined standards, which make the assessment of a 'reasonable standard' problematic.<sup>159</sup> The steps taken by the federal government to formalise a framework of standards and registration process under the Tertiary Education Quality and Standards Agency ('TEQSA'), suggest that academic standards can be measured.<sup>160</sup> However, to the extent that Davies' arguments rest on the analogy of the removal of advocates' immunity,<sup>161</sup> which is no longer extended in the UK but remains in Australia,<sup>162</sup> this argument may be less persuasive in Australia.<sup>163</sup> It is arguable that this follows for the new consumer guarantees in the ACL also.<sup>164</sup> Notwithstanding commentators' opinions, there remains little precedent to support the view that courts will encroach on the academics' purview and review academic matters in this context.

An emerging area of law where it would appear the courts are prepared to examine the merits of the academic decision is in 'admissions law'. The recent cases of

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<sup>157</sup> *R v Higher Education Funding Council, Ex parte Institute of Dental Surgery* [1994] 1 WLR 242

<sup>158</sup> Davies, 'Challenges to "Academic Immunity"', above n 63, 75, 78.

<sup>159</sup> See also Corones, 'Consumer Guarantees and the Supply of Educational Services', above n 65. He identifies that standards have not been available as noted also in the report by the Victorian Ombudsman: J R Taylor, *Victorian Ombudsman Investigation into how Universities Deal with International Students*, (October 2011) <[http://www.ombudsman.vic.gov.au/resources/documents/Investigation\\_into\\_how\\_universities\\_deal\\_with\\_international\\_students.pdf](http://www.ombudsman.vic.gov.au/resources/documents/Investigation_into_how_universities_deal_with_international_students.pdf)> n 1: at 11.

<sup>160</sup> *Ibid* 11–14, 17–18; Davies, 'Challenges to "Academic Immunity"', above n 63, 75, 92; Greg Craven, 'Standards Agency Armed to the Teeth', *The Australian* (online), 11 September 2011 <<http://www.theaustralian.com.au/higher-education/standards-agency-armed-to-the-teeth/story-e6frgcjx-1226135998646>>; Joanna Mather, 'Shonky Colleges in the Firing Line', *Financial Review* (Sydney), 30 April 2012, 24.

<sup>161</sup> Davies, 'Challenges to "Academic Immunity"', above n 63, 75, 87–9. In the UK the preservation of advocates' immunity was based on issues of inconvenience. He notes in particular the artificial and problematic distinction between procedural and administrative decisions, and those relating to the decision based on the skill of the professional. Davies argues in light of this 'The expectation should be that minimum standards of competence are rightly to be expected of all professionals, and that the law should ensure that innocent victims of professional failure should not be the ones to suffer': at 89. See also Simon Baker, 'Legal Immunity over Marks May Wane, Expert Cautions', *Times Higher Education* (online), 13 January 2011 <<http://www.timeshighereducation.co.uk/story.asp?storyCode+414832&sectioncode=26>>.

<sup>162</sup> See, eg, *Goddard Elliot v Fritsch* [2012] VSC 87. In this case the Victorian Supreme Court recently confirmed that it was bound by the decisions of the High Court in relation to the existence advocates immunity, despite the Court's obvious discomfort with the outcome of the case.

<sup>163</sup> Lim and Hyatt, above n 62. After a review of available 'academic' protections in the UK, USA Australia and NZ, the authors state that the 'inability to find any clear definition of ... "quality" will affect the willingness of courts to adjudicate on the level of quality of education being provided to tertiary students': at 35.

<sup>164</sup> As discussed above, the claim is likely to be founded in tortious principles. See Miller, above n 64. He states that 'due care and skill is a common law negligence standard' and the 'effect of the section is to negate the opportunity to contract out of a claim for negligence': at [1.S2.60.10].

*Humzy-Hancock, Re* [2007] QSC 34, and the Victorian case *Re Legal Profession Act 2004; re OG* [2007] VSC 520 (Unreported Warren CJ, Nettle JA and Mandie J, 14 December 2007) are instructive. Both cases demonstrate that in circumstances where a decision involving academic judgement may impact significantly on a student's capacity to engage in the livelihood for which they have been training for their tertiary career, the court will review the merits of the decision made by the relevant academic or academic decision making body. These cases both concerned the disclosure or non-disclosure of student academic misconduct in their application to the legal practitioners' board in their respective states for approval and permission to practice as a solicitor. The Courts' decision in both cases is not limited to a decision in relation to the existence or not of procedural fairness and clearly go behind the academic judgement of the university decision making bodies and consider the nature and merits of the decision made. In each case the Court made a determination whether in fact the student was guilty of academic misconduct, in particular in relation to whether the conduct amounted to plagiarism. Cumming notes:

The determination in *Humzy-Hancock* has two implications for future educational law challenges in Australia, and possibly internationally. First, the language used in the determination and judicial pronouncements about the quality of academic work, rather than an argument about the establishment of findings beyond a reasonable standard of doubt or lack of procedural fairness, indicate that there are circumstances where the court will intervene and make judgements of an academic nature, that is, educational decisions, contrary to previous policy statements and dicta. With an absence of a clear legal framework of reference in this decision, either objective or subjective, the determinational facts become a judgement of academic quality and behaviour, not of an expected standard of behaviour.<sup>165</sup>

Bartlett draws similar conclusions in her consideration of the *Humzy-Hancock and Re OG* cases.<sup>166</sup> It is clear that the courts' were concerned with the impact of the academic decision on the capacity of the students' to practice law for which they had spent considerable time and money preparing for.

There are other circumstances that commentators have identified as being possible exceptions to the moratorium on review of academic matters. Regarding the issue of justiciability in general, Davies is of the view that courts in England do acknowledge the need for public decision making bodies to be accountable and 'to account

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<sup>165</sup> Cumming, 'Where Courts and Academe Converge', above n 100, 105.

<sup>166</sup> Bartlett, above n 100. See also Mary Wyburn, 'Disclosure of Prior Student Academic Misconduct in Admissions to Legal Practice: Lessons For Universities and the Courts' (2008) 8(2) *Law and Justice Journal* 314, 338–9.

intelligently for their decisions by explaining not simply how, but why they have reached them'.<sup>167</sup> He maintains that this pressure increases in accordance with statutory pressures, for example, where race or sex discrimination is alleged.<sup>168</sup> Davies is of the opinion that in relation to disability cases, the courts will look behind the academic decision made and the reasons thereof.<sup>169</sup> Lindsay notes that under the *Education Services for Overseas Students Act 2000* (Cth), the International Student Ombudsman can review an academic decision, which is to be contrasted with the position of the independent adjudicator in the United Kingdom.<sup>170</sup> Kaye also considered the impact of the *Human Rights Act 1988* (UK) on the courts' reticence to determine decisions made by the university Visitor and possible contraventions of the provisions of the *Human Rights Act 1998* (UK) as it applied in the UK.<sup>171</sup> It is possible to argue that competing obligations under various statutory regimes provide the judiciary with opportunities to review academic decisions.

In the context of the ACL, it could also be argued that the legislature has indicated that the supply of services which, as will be argued in the next chapter, includes the supply of educational services, must comply with consumer protection legislation. Decisions of specialist consumer claims tribunals where typically the HEI is a private provider have certainly taken this approach. There are also decisions in admissions law, which is concerned with the statutory obligations in relation to legal practice that indicate courts are increasingly prepared to review matters of academic judgement. In contrast, however, superior courts remain reluctant to adjudicate on matters of academic judgement, although it should be acknowledged that there has not been a recent opportunity in Australia to consider this point directly.<sup>172</sup> Outside of the consumer tribunals, there is no Australian precedent to support the proposition that the courts will look to matters of quality and standards in the supply of educational services the same way as it will for other professional services. As the authorities stand, judicial review of academic matters attending to the quality of the service

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<sup>167</sup> Davies, 'Challenges to "Academic Immunity"', above n 63, relying on the decision in *R v Higher Education Funding Council, Ex parte Institute of Dental Surgery* [1994] 1WLR 242: at 78.

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid* 90–1.

<sup>170</sup> Lindsay, 'Complexity and Ambiguity in University Law', above n 3, 17. The author notes 'there is no restriction on review of academic decisions under the *Educational Services for Overseas Students Act 2000* (Cth) (ESOS) framework. Grievances procedures established under the *HESA* framework must be able to deal with academic decisions: s19–45(1)(b), *HEP Guidelines*, s 4.5.1(b)': at 24 n 138.

<sup>171</sup> Kaye, 'Academic Judgment', above n 100.

<sup>172</sup> This point was remarked upon by the majority in *Griffith University v Tang* (2005) 221 CLR 99, 121, [58].

supplied is unlikely.<sup>173</sup> Therefore, there may be difficulties in removing academic immunity in its entirety, so as to allow the review of the quality or standard of the teaching service delivered, even pursuant to the statutory guarantees under the ACL.<sup>174</sup>

It is suggested, however, that claims regarding the nature of the educational service provided by a HEI under the UCT provisions are not as limited by notions of academic immunity as other causes of action. The corresponding obligation under the legislation in the context of this research is that to the extent that standard form consumer contracts contain unfair terms, the term will be void. As the UCT looks to the substantive fairness of terms, the provisions rely less on an adjudication of the quality and standard of educational services supplied by reference to analogous principals from other areas of law, such as professional negligence<sup>175</sup> and focus instead on the essence of the term. As the UCT provisions address issues of substantive unfairness, it is possible that the actual effect of a HEI relying on an unfair term, which is concerned with matters of academic judgement, will be justiciable. These statutory obligations arising under the ACL in relation to the provision of educational services may be able to be enforced without reference to notions of academic immunity in relation to academic matters in the supply of that service.

## **Conclusion**

The legal framework applying to the student–HEI relationship is multifaceted. The causes of action available to students with respect to a claim against a HEI are extensive, although frequently limited in their effectiveness, both in terms of suitability and adequacy of remedies. Students are often seen to ‘shoehorn’ their grievances in a way that will achieve reparation. Students can seek remediation of their claims either internally through domestic procedures of the HEI, or possibly judicial review of the same. Students can bring their grievance before the relevant Ombudsman. Students’ rights are also reinforced by the considerable ancillary and supporting

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<sup>173</sup> See also Kamvounias and Varnham, ‘Legal Challenges to University Decisions Affecting Students’, above n 1, 179.

<sup>174</sup> Cf Coronos, ‘Consumer Guarantees and the Supply of Educational Services’, above n 65. However he does not consider the jurisprudence regarding non-justiciability of academic matters in this context.

<sup>175</sup> See Davies, ‘Challenges to “Academic Immunity”’, above n 63; David Palfreyman, ‘£400K for Educational Malpractice by University Academics’ (2006) 18(2–3) *Education and the Law* 217; David Palfreyman, ‘HE’s ‘get-out-of-jail-free card’ (2010) 14(4) *Perspectives: Policy and Practice in Higher Education* 114.

statutory frameworks around the regulation of the higher education sector,<sup>176</sup> and more general statutory rights, such as freedom of information legislation or anti-discrimination legislation. International students have specific protections in place.<sup>177</sup> A claim under the ACL by a student against their HEI for an alleged failure in the provision of educational services is only one route open to the student.

As seen above, students are concerned about the nature of the educational experience they participate in. They do make complaints when the educational services they receive are not of the standard a reasonable (or occasionally unreasonable) student might expect. Students may well be concerned that decision making processes are fair, but this is not mutually exclusive of claims in relation to substantive matters. Despite significant internal, public and private rights, including rights accruing under consumer protection, students have had limited success in enforcement of the same before the courts. One reason for this is it is often difficult to determine the exact nature of those rights or obtain a remedy due to lack of proof of loss suffered. However, a common barrier in relation to claims regarding the nature of the educational service provided is that subject to few exceptions, such as the emerging area of admissions law, claims made by students in higher courts in relation to academic matters are not justiciable.

Some of the difficulties in relation to what is justiciable appear to lie with the lack of clarity in relation to what can be categorised as matters of 'pure academic judgement' or academic freedom. It is the proposition of this research that once the 'pure academic judgement' has been exercised in the determination of course requirements, to the extent academic matters form part of the student-HEI contract those terms are subject to review. It is suggested that claims regarding the nature of the educational service provided by a HEI under the UCT provisions may not be as limited by notions of academic immunity as other causes of action, as the legislation prevents a HEI from relying on a term in the student-HEI contract that is unfair. As will be seen in Chapter 5, this goes beyond issues of procedural fairness to matters that are substantive in relation to the supply of educational services. This, it is suggested, circumvents the principle that academic matters are non-justiciable, thus advancing students' rights as consumers.

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<sup>176</sup> See, eg, various state Higher Education Acts and Commonwealth funding legislation such as *Higher Education Support Act 2003* (Cth); *Higher Education Funding Act 1988* (Cth); *Tertiary Education Quality and Standards Agency Act 2011* (Cth) ('TEQSA Act').

<sup>177</sup> *Educational Services for Overseas Students Act 2000* (Cth).

## Chapter 3: Application of the ACL to HEIs in Australia

### Introduction

Prior to the introduction of the ACL, one significant barrier for students bringing claims under consumer protection legislation has been the view that the services supplied by the HEI may not be supplied in 'trade or commerce'. Previously under the TPA, academic activities, such as statements made in lectures, have been considered matters internal to the student–HEI relationship. Therefore, although this type of activity was conduct that may relate to the overall trade or commerce of a HEI, it was not within the scope of the legislation as conduct *in* trade or commerce.<sup>1</sup> This is in contrast to promotional activities of the HEI.<sup>2</sup> In order to attract the UCT provisions, the contract for educational services must be 'services' 'provided, granted or conferred in trade or commerce'.<sup>3</sup> This chapter will assess whether the supply of educational services falls within the scope of the legislative requirement that services must be supplied in 'trade or commerce' as defined by the ACL. In particular, an analysis of the effect of the new extended definition of 'trade or commerce' will be undertaken. The extended definition of 'trade or commerce'<sup>4</sup> includes activities and transactions characteristic of the carrying-on of a business or profession.<sup>5</sup>

Thus this thesis is concerned only with whether the student–HEI contract is a service supplied in 'trade or commerce', as opposed to a broad range of conduct engaged in by a HEI and its employees that might be subject to other provisions in the ACL, such

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<sup>1</sup> *Fasold v Roberts* (1997) 145 ALR 548; *Plimer v Roberts* (1997) 150 ALR 235; *ACCC v Black on White Pty Ltd* (2001) 110 FCR 1. See especially Francine Rochford, 'Traders of the Lost Ark — Lecturers and Liability' (2001) 13(2) *Education and the Law* 127, 133.

<sup>2</sup> See, eg, Francine Rorke, 'The Application of the Consumer Protection Provisions of the *Trade Practices Act 1974* (Cth) to Universities' (1996) 12 *Queensland University of Technology Law Journal* 176, 177. Francine Rorke now writes under the name Francine Rochford; Phillip Clarke, 'University Marketing and the Law Applying the Trade Practices Act to Universities' Marketing and Promotional Activities (2003) 8 *Deakin Law Review* 304; Jim Jackson, 'The Marketing of University Courses Under Sections 52 and 53 of the *Trade Practices Act 1974* (Cth)' (2002) 6 *Southern Cross University Law Review* 106, 114; Patty Kamvounias and Sally Varnham, 'Getting What They Paid For: Consumer Rights of Students in Higher Education' (2006) 15(2) *Griffith Law Review* 306, 315–21; Lynden Griggs, 'Tertiary Education, The Market and Liability "In Trade or Commerce"' (2004) 12 *Competition and Consumer Law Journal* 1, 6, 8; Judith Bessant, 'Legal Issues in Higher Education and the Trade Practices Act' (2004) 26(2) *Journal of Higher Education Policy and Management* 251, 256–7; Sally Varnham, 'Straight Talking, Straight Teaching: Are New Zealand Tertiary Institutes Potentially Liable to Their Students Under Consumer Protection Legislation?' (2001) 13(4) *Education and the Law* 303, 308; Bruce Lindsay, 'Complexity and Ambiguity in University Law: Negotiating the Legal Terrain of Student Challenges to University Decisions' (2007) 12(2) *Australian & New Zealand Journal of Law & Education* 7, 12. Similarly the regulator was also clear some 15 years ago, see, eg, Allan Fels, 'The Impact of Competition Policy and Law on Higher Education in Australia' (Paper presented at the Australasian Association for Institutional Research 1998 International Conference, Australia, 24 November 1998) 4–5.

<sup>3</sup> ACL s 2 (definition of 'services').

<sup>4</sup> *Ibid* (definition of 'trade or commerce').

<sup>5</sup> *Shahid v Australasian College of Dermatologists* 248 ALR 267; *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* (2002) 122 FCR 110.

as misleading or deceptive conduct. This research is therefore a narrower inquiry than a consideration of the extensive range of individual academic activities that could arguably be conduct in 'trade or commerce' for the purpose of other protections available under the ACL.<sup>6</sup> It is the proposition of this thesis that the contract for the supply of educational services occurs in 'trade or commerce' and is therefore a contract subject to the UCT provisions. To the extent that academic activity forms part of the student–HEI contract it will be subject to the ACL provisions regulating unfair contract terms.

If the ACL applies, this chapter also examines whether HEIs can avail themselves of Crown immunity<sup>7</sup> and the existence of any jurisdictional issues arising for particular categories of students including international students,<sup>8</sup> students studying at Australian HEIs at campuses located overseas and online students who may enrol in an Australian course but be resident outside the jurisdiction<sup>9</sup>.

### **The Australian Consumer Law**

*The object of this Act is to enhance the welfare of Australia through the promotion of competition and fair trading and provision for consumer protection.*<sup>10</sup>

The impetus for a new national consumer law was the review by the Productivity Commission into Australia's consumer policy framework.<sup>11</sup> The report was concerned with improved coordination of policy development; the minimisation of gaps in the law; harmonisation of consumer laws; empowering consumers, especially vulnerable and disadvantaged consumers; and eliminating inconsistencies within the system.<sup>12</sup> There was also a concern amongst the Commission and the Council of Australian Governments ('COAG') about administrative and regulatory duplication and

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<sup>6</sup> Such as the Consumer Guarantees contained in ACL ch 3 pt 3-2 div 1 sub-div A-D ss 51–68. See especially Stephen Corones, 'Consumer Guarantees and the Supply of Educational Services by Higher Education Providers' (2012) 35(1) *University of New South Wales Law Journal* 1.

<sup>7</sup> CCA ss 2A, 2B.

<sup>8</sup> Ibid ss 5(1)(c), 6(3)(a), 6(4). Liability for the use of educational agents lies with providers and is currently governed by the *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007* and common law principles of agency.

<sup>9</sup> CCA ss 5(1)(c), 6(3)(a), 6(4).

<sup>10</sup> Ibid s 2 (objects clause). This was based on Productivity Commission's overarching objectives in Productivity Commission, Australian Government, *Review of Australia's Consumer Policy Framework*, Final Report No 45 2008, Canberra <<http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport>> adopted in *Joint Communiqué Ministerial Council on Consumer Affairs* 15 August 2008, Minister for Competition Policy and Consumer Affairs, Australian Government, *An Australian Consumer Law Fair Markets — Confident Consumer* (2009), 101.

<sup>11</sup> Productivity Commission, Australian Government, *Review of Australia's Consumer Policy Framework*, above n 10.

<sup>12</sup> Minister for Competition Policy and Consumer Affairs, Australian Government, *An Australian Consumer Law Fair Markets*, above n 10, 5; Productivity Commission, Australian Government, *Review of Australia's Consumer Policy Framework*, above n 10.



inefficiencies, particularly for business compliance costs in relation to consumer protection.<sup>13</sup> The introduction of national laws to regulate unfair contract terms<sup>14</sup> was seen as one of the six key elements in achieving these objectives.<sup>15</sup> The resulting ACL is a cooperative reform of the Australian Government and the states and territories underpinned an Intergovernmental Agreement signed by COAG.<sup>16</sup>

By January 2011, Australia had a single national consumer protection law regime in place, the Australian Consumer Law ('ACL').<sup>17</sup> The first tranche of reforms resulted in the imposition of an unfair contract terms law from 1 July 2010. Now any term in a consumer contract that is unfair as defined by the ACL is void.<sup>18</sup> It is arguable that universities' arrangements with their students falls within the definition of standard form consumer contracts, to which the law attaches.<sup>19</sup> The second part of the ACL, while leaving the umbrella provision prohibiting misleading or deceptive conduct and unconscionable conduct largely unchanged, significantly alters the operation of statutory implied conditions and warranties in consumer contracts for goods and services.<sup>20</sup> A discussion of the provisions contained in the second tranche of reforms is outside the scope of this research. The new legislation has also provided additional remedies for those seeking redress and heightened enforcement powers for the regulators.<sup>21</sup>

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<sup>13</sup> Darren Jackson, 'Implications of the Recent Trade Practices Amendments: An Overview of the New Legislation' (Paper presented at Law Summer School 2011, University of Western Australia Law School, Perth, 25 February 2011) 44, 47, n 21; Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) ('EM1'); Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010 (Cth) ('EM2'); Economics Legislation Committee, The Senate (Cth), Trade Practices Amendment (Australian Consumer Law) Bill 2009 [Provisions] September 2009. See generally Australian Government, *Australian Consumer Law* <<http://www.consumerlaw.gov.au/content/Content.aspx?doc=home.htm>>.

<sup>14</sup> Council of Australian Governments, *Intergovernmental Agreement for the Australian Consumer Law*, July 2009 <[http://www.consumerlaw.gov.au/content/the\\_acl/downloads/acl\\_iga.pdf](http://www.consumerlaw.gov.au/content/the_acl/downloads/acl_iga.pdf)> 4.

<sup>15</sup> *Ibid.* 'The overarching objectives are supported by six operational objectives for consumer policy: 1) to ensure that consumers are sufficiently well-informed to benefit from and stimulate effective competition; 2) to ensure that goods and services are safe and fit for the purposes for which they were sold; 3) to prevent practices that are unfair; 4) to meet the needs of those consumers who are most vulnerable or are at the greatest disadvantage; 5) to provide accessible and timely redress where consumer detriment has occurred; and 6) to promote proportionate, risk-based enforcement': at 3.

<sup>16</sup> Australian Government, *Australian Consumer Law*, above n 13.

<sup>17</sup> Schedule 2 of the *Trade Practices Amendment (Australian Consumer Law) Act (No.1) 2010* (Cth); *Trade Practices Amendment (Australian Consumer Law) Act (No.2) 2010* (Cth). The first tranche of reforms received assent on 14 April 2010 operative from 1 July 2010 the second Bill was passed on 24 June 2010 and took effect on 1 January 2011.

<sup>18</sup> ACL s 23.

<sup>19</sup> *Ibid* s 27.

<sup>20</sup> *Ibid* ch 3 pt 3-2 div 1 sub-div A-D ss 51–68, previously Part V of the TPA ss 71 and 74 in particular. Section 60 provides that services must be supplied due care and skill. For a discussion of the application of these provisions to HEI see Corones, above n 6.

<sup>21</sup> ACL ch 5, see, eg, the new substantiation notices pt 5-1 div 2 ss 219–22, pecuniary penalties pt 5-2 div 1 ss 224–30. See generally Sarah Russell, 'The Australian Consumer Law: The New Enforcement Powers and Remedies — The Story So Far' (2012) 20 *Australian Journal of Competition and Consumer Law* 6.

In essence, the TPA as a legislative mechanism remained unchanged in the sense that the TPA was not repealed but rather renamed the *Competition and Consumer Act 2010* ('CCA').<sup>22</sup> The ACL in effect operates as a self-contained code.<sup>23</sup> The states in turn have enacted legislation adopting the text of the ACL as the law of their respective jurisdictions.<sup>24</sup> The effect of this is that the ACL applies as the law of each state and territory.<sup>25</sup> There are of course potential problems with a uniform legislation approach rather than the states referring their powers to the Commonwealth. There is a risk that individual jurisdictions will make small but increasing modifications to the law as it applies in their state, potentially defeating the objective to have a single national consumer law.<sup>26</sup> Additionally amendments at the Commonwealth level do not automatically flow through to all the states, notably WA.<sup>27</sup>

The former consumer protection regime was structured in a framework of the Commonwealth TPA, supported by legislation in the various states and territories which, for the most part mirrored the provisions of the Commonwealth Act. Due to the construction of federal powers within the Constitution, if a claim was bought pursuant to the TPA, claimants were required to establish that the alleged wrongdoer was a

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<sup>22</sup> *Trade Practices Amendment (Australian Consumer Law) Act (No.2) 2010* (Cth). In addition to the name change, Parts IV (A Unconscionable conduct), V (Consumer protection), VA (Liability for defective goods) and VC (Offences) of the TPA were moved to the second schedule, the ACL, as amended and renumbered and applying as a law of the Commonwealth. See especially Darren Jackson, above n 13, 45. The paper contains a detailed discussion of the overview of the statutory framework for the implementation of the new ACL.

<sup>23</sup> Section 131(1) CCA. See also Russell Miller, *Miller's Australian Competition and Consumer Law Annotated* (Thomson Reuters, 34<sup>th</sup> ed, 2012) 1537 [1.S2.2.7].

<sup>24</sup> *Fair Trading (Australian Consumer Law) Act 1992* (ACT) as amended by *Fair Trading (Australian Consumer Law) Amendment Act 2010* (ACT); *Fair Trading Act 1987* (NSW) as amended by *Fair Trading (Australian Consumer Law) Amendment Act 2010* (NSW); *Consumer Affairs and Trading Act 1990* (NT) as amended by *Consumer Affairs and Fair Trading Amendment (National Uniform Legislation) Act 2010* (NT); *Fair Trading Act 1989* (Qld) as amended by *Fair Trading (Australian Consumer Law) Amendment Act 2010* (Qld); *Fair Trading Act 1987* (SA) as amended by *Statutes Amendment and Repeal (Australian Consumer Law) Act 2010* (SA); *Australian Consumer Law (Tasmania) Act 2010*; *Fair Trading Act 1999* (Vic) as amended by *Fair Trading (Australian Consumer Law) Amendment Act 2010* (Vic); *Fair Trading Act 2010* (WA).

<sup>25</sup> See, eg, *Fair Trading Act 2010* (WA) ('FTA (WA)') ss 18–19.

<sup>26</sup> As has already occurred in at least one instance. See, eg, the FTA (WA) s 36; Darren Jackson, above n 13. Jackson notes there is already a divergence between the curfew on door to door sales activities in Western Australia (8pm) compared with the Commonwealth law (6pm): 45 n3. It should be noted also that the ACL is a different statutory regime to the Corporations Law whereupon all states referred their constitutional power in relation to corporations to the Commonwealth Government. This has not been done in relation to consumer protection. It remains to be seen whether the mechanisms chosen to harmonise the laws in the Commonwealth will be successful, or whether over time there is a divergence in the ACL with parochial idiosyncratic provisions.

<sup>27</sup> All jurisdictions bar WA set the process for future amendments to the Commonwealth ACL to flow through to their Acts automatically upon proclamation and Royal Assent of the Commonwealth ACL. See, eg, *Fair Trading Act 1987* (NSW) s 29. It appears a little more complicated in WA. Section 20 of the *Fair Trading Act 2010* (WA) states the Governor may amend the Australian Consumer Law (WA) by Bill. Section 21 of the *Fair Trading Act 2010* (WA) deals with publication of regulations and notices in the Gazette in order to have force. It remains to be seen whether the mechanism of providing for the Governor to quickly enact legislative amendments under this delegated responsibility will overcome the hurdles of the difficulty of harmonising laws in a Commonwealth, including whether over time all amendments are captured: Darren Jackson, above n 13, 44–5.

'corporation'.<sup>28</sup> The provisions of the TPA would then apply. These procedural difficulties were often overcome by plaintiffs pleading both under the TPA and the relevant state or territory fair trading act. Given the introduction of the national consumer law, the constitutional requirement that the HEI be a foreign, financial or trading corporation is less significant, as a constitutional corporation is not a prerequisite to enliven the provisions.<sup>29</sup> It is still a requirement however that the activity or conduct under scrutiny occur in 'trade or commerce'.<sup>30</sup>

### **Does the ACL apply to Higher Education Institutions?**

The Ministerial Council on Consumer Affairs has explicitly stated that the 'national consumer provisions should apply to all sectors of the economy'.<sup>31</sup> For at least the last ten years it has been settled law that the consumer protection legislation, formerly the TPA, has applied to the activities of HEIs, at least in regard their promotional activities.<sup>32</sup> Academic commentators have been considering the application and effect of consumer protection regimes in the higher education sector, both within Australia and in other common law jurisdictions for some time.<sup>33</sup>

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<sup>28</sup> TPA s 4 (definition of 'corporation' and 'trading corporation'); *Australian Constitution* s 51(xx).

<sup>29</sup> In the sense that it is the ACL (Cth) that is relied on. They would still be subject to the ACL under the various state application Acts. See especially Corones, above n 6, 7–8. It may also be significant in determining who the appropriate regulator is: see Darren Jackson, above n 13, 46. In terms of other Commonwealth legislation and particularly funding arrangements, the status of the university as a trading corporation may be important in light of the High Court's recent ruling in the School Chaplin's case: see John Ross, 'The Power to Fund', *The Australian* (online), 27 June 2012 <<http://www.theaustralian.com.au/higher-education/the-power-to-fund/story-e6frgcjx-1226409483875>>; John Ross, 'Ruling on Chaplains Threatens Uni Funding', *The Australian* (online), 27 June 2012 <<http://www.theaustralian.com.au/higher-education/ruling-on-chaplains-threatens-uni-funding/story-e6frgcjx-1226409544364>>; Joanna Mather, 'Regulator Could Face Legal Challenge', *Financial Review* (Sydney), 12 March 2012, 27.

<sup>30</sup> ACL s 2 (definition of 'trade or commerce'). See, eg, ACL s 18 whereby the misleading or deceptive conduct must occur in 'trade or commerce'; ACL ch 2 pt 2-3 s 23(3) where the contract must be a supply for services. ACL s 2 (definition of 'services') means that the services must be supplied granted or conferred in 'in trade or commerce'.

<sup>31</sup> Noting the constitutional limitations in relation to financial services see *Joint Communiqué Ministerial Council on Consumer Affairs 15 August 2008*, Minister for Competition Policy and Consumer Affairs, Australian Government, *An Australian Consumer Law Fair Markets*, above n 10, 103.

<sup>32</sup> *Pilmer v Roberts* (1997) 150 ALR 235; *ACCC v Black on White Pty Ltd* (2001) 110 FCR 1; See especially Rochford, 'Traders of the Lost Ark', above n 1; Rorke, above n 2; Clarke, above n 2; Jim Jackson, 'The Marking of University Courses', above n 2; Kamvounias and Varnham, 'Getting What They Paid For', above n 2; Griggs, 'Tertiary Education, The Market and Liability', above n 2, 6, 8; Bessant, above n 2; Varnham, 'Straight Talking, Straight Teaching', above n 2, 308; Lindsay, 'Complexity and Ambiguity in University Law', above n 2.

<sup>33</sup> Corones, above n 6; Damian Considine, 'The Loose Cannon Syndrome: University as Business and Students as Consumers' (1994) 37(1) *Australian Universities' Review* 36; Fels, above n 2; Patty Kamvounias and Sally Varnham, 'In-House or In Court? Legal Challenges to Universities' Decisions' 18(1) *Education and the Law* 1; J Steven Kós and Russell McVeagh, 'The View From the Bottom of the Cliff: Enforcement of Legal Rights Between Student and University' (1999) 4(2) *Australian and New Zealand Journal of Law and Education* 18; Bruce Lindsay, 'Student Subjectivity and the Law' (2005) 10(2) *Deakin Law Review* 628; Andre Onsmann, 'Tempering Universities' Marketing Rhetoric: A Strategic Protection Against Litigation or an Admission of Failure?' (2008) 30(1) *Journal of Higher Education Policy and Management* 77; Francine Rochford, 'The Relationship Between the Student and the University' (1998) 3(1) *Australia and New Zealand Journal of Law and Education* 28; Sally Varnham, 'Guarantees for Degrees?' (2001) *New Zealand Law Journal* 418; Sally Varnham, 'Liability in Higher

Promotional activities have been identified by commentators as clearly being activities in 'trade or commerce' and include activities such as statements made in prospectuses, advertisements in all forms of media including social networking sites, and open days. Common statements made in the course of these activities to attract students can include claims in relation to facilities, cost, accreditation status, graduate employment prospects, recognised prior-learning credit, additional support services, size of classes and how long it takes to complete the course.<sup>34</sup> Thus the provisions of the TPA, now the ACL, will extend to the recruitment activities for international or domestic full-fee paying students.<sup>35</sup> Some commentators are also of the view that the act of accepting a student into a course may be conducted in 'trade or commerce' such that if a student is subsequently without the skills to complete the course, the HEI may be exposed to claims under the ACL.<sup>36</sup> Many of these activities can be said to form part of the terms of the contract for supply of educational services between the student and HEI. Some observers have, however, cast doubt that the provision of services under the government regulated fee payment scheme can be caught as a trading activity.<sup>37</sup> The issue in relation to Commonwealth funded students is considered specifically below.

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Education in New Zealand: Cases for Courses?' (1998) 3(1) *Australian and New Zealand Journal of Law and Education* 3. The Australian commentaries don't always include a consideration of cases in the lower courts such as the *Kwan v University of Sydney Foundation Program P/L* case; cf Lindsay, 'Complexity and Ambiguity in University Law', above n 2, 12; Jim Jackson, 'Regulation of International Education: Australia and New Zealand' (2005) 10(2) & (2006) 11(1) *Australia & New Zealand Journal of Law & Education* 67, 78; Corones, above n 6. For a discussion of similar issues arising in the UK see, eg, Tim Birtwistle and Melissa Askew, 'The Teaching and Higher Education Act 1998 — Impact on the Student Contract' (1999) 11 *Education and the Law* 89; Mark Davies, 'Challenges to "Academic Immunity" — The Beginning of a New Era?' (2004) 16 *Education and the Law* 75; Martin Davis, 'Students, Academic Institutions and Contracts — A Ticking Time Bomb?' (2001) 13(1) *Education and the Law* 9; Dennis Farrington and David Palfreyman, *The Law of Higher Education* (Oxford University Press, 2<sup>nd</sup> ed, 2012); William Hoye and David Palfreyman, 'Plato vs Socrates: The Devolving Relationship Between Higher Education Institutions and Their Students' (2004) 16(2–3) *Education and the Law* 97.

<sup>34</sup> Jackson, 'Regulation of International Education', above n 33, 76–7.

<sup>35</sup> See, eg, Jackson, 'Regulation of International Education', above n 33, 75–8; Griggs, 'Tertiary Education, the Market and Liability', above n 2, 5; Clarke, above n 2, 17.

<sup>36</sup> See especially Corones, above n 6, 14–17 and his observations following the report by the Victorian Ombudsman, J R Taylor, *Investigation into How Universities Deal with International Students* (2011) who is of the view that this type of claim is very possible in regards the new consumer guarantees especially; Rorke, 'The Application of the Consumer Protection Provisions', above n 2. Rorke also considers the acceptance of students into a course as being in trade or commerce and notes in her view that irrespective of the category of the student (ie. HECS or full fee paying undergraduate or postgraduate) the 'acceptance of the student into a course is likely to be in trade or commerce': at 190. She notes further that it is possibly a 'sustainable argument that a student with insufficient skills was being enrolled in a course might be able to recover the fees paid': at 193.

<sup>37</sup> Clarke, above n 2, 17; Jackson, 'Regulation of International Education' above n 33, 76; cf Bessant, above n 2; Corones, above n 6.

### **Is the contract for the supply of educational services in ‘trade or commerce’?**

In order to attract the UCT provisions, the contract for services must be services provided, granted or conferred in ‘trade or commerce’.<sup>38</sup> Whether the student–HEI contract is for ‘services’ as defined by the ACL is considered in Chapter 4.<sup>39</sup> Assuming that the student–HEI contract is such a service, the focus of this chapter is whether the supply of that service occurs in ‘trade or commerce’ as required by the ACL. Given the requirement that services be supplied in ‘trade or commerce’ was also a threshold requirement under the TPA, an examination of the case law dealing with the previous provisions under the former TPA remains relevant and useful to an examination of the new law under the ACL.

Few reported cases have considered what type of conduct engaged in by providers of higher education services amounts to conduct in ‘trade or commerce’ for the purpose of the legislation.<sup>40</sup> It is clear that some academic activity will not be considered to be conduct in ‘trade or commerce’, such as statements made in public lectures.<sup>41</sup> There is, however, disparity in the approach taken by the courts across the jurisdictions in which these cases are heard, notably the lower courts. Furthermore, the complex nature of student litigation has precluded a detailed consideration of this issue in a number of cases. In addition, it is apparent that the attitude is markedly different if the supplier of the educational service is a private provider.

The meaning of ‘trade or commerce’ as interpreted by the courts is considered in detail in this chapter. While the decided cases involving HEIs are instructive, it is important to remember that this thesis is concerned only with whether the student–HEI contract is a service supplied in ‘trade or commerce’. Most of the cases contemplate whether a particular academic activity is conduct in ‘trade or commerce’ for the purpose of a claim that the HEI has engaged in misleading or deceptive behaviour as prohibited by the ACL. This research is a narrower inquiry. It is the proposition of this thesis that the supply of educational services occurs in ‘trade or commerce’ and therefore any contract for those services is subject to the UCT provisions. Consequently, the issue of whether particular types of academic activity

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<sup>38</sup> ACL s 2 (definition of ‘trade or commerce’). See, eg, ACL s 18 whereby the misleading or deceptive conduct must occur in ‘trade or commerce’; ACL ch 2 pt 2-3 s 23(3) where the contract must be a supply for services. ACL s 2 (definition of ‘services’) means that the services must be supplied granted or conferred ‘in trade or commerce’.

<sup>39</sup> ACL ch 2 pt 2-3 s 23(3) where the contract must be a supply for services.

<sup>40</sup> See, eg, *Pilmer v Roberts* (1997) 150 ALR 235; *ACCC v Black on White Pty Ltd* (2001) 110 FCR 1.

<sup>41</sup> *Fasold v Roberts* (1997) 145 ALR 548; *Pilmer v Roberts* (1997) 150 ALR 235; *Quickenden v O’Conner* (2001) 184 ALR 260. See generally Rochford, ‘Traders of the Lost Ark’, above n 1.

or judgement are in 'trade or commerce' does not directly arise, except to the extent that that activity could be said to be incorporated as a term of the contract in question. The nature and content of the student–HEI contract are considered in detail in Chapters 4 and 5.

### **Legislative definition of 'trade or commerce'**

The definition of 'trade or commerce' as amended in the ACL, provides a potentially wider definition than previously under the TPA. Formerly the definition of 'trade or commerce' was:

**trade or commerce** means trade or commerce within Australia or between Australian and places outside Australia.<sup>42</sup>

The power of the Commonwealth Government to make laws in respect of trade or commerce emanates from clause 51(i) of the Constitution. As a result of the harmonisation of the consumer protection laws described above, the national law in relation to consumer protection is not so restricted. The meaning of the phrase 'trade or commerce' in the ACL is ascribed a broader meaning. The definition of the ACL adopts the wording of that found in former state fair trading acts:<sup>43</sup>

*trade or commerce* means:

- (a) Trade or commerce within Australia.
- (b) Trade or commerce within Australia and places outside Australia.

It includes any business or professional activity (whether or not carried on for profit).<sup>44</sup>

As with the previous definition in the TPA, this has the effect of the ACL applying to conduct engaged in outside of Australia, provided at least one of the parties to the commercial or trading relationship is situated within Australia. This assists students who may be studying fully online or at a branch campus of an Australian HEI outside Australia.<sup>45</sup> The significance for HEIs in the context of the application of the ACL to academic activities is in the addition of the words 'any business or professional activity (whether or not carried on for profit)'. The new extended definition is significant in determining what activities of HEIs (beyond promotional activities) are in 'trade or commerce' for the purpose of the ACL. The jurisprudence surrounding this

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<sup>42</sup> TPA s 4 (definition of 'trade or commerce').

<sup>43</sup> See, eg, *Fair Trading Act 1987* (NSW) s 42(1), which used to provide 'a person shall not, in trade or commerce, including any business activity or in any professional activity, engage in conduct that is misleading or deceptive or is likely to mislead or deceive' and s 4 (definition of 'business') 'includes a business not carried on for profit and a trade and a profession.'

<sup>44</sup> ACL s 2 (definition of 'trade or commerce').

<sup>45</sup> See also the discussion below pp 92-93 regarding the extraterritorial application of the CCA.

phrase will be considered with particular regard to the effect, if any, of the new definition.

## **Judicial consideration of the meaning of 'in trade or commerce'**

### ***Interlocutory proceedings***

In relation to matters brought before the courts by students, often the issue of whether the conduct complained of is in 'trade or commerce' is not dealt with at all by the courts. One could speculate that this is influenced by the fact that much of the litigation is 'omnibus litigation' and many of the decisions relate to interlocutory applications, generally strike out applications or applications for summary judgment.<sup>46</sup> Traditionally courts are not inclined to deny a claimant's right to be heard in substance on the basis of threshold issues in a strike out or summary judgment application, particularly when the claimant is an in-person litigant as many students are.<sup>47</sup> In order to succeed on a strike out or summary judgment, applicants (typically the HEI) are generally required to demonstrate a higher standard of proof.<sup>48</sup> It is also arguable that the outcomes in these types of matters are influenced by what Astor has identified as 'complexity' in the cases, that is, not just the nature of the claim made, but in the number of claims and appeals brought, and the characteristics of the litigant themselves.<sup>49</sup>

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<sup>46</sup> See, eg, *Hanna v University of New England* [2006] NSWSC 122, [36] where the issue of whether the conduct is in 'trade or commerce' is noted but the court said that for the present purposes did not need to be pursued. The court turned its attention to matters of substance.

<sup>47</sup> As occurred in *Walsh v University of Technology, Sydney* [2007] FCA 880, [87]. Although the matter was struck out, it was on the basis of matters of substance. The issue of whether the conduct had occurred in 'trade or commerce' was not canvassed at all. This notion of protecting in person litigants is also relevant to applications for costs orders by defendant universities, which would prevent students from pursuing their claims in a practical way. See, eg, *Ogawa v University of Melbourne* [2005] FCA 1139, 'I am mindful of the need to ensure that an impecunious student is not shut out by a potential liability for costs from pursuing an apparently meritorious claim against a large and wealthy corporation like the University': at [95] (Ryan J); *Griffith University v Tang* (2005) 221 CLR 99. Justice Kirby remarked it was of concern that the students complaints in that case the substance of which would never be reviewed nor the procedural fairness or not of the same see paragraphs: at 138 [114]–[119] (Kirby J).

<sup>48</sup> See, eg, *Rules of the Supreme Court 1971* (WA) O16 r 1, O20 r 19(1) where an order for summary judgement can be made on the application of the defendant when the Court is 'satisfied that the action is frivolous or vexatious, that the defendant has a good defence on the merits, or that the action should be disposed of summarily ... the onus is on the defendant to show that there is no serious question to be tried on any cause of action raised by the plaintiff ... In a combined application of this sort, the court is not confined by the manner in which the plaintiff has formulated his case on the pleadings and may consider the undisputed facts as well as the facts which are in dispute': at LexisNexis *Civil Procedure WA commentary*

<<http://www.lexisnexis.com.dbgw.lis.curtin.edu.au/au/legal/results/pubTreeViewDoc.do?nodeId=TAADAACAAVAAF&refPt=TAAF&pubTreeWidth=23%25>>.

<sup>49</sup> Hilary Astor, 'Why do Students Sue Australian Universities?' (2010) 21 *Australasian Dispute Resolution Journal* 20. See the discussion in Chapter 2 n 97.

An example<sup>50</sup> of this can be seen in the extensive, protracted and bitter litigation between the University of Melbourne and former PhD candidate Megumi Ogawa. Ms Ogawa brought many claims against the University that were not limited to claims pursuant to the TPA and included an application to the High Court. Ms Ogawa was incarcerated for contempt and ultimately left Australia due to difficulties with her visa.<sup>51</sup> She eventually completed her doctoral studies with the University of Queensland and ultimately settled the dispute with the University of Melbourne.<sup>52</sup> In the matter of *Ogawa v The University of Melbourne (No.3)* [2004] FMCA 536, Ms Ogawa made various claims against the University, including contravention of section 52 of the TPA and breach of contract. The University of Melbourne sought orders to strike out the applicant's statement of claim or alternatively summary dismissal on the basis the claim was vexatious. The University's application was not successful. However, Ogawa's claims against the University were dismissed in *Ogawa v The University of Melbourne* [2005] FCA 1139 as Ogawa failed to attend at the hearing. In *Ogawa v Phipps* [2006] FCA 361, Ogawa was successful in her application for writs for certiorari and prohibition in respect of the decision dismissing the application and orders for costs<sup>53</sup> on the basis that the proceedings had been wrongly transferred to the inferior court. The Court also ordered that the matter be transferred to the Federal Court.

In relation to the claims made pursuant to the TPA, the University of Melbourne did not admit that it was a trading corporation for the purposes of the Act or that the offering of courses to overseas students was in 'trade or commerce'.<sup>54</sup> In relation to the claim under the TPA for misleading and deceptive conduct, Phipps FM noted the difficulty in distilling the representations given the manner in which the claim had been pleaded.<sup>55</sup> The Court was of the view that it was likely that the impugned conduct was first that the candidate would be supervised by members of the academic staff with appropriate and continuing research experience and second, in absence of this, the University would arrange a suitable replacement.<sup>56</sup> It is arguable

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<sup>50</sup> See also *Mathews v University of Queensland* [2002] FCA 414; *Walsh v University of Technology, Sydney* [2007] FCA 880; *Dudzinski v Kellow* [1999] FCA 390.

<sup>51</sup> Adam Morton, 'Learning to Fight', *The Age* (online) 29 July 2006 <<http://www.theage.com.au/news/in-depth/learning-to-fight/2006/07/28/1153816381159.html?page=z>>.

<sup>52</sup> See Megumi Ogawa, 'The Courts' Jurisdiction Over Student/University Disputes in Australia', (2012) 2(1) *International Journal of Public Law and Policy* 96.

<sup>53</sup> *Ogawa v University of Melbourne (No.2)* [2005] FMCA 1216.

<sup>54</sup> *Ogawa v University of Melbourne* (2005) 220 ALR 659 [105].

<sup>55</sup> *Ogawa v University of Melbourne (No.3)* [2004] FMCA 536, [14], [17].

<sup>56</sup> *Ibid* [23].



that these representations were also terms of the student–HEI contract.<sup>57</sup> The issue of whether this constituted conduct in ‘trade or commerce’ was not determined as the proceedings were resolved by way of confidential settlement.<sup>58</sup>

By way of contrast, in *Mathews v University of Queensland* [2002] FCA 414 (*Mathews*), claims regarding particular academic activities were struck out, largely on the basis that they were not conduct in ‘trade or commerce’.<sup>59</sup> A former student complained in relation to the failure by the University to properly assess his academic achievement and deal with complaints by him about the assessment in relation to mathematic units undertaken. The first claim related to the decision by the relevant appeals committee and their representation that they could deal with all matters raised in his appeal.<sup>60</sup> The claimant was of the opinion he should have been awarded a grade of seven in the particular subject, rather than the six he received.<sup>61</sup> Justice Spender was of the view that that the statement of claim did not disclose that this representation had been made in ‘trade or commerce’.<sup>62</sup> The Court also held that the University’s alleged representation that it would not ‘countenance plagiarism’ and subsequent failure to apply the plagiarism policy to other students was not conduct in ‘trade or commerce’.<sup>63</sup>

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<sup>57</sup> See generally Chapter 4; *Griffith University v Tang* (2005) 221 CLR 99, 121; Megumi Ogawa, above n 52, 98.

<sup>58</sup> Megumi Ogawa, above n 52, 96–7.

<sup>59</sup> Mr Mathews failed to show reasonable cause of action against the University and the proceedings were struck out as frivolous and vexatious. See also *Dudzinski v Kellow* [1999] FCA 390 where the court struck out the part of the claim relating to claims under s 52 of the TPA. The student sought to allege that the determination by three members of the academic staff that he was not entitled to credit for prior learning was misleading or deceptive. The Court stated ‘... his bald assertion of a conclusion without any explanation of how the communication by any of (the academic staff) constituted conduct in trade or commerce ... is plainly embarrassing’: at [26].

<sup>60</sup> The claimant alleged that committee had falsely represented that they had the ability to deal with and consider all relevant matters in relation to the appeal and that they had failed to do so.

<sup>61</sup> *Mathews v University of Queensland* [2002] FCA 414, [11].

<sup>62</sup> *Ibid* [10].

<sup>63</sup> *Ibid* [21]. The courts have shown reluctance in other matters to find the development or application of institutional policy as an activity that can be said to be in ‘trade or commerce’. For example, jurisdiction was denied in relation to a claim made in the matter of *Crook v Holmesglen Institute of TAFE* (Civil Claims) [2010] VCAT 1808. The applicant Crook made a claim in relation to disciplinary action brought by TAFE against him because of alleged disruptive behaviour in class. The student applied for an injunction, declarations and for a refund of fees. Crook sought orders for a substantial change to disciplinary procedures at Holmesglen TAFE, the implementation of an anti-bullying campaign and the implementation of proper grievance procedures at the TAFE. The student’s claim was unsuccessful. The Tribunal thought that in the circumstances the only remaining question to be determined was whether the applicant had been afforded procedural fairness in the appeals process. The Tribunal found that he had. When considering jurisdiction, the Tribunal said the ‘items pleaded in the Statement of Claim ... do not reflect a “consumer and trader” dispute as defined in Part 9 of the *Fair Trading Act* 1999 because, unlike [other] items, they do not reflect a dispute over whether the respondent wrongly deprived him of “service” which by contrast it was obliged to supply. Rather [they] request VCAT to dictate to the respondent how it should regulate and conduct its disciplinary procedures. That is not something which the *Fair Trading Act* has conferred upon VCAT the jurisdiction to do’: at [15].

Mathews also alleged that ‘the University represented that the lecturer responsible for the subject would provide a written statement of the goals or purposes of the subject and the nature of the assessment, that the lecturers would be available to discuss assessments with students.’<sup>64</sup> He claimed that the lecturer had failed to do so and he had suffered loss as a result. The Court held that the representations if made were not in ‘trade or commerce’.<sup>65</sup> The decision should be treated with caution however as scant regard was paid to substantive issues, such as whether the impugned conduct is in ‘trade or commerce’. His Honour accepted on principle the university’s submissions without giving detailed reasons. The findings in relation to what might be activities of a HEI in ‘trade or commerce’ are really bald conclusions and cannot be said to be decisive of the matter. The Court focused on the difficulties of the student being able to prove that the loss was caused by the representations.<sup>66</sup> Further it is clear that once again the matter and relationship the student had with the University was a ‘complex’ one.<sup>67</sup>

### ***Assumption of application***

In other instances it appears that it is assumed that the conduct is ‘in trade or commerce’ or is decided without discussion. If the issue is dealt with it is often in the course of the judgment, but not necessarily in the context of a threshold requirement to be established by the claimant.<sup>68</sup> Again this could be more reflective of the nature of claims made often being by self-represented litigants. For example, in the matter of *Fennell v Australian National University* [1999] FCA 989, a former MBA student<sup>69</sup> brought a claim under the TPA alleging that he had been induced by false representations to enrol in an MBA with the University. He also brought a claim against the individual academic who was the director of the programme. The applicant alleged that the University had falsely represented it would arrange a work placement for him in Asia. The representations were said to have been made variously in an advertisement in a newspaper, the interview process, the prospectus

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<sup>64</sup> *Mathews v University of Queensland* [2002] FCA 414, [22]–[23].

<sup>65</sup> *Ibid* [34].

<sup>66</sup> *Ibid* [22]–[23], [12]–[15], [33]–[34]. The Court identified that the significant problem for the applicant student was his inability to establish a causative link between the conduct that was alleged to have breached the TPA and any damage or loss suffered by him. Mr Mathews claimed damages in excess of \$400 million, which included diminished prospects of an academic career and the lost opportunity to undertake his PhD in Logical Equivalence of Legal Decisions, which would have been commercialised as a computer program.

<sup>67</sup> See above n 49.

<sup>68</sup> See *ACCC v Black on White Pty Ltd* (2001) 110 FCR 1, 21 [87].

<sup>69</sup> It should be noted that in this matter the applicant student was assisted by his barrister father.

and handbook. The applicant's claim failed because of his inability to establish any loss suffered.<sup>70</sup>

There was no discussion regarding whether the impugned conduct of the University (the various representations) was in 'trade or commerce'. It appeared that it was assumed that the conduct fell within the ambit of the consumer protection legislation. The Court proceeded to examine the substantive issues in relation to liability and damages. Similarly in the matter of *Joseph v LA Trobe University* [2004] FCA 746, the student made a claim pursuant to the provisions in the TPA alleging coercion and exclusive dealing. No consideration was given to whether the imposition of a general services fee was in 'trade or commerce' as required for the exclusive dealing and soliciting payments provisions. No submission on this threshold issue was made by the University.

### ***Private Providers***

It is also clear from the cases that the issue of whether or not the conduct is in 'trade or commerce' is less problematic for the courts if the HEI is other than a public university.<sup>71</sup> In these cases often the issue does not arise for discussion, but rather is assumed by the complainant, provider and the court to apply. If it is raised, the discussion and application is often a cursory one. In the matter *ACCC v Black on White Pty Ltd* (2001) 110 FCR 1, the Court had no hesitation in finding that the conduct in question was in 'trade or commerce'. The ACCC commenced proceedings against Black on White Pty Ltd, which was a private provider of colleges specialising in early childhood studies for domestic and international fee paying students. The ACCC alleged misrepresentations were made in respect of accreditation claims, the standard, quality and suitability of the services, refund entitlements and deferred payment plans of tuition fees by students.<sup>72</sup> It also alleged unconscionable conduct in

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<sup>70</sup> The applicant had in fact graduated with his MBA and was employed in a new position that paid substantially more than his employment as engineer prior to completing his MBA.

<sup>71</sup> In addition to the cases at the tribunals below at n 74, see also *Beardsley v Commission of Consumer Affairs* [2009] SASC 304 where the Supreme Court of SA considered whether offences under the FTA (SA) had occurred by the defendant making representations in the course of conducting the business of a beauty college. The Court held that the defendant appellant had accepted payments from students for the supply of a training course that would lead to qualifications under the Australian Qualifications Framework when in fact it would not; *ACCC v Real Estate Institute of Australia Inc* [1999] FCA 18 in relation to undertaking and final orders by consent the issue of jurisdiction was limited to a consideration of whether the TAFE was a trading corporation within the meaning of the TPA. No consideration was given as to whether the conduct was in trade or commerce but this matter did involve orders by consent; *ACCC v Henry Kaye and National Investment Institute Pty Ltd* [2004] FCA 1363 in relation to the get rich quick seminars that the courts were clear that the representations were made in 'trade or commerce'. This case was discussed in Chapter 2, n 136.

<sup>72</sup> Again, it is interesting to note that it is arguable that these could be said to be terms of the contract. See Chapter 4.

respect of the same pursuant to section 51AB of the TPA. Justice Spender simply stated:

I am satisfied that the representations ... made by the first respondent was conduct in contravention of s 52 of the Act. The conduct was clearly conduct in trade or commerce

...<sup>73</sup>  
...

### **Consumer Tribunals**

The acceptance of the jurisdiction is particularly noticeable in the small claims courts.<sup>74</sup> In the matter of *Kwan v University of Sydney Foundation Program P/L and ORS (General)* [2002] NSWCTT 83 ('*Kwan*'), a student claimed damages in respect of breach of contract and misleading or deceptive conduct pursuant to the *Fair Trading Act 1987*(NSW)(FTA(NSW)). The student was enrolled in a pre-university course supplied by the respondent. The respondent was a corporation established by the University of Sydney. The substance of the claim is discussed more fully in

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<sup>73</sup> See *ACCC v Black on White Pty Ltd* (2001) 110 FCR 1, 21 [87]; In the related area of educational consulting services, French J found that the conduct of a private provider of educational services engaged in conduct in 'trade or commerce'. *ACCC v Kokos International Pty Ltd* [2007] FCA 2035 involved allegations of price fixing and other anti-competitive conduct between companies providing education services to overseas students. It was agreed between the parties that 'Kokos is and was at all material times a trading corporation within the meaning of the Act and carrying on business in trade or commerce in Western Australia as a supplier of education consultancy services to students and prospective students of Korean origin intending to study at secondary and tertiary educational institutions (Schools)': at [10] (French J).

<sup>74</sup> See also *Shu Fen Li v Jia Cheng International Pty Ltd (General)* [2008] NSWCTT 944. This was a claim by 19 international students enrolled in a certificate course in aged care. The Tribunal said there was no doubt the applicants were consumers under the *Consumer Claims Act 1998*. Consideration was given in relation to who were the suppliers within the meaning of the Act, notably the students' agent. The Tribunal found that the agent was a supplier within the meaning of the Act; In *Lan v The International College of Management, Sydney P/L (General)* [2007] NSWCTT 299 an order was made pursuant to the *Consumer Claims Act 1998* (NSW) for a refund of college fees. The Tribunal found that the HEI was a tertiary institution and that the applicant relied on the provisions of s 13(2)(g) of the *Consumer Claims Act 1988*. Without discussing the matter the tribunal found it had jurisdiction to hear the matter under the provisions of the Act; In *Evans v Australian Institute of Professional Counsellor Laws (General)* [2004] NSWCTTT 108 jurisdiction lay as this was a 'consumer claim' under the *Consumer Claims Act 1998* (NSW) in relation to a claim of misleading and deceptive conduct when the applicant enrolled in a counselling course. The alleged misrepresentations related to the student's selection to undertake a 'major subject'; In the matter of *Cotton v Blinman Investments P/L & Blinman (General)* [2004] NSWCTTT 723 claims were brought in relation to representations regarding the qualifications and experience of the teaching staff at the Strand College of Beauty Therapy. The Tribunal found that the College conducted a business and this was a consumer claim within the meaning of the *Consumer Claims Act 1988* (NSW); In *Qayam v Shillington College (General)* [2007] NSWCTT 620 the student had enrolled in a certificate course in graphic design and alleged various misrepresentations about the timing of the format of the courses and the advice that novices could undertake the course. Without any discussion the Tribunal decided it had jurisdiction to hear the matter under the provisions of the *Consumer Claims Act 1988* (NSW); So too in *Nguyen v Anderson (General)* [2009] NSWCTT 278; In a claim for misrepresentation pursuant to s 42 of the *Fair Trading Act 1987* (NSW), the Tribunal did not consider the issue of jurisdiction but only the substance of the matter, *St Clair v College of Complimentary Medicine Pty Ltd (General)* [2008] NSWCTT 1309; In *Cui v Australian Tesol Training Centre (General)* [2003] NSWCTT 329 the application concerned a claim under the *Consumer Claims Act 1998* (NSW) in relation the refund fees for the Cambridge certificate in English Language Teaching to Adults course, which was an international qualification accredited by the University of Cambridge (UK). The issue of jurisdiction was not raised at all, so too in the matter of *Navarro v Academies Australasia P/L (General)* [2003] NSWCTTT 678 and *Jones v Academy of Applied Hypnosis P/L (General)* [2005] NSWCTTT 841.

Chapter 4. In relation to jurisdiction, the Tribunal found it derived its jurisdiction from the *Consumer Claims Act 1998 (NSW)*.<sup>75</sup> The Member was of the view that there was ‘no dispute that there was a supply of goods and services’ and therefore he could ‘determine a claim or breach of contract for the supply of services ... under the Fair Trading Act 1997.’<sup>76</sup> Part of the claim by the student related to the standard of tuition provided as well as claims in relation to the provisions of facilities. The contract therefore included academic activities of the HEI, all of which were in effect supplied ‘in trade or commerce’.<sup>77</sup>

### ***The test in Concrete Constructions***

The meaning of ‘trade or commerce’ receives very little attention in the Explanatory Memorandum Trade Practices Amendment (Australian Consumer Law) Bill (no.2) 2010 (Cth) (‘EM2’) and only in the context of section 18.<sup>78</sup> In relation to the application of section 18 the following is noted from the EM2:

The High Court has found, for the purposes of section 52 of the TP Act, that ‘trade or commerce’ includes conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial nature.<sup>79</sup>

The EM2 footnotes the case of *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17 (‘*Concrete Constructions*’).<sup>80</sup> It is relevant therefore to review *Concrete Constructions* and consider how that precedent has been followed in subsequent cases with particular regard to what activities of a HEI might be considered to be in ‘trade or commerce’ so as to attract the application of the ACL.

In *Concrete Constructions*, the High Court considered whether the provision of an internal memo by an employee of a company to another employee regarding directions about the placement of a grate in the workplace was in ‘trade or commerce’ for the purpose of section 52 of the TPA. The employee was injured and sought to make a claim under the TPA on the basis that the directions given in the memo were misleading or deceptive, resulting in his injury. The question was

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<sup>75</sup>The NSW Consumer Trader and Tenancy Tribunal does not have jurisdiction to hear claims brought under the FTA unless the action is ancillary to one brought in relation to the supply of goods and services. *Kwan v University of Sydney Foundation Program P/L (General)* [2002] NSWCTT 83, [6].

<sup>76</sup> *Ibid* [7].

<sup>77</sup> Lindsay, ‘Complexity and Ambiguity in University Law’, above n 2, 12.

<sup>78</sup> Formerly s 52 of the TPA, which provides a broad prohibition on misleading or deceptive conduct. Explanatory Memorandum Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010 (Cth) (‘EM2’) 37–38 [3.7]–[3.16].

<sup>79</sup> *Ibid* [3.13].

<sup>80</sup> *Ibid* [3.13] n 4.

therefore whether the internal memo was conduct 'in trade or commerce'. Of the nature of the conduct, the majority (Mason CJ, Deane Dawson and Gaudron JJ) said:

The phrase 'in trade or commerce' in s 52 has a restrictive operation. It qualifies the prohibition against engaging in conduct of the specified kind. As a matter of language, a prohibition against engaging in conduct 'in trade or commerce' can be construed as encompassing conduct in the course of the myriad of activities which are not, of their nature, of a trading or commercial character but which are undertaken in the course of, or as incidental to, the carrying on of an overall trading or commercial business ... Alternatively, the reference to conduct 'in trade or commerce' in s 52 can be construed as referring only to conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character. So construed, to borrow and adapt the words used by Dixon J in a different context in *Bank of NSW v Commonwealth* [(1948) 76 CLR 1 at 381], the words 'in trade or commerce' refer to 'the central conception' of trade or commerce and not to the 'immense field of activities' in which corporations may engage in the course of, or for the purposes of, carrying on some overall trading or commercial business. .... In the context of Pt V of the Act with its heading 'Consumer Protection', it is plain that s 52 was not intended to extend to all conduct, regardless of its nature, in which a corporation might engage in the course of, or for the purposes of, its overall trading or commercial business. Put differently, the section was not intended to impose, by a side-wind, an overlay of Commonwealth law upon every field of legislative control into which a corporation might stray for the purposes of, or in connection with, carrying on its trading or commercial activities. *What the section is concerned with is the conduct of a corporation towards persons, be they consumers or not, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character.* Such conduct includes, of course, promotional activities in relation to, or for the purposes of, the supply of goods or services to actual or potential consumers, be they identified persons or merely an unidentifiable section of the public. In some areas, the dividing line between what is and what is not conduct 'in trade or commerce' may be less clear and may require the identification of what imports a trading or commercial character to an activity which is not, without more, of that character... Nor, without more, is a misleading statement by one of a building company's own employees to another employee in the course of the ordinary activities. The position might well be different if the misleading statement was made in the course of, or for the purpose of, some trading or commercial dealing between the corporation and the particular employee.<sup>81</sup>

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<sup>81</sup> *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594, 602–4 (emphasis added).

What then is the 'central conception' of the business of a HEI? Surely at the heart of this is the delivery of educational services, a notion that incorporates the provision of courses for certification or degree.<sup>82</sup> This issue is intrinsically linked to the complexities in determining the exact nature of the student–HEI contract. As will be seen in Chapter 4, there is little precedent in Australia regarding the exact nature and terms of the agreement to supply educational services. The relationship between the student and the HEI evolves and multiplies over a period of time. There are many activities and transactions in which the HEI and the student deal. There is a potential myriad of sources for terms of the student–HEI contract, which may be simply just the rules and ordinances of the HEI or, as is likely, something more. The something more could include pre-admission representations, terms that relate to descriptions of 'course content, course delivery ("consumer services" terms)',<sup>83</sup> assurances in relation to standards of the professional services of academics and guarantees in relation to learning outcomes and graduate attributes. The commercial or trading nature of these types of activities that are related to the dealings between a HEI and its students is not as self-evident as conduct that is promotional in nature 'designed to attract custom'.<sup>84</sup> The High Court in *Concrete Construction* notes that the dividing line may not always be clear and anticipates the need to identify those aspects of particular activities that import a commercial or trading character. It is accepted that the section is not intended to operate by a side-wind so as to regulate every activity of a supplier.<sup>85</sup> The test in *Concrete Construction* is concerned with the conduct of a HEI towards its students in the course of its dealings with them, and the activities or transactions which 'of their nature, bear a trading or commercial character'. One critical aspect of the analysis is to identify what is internal to the relationship between the student and HEI so as not to form part of the contract for supply of educational services? That is, what academic activity corresponds to the internal memo between employees?

One approach regarding university students is that once enrolled, dealings between them and the university are likened to the internal memo between employees. This proposition rests on the corporate model of the university and communications

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<sup>82</sup> Fels, above n 2. He notes that the then TPA applied equally to teaching and research functions: at 3–4; *Griffith University v Tang* (2005) 221 CLR 99. Chief Justice Gleeson said of the functions of the University: 'The functions of the appellant include providing education, providing facilities for study and research, and conferring higher education awards.' This is discussed further in chapter four in relation to the meaning of 'services': at 109 [15] (Gleeson CJ).

<sup>83</sup> Davis, above n 33, 18.

<sup>84</sup> Rorke, 'The Application of the Consumer Protection Provisions', above n 2, 189.

<sup>85</sup> See generally David Meltz, 'The Persistent Side-Wind — The Notion of "In Trade or Commerce" Under s 52 of the *Trade Practice Act 1974*' (2001) 9(2) *Competition and Consumer Law Journal* 128.

between the HEI and student are likened ‘to a communication between a corporation and its shareholders *after* they have become shareholders’.<sup>86</sup> This approach resonates with the views expressed in the cases relating to the application relating to the phrase in ‘trade or commerce’ to negotiations by universities with existing staff members.<sup>87</sup> As discussed in Chapter 1, it is possible that the student is both a corporator and a consumer of educational services provided by the university. These rights can coexist rather than the status as a member of the university corporation excluding other claims at law. For all providers, public or private, a separate question arises as to whether activities or transactions between the student and the HEI have a different character if discussing matters arising on admission (i.e. acceptance of a place at the HEI) or the ongoing nature of the process of enrolment (enrolment into a degree annually, by semester or individual units). The issue is whether the latter is an internal communication between students and the university in the course of their ordinary activities rather than forming part of the student–HEI contract. Again, to the extent that academic activities are a term of the contract for the supply of educational services,<sup>88</sup> the question of whether the academic activity occurring after the student has enrolled is capable of being ‘in trade or commerce’ should be answered in the affirmative. Once any academic activity forms part of the student–HEI contract it is suggested that *prima facie* this is then an activity or transaction between the student and the HEI which of its nature, bears a trading or commercial character.

Guidance regarding the dividing line in relation to what academic activities bear a commercial or trading character can be found in the cases involving a series of lectures on creationist theory: *Fasold v Roberts* (1997) 145 ALR 548 and *Plimer v Roberts* (1997) 150 ALR 235 (the ‘Noah’s Ark’ case). The matter was heard at first instance by Sackville J in *Fasold v Roberts* (1997) 145 ALR 548. The respondent, Dr Roberts, presented a series of public lectures regarding the genesis theory of creation and the alleged discovery of remnants of Noah’s Ark in Turkey. The lecture series was organised by the Noah’s Ark Research Foundation (‘NARF’), an unincorporated association. Importantly, Dr Roberts was not paid for delivering the lectures. The application was brought by a Professor Plimer who objected to the representations and claims made by Dr Roberts. He claimed that Dr Roberts had ‘in the course of his public lectures and in the brochure and newsletter, made or

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<sup>86</sup> Rorke, ‘The Application of the Consumer Protection Provisions’, above n 2, 188–9; See also Rochford, ‘Traders of the Lost Ark’ above n 1, 135.

<sup>87</sup> See, eg, *Roberts v University of New England* [2009] FMCA 964, [52]; Rochford, ‘Traders of the Lost Ark’, above n 1, 134.

<sup>88</sup> There are grounds to argue that academic activities or the promise thereof are incorporated into the student–HEI contract over time, on a rolling basis much like a contract of employment. See Chapter 4.



authorised the making of a number of misleading or deceptive statements', including representations that Dr Roberts had actually undertaken 'archaeological or scientific work in relation to the site'.<sup>89</sup> Professor Plimer's claim against Dr Roberts was based on contraventions of the consumer protection legislation prohibiting misleading and deceptive conduct in New South Wales, Victoria, South Australia, Western Australia, Queensland, Tasmania and the ACT.<sup>90</sup> A claim was also brought against Ark Search Inc. (an incorporated association that had its origins in NARF) pursuant to section 52 of the TPA prohibiting misleading and deceptive conduct.<sup>91</sup>

The initial question before the court was whether the representations allegedly made by Dr Roberts occurred in 'trade or commerce' as argued by Professor Plimer. The argument relied upon by the applicants was, notwithstanding the fact Dr Roberts was not paid for his lectures, 'he was acting in trading or commerce, because he was promoting the business'<sup>92</sup> of NARF. The Court was required to determine whether, applying the wider definition of 'trade or commerce' found in the state Acts, Dr Robert's promotion of NARF's activities meant that the conduct complained of (the alleged misleading statements in the lecture) was "in trade or commerce'. As outlined above, the definition of 'trade or commerce' in state consumer protection legislation had a more expansive definition of 'trade or commerce', which was inclusive of not-for-profit business and professional services. This broader definition is adopted in the ACL.<sup>93</sup>

There were two parts to the Court's consideration of this issue. First could it be said that the NARF was carrying on a business? Second, if the NARF was carrying on a business within the meaning of the Act, was the impugned conduct in 'trade or commerce'. The Court examined the business records of NARF and found that even though the definition in the state Fair Trading Acts expressly contemplated the inclusion of businesses carried on not-for-profit, NARF did not carry on a business because its activities lacked the necessary degree of system and continuity.<sup>94</sup> Further the statements of Dr Roberts were not considered conduct 'in trade or commerce'.<sup>95</sup> On the facts the Court found that Dr Roberts primary objective was not to promote the business of the NARF (which was not a commercial or trading organisation), but

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<sup>89</sup> *Fasold v Roberts* (1997) 145 ALR 548, 549.

<sup>90</sup> The first applicant Mr Fasold brought claims pursuant to infringements of the *Copyright Act 1968* (Cth), which are not relevant to this research so will not be canvassed.

<sup>91</sup> *Fasold v Roberts* (1997) 145 ALR 548, 549.

<sup>92</sup> *Ibid* 553.

<sup>93</sup> See above page 59.

<sup>94</sup> *Fasold v Roberts* (1997) 145 ALR 548, 553.

<sup>95</sup> *Ibid* 553.

rather to 'disseminate his own views in relation to the theory surrounding the creation of life science'.<sup>96</sup> He did not 'seek to maintain or encourage a commercial relationship between his audience and a trading entity'.<sup>97</sup> The Court found in these circumstances it could not be said that the giving of the lecture and the statements made therein bore a trading or commercial character. Therefore the conduct was not in 'trade or commerce' as required under the Fair Trading Acts.<sup>98</sup>

Of particular interest to this research is consideration by Sackville J of whether the inclusion of the words 'any business' to the definition of 'trade or commerce' altered the test under *Concrete Constructions*. Sackville J considered the authorities in relation to the meaning of the word 'business'.<sup>99</sup> After reviewing the authorities Sackville J was of the view:

...generally speaking, the word 'business' as used in the Fair Trading Acts bears the dictionary meaning of 'trade, commercial transactions or engagement'. However, that will not always carry matters very far. I think that in addition, ordinarily at least, the concept of 'business' imports ... a notion of system, repetition and continuity. I appreciate and accept that due regard should be paid to the 'wide and flexible meaning' attributed to the word 'business' in common usage ... Nonetheless, in general, for an undertaking to constitute a business it will have to be conducted with some degree of system and regularity ... In my view, the less commercial the character and objectives of an organisation, the greater the degree of system and regularity required for the organisations activities to be characterised as a 'business'.<sup>100</sup>

The Court looked at the very small number of sales taken in relation to the seminar series in question, including the sale of the taped lectures. In the circumstances, the Court found that the objectives and activities of NARF were not trading or commercial in character sufficient for the Fair Trading Acts. The NARF was staffed by volunteers and a significant amount of their revenue was dependant on donations, memberships, small amounts of entrance fees and the sale of the taped lectures.<sup>101</sup> In the circumstances, there was not the system of continuity and regularity required.

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<sup>96</sup> Ibid 595.

<sup>97</sup> Ibid 595.

<sup>98</sup> Ibid. It should be noted that notwithstanding his findings that the conduct was not 'in trade or commerce', His Honour did go on to consider whether any of the statements were misleading or deceptive. He concluded that had the Acts applied, the statements by Dr Roberts regarding his personal participation in the investigations at the Noah's Ark site and the scientific tests conducted by him as a result, would have constituted misleading or deceptive conduct in contravention of the Acts: at 597-613.

<sup>99</sup> Ibid 587 and authorities referred to therein. Sackville J adopted the notion that the phrase has a 'chameleon-like hue but must take its meaning from the particular statutory context', quoting Mason J in *FTC v Whitfords Beach Pty Ltd* (1982) 150 CLR 355.

<sup>100</sup> *Fasold v Roberts* (1997) 145 ALR 548, 588.

<sup>101</sup> Ibid 595.

His Honour did note however that 'even a voluntarily organization perusing purely altruistic or charitable goals can conduct a business'.<sup>102</sup>

The matter was heard on appeal by the Full Court of the Federal Court of Australia in *Plimer v Roberts* (1997) 150 ALR 235. The ground for appeal was based on Professor Plimer's assertion that the finding by Sackville J that the NARF did not carry on a business, and consequently that Dr Roberts' representations were not made in trade or commerce, was erroneous. The appeal was dismissed. Both Davies and Branson JJ agreed with the leading judgment of Lindgren J. However, Davies and Branson JJ considered separately the activities of the NARF and whether they were 'in trade or commerce'. Davies J was of the view that because section 42(1) of the *Fair Trading Act 1987* (NSW) so closely resembled the provisions of the TPA, the words 'in trade or commerce' should be given the same construction as adopted in *Concrete Constructions*.<sup>103</sup> Further, although Davies J was of the view that NARF carried on a business within the meaning of the Act, it was only significant if 'the business activities of NARF gave the designated character to the relationship between Dr Roberts and those who attended the lectures and purchased the tapes'. He concluded that the lectures were not given as part of NARF's business for financial gain,<sup>104</sup> but for the achievement of other objectives.<sup>105</sup> Justice Branson also considered separately the definition of 'trade or commerce' and 'business' in section 4 of the *Fair Trading Act 1987* (NSW). Justice Branson adopted the view of Lindgren J in relation to the definition of what amounts to conduct 'in trade or commerce'; he added that the meaning of a business activity within the expanded definition of 'trade or commerce' 'is an activity in business which of itself bears a business character and a professional activity is an activity in the course of the conduct of a profession which of itself bares a professional character'.<sup>106</sup>

Justice Lindgren did not feel it necessary to decide whether the NARF had engaged 'in trade or commerce' within the meaning of section 42(1) of the *Fair Trading Act 1987* (NSW). He did so on the basis that the trial judge had proceeded on the view that the NARF was engaged in business even though that was contrary to his finding. Justice Lindgren's judgment therefore turned on whether the conduct of Dr Roberts in the making of the statements in the course of giving a public lecture on a non-

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<sup>102</sup> Ibid 558.

<sup>103</sup> *Plimer v Roberts* (1997) 150 ALR 235, 237.

<sup>104</sup> Ibid 239, as did the trial judge, Sackville J.

<sup>105</sup> Ibid 238.

<sup>106</sup> Ibid 241. Branson J was of the view that the NARF was engaged in trade within the meaning of the Act.

commercial matter was in 'trade or commerce'.<sup>107</sup> In considering the specific construction of the phrase from section 42 (1), His Honour stated:

Although the present distinction is a fine and difficult one, I think that, consistently with the clearly adjectival senses of 'business' and 'professional' in the definition of 'trade or commerce', what the notion of 'business ... activity' incorporated into the definition of 'trade or commerce' includes, is activity which is unequivocally and distinctively characteristic of the carrying on of a non-profit business, or of the carrying on of a trade, or of the carrying on of a profession. The distinction will, perhaps, rarely be of practical importance and the most straight forward way of demonstrating that the inclusory definition is brought into play in a particular case will be to show that the conduct in question was engaged in the course of the actual carrying on of a particular non-profit business or trade or profession.<sup>108</sup>

His Honour then considered the test formulated in *Concrete Constructions*. Justice Lindgren was of the view that the statements of Dr Roberts in the course of giving his lecture did not constitute conduct 'in trade or commerce' according to the test formulated in *Concrete Constructions*.<sup>109</sup> The 'delivery of the lectures was not inherently a trading or commercial activity'<sup>110</sup> and would not ordinarily be in 'trade or commerce'.<sup>111</sup> His Honour did note the possibility of special circumstances where a misrepresentation may be made in a lecture or address designed to promote goods or services, or the lecturer is themselves in the business of providing lectures for profit.<sup>112</sup>

The case of *Monroe Topple and Associates Pty Ltd v Institute of Chartered Accountants in Australia* [2001] FCA 1056 ('*Monroe Topple*') concerned the supply of educational services for professional development and accreditation. This case is especially pertinent to this research as Lindgren J had occasion to revisit the issue of the provision of educational services as being in 'trade or commerce'. The applicant,

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<sup>107</sup> Ibid 243. As with the other members of the Court, Branson J was of the view that the critical issue was whether the conduct of Dr Roberts (the giving of the lectures and the making of statements in the seminars) was conduct in trade in which the NARF was engaged within the meaning of s 42 of the Act. Branson J concluded: 'In my view, the accuracy of the content of Dr Roberts' lectures and answers, as opposed to the accuracy of the recordings thereof, was not "the central conception" of the trade of NARF': at 245; Davies J stated 'Although there were monetary incidents to the lectures such as entry fees, the lectures were not concerned with commerce but rather with the promotion of a creationist view of history and the investigation of a matter of great historical interest ... The lectures were the subject of the sales but the sales themselves were not misleading or deceptive. The consumers obtained what they sought and what they paid for': at 238.

<sup>108</sup> Ibid 254.

<sup>109</sup> Ibid 257. In considering the applicability of *Concrete Constructions* to the wider definition of 'trade or commerce' in the NSW Act, Lindgren J found that the "narrow" construction of the expression adopted in the joint judgment governed the construction of the same expression in s 42 of the FTA (NSW).

<sup>110</sup> Ibid 258.

<sup>111</sup> Ibid 258.

<sup>112</sup> Ibid 254.

Monroe Topple and Associates ('MTA'), was a private provider of educational materials for accountants studying in their professional year for accreditation by the Institute of Chartered Accountants in Australia ('ICAA'). The ICAA withdrew its support for the services of the applicant MTA. The applicant thereupon made claims in relation to breaches of the TPA in relation to anti-competitive behaviour under Part IV and unconscionable conduct. One of the agreed issues for determination was whether the 'educational and training functions supplied by the ICAA in connection with its CA program pursuant to its Charter constitute[d] the provision of "services" in trade or commerce'.<sup>113</sup> The ICCA argued that 'its pursuit of its Charter objects of education, training, examination, assessment and certification, [fell] outside the meaning of the expression "in trade or commerce" as explained by the High Court in *Concrete Constructions*'<sup>114</sup> and that it did not make a profit from these activities.<sup>115</sup>

Justice Lindgren defined the meaning of 'educational and training functions' supplied by the ICCA before considering whether the supply by ICAA was in 'trade or commerce':

I take the expression to refer at least to the enrolment in CA Program modules, the compilation and selling of the module syllabuses, the writing, production and sale of module support materials, the conduct of 'focus sessions' and the provision of 'feedback' to the candidates. The expression clearly does not include the admission of persons into membership of ICAA and the certification of persons so admitted as chartered accountants: admission and certification are inherently different from 'education and training', occur as distinct and later events, and require satisfaction of conditions in addition to satisfactory completion of the CA Program ... I think it appropriate to regard examination as part of ICAA's education and training function: the devising of the CA Program modules and of the methods of assessment appropriate for them were closely interrelated activities.<sup>116</sup>

His Honour considered the differing ways the phrase 'trade or commerce' was used within the TPA. In relation to anti-competitive conduct, this meant the provision of services was to occur in a market, whereby those services were provided in 'trade or commerce'. In relation to unconscionable conduct, the impugned conduct must be directly related to the supply of services in 'trade or commerce'. Justice Lindgren was of the view:

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<sup>113</sup> *Monroe Topple and Associates Pty Ltd v Institute of Chartered Accountants in Australia* [2001] FCA 1056, [130].

<sup>114</sup> *Ibid* [131].

<sup>115</sup> *Ibid* [131].

<sup>116</sup> *Ibid* [132]–[133].

... ICAA supplies the education and training it provides in connection with its CA Program pursuant to its Charter 'in trade or commerce'. It seems to me that this conclusion is compelled by the fact that the ICAA sells those services to students for a very substantial monetary return on a highly organised, systematic and ongoing basis. While it may not be necessary that all of those features be present in order to satisfy the expression 'in trade or commerce' the present of all of them makes it clear that the expression is satisfied in this case.<sup>117</sup>

This definition of the supply of education and training functions is clearly applicable to the activities of both public and private HEIs. His Honour also held that these functions could occur in 'trade or commerce' notwithstanding the fact that the objects of the organisation had other characteristics, or public or professional obligations.<sup>118</sup>

ICAA had relied on the decision in the *Noah's Ark* case as authority for the principle that the provision of educational and training services are not inherently commercial and therefore not in 'trade or commerce'. In particular the ICAA relied on the part of Lindgren's J finding that Dr Roberts was not motivated by a desire to promote the business of NARF.<sup>119</sup> Justice Lindgren distinguished his decision in the *Noah's Ark* case. He was of the view that on the facts, the dimensions and features of the ICAA educational and trading activity demonstrated that there was a much stronger case for regarding those services being provided in 'trade or commerce'.<sup>120</sup> His Honour also considered the issue of the services being provided without profit and was clearly of the view that the 'rights of consumers and the obligations of a corporation under the Act ... should not be denied because no profit was made from an activity in question at a particular period in time'.<sup>121</sup>

The ICAA also relied on comments by Branson J in the *Noah's Ark* case, where she noted that if a broad operation was given to section 52 of the TPA, this could impact negatively on intellectual and religious debate in Australia.<sup>122</sup> Justice Lindgren distinguished this argument as:

... a notion far removed from the selling of educational and training services designed to equip persons to practice a profession for remuneration as members of a particular

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<sup>117</sup> Ibid [139] Lindgren J applied the construction taken *Concrete Constructions*.

<sup>118</sup> Ibid [147].

<sup>119</sup> Ibid [148].

<sup>120</sup> Ibid.

<sup>121</sup> Ibid [150].

<sup>122</sup> Branson J was of the view that if the broad construction of 'trade or commerce' advocated by Prof Plimer was accepted, this had the potential to 'significantly deter intellectual and religious debate in Australia, at least to the extent that it is carried on through commercial avenues': *Plimer v Roberts* (1997) 150 ALR 235, 245.

professional organisation and under a particular designation. Unlike the activity to which her Honour referred, the education and training provided by ICAA in connection with its CA Program are commercially valuable services.<sup>123</sup>

Again, this resonates with the contract for supply of educational services between the student and modern HEI being an activity in 'trade or commerce' when compared to a statement made in a public lecture regarding philosophical or religious views.

MTA appealed the decision of the trial judge Lindgren J in relation to his findings that the conduct of ICAA in bundling its services and materials and fixing its charges at less than cost did not contravene the anti-competitive provisions of the TPA, nor was it unconscionable conduct.<sup>124</sup> The members of the appeal court gave separate judgments. Only Heerey J (with whom Black CJ agreed) specifically addressed the issue in relation to the question of whether the ICAA's supply of education and training in connection with its CA Program was a provision of services in 'trade or commerce'.<sup>125</sup> Justice Lindgren had found in favour of MTA on this issue, that is that the ICAA had provided education and training services in 'trade or commerce'. Justice Heerey agreed that the status of a non-profit organisation was not conclusive of the activities not being in 'trade or commerce'. His Honour considered the test in *Concrete Constructions* and said:

The provision, for reward, of training and education services, if carried on systematically, is a trading and commercial activity. Everyday examples are the provision of education and training in relation to foreign languages, or English, or skills such as cooking or photography, or sports such as golf or tennis.

As His Honour noted, the Full Court in *Plimer v Roberts* (1997) 80 FCR 303 drew a distinction between, on the one hand, the selling of door tickets, video tapes and audio cassettes in relation to lectures about Creationist theory and Noah's Ark and, on the other hand, the content of what was said in the lectures. The former was accepted to be conduct in trade or commerce, the latter not.<sup>126</sup>

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<sup>123</sup> *Monroe Topple and Associates Pty Ltd v Institute of Chartered Accountants in Australia* [2001] FCA 1056, [149].

<sup>124</sup> *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* (2002) 122 FCR 110.

<sup>125</sup> *Ibid* 130–1, [76]–[79].

<sup>126</sup> *Ibid*, see per Davies J at 305G, per Branson J at 310D and per Lindgren J at 327A.

Thus the particular facts of the *Noah's Ark* case and the obiter statements of Lindgren J<sup>127</sup> open the possibility for a construction that in some circumstances academic activities of the modern HEI are conduct in 'trade or commerce'.<sup>128</sup> Dr Roberts in the *Noah's Ark* case was delivering a public lecture and was not seeking to maintain a commercial relationship between his audience and a trading entity. It is arguable that this is entirely different to a scenario whereby a lecture or series of lectures was not delivered as promised. The *Noah's Ark* case can be distinguished when what is under consideration is the provision of educational services to students for reward 'on a highly organised, systematic and ongoing basis'. In her article regarding potential liability for New Zealand HEIs to their students under consumer protection legislation, Varnham considers the type of conduct that may be considered in 'trade or commerce' in the higher education sector.<sup>129</sup> Varnham notes that while academics may individually take comfort from the fact that their lecture content is unlikely to be considered conduct in 'trade or commerce' following the *Noah's Ark* case, she is of a different view in relation to the position of HEI. Varnham refers to the Court's determination that the misrepresentation related to the lecture content rather than the provision of the service (that is the sale of the tickets and the recordings of the lecture) and states:

... there is no comfort here for institutes, however it does not preclude but rather enforces the argument that an institute is in trade in respect of the marketing and advertising of its courses, and its supply of course information to perspective students.<sup>130</sup>

It is submitted that Varnham's argument is not just limited to promotional activities of HEIs. Activities or transactions between the student and the HEI pursuant to a contract for the supply of educational services of their nature, bear a trading or

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<sup>127</sup> His Honour gives a number of similar fact examples, including that of a professor giving a lecture to university students: see above n 112. In those examples, Lindgren J assumes that the speakers are not paid for the delivery of the lecture, seminar or address, although the organisation may be. That was the scenario in the *Noah's Ark* case. It is not however the usual academic scenario, whereupon academics, sessional or tenured, are paid for delivering lectures. They are, so to speak, in the business of giving lectures.

<sup>128</sup> See Griggs, 'Tertiary Education, the Market and Liability', above n 2 for a detailed consideration of the application of the requirement of in 'trade or commerce' to the higher education sector and individual academic activities. Griggs considers specifically whether information provided to current students or in a public lecture is in 'trade or commerce'. Griggs concludes that in general advice given by a faculty officer regarding administrative matters is unlikely to be considered in 'trade or commerce'. This is in line with the test formulated in *Concrete Constructions* as matters internal to the organisation. However, Griggs is of the view that this would likely be different if the advice or information is provided in the context of attracting or recruiting students to the particular faculty: at 8. It is this type of activity with which this research is concerned. See generally Meltz, above n 45, 137 and the distinction between a paid professional speaker and one who is not.

<sup>129</sup> Varnham, 'Straight Talking, Straight Teaching', above n 2, 309–11.

<sup>130</sup> Ibid 308.



commercial character'.<sup>131</sup> So, for example, while the provision of a lecture or the giving of feedback could be considered part of the relevant trading or commercial relationship, the actual substance of that feedback or statements of opinion made in the lecture may well be matters internal to the dealing; in much the same way as an internal memorandum between employees was in *Concrete Constructions*.<sup>132</sup> It is here that the dividing line referred to by the High Court might lie. The *Monroe Topple* case should be viewed as a clear signal to HEIs that the supply of educational services by them, which includes an array of attending activities, is very likely to be considered conduct 'in trade or commerce' even without the extended definition. The modern HEI more closely resembles the supply of educational services by ICAA than a community of scholars transmitting knowledge in the Oxbridge tradition. To the extent academic activity is part of this contract for educational service it will be subject to the UCT under the ACL. The comments in *Monroe Topple* suggest a wide application, including devising courses of study and methods of assessment and attending activities, including feedback. To the extent that academic activities form part of the student–HEI contract will be fully considered in Chapters 4 and 5.

### ***The extended definition***

The extended definition introduces the notion that 'trade or commerce' includes any 'business activity' or any 'professional activity' whether or not for profit. It is suggested that the addition of the words 'any business activity' will add very little to the test as formulated in *Concrete Construction*. Regard was had to the meaning of 'business' in the *Noah's Ark* case above and the Court held that 'for an undertaking to constitute a business it [would] have to be conducted with some degree of system and regularity'.<sup>133</sup> In the *Monroe Topple* case, Lindgren J distinguished his findings in relation to the business of the NARF in *Noah's Ark* with that of the trading activities of the ICAA. The concept of 'business' and 'trade or commerce' was used interchangeably.<sup>134</sup> However, the addition of the words 'any professional activity' will arguably impact on the application of the ACL to providers of educational services.

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<sup>131</sup> As per the test *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594, 603

<sup>132</sup> Although given the introduction of learning and teaching standards by TEQSA, this may not remain the case or may not currently be the position in relation to professional degrees that require approval of standards, including veracity of content by accrediting bodies. See below n 164.

<sup>133</sup> *Fasold v Roberts* (1997) 145 ALR 548, 558.

<sup>134</sup> *Monroe Topple and Associates Pty Ltd v Institute of Chartered Accountants in Australia* [2001] FCA 1056, [148].

This supposition is borne out by *Shahid v Australasian College of Dermatologists*<sup>135</sup> ('*Shahid*'). This case concerned the matter of a general medical practitioner seeking to obtain further qualifications in the speciality of dermatology. As part of the process of becoming a Fellow of the Australasian College of Dermatologists ('the College'), the candidate was required to undertake supervised training in an accredited training hospital.<sup>136</sup> Each year between the years 2000 and 2004, Shahid applied for employment as trainee registrar in dermatology at the hospital. The registrar's position was only available upon the recommendation of the College.<sup>137</sup> Shahid claimed that the College, through its various conduct including application and appeal processes, provision of handbooks, texts, curriculum and the selection process for trainee registrars,<sup>138</sup> had engaged in misleading or deceptive conduct in contravention of the TPA. Alternatively, Shahid pleaded that the College had breached the mirror provisions of the *Fair Trading Act 1987 (WA)* ('FTA'). The applicant was unsuccessful in the first instance;<sup>139</sup> however, the appeal<sup>140</sup> was allowed.

The leading judgment on appeal was delivered by Jessup J and a joint judgment delivered by Branson and Stone JJ. The Court unanimously agreed on the application and meaning of the relevant provisions in the FTA.<sup>141</sup> The types of activities considered by the Court in relation to whether the conduct of the College was in 'trade or commerce' included statements in the published handbook regarding the appeal process and record-keeping procedures. The programme assessments

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<sup>135</sup> *Shahid v Australasian College of Dermatologists* 248 ALR 267.

<sup>136</sup> In this case Royal Perth Hospital (WA).

<sup>137</sup> *Shahid v Australasian College of Dermatologists* (2008) 248 ALR 267.

<sup>138</sup> *Ibid.*

<sup>139</sup> At first instance the Court found that the College was a trading corporation and this was not challenged on appeal, therefore the appeal under the TPA could be heard.

<sup>140</sup> *Shahid v Australasian College of Dermatologists* (2008) 248 ALR 267, 305. The issues for determination on appeal were as follows:

- (1) Were the record-keeping representation and the meaningful appeal representation, or was either of them, made in: a) trade or commerce; or b) a professional activity?
- (2) If Yes to (1), in relation to the meaningful appeal representation, did the making of the representation amount to a breach of s 52 or of s 53(aa) or (g) of the Trade Practices Act or the corresponding provisions of the Fair Trading Act?
- (3) Did s 55A of the Trade Practices Act, or s 18 of the Fair Trading Act require proof beyond reasonable doubt?
- (4) If No to (3), should a finding now be made that the conduct of the College did occur as alleged and was liable to mislead the public as to the nature, characteristics, suitability or quantity of any services?
- (5) Was the lodgement by the appellant, and the acceptance by the College, of an appeal in each of the years 2002, 2003 and 2004 accompanied by an intention to create legal relations?
- (6) To the extent that the appellant succeeds, to what, if any, remedy is she entitled?

Only issues (1), (5) and (6) are directly relevant to this research.

<sup>141</sup> Jessup J dissented in relation to the application of the meaning of the phrase 'trade or commerce' under the TPA.

and processes, including the substantial fees for textbooks, course materials and right to sit the examination, were also considered by the court.<sup>142</sup>

*'Trade or commerce' under the TPA*

Justices Branson and Stone (Jessup J dissenting) found the College had engaged in 'trade or commerce' within the meaning of the TPA pursuant to the test set out in *Concrete Constructions*.<sup>143</sup> In contrast to Jessup J,<sup>144</sup> Their Honours considered the cumulative significance of the evidence, rather than each activity separately.<sup>145</sup> The majority were of the view that the evidence supported the 'conclusion that the college had a commercial relationship with practitioners'.<sup>146</sup> This was based on the considerable revenue generated by the College in relation to the activities under consideration. Significantly, they felt that the publication of the handbook (and the representations contained therein) was an important part of that commercial relationship. They held that the publication was 'conduct' 'in the central conception' of the College's commercial activities.<sup>147</sup>

*'Trade or commerce' as extended by the definition under the FTA*

All members of the Court of Appeal in *Shahid* were in agreement regarding the meaning of the words 'professional activity' and its effect on extending the definition of 'in trade or commerce'. Little attention was given to the issue of how far the addition of the words 'any business activity' extended the definition of 'trade or commerce' under the FTA. In considering the structure and objects of the FTA Jessup J notes:

The definition of 'trade or commerce' is expanded, and it is expanded to include not only any professional activity but also any business activity. The word 'business' includes a trade or profession. Any businesslike activity of a professional firm or person would be a 'business activity'. That the expression 'professional activity' means something further again does seem to be a grammatically appropriate conclusion.<sup>148</sup>

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<sup>142</sup> *Shahid v Australasian College of Dermatologists* (2008) 248 ALR 267, 277 (Jessup J), 270 [2] (Branson and Stone JJ).

<sup>143</sup> *Ibid* 275 [29]. The representations made in the handbook were conduct in 'trade or commerce'.

<sup>144</sup> *Ibid* 268. In his dissenting judgement on this issue, Jessup J broke down the activities of the College into separate components and dealt with each separately. In the end he was of the view that 'training for professional qualifications is not an inherently commercial activity' and what was provided by the College in this matter was in contrast to the overtly commercialised model in *Monroe Topple*: at 314 [134].

<sup>145</sup> *Ibid* 275 [25].

<sup>146</sup> *Ibid* [26].

<sup>147</sup> *Ibid*.

<sup>148</sup> *Ibid* 324 [193].

The focus was on the effect, if any, of the addition of the words ‘any professional activity’ on the meaning of ‘trade or commerce’. The approach of the Court in *Shahid* supports the observation that the addition of the words ‘any business activity’ will add very little to the test as formulated in *Concrete Construction*.

### **‘Any professional activity’**

Justice Jessup considered at length the meaning of the phrase ‘any professional activity’ in the context of the extended definition of ‘trade or commerce’ in both the NSW and WA Fair Trading Acts. His Honour casts doubts on the reasoning in *Prestia v Aknar* (1996) 40 NSWLR 165 and that Court’s consideration of the phrase ‘any professional activity’ and the narrow construction given therein.<sup>149</sup> In particular he rejected the argument that the phrase ‘professional activity’ was a qualification to ‘trade or commerce’.<sup>150</sup> Rather in his opinion it was clearly an addition.<sup>151</sup> His Honour then considered the only binding authority, the *Noah’s Ark* case. The meaning and impact of the phrase ‘professional activity’ was left open in the *Noah’s Ark* case.<sup>152</sup> After considering the judgments of the Full Court, Jessup J stated:

So far as Full Court authority in this court is concerned, therefore, the position seems to be, first, that the expression ‘trade or commerce’ should be so read as to include any professional activity; second, that a professional activity will only be such as is unequivocally and distinctively characteristic of the carrying on of a profession; but third, that whether the activity should also be such that, when done in the carrying on of a profession, it bears a trading or commercial character is an open question. The present case requires that question to be answered. There is no authority binding on this Full Court which requires it to be answered in a particular way.<sup>153</sup>

His Honour saw no reason why the jurisprudence of *Concrete Constructions* and *Noah’s Ark* could not inform the construction of the expression of ‘professional activities’ in the same way it did ‘trade or commerce’.<sup>154</sup> In this way a professional

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<sup>149</sup> Ibid 317 [173]. That case was a decision of a single judge of the Supreme Court of NSW and concerned alleged misrepresentations made by a solicitor in the course negotiations, but after he had ceased to act as a solicitor for his clients. The Court also cited Bernard McCabe, ‘Revisiting Concrete Constructions’ (1995) 3 *Trade Practices Law Journal* 161 in which a distinction between ‘the actual exercise of the intellectual skill’ of a professional, on the one hand, and ‘representation about the product of that intellectual skill or about the practice which generates it’, on the other hand was made. Jessup J declined to be persuaded by the decision in *Prestia v Aknar* (1996) 40 NSWLR 165: at 317–18.

<sup>150</sup> Ibid 319 [179]. Jessup J also expressed reservations regarding the emphasis and reliance placed on the NSW Court’s concerns regarding the erosion of the advocate’s immunity through a ‘side-wind’ of consumer protection regulation.

<sup>151</sup> Ibid 316–319 [171]–[178].

<sup>152</sup> *Plimer v Roberts and Another* (1997) 150 ALR 235, 254 (Lindgren J), 241 (Branson J).

<sup>153</sup> *Shahid v Australasian College of Dermatologists* (2008) 248 ALR 267, 320 [181].

<sup>154</sup> Ibid 323 [188]–[189].

activity would be one that was ‘unequivocally and distinctively characteristic of the carrying on of a profession’.<sup>155</sup> His Honour was of the view that there were no obvious reasons within the Act itself to qualify to the phrase ‘any professional activity’<sup>156</sup> and that ‘the introduction of a further limitation, that the professional activity must bear a trading or commercial character, would bring confusion, where presently there is none’.<sup>157</sup>

His Honour considered the meaning of the expression ‘any professional activity’ and stated:

... the expression ‘any professional activity’ does not extend to purely instrumental or mundane activities by which professionals or their staff execute their daily tasks. A *professional activity is one that is unequivocally and distinctly characteristic of the carrying-on of a profession*. This requirement prompts the question which is perhaps at the heart of the matter in the present case: *is the concept of the carrying-on of a profession limited to engagement in professional practice, whether as a principle or as an employee or does it extend to functions of the kind carried on by the college?* Here it is important to consider the underlying denotation of the word ‘professional’. At base, a profession is ‘an occupation in which a professed knowledge of some subject, field, or science is applied; a vocational career, especially one that involves prolonged training and a formal qualification’. Thus ‘professional’ is ‘[o]f, belonging to, or proper to a profession ... [r]elating to, connected with, or befitting a (particular) profession or calling; preliminary or necessary to the practice of a profession ... [e]ngaged in a profession, esp one requiring special skill or training’: *Oxford English Dictionary*, 2<sup>nd</sup> ed. These senses of the noun and of the adjective are not limited to engagement in professional practice ... I would not construe the expression ‘any professional activity’ more narrowly than as implicit in the requirement that the activity in question be unequivocally and distinctly characteristic of the carrying-on of a profession, giving to the latter concept a connotation which is *not limited to engagement in professional practice*.<sup>158</sup>

His Honour held that the activities of associations of professionals such as the College were not excluded from the expression ‘any professional activity’<sup>159</sup> and applied this conclusion to the facts:

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<sup>155</sup> Ibid 323 [188].

<sup>156</sup> Ibid 322 [186]. His honour also noted ‘To say that the Act was substantially concerned with trading and trading-like transactions would be to do no more than to beg the question presently for determination. The definition of ‘trade or commerce’ is expanded, and it is expanded to include not only any professional activity but also any business activity’: at 324 [194] (Jessup J).

<sup>157</sup> Ibid 323 [190].

<sup>158</sup> Ibid 324 [192]–[194] (emphasis added).

<sup>159</sup> Ibid 324 [194].

First, the nature of the calling, vocation or pursuit both of the appellant and of the persons who constituted the body which she sought to join was 'professional' even in the narrower sense of the word. This proceeding does not present an occasion for the exploration of the limits of that word in its possible application, for instance, to footballs, film stars and others. Second, the college was a professional body whose members were concerned to advanced knowledge and to maintain standards in dermatology, and to do so selflessly. Third, the establishment of standards of learning, and the enforcement of those standards through its training program, were significant elements of the college's overall activities. They were not merely incidental ... Fourth, in the transactions presently relevant, the college acted as such. That is to say, this was not a case in which there was no more than an instrumental act or omission by a subordinate functionary. The representations which the trial judge found to have been misleading or false were made in a formal publication of the college and were addressed to the cohort of persons which whom the college intended to have dealings. Fifth, the training programme, and the selection process within it, were tightly organised, systematic and ongoing activities of the college. There was nothing ad hoc about them, or about the publication of the handbooks in which the representations were made ... I take the view that the activities of transactions in the course of which the record-keeping representation and the meaningful appeal representation were made were unequivocally and distinctly characteristic of the carrying-on of the profession of dermatologists. I consider that it would be quite artificial to regard them otherwise. Those activities were professional activities within the extended meaning of 'trade or commerce' in the Fair Trading Act, and the trial judge was in error not to have held so.<sup>160</sup>

Therefore the relevant test under the extended definition in relation to professional activities is whether 'the activities and transactions are unequivocally and distinctly characteristic of the carrying-on of the profession'.<sup>161</sup> This concept is not limited to the engagement of professional practice. If the activities are characteristic of the carrying on of a profession, then those activities will occur in 'trade or commerce'.

If each of the points identified in the passage from Jessup J are considered, it is clear how the extended definition of 'trade or commerce' will be applicable to HEIs. First, academics and their institutions are likely to regard themselves as a profession, or a collection of professionals (especially if the alternative is footballers or film stars).<sup>162</sup>

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<sup>160</sup> Ibid 325 [195], [197].

<sup>161</sup> Ibid 268.

<sup>162</sup> See generally Justice John Mansfield, 'Professional Men, They Have No Cares: Whatever Happens, They Get Theirs' (Speech delivered at the Nineteenth Annual Workshop of the Competition Law and Policy Institute of New Zealand, 2 August 2008); David Warren Piper, 'Are Professors Professional?' (1992) 46(2) *Higher Education Quarterly* 145; Kevin Williams, 'Troubling the Concept of the 'Academic Professional' in 21<sup>st</sup> Century Higher Education' (2008) 56 *Higher Education* 533; Mark Davies, 'Universities, Academics and Professional Negligence' (1996) 12(4) *Tolley's Professional Negligence* 102; Corones, above n 6.

Second, HEI are institutions whose main concern is to advance knowledge and to maintain standards of learning for many disciplines and often in accordance with accrediting bodies' approval.<sup>163</sup> Third, the establishment of standards of learning, and the enforcement of those standards are significant elements of a HEI's overall activities and are not merely incidental.<sup>164</sup> Fourth, transactions with students in relation to the delivery of educational services occur as an instrumental act or not as an omission by a subordinate functionary. The academic activities are directed to and involve the cohort of persons with whom the HEI intends to have dealings. Fifth, the entrance into and the provision of education services are tightly organised, systematic and ongoing activities of a HEI. Many academic activities that make up the supply of educational services will thus be unequivocally and distinctly characteristic of the carrying on of the profession of an academic and therefore within the extended meaning of 'trade or commerce' under the ACL.

There still will be occasion to determine what exactly a 'professional activity' is. It will not be any 'purely instrumental or mundane activities by which professionals or their staff execute their daily tasks'.<sup>165</sup> Not everything that is related to the professional activity will be considered to be 'in' 'trade or commerce' even within the extended definition.<sup>166</sup> In his article relating to the application of sections 52 and 53 of the TPA to specifically the marketing of university courses, Jackson<sup>167</sup> draws analogies from other professions in determining what conduct in relation to HEIs could be considered to be in 'trade or commerce'.<sup>168</sup> Jackson is of the view that universities should assume they are engaged in 'trade or commerce'.<sup>169</sup> Rorke suggests a 'distinction between representations made in the course of promotion of professional skills, and representations made as part of the actual provision of advice'.<sup>170</sup> The operation of the ACL to 'a thing done' 'in the course of the promotional activities of a

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<sup>163</sup> It is also possible that differing standards may apply to different disciplines, eg, there may be different measures for the need for accuracy regarding exactness of information in a degree in pharmacy or medicine, than discourse regarding diverse theories and argument in philosophy.

<sup>164</sup> This is strengthened by the development of learning and teaching standards and frameworks of learning and delivery in the higher education sector: TEQSA Act; Corones, above n 6, 11–14.

<sup>165</sup> *Shahid v Australasian College of Dermatologists* (2008) 248 ALR 267, 325 [194]–[195], [197].

<sup>166</sup> Commentators in general have been concerned to ensure that the very broad provisions of the misleading or deceptive conduct prohibition do not detract from commercial and indeed professional life. See Meltz, above n 85, 18.

<sup>167</sup> Jackson, 'The Marketing of University Courses', above n 2.

<sup>168</sup> *Ibid* 112–16.

<sup>169</sup> *Ibid*. Although he feels it is arguable under the authorities of *Quickenden* and the *Noah's Ark* case 'that the issue that certain conduct, for example teaching itself may not be in trade or commerce': at 116.

<sup>170</sup> Rorke, 'The Application of the Consumer Protection Provisions', above n 2, 190.

professional person' is specifically extended by section 6(4) of the CCA<sup>171</sup>. Rorke notes the analogy drawn by McCabe:

Where representations are made about the experience or expertise of the teacher or class sizes or some other matter that might induce students to enrol and pay fees, the representations will be conduct in trade or commerce because they are directly relevant to the terms of the commercial relationship between the student and the institution. The relationships bear a trading or commercial character. But where the teacher in the course of teaching the class makes a mistake of fact that misleads the students, the error is not, without more, actionable under section 52. It does not relate to the terms of the pre-existing teacher-student relationship, which is the commercial transaction in question.<sup>172</sup>

This is in keeping with the proposition of this research that to the extent that there is a student–HEI contract, this is a transaction that is properly considered to be 'in trade or commerce' as required by the ACL. Following *Monroe Topple* and the majority in *Shahid*, it is arguable that the supply of educational services falls within the definition of 'trade and commerce' as determined by *Concrete Constructions*. Even more probable is that many of the activities of the modern HEI will be a professional activity and within the extended definition of 'trade or commerce' under the ACL. This interpretation of professional activities of the HEI aligns the sector with other professions, their activities being subject to the consumer protection provisions of the ACL.<sup>173</sup> Thus the student–HEI contract will be subject to the UCT regime.

### **Commonwealth funded students**

As discussed above, the requirement that one party to the activity in question be a constitutional corporation is no longer needed to enliven the consumer protection provisions. Nevertheless, the jurisprudence regarding whether HEI's are 'trading corporations' remains instructive in the determination of whether educational activities are conduct in 'trade or commerce' when connected to the teaching of

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<sup>171</sup> The definition in s 6(4) extends the provisions of the CCA to the *promotional activities* of professional persons, such as solicitors, accountants and teachers. This thesis is concerned with matters beyond this. It is also of less significance given the harmonisation of a national consumer protection regime. The new definition of 'trade or commerce' as discussed in this chapter includes 'any professional activity'. This section however specifically extends the operation of the ACL to 'a thing done' 'in the course of the promotional activities of a professional person'. This is in respect of ACL pt 2-2 (unconscionable conduct), pt 3-1 (unfair practices — other than ss 30 (land) and 33 (nature of goods, but not services)), pt 4-1 (offences relating to unfair practices — other than ss 152 (land), 155 (nature of goods, but not services) and 164 (pyramid schemes)) and pt 5-3 (country of origin representations) of the ACL. There are no reported decisions in relation to s 6(4); however, 'a thing done' in the course of promotional activities is potentially very wide in its application. Orders for both civil penalties and damages against individuals involved in a contravention of the ACL are also available under the ACL.

<sup>172</sup> Rorke, 'The Application of the Consumer Protection Provisions', above n 2, 190 quoting Bernard McCabe, 'Revisiting Concrete Constructions' (1995) 3 *Trade Practices Law Journal* 161.

<sup>173</sup> See especially Guzyal Hill, 'The New Consumer Legislation and the Legal Profession' (2012) 20 *Australian Journal of Competition and Consumer Law* 18.



Commonwealth-funded undergraduate and postgraduate domestic students. Commentators support the view that the market culture in the higher education sector has the resulting effect that the consumer protection legislation applies to educational services, although some note the potential issues with the Higher Education Contributions Scheme ('HECS').<sup>174</sup> The former chair of the ACCC Professor Allan Fels has long been of the view that HECS charges fall within the business activities of HEIs.<sup>175</sup>

The issue of whether a university is a trading corporation was settled in the matter of *Quickenden v O'Connor, Commissioner of Australian Industrial Relations Commission* (2001) 184 ALR 260. The matter concerned issues relating to the employment of Dr Terry Quickenden at the University of Western Australia ('UWA') and the validity of a certified agreement made under Commonwealth legislation. On appeal, the Federal Court was required to determine whether UWA was a constitutional corporation in order for the Commonwealth legislation to apply rather than the state Act. The question was whether the University was a foreign, financial or trading corporation as defined by the Commonwealth workplace legislation. This required a finding that the University's trading activities were substantial 'in the sense of non-trivial' although not necessarily 'the predominant element of what the University did.'<sup>176</sup> The University submitted that it was in fact a trading corporation in support of its argument that the Commonwealth workplace legislation applied.<sup>177</sup> In a unanimous decision the court found that the University was indeed a trading corporation.

The Court noted that the traditional role of the university was not one that conjured immediately a notion that a university was a trading or a financial corporation in undertaking educational and research activities.<sup>178</sup> In determining the issue, the Court

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<sup>174</sup> Pursuant to the *Higher Education Funding Act 1988* (Cth) now *Higher Education Support Act 2003* (Cth). See, eg, Clarke, above n 2 17; Jackson, 'Regulation of International Education', above n 33, 76; cf Bessant, above n 2; Corones, above n 6; Lynden Griggs, 'Knowing the Destination Before the Journey Starts — Legal Education and Fitness for Purpose' (2007) *Murdoch ELaw Journal* 315 <[https://elaw.murdoch.edu.au/archives/issues/2007/1/eLaw\\_knowing\\_destination.pdf](https://elaw.murdoch.edu.au/archives/issues/2007/1/eLaw_knowing_destination.pdf)>; Kamvounias and Varnham, 'Getting What They Paid For', above n 2, 315.

<sup>175</sup> Fels, above n 2. He said of the application of the competitive neutrality principles to government business enterprises: '... it appears that the Commonwealth government, through Treasury, considers that all undergraduate services which involve some user charge, including HECS, will be considered a commercial activity and therefore subject to the competitive neutrality principles': at 5–6, cited in Bessant, above n 2, 257.

<sup>176</sup> *Quickenden v O'Connor* [2001] FCA 303, (2001) 109 FCR 243, (2001) 184 ALR 260.

<sup>177</sup> It was to the University's advantage that the Federal legislation regulating the workplace agreement be the governing law rather than the state legislation.

<sup>178</sup> *Quickenden v O'Connor* (2001) 109 FCR 243, 260 [48].

considered the provision of accounts and evidence of various trading activities<sup>179</sup> from UWA, together with investments in relation to property and other forms of investment.<sup>180</sup> Importantly for this research, it was submitted by the University that the fees charged by it were a fee for service, notwithstanding the fact that a large portion of those fees were governed by HECS. In their in the joint judgment, Black CJ and French J said:

The University also submitted that the fees charged by it for courses are fees for services notwithstanding that they are regulated by legislation and ministerial guidelines. So it was said that under the *Higher Education Funding Act 1988* (Cth) the regulation of fees is a condition of receiving Commonwealth grants and not a requirement imposed directly by law. The guidelines themselves, it is said, do not limit the University in such a way as to deny the fees the character of payment for services and facilities provided in the courses offered by the University. No limits are imposed on the number or content of the courses nor on their promotion or design, nor on ancillary matters such as accommodation and other student benefits which may attract potential students. Specifically, in respect of payments made by the Commonwealth to the University under the Higher Education Funding Act it is said that they should properly be characterised as revenue from trading activities. The argument is put thus. Some students pay HECS contributions directly to the University. That is, they pay a fee for services rendered to them. In 1995 fees paid in this way amounted to \$8.849 million. HECS payments by the Commonwealth to the University in that year amounted to \$17.318 million. Those payments, it was submitted, should also be characterised as revenue derived from trading.

It is questionable whether the provision of educational services within the statutory framework of the Higher Education Funding Act amounts to trading. The Act creates a liability for each student to the university in respect of each course of study undertaken in a semester. The amount is not fixed by the university but rather by the minister under published guidelines. The concept of 'trading' is a broad one. *It is doubtful, however, that it extends to the provisions of services under a statutory obligation to fix a fee determined by law and the liability for which, on part of the student, appears to be statutory. For the present purposes, however, this aspect of the claim trading activities can be disregarded.* For it is plain that the other activities sighted are trading activities and are a substantial, in the sense of non-trivial...albeit not for the predominant element of what the university does. The university was not established for the purpose of trading and at another time, closer to the time of its creation, it may not have been possible to describe it as a trading

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<sup>179</sup> Ibid 261 [49]. Evidence of operating revenues including the engagement in the organisation of festivals, sales of publications, parking, provision of student accommodation and other services was also tendered in support of the proposition that UWA was a trading corporation.

<sup>180</sup> Ibid.

corporation. But at the time relevant to this case and at the present, it does fall within that class.<sup>181</sup>

This has been seen as indicating that activities or conduct in relation to HECS students do not fall within the TPA as they are potentially not activities in 'trade or commerce'.<sup>182</sup> However, as can be seen from the emphasis above, this specific issue was not decided by Their Honours as there were sufficient other trading activities to characterise the University as a constitutional corporation. The dicta in the separate judgment of Carr J in *Quickenden* should also be considered in relation to the nature of the trading activities of a HEI and students in receipt of HECS. His Honour stated:

Although it is not necessary for me to decide, in my view there were other aspects of the University's activities which could be characterised as trading. Judicial notice can, I think, be taken of the fact that these days universities compete for students. The competition may be more intense within a particular State, but it certainly extends overseas and probably extends interstate. The Higher Education Contribution Scheme, in essence, works as follows. Relevantly, if the University wishes to participate in the Scheme it is obliged to charge fees to the students for the provision of education. If a student elects to pay those fees to the University directly and immediately out of his or her own funds the student gets a discount of 25%, with the Commonwealth paying the balance to the University. Otherwise the student borrows the amount of the fees from the Commonwealth (which the Commonwealth pays to the University on the student's behalf) and subsequently repays that loan when he or she earns certain levels of income. The evidence was that the University derived, in the year ended 31 December 1997, an amount of \$29.5 million under the Higher Education Contribution Scheme. I would regard that as being a trading activity.<sup>183</sup>

In the context of determining whether the provision of educational services to students falling under the HECS scheme are trading in nature, His Honour's comments are instructive and align with the reality of the modern university. In his

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<sup>181</sup> Ibid 261 [51] (emphasis added).

<sup>182</sup> *Hughes v Al-Hidayah Islamic Education Administration Inc.* (2009) WAIRC 00967. Again this was another issue in relation to jurisdiction under workplace legislation and the need to determine the existence of a trading corporation. In this case it was whether a private school was a trading corporation. This turned on the nature of the school fees. The Court found that the school's income was drawn from the state and federal governments and from school fees paid by parents with children at the school. The court followed the reasoning of Black CJ and French J in *Quickenden* and said 'It is not the case that the *Quickenden* matter found that educational services could not be seen as "trading", it was simply a matter of how the charging for the services was derived. In this matter the fees are charged directly by the school and have no statutory basis. The fees, as submitted, do have a commercial character to them ... "trading", it a broad concept. Hence is can include, in my view, the receipt of fees for the provision of educational services. The fact that a profit is not made is not relevant to my determination. The provision of educational services is clearly the main activity of the respondent. Those activities can be classified as trading. The question is whether the trading of those services are sufficient to categorise the respondent as a trading corporation': at [12].

<sup>183</sup> *Quickenden v O'Connor* (2001) 109 FCR 243, 272 [106].

recent article, Corones is of the view that changes to the funding arrangements under the *Higher Education Support Act (2003)* (Cth) has meant that since 1 January 2005, universities have operated in 'trade or commerce' in respect of HECS students within the meaning of the legislation.<sup>184</sup> The change in the funding model has allowed:

Universities to determine their own student contribution fees, which may be up to 30 per cent more than the HECS fees set by the Commonwealth. This is, in effect, a discretionary tuition fee rather than a statutory charge.<sup>185</sup>

There would be significant difficulties and indeed inequities if the provisions of the ACL only applied to students who paid full fees. Ergo the ACL would cover international students, domestic students paying full fees and, curiously, potentially HECS students who had availed themselves of the opportunity of a discount under the HECS scheme and paid their fees upfront. It is suggested that an outcome whereby the provision of educational services came within the ambit of the ACL for all but one group of students would not accord with policies based on equity of access to the higher education and certainly in light of the governments push for increased participation from disadvantaged groups.<sup>186</sup>

Further, the Productivity Commission Report was concerned with improving outcomes for vulnerable consumers.<sup>187</sup> Young people are a recognised category of vulnerable consumers.<sup>188</sup> The Commission defines vulnerability as:

a broader term relating to the susceptibility of consumers to detriment based on both their personal characteristics (including, but not limited to disadvantage) and the specific context in which they find themselves (market features, product qualities, the nature of the transaction, the regulatory environment). Disadvantage and vulnerability often overlap, but they can be distinct. For instance, in markets where the quality of services is hard to discern and convey to consumers, many will be vulnerable, despite not being disadvantaged.<sup>189</sup>

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<sup>184</sup> Corones, above n 6, 6.

<sup>185</sup> Ibid.

<sup>186</sup> Denise Bradley, Peter Noonan, Helen Nugent, Bill Scales, *Review of Australian Higher Education Final Report*, 2008 Australian Government (28 September 2010) <<http://www.deewr.gov.au/HigherEducation/Review/Pages/ReviewofAustralianHigherEducationReport.aspx>>; Australian Government, *Transforming Australia's Higher Education System* Department of Education, Employment and Workplace Relations (2009) <<http://www.deewr.gov.au/HigherEducation/Documents/TransformingAusHigherED.pdf>> 6.

<sup>187</sup> Productivity Commission, Australian Government, *Review of Australia's Consumer Policy Framework*, above n 10, chapter 12.

<sup>188</sup> Ibid 295.

<sup>189</sup> Ibid.

The report gives examples of the context in which a consumer may purchase goods or services that may make them vulnerable, such as the 'purchasing goods or services at times of emotional stress, or for which the quality is difficult to ascertain'.<sup>190</sup> It can be said that students, especially school leavers, may make decisions about which courses they enrol in at a time of emotional stress. As will be seen in Chapter 4, students face significant difficulties ascertaining the exact terms of the educational services they transact.

*Conclusion — the meaning of 'trade or commerce' under the ACL and academic activities*

The extended definition into the ACL and the decisions of *Monroe Topple* and *Shahid*,<sup>191</sup> decisions of the Full Court of the Federal Court, strongly suggest that the contract for the supply of educational services of a HEI will be considered to be in 'trade or commerce' as either a business or professional activity. Activities or transactions between the student and the HEI pursuant to a contract for the supply of educational services 'of their nature, bear a trading or commercial character.' The provision of educational services by the modern HEIs is for reward 'on a highly organised, systematic and ongoing basis'. Alternatively, the activities and transactions are 'unequivocally and distinctly characteristic of the carrying-on of the profession'.<sup>192</sup> This concept is not limited to the engagement of professional practice and HEIs are therefore not excluded from the ambit of the ACL on this basis. It is arguable that this supply in 'trade or commerce' includes Commonwealth funded students.

However, regard should properly be had to notions of academic freedom and intellectual debate. It is possible to say that academic matters that attend to expressions of opinion or the divergence in views are not conduct in 'trade or commerce' under the ACL as this is not the 'central conception' of the commercial relationship. Furthermore, while the expression of opinion may be related to the exercise of the intellectual skill of a professional, it may not be 'unequivocally and distinctly characteristic of the carrying-on of the profession', the emphasis on the 'carrying-on'. However, while notions of academic freedom should protect that to which it strictly obtains, such as the discussion and promulgation of ideas, especially

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<sup>190</sup> Ibid.

<sup>191</sup> The other case referred to in relation to this issue, *Mathews* above pp 62-63, was before a single judge of the Federal Court and decided before *Shahid*. *Mathews* was not referred to at all by the Full Court in *Shahid*.

<sup>192</sup> *Shahid v Australasian College of Dermatologists* (2008) 248 ALR 267, 268.

unfashionable ones, this should not be invoked to limit the ambit of consumer protection laws in identifiable consumer transactions.<sup>193</sup> The definition of what is 'in trade or commerce' should not be confused with concerns to protect ideas of academic freedom and freedom of speech if in fact the conduct is not divorced from any relevant actual or potential trading, commercial, professional relationship or dealing.

*Can HEIs avail themselves of any immunity?*

If it is accepted that the ACL applies to the activities of the HEI that are in 'trade or commerce', are HEI able to claim any immunity from the operation of the CCA? The issue of the availability of Crown immunity is only relevant to HEI public universities and not private providers of higher education services. There is no immunity specifically available in relation to the ACL under the CCA.<sup>194</sup> As public universities are established under state legislation, regard is had to each of the state fair trading Acts<sup>195</sup> that enact the ACL provisions as law in those relevant jurisdictions to establish whether immunity is available. All state Acts adopting the ACL have removed Crown immunity from the consumer protection provisions.<sup>196</sup> Immunity remains in place in relation to prosecution for offences and penalties under the ACL, provided the Crown is acting in right of the state.<sup>197</sup>

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<sup>193</sup> Rochford, 'Traders of the Lost Ark', above n 1. Rochford refers to public policy reasons why s 52 of the TPA should not apply to lectures. Rochford identifies the difference between 'higher principles' of academic freedom, and draws similarities with 'high value speech' of US constitutional law when contrasted with 'low value speech'. She poses the question as to whether a similar distinction should be made in this situation: at 138–9

<sup>194</sup> The relevant provision under the CCA is s 2B. Under this section the removal of immunity exists only in relation to part IV and XIB of the CCA. In so far as the Crown in each state carries on a business, the CCA will apply to the Crown and its authorities in relation to Part IV (Restrictive Trade Practices) and XIB (Telecommunications). There has been no amendment to this section of the CCA. Section 2A of the CCA deals with the issue of Crown immunity in relation to the Crown in right of the Commonwealth; see Rorke, 'The Application of the Consumer Protection Provisions', above n 2. Rorke considers the application of consumer and protection provisions of the TPA to universities and Crown immunity in right of the Commonwealth and the possibility of a university acting as an emanation or authority of the Commonwealth carrying on a business. She examines the enabling legislation and in particular legislation which applies as a de facto control mechanism of universities by the Commonwealth, such as the *Higher Education Funding Act 1988*. Rorke concludes however that, given the high degree of autonomy in relation to higher education institutions, it is unlikely, that they would be able to avail themselves of the protection of crown immunity: at 179–84; cf Ann Monotti, 'Universities and the Validity of their Claims to Student Intellectual Properties Rights' (1998) 24(1) *Monash University Law Review* 145, 183–5. Upon an analysis and evaluation to the extent of executive control over a university provided in its enabling statute, Monotti considers it possible for a court to find that a university is an emanation of the Crown. Monotti does note however that there is a judicial reluctance for this proposition and expansion of Crown immunity. For further detailed discussion see Colin Lockhart, *The Law of Misleading or Deceptive Conduct* (ed) (LexisNexis Butterworths, 2003) 8–16 [1.9]–[1.19] for discussion of both Commonwealth and state immunity.

<sup>195</sup> See above n 24.

<sup>196</sup> See, eg, s 10, ss 27–30 of the *Fair Trading Act 2010* (WA). All state acts adopting the ACL have removed of the Crown immunity from the consumer protection provisions in the same terms.

<sup>197</sup> Jackson, 'The Marketing of University Courses', above n 2, 116, n 35.

The first issue to be addressed in the application of the provisions in relation to immunity is to determine whether the respondent HEI is entitled to immunity as part of the Crown. If it is not, then the provisions of the ACL will apply to the respondent in the same way as to any other parties. If the respondent would have been entitled to immunity as part of the Crown, then the relevant section of the state Act<sup>198</sup> will apply to waive Crown immunity to the extent that that section applies.<sup>199</sup> It is important to note that while the Crown acting in right of the state has immunity from being prosecuted for offence or pecuniary penalty, this does not extend to an authority of the state or territory. As noted by Lindsay it is also possible that the university enabling legislation will also make it clear that the institution is not an instrumentality of the Crown.<sup>200</sup> In the absence of any authority on this issue, an examination of the relevant legislation suggests that Crown immunity, including in relation to the imposition of penalties, will not be available for public universities. In light of the changes to the ACL regarding the imposition of pecuniary penalties and more significant consumer enforcement orders in relation to breaches of the consumer protection provisions, this may be an issue of some concern for HEIs.

#### *HEI and extended jurisdiction of the ACL*<sup>201</sup>

Of interest to universities providing online or offshore educational services are the provisions of the ACL that extend the application of the ACL to conduct outside Australia. Section 5 (1)(c) of the CCA provides that the provisions of the ACL extends to conduct engaged in outside Australia by corporations carrying on business within Australia, Australian citizens or permanent residents.<sup>202</sup> The question therefore would be whether the provision of educational services to locations outside Australia would be considered to be 'carrying on a business'. Given the conclusions drawn above following the examination of the test for whether activities of the HEI are in 'trade or commerce', it is highly likely that the provision of educational services offshore by a HEI would attract the extended operation of the CCA, as the provision of these services would be 'carrying on a business'. This would also include any overseas HEI

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<sup>198</sup> See, eg, s 10, ss 27–30 of the *Fair Trading Act 2010* (WA).

<sup>199</sup> Miller, above n 23, 330 discussing the operation of the equivalent Commonwealth provision CCA s 2B.

<sup>200</sup> Lindsay, 'Complexity and Ambiguity in University Law', above n 2, n 145 and the example from the *University of Adelaide Act 1971* (SA).

<sup>201</sup> It is clear that the activities of HEI supplying educational services will be extended to the scenarios outlined below. It is worth noting however in the case of international students (and perhaps online students through arrangements such as OUA) who are recruited through educational agents other legal issues under the principles of agency law and the interaction with the ESOS Act also arise, but are beyond the scope of the thesis to examine it further.

<sup>202</sup> See also the discussion above at [page 10](#) n 45 in relation to the meaning of 'trade or commerce'.

that carries on a business in Australia through a branch.<sup>203</sup> The CCA also provides extension to encompass the promotional activities of professional persons.<sup>204</sup>

The provision of educational services through the internet outside of Australia's geographical territory is also likely to be caught by the extended definition under section 6(3)(a) of the CCA. This section extends the operation of the CCA to postal, telegraphic or telephonic services. It will cover the promotional activities of HEI through the internet<sup>205</sup> and the delivery of course materials through learning management systems such as blackboard, which are accessed via the internet. This will be the case even if the server is located outside Australia.<sup>206</sup>

## Conclusion

While the relationship between the student and HEI is multifaceted, there exists a commercial relationship for the supply of educational services, underpinned by the law of contract, overlaid by statutory obligations and supported by the placement of the student at the centre as consumer. To the extent that a student–HEI contract for educational services exists, it is argued that this is supplied in ‘trade or commerce’. This is perhaps distinct from academic activities such as statements made in lectures, but not necessarily the compilation and provision of teaching materials, and the skills and qualifications of academic staff, for example, in the exercise of their academic judgement in the preparation and delivery of the course materials or the evaluation of assessment. Promises in relation to these aspects of the student–HEI relationship may form part of the contract for the supply of educational services, as discussed in the next chapter. Ipso facto if there is an enforceable contract there is a trading or commercial relationship or dealing. Further, the rights of consumers will not be denied because the services are provided without profit for the supplier. Alternatively, the supply of educational services is a ‘professional activity’ and therefore provided in ‘trade or commerce’ within the extended meaning of the ACL. It is also arguable that this includes the supply of educational services to

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<sup>203</sup> See Miller, above n 23, 401 [1.5.10]. See, eg, Andrew Trounson, ‘Global Laureate International Universities Targets Adelaide’, *The Australian* (online) 15 June 2011 <<http://www.theaustralian.com.au/higher-education/global-laureate-international-universities-targets-adelaide/story-e6frgcjx-1226075202086>>.

<sup>204</sup> CCA s 6(4). See above n 171.

<sup>205</sup> In the case *ACCC v Henry Kaye and National Investment Institute Pty Ltd* [2004] FCA 1363, when examining the provision of educational materials and the promotion thereof the court noted that the promotional activities had occurred using the internet and were therefore caught by the extended operation of the TPA.

<sup>206</sup> See, eg, *ACCC v Hughes* [2002] FCA 270; *ACCC v Chen* [2003] FCA 897 cited in Russell Miller, *Miller's Australian Competition and Consumer Law Annotated* (Thomson Reuters, 33<sup>rd</sup> ed, 2011) 412 [1.6.15].



Commonwealth-funded students, both on the law and on policy grounds. HEIs are unable to claim immunity from the operation of the ACL, which has an extended jurisdiction that impacts on the delivery of educational services in locations outside Australia, including via the internet.

However, it may be said that within the framework of understanding what the student is transacting, there remains room for the expression of divergent views, intellectual debate and academic freedom, whatever that phrase entails.<sup>207</sup> The courts have been concerned to ensure that consumer protection legislation does not impact negatively on intellectual debate in Australia.<sup>208</sup> Therefore, is it possible to say that academic matters that attend to expressions of opinion or the divergence in views are not conduct in 'trade or commerce' under the ACL, as this is not the central concept of the commercial relationship. However, other matters relating to the transaction in relation to the delivery of educational services are. The definition of what is 'in trade or commerce' should not be confused with concerns to protect ideas of academic freedom and freedom of speech if in fact the conduct is not divorced from any relevant actual or potential trading, commercial, professional relationship or dealing. The proposition that the contract for the supply of educational services occurs in 'trade or commerce' and is therefore a contract subject to the UCT provisions is supported by the analysis of the legislation and precedent. To the extent that academic activity forms part of the student–HEI contract, it will be subject to the ACL provisions regulating unfair contract terms.

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<sup>207</sup> Cf Rochford, 'Traders of the Lost Ark', above n 1. Rochford refers to public policy reasons why s 52 of the TPA should not apply to lectures. Rochford is concerned that claims made under s 52 of the TPA (s 18 ACL) threatens the idea of academic freedom. She suggests that it would be appropriate, as it is with newspapers, to obtain exclusion from the operation of the Act for statements made that involve matters of 'academic freedom'. She is of the view that the protection of the idea of academic freedom should be as critical as that for the reasons given for exclusion for newspapers: at 138–9. As was seen in Chapter 2, it is difficult to state definitively what academic freedom comprises.

<sup>208</sup> See above n 122.

## Chapter 4: The Student–HEI Contract

### Introduction

The protections available under the UCT of the ACL require the existence of several factors before the provisions are enlivened. There must be a ‘standard form’<sup>1</sup> ‘consumer contract’<sup>2</sup> between the supplier of the services (the HEI) and the consumer of those services (the student). Further, that contract must be supplied in ‘trade or commerce’. The analysis in the preceding chapter established that a contract for the supply of educational services, if it exists, occurs in ‘trade or commerce’ as defined by the ACL. A consideration of whether the contract is a ‘standard form’ ‘consumer contract’ as required will be undertaken in Chapter 5.

This chapter is concerned with an examination of the case law and literature to determine whether a contract between the student and the HEI exists in Australia. As has been discussed previously in Chapter 2, students’ rights at law are various and co-exist in a manner that is not exclusive. Legal commentators in Australia and other common law jurisdictions have acknowledged that this includes the relationship between the HEI and student being situated in contract.<sup>3</sup> It is settled law in the United Kingdom that a student–HEI contract exists.<sup>4</sup> There is very little direct Australian authority on this particular issue, but some commentators go so far as to say that it is now beyond debate that a student–HEI contract exists in Australia.<sup>5</sup> This chapter will

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<sup>1</sup> ACL s 23(1)(b).

<sup>2</sup> *Ibid* s 23(3).

<sup>3</sup> *Clark v University of Lincolnshire and Humberside* [2000] 3 All ER 752 (‘Clark’). Even Francine Rochford who was a strong proponent that the university–student relationship should be one of status (that is the students stand as corporators in relation to the university) acknowledges now that the prevailing view is to describe the university–student relationship as one of contract: Francine Rochford ‘The Contested Product of a University Education’ (2008) 30(1) *Journal of Higher Education Policy and Management* 41, 42. See also J Stephen Kós and Russell McVeagh, ‘The View From The Bottom of The Cliff: Enforcement of Legal Rights Between Student and University’ (1999) 4(2) *Australia and New Zealand Journal of Law and Education* 18, 26 where Kós and McVeagh acknowledge the coexistence of statutory powers and contractual rights in other aspects of New Zealand law, notably companies formed under the NZ Companies Act; Simon Whittaker, ‘Public and Private Law-Making: Subordinate Legislation, Contracts and the Status of “Student Rules”’ (2001) 21(1) *Oxford Journal of Legal Studies* 103.

<sup>4</sup> *Clark* [2000] 3 All ER 752, 756 (Sedley LJ); *Moran v University College, Salford* [1994] ELR 187 (‘Moran’). See generally Dennis Farrington and David Palfreyman, *The Law of Higher Education* (2012, 2<sup>nd</sup> ed, Oxford University Press) chapter 12; Tim Birtwistle and Melissa Askew, ‘The Teaching and Higher Education Act 1998 — Impact on The Student Contract’ (1999) 11(2) *Education and the Law* 89, 95; Martin Davis, ‘Students, Academic Institutions and Contracts — A Ticking Time Bomb?’ (2001) 13(1) *Education and the Law* 9; William P Hoye and David Palfreyman, ‘Plato vs Socrates: The Devolving Relationship Between Higher Education Institutions and their Students’ (2004) 16(2–3) *Education and the Law* 97; Sam Middlemiss, ‘Legal Liability of Universities for Students’ (2000) 12(2) *Education and the Law* 61; David Palfreyman, ‘Phelps ... Clark ... and now Rycotewood? Disappointment Damages for Breach of the Contract to Educate’ (2003) 15(4) *Education and the Law* 237.

<sup>5</sup> See Patty Kamvounias and Sally Varnham, ‘In-House or in Court? Legal Challenges to University Decisions’ (2006) 18(1) *Education and the Law* 1, 10; Lynden Griggs, ‘Knowing the Destination Before

review the authorities to determine the acceptance of a contract between the student and HEI in Australia. However, even if it can be said that the contract does exist, there is divergence in views as to the particular arrangements entered into. There is some debate about whether the contract for the supply of educational services consists of one or two contracts. Proponents of the two contract theory suggest that the first contract between the student and HEI is a contract 'to admit'.<sup>6</sup> That is, the prospective student in receipt of an offer and upon acceptance of that offer has a contractual entitlement to take up a place at the HEI and enrol.<sup>7</sup> The second contract, the contract 'to educate' (alternately a contract for tuition or matriculation),<sup>8</sup> arises upon enrolment. A consideration of the technical aspects of the formation of the contract, such as intention to be legally bound, consideration and agreement will be undertaken in an attempt to resolve these issues.

The chapter will also examine the nature of the student–HEI contract and attempt to determine the scope of the terms of the contract, with particular reference to the myriad of HEI enrolling, policy and other documents. The focus of the analysis will be on the potential express terms of what might be considered the 'standard form' contract. The determination of the nature of the contract and its terms is significant for this research. The following chapter will examine the application and effect of the UCT provisions to identify any connection between the UCT provisions regarding substantive unfairness and the protection afforded students by the legislation in the context of the provision of educational services. The identification of the nature and terms of the student–HEI contract is necessary in order to assess whether any terms in the student–HEI contract are potentially unfair terms as proscribed under the ACL. This chapter will then canvass the remedies available at common law for breach of the contract for the supply of educational services as it is very possible that the remedies available under the ACL are more effective mechanisms for redress for students.

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the Journey Starts — Legal Education and Fitness for Purpose' (2007) *Murdoch ELaw Journal* 315 <[https://elaw.murdoch.edu.au/archives/issues/2007/1/eLaw\\_knowing\\_destination.pdf](https://elaw.murdoch.edu.au/archives/issues/2007/1/eLaw_knowing_destination.pdf)> 321.

<sup>6</sup> Moran [1994] ELR 187, OxCHEPS Law of Higher Education online casebook (18 November 2011) <[http://oxcheps.new.ox.ac.uk/new/casebook/part3\\_13.php](http://oxcheps.new.ox.ac.uk/new/casebook/part3_13.php)>. See generally Farrington and Palfreyman, *The Law of Higher Education*, above n 4, 336–350 [12.08]–[12.240]; Davis, above n 4; but see Middlemiss, above n 4, 85; Birtwistle and Askew, above n 4.

<sup>7</sup> Indeed the initial relationship between the prospective student and the HEI can only be based in contract as the prospective student is not yet a member of the HEI. Farrington and Palfreyman, *The Law of Higher Education*, above n 4, 336 [12.08].

<sup>8</sup> Moran [1994] ELR 187, OxCHEPS, above n 6. See generally Farrington and Palfreyman, *The Law of Higher Education*, above n 4; Davis, above n 4; but see Middlemiss, above n 4; Birtwistle and Askew, above n 4.

### The existence of the student–HEI contract<sup>9</sup>

The seminal English case is that of *Clark v University of Lincolnshire and Humberside* ('*Clark*'),<sup>10</sup> which was discussed in some detail in Chapter 2 in relation to the justiciability of matters pertaining to academic judgement. In this case the student had been working on a paper on the play *A Streetcar Named Desire* as part of her final examination. She failed to make a backup copy and lost all electronic records of her work. As a result, all she was able to submit on the due date was a collation of notes copied from other sources. She was failed for plagiarism.<sup>11</sup> The student availed herself of various university appeal processes, which were unsuccessful. She then brought a claim for breach of contract. Initially the student claimed that the University had 'misconstrued the meaning of plagiarism and that the paper had been given a mark beyond academic convention'.<sup>12</sup> At first instance the trial judge decided that alleged breaches of contract by universities were not justiciable by courts.<sup>13</sup> This point was specifically rejected by the Court of Appeal.<sup>14</sup> The Court of Appeal confirmed the existence of a contractual relationship between a fee-paying student and a HEI.<sup>15</sup> On appeal, the student's claim was limited to breach of contract under the University's regulations.<sup>16</sup> This case has been followed consistently in the UK and considered highly persuasive in other jurisdictions.<sup>17</sup> The issue of what constitutes a

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<sup>9</sup> It should be noted that this discussion is not concerned with 'learning contracts' often found in a teaching and learning context, which are imbued with the force of contractual terminology but are not intended to be binding at law. The following discussion centres on enforceable legal rights arising from the agreement between the student and the HEI in the provision of educational services. See, eg, Paul Gibbs, 'Learning Agreements and Work-Based Higher Education' (2009) 14(1) *Research in 'Post Compulsory' Education* 31. The issues of learning contracts was also raised in the matter of *Walsh v University of Technology, Sydney* [2007] FCA 880, [67] where the student applicant and the respondent university agreed after the misleading by the applicant student that the learning contract was not a document intended to be legally binding; but see Ruth Gaffney-Rhys and Joanna Jones, 'Issues Surrounding the Introduction of Formal Student Contracts' (2010) 35(6) *Assessment and Evaluation in Higher Education* 711 where the authors discuss the ramifications of the introduction of 'formal learning agreements'. Their proposition is that the formalisation of the student–HEI contract can improve student satisfaction and assist with the management of student expectations. However, with respect the article is unhelpful at times as it is not always clear whether the authors are referring to the implementation of those agreements that are legally binding and those that are not (eg, they suggest that the word 'contract' should be avoided because of the negative connotations held by the student respondents in their sample, but this would have no effect at law. In the next paragraph the authors emphasise that it needs to be clear to all parties whether the provisions are legally binding; at 719). This is exacerbated by the use of the phrase 'learning agreement', which is often used in a purely learning and teaching context.

<sup>10</sup> *Clark* [2000] 3 All ER 752.

<sup>11</sup> *Ibid* 754 [1].

<sup>12</sup> *Ibid* 752.

<sup>13</sup> *Ibid*, 755.

<sup>14</sup> See Chapter 2 for detailed discussion of the issues attending to the examination of matters of academic judgement.

<sup>15</sup> *Clark* [2000] 3 All ER 752, 756 [12].

<sup>16</sup> *Ibid* 756 [12]. This had the effect of allowing the Court to review the decision making process as the claim was no longer framed in a manner that sought review of a matter of academic judgement.

<sup>17</sup> See, eg, *Moran* [1994] ELR 187, OxCHEPS, above n 6; *Grant v Victoria University of Wellington* [2003] NZAR 186 ('*Victoria University*'); *Lamb v Massey University* [2006] NZCA 167; referred to in *Griffith University v Tang* (2005) 221 CLR 99.

'fee-paying student' in an Australian context is considered further below. Clearly the phrase would encompass full fee paying students, typically international students, postgraduate students and some domestic students, particularly at private HEIs. The situation is less certain for Commonwealth-funded students.

It is also accepted in New Zealand that a student–HEI contract exists. In *Grant v Victoria University of Wellington* [2003] NZAR 186 ('*Victoria University*'), the student plaintiffs had completed and been awarded the Degree of Master of Arts (Applied) in Environmental Studies. They were however dissatisfied with the quality of the course provided and brought a claim based on breach of the contract with the University.<sup>18</sup> Justice Ellis was of the view that it was beyond argument that the relationship between the student and university was partially based in contract. Thus in New Zealand students are entitled to seek redress against a university on the basis of contract, tort or judicial review.<sup>19</sup> The existence of a student–HEI contract in New Zealand was confirmed in *Lamb v Massey University* [2006] NZCA 167.<sup>20</sup>

### **The position in Australia**

Australian commentators are largely of the view that a student–HEI contract does arise, at least upon enrolment. Griggs has examined the effect of the former implied warranty of fitness for purpose<sup>21</sup> into the student–HEI contract in the context of legal education.<sup>22</sup> He has considered the existence of the student–HEI contract and how the matter has been addressed in the UK.<sup>23</sup> As there is little direct authority on this point in Australia, Griggs relies on persuasive precedent from England and the United States.<sup>24</sup> Lindsay also agrees that the Australian authorities are 'scant and not particularly revealing of the nature and content of the contract' and has regard to UK

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<sup>18</sup> *Victoria University* [2003] NZAR 186. The second cause of action was based on misrepresentation. This decision concerns a strike out application by the University. See especially Kós and McVeagh, above n 3.

<sup>19</sup> *Victoria University* [2003] NZAR 186, 191.

<sup>20</sup> In that matter a student who had passed the theory component of her Diploma of Teaching but failed her practicum claimed that the University had breached the contract. No breach of contract was established. See Pheh Hoon Lim and Juliet Hyatt, 'Educational Accountability — Do Tertiary Students Need More Academic Protection in New Zealand?' (2009) 14(1) *International Journal of Law and Education* 23, 31.

<sup>21</sup> TPA s 74.

<sup>22</sup> Lynden Griggs, above n 5.

<sup>23</sup> *Ibid* 318–21.

<sup>24</sup> *Ibid* 321. Given the differences in the higher education systems in the United States and Australia, the American jurisprudence will not be considered in this thesis. There is a significant jurisprudence in relation to a higher education law in the US and has longevity not matched in either the UK or Australia. For a comparative analysis of the US and UK see David Palfreyman, 'The HEI–Student Legal Relationship, Special Reference to the USA Experience' (1999) 11(1) *Education and the Law* 5.

authorities, notably *Clark and Moran v University College Salford (No2) [1994] ELR 187 ('Moran')*.<sup>25</sup>

The accepted authority in the Australian context is *Bayley-Jones v University of Newcastle (1990) 22 NSW 424 ('Bayley-Jones')*. Ms Bayley-Jones applied to the Court for an order quashing the Visitor's award to her for compensation and that instead the Visitor be compelled to assess damages due to her in accordance with the law.<sup>26</sup> The plaintiff had been awarded a 'solatium' in the amount of \$6,000 by the Visitor as a result of her PhD candidature being wrongfully terminated by the University.<sup>27</sup> The Court found that the Visitor, '[h]aving determined that a wrong had been done by the University to the plaintiff it was not open to him to deny her such compensation as would redress the reasonably foreseeable harm to her caused by that wrong and to award her a mere "solatium"'.<sup>28</sup> The question was then on what basis should damages be properly measured. The University argued that the plaintiff could not succeed in her claim as she had not alleged any cause of action upon which an award of damages could be based.<sup>29</sup> The Court considered potential claims arising in administrative law<sup>30</sup> and negligence<sup>31</sup>. In relation to the plaintiff's reliance on a breach of contract to support her claim for damages, the Court said:

In the petition she set out at great length and with fine particularity all the documentation relating to her candidacy being accepted and all the arrangements made between her and the relevant University officials. The relevant documents and the relevant rules were reproduced in full. Any lawyer reading her petition would have been evincing a remarkable lack of perspicacity if his mind did not turn immediately to the law of contract. The word 'contract' is not used. The expression 'breach of contract' is not used. But the relevant facts are alleged. One can have contractual rights which are a reflection of rules of the University. Where in such a case what constitutes the breach of the contract is breach of the rules of the University the Visitor's jurisdiction, which is exclusive, is attracted. In my opinion it is clear that in the present case the plaintiff is entitled to rely upon any breach of contract between her and the University which was involved in the ultra vires purported termination of her candidacy.<sup>32</sup>

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<sup>25</sup> Bruce Lindsay, 'Complexity and Ambiguity in University Law: Negotiating the Legal Terrain of Student Challenges to University Decisions' (2007) 12(2) *Australia and New Zealand Journal of Law and Education* 7, 10–11.

<sup>26</sup> *Bayley-Jones v University of Newcastle (1990) 22 NSW 424, 425.*

<sup>27</sup> *Ibid*, 427–8. 'A 'solatium' is a sum paid to an injured party 'by way of solace to his wounded feelings': *The Dictionary of English Law*: at 432 (Allen J).

<sup>28</sup> *Ibid* 428.

<sup>29</sup> *Ibid* 432.

<sup>30</sup> *Ibid* 433–5.

<sup>31</sup> *Ibid* 435.

<sup>32</sup> *Ibid*.

### **Public HEIs and the contract for the supply of educational services in Australia**

The decision in *Bayley-Jones* was followed in the matter of *Harding v University of New South Wales* [2001] NSWSC 301 ('*Harding*') with very little discussion of the issue.<sup>33</sup> That case involved an application by the student Mrs Kathleen Harding regarding a decision that was made in 1988. The University did not allow her to re-enrol in the medicine course as she had failed her end-of-year examination. The basis of the student's claim was that the appeal committee formed to consider her application supporting her re-enrolment, based on expert medical opinion regarding the illness that had contributed to the failure of her exams, did not do so according to University rules. One cause of action pleaded by the student was breach of contract.<sup>34</sup> The Court considered whether there was a contract on foot between the student and the University and, if so, did that contract contain a term or terms requiring the University to apply its rules regarding the relevant appeals process in relation to the claim by the plaintiff. Justice Sully was simply of the view that those questions should be answered in the affirmative following the reasoning of Allen J in *Bayley-Jones*.<sup>35</sup>

A number of Australian cases involving public universities have touched on the issue of contractual relationship between the HEI and the student, although largely these cases have dealt with the issue of the contractual relationship in interlocutory proceedings, usually involving strike-out applications or alternatively determinations of deficient pleadings and insufficient evidence. The complex and multi-causal matter between a disgruntled PhD student Megumi Ogawa and the University of Melbourne has been canvassed earlier in Chapter 3.<sup>36</sup> In one of the many applications made by Ms Ogawa, the Court had reason to consider a claim by her in relation to breach of contract.<sup>37</sup> Ms Ogawa alleged amongst other things that the supervision of her PhD studies was inadequate and in breach of the contract between her and the University.<sup>38</sup> The claim for breach of contract was struck out due to Ogawa's failure to identify the terms of the contract. However, it was

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<sup>33</sup> *Harding v University of New South Wales* [2001] NSWSC 301, [18].

<sup>34</sup> The student also made various claims including discrimination in relation to her medical condition and age, negligence, breach of statutory duty, misfeasance in public office and equitable estoppel.

<sup>35</sup> *Harding v University of New South Wales* [2001] NSWSC 301, [44]–[45]. The Court went on to find that the University had breached the term of the contract requiring it to deal with the plaintiff on the basis of its rules regarding the appeals committee and had not done so by the fact that the appeals committee convened with two members not three. This did not advance the student's claim however. Even though there was a breach, it could not be shown that it related to any damage that the plaintiff could establish.

<sup>36</sup> See generally Megumi Ogawa, 'The Courts' Jurisdiction Over Student/University Disputes in Australia', (2012) 2(1) *International Journal of Public Law and Policy* 96.

<sup>37</sup> *Ogawa v University of Melbourne (No.3)* [2004] FMCA 536.

<sup>38</sup> *Ibid* [26]–[27].

specifically noted that the allegation of a breach of contract in general was not objected to.<sup>39</sup> Ogawa was given an opportunity to re-plead her case but failed to do so.<sup>40</sup> The issue of whether or not there can be contract between a student and public university has not been specifically decided in other matters, although considered.<sup>41</sup>

Unfortunately the issue of whether or not a contract to educate exists in Australia could not be determined by the High Court in *Griffith University v Tang* as breach of contract was not pleaded by the applicant student.<sup>42</sup> At the application for special leave to appeal to the High Court, Kirby J noted the absence of what seemed an obvious point (although bringing a claim for breach of contract may have impeded the availability of judicial review in the circumstances<sup>43</sup>):

**KIRBY J:** Can I just ask a question. It was common ground when we were told this at the special leave hearing that there is no contractual relationship. I am curious about that. Would not the respondent have paid fees? I accept that this has been common ground and maybe it ought not and cannot be revived now, but would you just illuminate why that was common ground?

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<sup>39</sup> Ibid. Although the Court had been able to discern the nature of the allegations regards inadequate supervision in contravention of s 52 of the TPA despite the poor pleading, the statement of claim did not identify how the contract had been breached. The Court considered whether there was scope within the rules of the Federal Court that would allow the matter to proceed, even though the applicant had not specifically identified the terms of the contract. The Court held that there was not. Phipps FM was of the view that the best way to proceed given these difficulties was ‘... to strike out the whole contract pleading but make it clear that ... [the allegation of breach of contract] is not objected to and that the problem is that the terms of the contract relied upon are not set out and the matters which are alleged to consist the breaches need to be set out. Counsel for the respondent accepted that if the pleading was struck out the applicant should be given the opportunity to re-plead’: at [35]. In *Ogawa v Phipps* [2006] FCA 361, Ogawa was successful in her application for writs for certiorari and prohibition in respect of the decision eventually dismissing the application *Ogawa v University of Melbourne (No.2)* [2005] FMCA 1216 on the basis that the proceedings had been wrongly transferred to the inferior court. See Chapter 3 at pages 10–11 nn 50–8.

<sup>40</sup> *Ogawa v The University of Melbourne* [2005] FCA 1139 (22 August 2005). A further application that the proceedings be dismissed or struck out on the basis that the claim by Ogawa was frivolous or vexatious and/or an abuse of process of the court was heard by Ryan J in *Ogawa v The University of Melbourne* [2005] FCA 1139 (22 August 2005). The Court accepted the University’s submission that Ogawa’s re-filed statement of claim was in fact a mechanical reproduction in identical form to the claim that had been struck out Phipps FM and that Ms Ogawa had made no attempt to reformulate the pleading. Orders were made by Ryan J to stay the proceedings relating to the claims pursuant to the TPA, the breach of contract and the new claims made under the Racial Discrimination Act: see *Ogawa v Phipps* [2006] FCA 361. The matter was transferred back to the Federal Court and eventually settled. See also Ogawa, above n 36.

<sup>41</sup> See *Dudzinski v Kellow Dudzinski v Kellow* [1999] FCA 390 [18]; *Mathews v University of Queensland* [2002] FCA 414.

<sup>42</sup> *Griffith University v Tang* (2005) 221 CLR 99, 121 [58].

<sup>43</sup> Ibid 107 per Chief Justice Gleeson ‘The effect of the decision presently in question was to exclude the respondent from the appellant’s PhD research programme. There was no finding in the Supreme Court of Queensland as to exactly what was involved, in terms of legal relations, in admission to, or exclusion from, the programme. There was no evidence of a contract between the parties. There may well have been such a contract, but, if there was one, we were not told about it, and it was not relied upon by either party. The silence in the evidence about this matter, which bears upon the legal nature and incidents of the relationship between the parties, is curious. If the decision to exclude the respondent had been made pursuant to the terms of a contract, then, on the authorities, that would have been a consideration adverse to the respondent on the issue with which we are concerned.’: at 107–8 [12] (Gleeson CJ). The decision would therefore not have been made under enactment, but perhaps it should have been pleaded in the alternative.



**MR KEANE:** Well, your Honour, it is common ground but no evidence of any contractual relationship [was led] ... your Honour makes an assumption as to the provision of consideration which one cannot confirm.

**KIRBY J:** I just have to put it out of my brain even though it will not seem to go away. All right, well I will do so.<sup>44</sup>

At the hearing His Honour Gleeson CJ remarked:

In the present case, the exclusion was in accordance, or purported to be in accordance, with the terms and conditions as to academic behaviour which had previously been established. It appears to be accepted that, by applying to join the program, the respondent was bound by those terms and conditions, at least in the sense that the appellant could lawfully apply them to its relationship with the respondent. If there were a contract, presumably the contract, either expressly or by implication, included those terms and conditions. The case was argued on the assumption that the appellant was entitled to invoke and apply its policies in relation to academic misconduct, and its procedures for deciding whether academic misconduct had occurred and for internal review of such decision. The precise legal basis of that common assumption was not examined in argument. There is no reason to doubt that the assumption is correct...Undoubtedly, from a practical point of view, it is unrealistic to regard the decision to exclude the respondent from the PhD program as no different from the decision of any service provider to withdraw future supply from a consumer of those services. Yet the legal effect of an otherwise lawful decision to terminate the relationship, contractual or voluntary, may be ascribed accurately and sufficiently as a termination of the relationship, even if the statutory or other context in which the relationship exists confers particular benefits, or potential benefits, upon one of the parties.<sup>45</sup>

### **Private HEIs and the contract for the supply of educational services in Australia**

The matter seems less contentious in relation to private providers of higher educational services or postgraduate training.<sup>46</sup> Courts are prepared to accept the

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<sup>44</sup> Transcript of Proceedings, *Griffith University v Tang* [2004] HCATrans 227 (21 June 2004), [30]–[45]. The relevant passage from the Court of Appeal decision is as follows: *Tang v Griffith University* [2003] QCA 571 'In the instant appeal the appellant contended and the respondent accepted that there was no contractual relationship between these parties, and the appeal record discloses no evidence of any. For example, there is no evidence of any payment made by Ms Tang to the respondent University for admission to the PhD course, or of any terms or conditions agreed to between the parties when she was (presumably) admitted or accepted as a PhD candidate': Transcript of Proceedings, at [29].

<sup>45</sup> *Griffith University v Tang* (2005) 221 CLR 99, 110 [17]–[19]. See also *Griffith University v Tang* (2005) 221 CLR 99, 121 [58].

<sup>46</sup> See, eg, *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* (2002) 122 FCR 110.

existence of a contract between a student and private provider of higher education.<sup>47</sup> The ease of acceptance of a student–HEI contract is even more apparent when one considers the cases that have come before the consumer based tribunals.<sup>48</sup> Often the supply of services under a contract to educate is readily recognised and the tribunals focus on determining the contents of the contract and what loss, if any, has been suffered by applicants.<sup>49</sup> There appear to be very few cases where a court or tribunal has explicitly decided a contract does not exist between a student and a provider of educational services.<sup>50</sup>

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<sup>47</sup> See below n 49. See also Patty Kamvounias and Sally Varnham, 'Getting What They Paid For: Consumer Rights of Students in Higher Education' (2006) 15 *Griffith Law Review* 306, 312 and the authorities relied upon *Commonwealth of Australia v Noel Ling* (1993) 44 FCR 397; *Noel Ling v Commonwealth of Australia* (1994) 51 FCR 88; *Commonwealth of Australia v Ling* (1993) 44 FCR 397; *Orr v Bond University* (Supreme Court of Queensland, unreported, Dowsett J, No 2337, 3 April 1996).

<sup>48</sup> See, eg, *Kwan v University of Sydney Foundation Program P/L* ('Kwan') [2002] NSWCTTT 83.

<sup>49</sup> Other examples of where the consumer tribunals have been prepared to proceed on the basis of the existence of a contract for tuition or a contract to educate include *Clair v College of Complimentary Medicine Pty Ltd* (General) [2008] NSWCTTT 1309 where the Tribunal referred to the prospectus as containing the terms of the contract. The applicant agreed that she had signed a contract with the college, which included her acknowledgment that she had read and understood the conditions in the prospectus. In *Qayam v Shillington College* (General) [2007] NSWCTTT 620 (17 October 2007) the Tribunal did not specifically address the issue of whether there was a contract and appeared to proceed on the basis that the respondents had agreed to supply, and the applicant participate in, a certificate IV course in design upon enrolment. The issue related to the student's expectations that she receive one-on-one tutoring. After referring to the materials relating to the handbook and enrolment court found that the college provided an appropriate learning environment that met the obligations under the agreement. *Cotton v Blinman Investments Pty Ltd and Blinman* (General) [2004] NSWCTTT 723 (13 December 2004) concerned a claim for breach of contract and false representations in relation to the qualifications and experience of the respondent's teaching staff at the Strand College of Beauty Therapy. Again it was accepted that a contract was in existence and the focus of the Tribunal was whether or not a false representation had in fact been made, if there was a breach of contract and what loss, if any, had been suffered. The Tribunal proceeded on the basis that the contract was contained in a document entitled 'Course Enrolment Agreement': at [7].

<sup>50</sup> These cases are interesting because of the particular circumstances of the case, the extremity of the students' claims and the poorly formulated pleadings (more so than usual). In the matter of *Navarro v Academies Australasia P/L* (General) [2003] NSWCTTT 678 (4 October 2003) ('*Navarro*'), the student applicant was seeking an order that he did not have to pay an outstanding amount of \$5000 allegedly due to Excelsior College Pty Ltd. Excelsior College had been acquired by a subsidiary of Academies Australia Pty Ltd. The Tribunal found that any rights under the contract between Excelsior College Pty Ltd and the student Mr Navarro had been assigned to Academies Australia Pty Ltd. The question before the Tribunal was whether Mr Navarro had undertaken a contractual obligation to pay Excelsior College an additional \$5000, representing what Academies Australia Pty Ltd considered to be the outstanding tuition fee. There was no evidence before the Tribunal that Mr Navarro actually attended at the college or completed any part of his studies. Rather the issue turned on the effect of a certificate issued by the Department of Education, Science and Training. The Tribunal found that any certificate issued by the Department did not operate as a contract between Excelsior College and Mr Navarro (or respectively Academies Australia and Mr Navarro) and was 'no more and no less than a confirmation of enrolment': at 5. The Tribunal found that there was no evidence of a contract between the student and the College. In this instance the Tribunal did not accept that a contract was formed upon enrolment. This is contrary to the UK authorities. The Tribunal noted that the respondent was unable to produce evidence of any terms and conditions of enrolment, including further payments: at 5. In *Navarro* one wonders if the Tribunal may have been influenced by potentially sharp practices by the higher education provider in claiming an amount due to them when in fact there was no evidence any service having been provided to the Columbian student. The other two matters of note involve TAFE institutions. In *David Joseph Crook v Holmesglen Institute of TAFE* (Civil Claims) [2010] VCAT 1808 one of the orders sought by the student was that the policies and procedures in relation to student grievances and discipline at the Holmesglen TAFE be amended. This included the implementation of an anti-bullying campaign. The Tribunal declined to deal with any of the student's claims in relation procedures and policies of the TAFE as they were not matters that were between a consumer and trader, that is, the claim was not concerned with the supply of goods or services: at [15]; The other matter is *Chan v Sellwood*; *Chan v*

One issue particular to private providers may be the question of who the student contracts with. In the matter of *Kwan v University of Sydney Foundation Program P/L ('Kwan')*,<sup>51</sup> the Tribunal had occasion to consider claims in respect of breach of contract and misleading or deceptive under section 52 of the TPA.<sup>52</sup> The student had been enrolled in and completed a foundation program for admittance to a bachelor degree at the University of Sydney. The provider of the program was Taylors Institute of Advanced Studies Ltd ('Taylors'). Interestingly there was no discussion by the Tribunal regarding the formation of the contract, rather the application was concerned largely with what made up the terms of the contract and whether there had been a breach. The Tribunal found that the entity with which the student had 'contracted to supply the course was the Foundation. Taylors was the Foundation's agent in supplying the academic component of the programme'.<sup>53</sup>

This clearly has ramifications for HEIs who create other entities to provide programmes to assist students in securing alternative pathways for entry into a HEI. The Foundation in *Kwan* was established by the University of Sydney. The contract with the student was with the Foundation, not the private provider. The private provider was the agent of the University Foundation. There are a myriad of arrangements between HEIs and providers of what might be called 'further' education or 'vocational' education<sup>54</sup> in relation to recognised prior learning<sup>54</sup> direct entry and credit allocated for courses studied at other institutions.<sup>55</sup> Thus, while there is a

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*Calvert* [2009] NSWSC 135. Here the plaintiff Chan brought an action against the Ultimo TAFE in New South Wales and two staff members in relation to a fail mark awarded. One claim by the applicant rested on an allegation that there was a breach of TAFE policy in the conduct of the assessors in relation to assessment and the provision of full and accurate information: at [23]–[24]. Justice Davies found that there did not exist any 'contractual status between TAFE and any student that gives rise to a legal entitlement for the student to sue even if it is accepted that a breach of that clause [of the policy] is made out.': at [25]. The Court followed *Clark*, that had been 'seemingly approved' in *Griffith University v Tang* (2005) 221 CLR 99 and *Walsh v University of Technology, Sydney* [2007] FCA 880 stating that 'Disputes between students and establishments of learning are ordinarily unsuitable for adjudication in the courts and ought to be resolved by internal procedures': at [26]. It is worth noting that as a claim in contract was not pleaded, the comments are obiter and not decisive of the issue of the existence of a contract between students and TAFE institutions. This seems to go against the weight of other common law authority at least in relation to the existence of a contract notwithstanding the public status of the higher (or further) education institution.

<sup>51</sup> [2002] NSWCTTT 83.

<sup>52</sup> The Tribunal's findings in relation to jurisdiction are discussed in Chapter 2.

<sup>53</sup> *Kwan* (2002) NSWCTTT 83, [57].

<sup>54</sup> Known as 'further education' in the UK. See generally Oliver Hyams, *Law of Education* (Jordans, 2<sup>nd</sup> ed, 2004) 491.

<sup>55</sup> This is in addition to arrangements such as the one in *Kwan*, which is followed by many HEIs. See, eg, Curtin University and its pathway provider Curtin College, (12 August 2012), <<http://www.curtincollege.edu.au/>>. For articulation arrangements and credit for recognised prior learning, see, eg, TAFE (NSW) (12 August 2012) <<https://www.tafensw.edu.au/tafeunicredit/about/articulation.htm>>; Southern Cross University, (12 August 2012) <<http://www.scu.edu.au/articulationpathways/index.php/60/>>; College for Law and Justice

preponderance of cases in the tribunals brought against 'vocational' institutions or providers of 'further' education, these cases remain instructive and relevant. In some instances these types of providers will be the agents of a HEI, as in *Kwan*. Further, these types of claims are also significant given the increasing movement towards the integration of the university and Vocational and Educational Training ('VET') systems.<sup>56</sup>

### **Technical aspects in relation to the formation of the contract arising in an Australian context<sup>57</sup>**

#### ***Intention to be legally bound and capacity to contract***

Generally intention to be legally bound in business or commercial circumstances will be inferred unless the contrary is shown.<sup>58</sup> Chapter 3 considered the trading or commercial character of the transactions in which the HEI and student deal and concluded that it is very likely to be such. Interestingly, however, intention was an issue in the matter of *Shahid*<sup>59</sup> discussed in detail in Chapter 3. As discussed there, the applicant was a medical practitioner seeking to undertake further training with the College that would ultimately enable her to be a specialist dermatologist. The applicant's claim included an allegation that the College had breached its contractual obligation by not providing certain rights of appeal as promised.<sup>60</sup> At first instance the trial judge found that in the circumstances there was not the requisite intention on behalf of the parties to create a legally binding contract.<sup>61</sup>

On appeal, Jessup J referred to the relevant authorities in Australia in relation to the establishment of an intention to create legal relations.<sup>62</sup> His Honour looked at the

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Administration, *Police and Military RPL*, (12 August 2012) <<http://policerpl.com.au/university-articulation>>.

<sup>56</sup> See Andrew Trounson, 'Canberra Uni-TAFE Link Less Than a Perfect Match', *The Australian* (online), 1 June 2011 1 <<http://www.theaustralian.com.au/higher-education/canberra-uni-tafe-link-less-than-a-perfect-match/story-e6frqjx-1226066699206>>.

<sup>57</sup> For a detailed analysis of the technical aspects of the contract, see Francine Rochford, 'The Relationship Between The Student and The University' (1998) 3(1) *Australian & New Zealand Journal of Law & Education* 28, 30–6.

<sup>58</sup> *Esso Petroleum Co Ltd v Commissioners of Customs and Excise* [1976] 1 All ER 117; *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95. See Nadine Courmadias 'Intention to Create Legal Relations: The End of Presumptions?' (2006) 34 *Australian Business Law Review* 175. Note that there is criticism that this remains a separate element for the formation of an enforceable contract, especially when not a requirement in other jurisdictions such as the EU. See, eg, Bhawna Gulati, 'Intention to Create Legal Relations': A Contractual Necessity or An Illusory Concept' (2011) 2 *Beijing Law Review* 127.

<sup>59</sup> *Shahid v Australasian College of Dermatologists* 248 ALR 267.

<sup>60</sup> *Ibid* 329 [209]. The terms of the contract in question were that each time the applicant lodged an appeal she brought a contract into existence that contained a term that the College would proceed with the appeal in accordance with the procedures set out in the training handbook for the relevant year.

<sup>61</sup> *Ibid* 329–30 [207]–[209].

<sup>62</sup> *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95; *Edwards v Skyways Ltd* [1964] 1 WLR 349. This was the only issue in contention on appeal as the other elements for the

circumstances of the training programme as a whole,<sup>63</sup> including the maintenance of standards for the profession<sup>64</sup> and the detailed nature of the information regarding the programme, assessment and process for appeal in the course handbook.<sup>65</sup> His Honour also noted that the subject matter was important to both the profession and the student applicants as it went to their future careers.<sup>66</sup> The fee paid upon lodgement of an appeal was not insubstantial.<sup>67</sup> Justice Jessup held that there was a mutual intention to create legal relations.<sup>68</sup> Given that students enter into arrangements with a HEI to undertake courses of study for advancement of their future careers for a substantial fee, it seems unlikely that it will be difficult to establish an intention to be legally bound.

The increasing overlay of regulation has also been seen as crystallising the formal elements required to constitute an enforceable contract, including the issue of intention.<sup>69</sup> It has also been noted by a number of commentators that the existence of standard form contracts and the inability of students to individually negotiate the contract supports the view that there is in fact an intention to be legally bound and would certainly negate any argument a provider of higher education would make in relation to that point.<sup>70</sup> The notion of the student–HEI contract being a standard form contract is explored more fully in Chapter 5. No issue in relation to capacity of the student, if a minor, to contract exists in a contract that is clearly for the minors’ benefit, if not necessity.<sup>71</sup>

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formation of the contract were accepted by the parties; *Shahid v Australasian College of Dermatologists* 248 ALR 267, 329 [209].

<sup>63</sup> *Shahid v Australasian College of Dermatologists* 248 ALR 267, 330 [213].

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid* 331 [214].

<sup>68</sup> *Ibid* 332 [216].

<sup>69</sup> When considering the issue of the formation of the contract, interestingly Griggs turns to the requirements set out under the *Higher Education Support Act 1992* (Cth) (and in particular division 19 of the *Higher Education Support Act 2003*). This approach resonates with the decision in *Moran* that had regard to the statutory processes regulating the offer and acceptance of a place at the university. Griggs argues that the extensive prescription governing the student–HEI relationship arguably leads to the conclusion that the offer, acceptance and intent necessary to form contractual relationships are established: Griggs, ‘Knowing the Destination’, above n 5, 320, n 30; Middlemiss, above n 4, 72.

<sup>70</sup> Griggs, ‘Knowing the Destination’, above n 5, 320, n 30. Griggs goes onto to say that his proposition is supported by the fact that the contractual documents are dictated by the HEI and the existence of inequality in the bargaining power between the student and the HEI. Thus the courts use these factors to find a jurisdictional basis to assist the weaker party. See also Birtwistle, and Askew, above n 4, 94.

<sup>71</sup> *Hamilton v Lethbridge* (1912) 14 CLR 236; *Scarborough v Sturzaker* (1905) 1 Tas LR 117. See also various legislation governing agreements with minors, eg, *Minors Contracts Act 1988* (Tas).

### *Consideration*

The UK decision of *Clark* above is seen as authority for the existence of a contract between the HEI and the fee-paying student. The meaning of what is a 'fee-paying' student is not considered in any detail in *Clark*. In any event this is likely to be something different in Australia given the idiosyncratic and changing nature of higher education funding arrangements globally.<sup>72</sup> As indicated in the discussion in the previous chapter regarding the supply of educational services to Commonwealth-funded students' being in 'trade or commerce', the commerciality of the transactions with these students is less clear. In the context of the formation of a legally enforceable contract, consideration, the giving of something for something, is required.<sup>73</sup>

This is fairly obvious and presents no difficulties in relation to full fee paying students (typically international students, postgraduate students but also domestic fee paying students, particularly at private HEIs). The situation regarding a Commonwealth-funded student is more complex. In these circumstances, students agree to pay back to the Federal Government, with interest, a fee for their course. In turn the government pays an amount to the HEI for that particular place. The principles in relation to privity of contract might prevent a student from enforcing the contractual promise as it is the Federal Government who provides the consideration.<sup>74</sup> The decision in *Quickenden* does provide some guidance on the issue of enforceable obligations, even though the specific matter under consideration was whether the University was a constitutional corporation. The University's own submissions in that

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<sup>72</sup> See, eg, Glyn Jones, 'Managing Student Expectations: The Impact of Top-Up Tuition Fees' (2010) 14(2) *Perspectives: Policy and Practice in Higher Education* 44; Roger Brown (ed), *Higher Education and The Market* (Routledge, 2011); For an Australian context see especially Gavin Moodie, 'The Developing Student Market in Australian Higher Education' in Roger Brown (ed), *Higher Education and The Market* (Routledge, 2011) 63.

<sup>73</sup> *Currie v Misa* (1875) LR10Ex 153; *Thomas v Thomas* (1842) 2 QB 851.

<sup>74</sup> *Price v Easton* (1833) 4 B& Ad 433; See Rochford, 'The Relationship Between The Student and The University', above n 57, 36; Davis, above n 4. Davis is also of the opinion that in relation to third party obligations and the idea of another third party providing consideration for the execution of a promise under a contract is not unusual in other aspects of law: at 14; Tim Kaye, Robert D Bickel and Tim Birtwistle, 'Criticizing the Image of the Students as Consumer: Examining Legal Trends and Administrative Responses in the US and UK' (2006) 18(2-3) *Education and the Law* 85, 113; Bruce Lindsay, 'Student Subjectivity and the Law' (2005) 10(2) *Deakin Law Review* 628. Lindsay makes an interesting observation that perhaps the government should be seen as de facto purchaser of their educational service provided: at 634; This might even include 'helicopter parents' who pay the fees; Laura Clark, 'Now "Helicopter" Parents Land at Freshers' Week, Hover Around the Campus and Even Sleep in Their Children's Dorms', *Daily Mail* (online), 6 June 2012 <<http://www.dailymail.co.uk/news/article-2155634/Now-helicopter-parents-land-freshers-week-hover-campus-sleep-childrens-dorms.html>>; Afshan Jafar, 'Consumerism in Higher Education: The Rise of the Helicopter Parent', *The Guardian* (online), 23 January 2012 <<http://www.guardian.co.uk/higher-education-network/blog/2012/jan/23/consumerism-higher-education-helicopter-parents>>.

case add weight to the proposition that notwithstanding the HECS scheme, students provide sufficient consideration:

... the University submits that students incur a liability to it for part of the cost of their courses which liability is their Higher Education Contribution. Under the statutory scheme provision is made for the Commonwealth to lend to the student an amount equal to the unpaid part of the contribution and apply the amount so lent in discharge of the student's liability to the University...each institution is, in respect of each semester, to require each 'contributing student' undertaking a designated course of study at the institution to pay to the institution in respect of that semester ... There are various ... provisions relating to the mechanics of the scheme and the repayment of loans. Those mentioned illustrate the essential characteristics of an obligation imposed on each institution to require payment from students, the creation of a liability for the contribution owed by the student to the institution and the provision for the Commonwealth to lend the requisite amount to the student to discharge that liability.<sup>75</sup>

It is interesting to note that in 2012 in Australia the quota restrictions for universities on Commonwealth funded places has been removed and universities will compete for Commonwealth-funded places. Thus the system operates much more like a voucher system where the funding goes with the student to whatever particular university they attend.<sup>76</sup> This change in the structure and nature of the payment system for Commonwealth-funded places also adds weight to the idea of sufficient consideration on behalf of the student.

Furthermore, a number of commentators and UK authorities note that there is sufficient consideration simply in the student declining another place and thereby suffering a detriment<sup>77</sup> should the HEI not meet its contractual obligations.<sup>78</sup> Rochford

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<sup>75</sup> *Quickenden v O'Conner* (2001) 184 ALR 260, 266 (emphasis added). The examples of a contribution ascertained in accordance with the section were as follows: '.... An institution cannot permit a contributing student who is not an excepted student to enrol for, or undertake a designated course of study in a semester unless the student has paid at least seventy five per cent of the contribution and provided a written request to the Commonwealth to pay the remainder of the liability (s 41(1)(a)). Alternatively, a student can be enrolled if the student gives the appropriate officer of the institution a document requesting a loan from the Commonwealth equal to the unpaid part of the contribution and the application of that loan in discharge of the student's liability to pay the unpaid part of the contribution (s 41(1)(b)': at 266. See also Bernard McCabe, 'Concrete Constructions Turns 15' (2005) 13 *Trade Practices Law Journal* 6.

<sup>76</sup> See generally Department of Industry, Innovation, Science, Research and Tertiary Education, *Higher Education Support Act 2003 (Cth) Guidelines* (13 August 2012) <<http://www.deewr.gov.au/highereducation/resources/hesupportact2003guidelines/Pages/Home.aspx>>.

<sup>77</sup> See Griggs, 'Knowing the Destination', above n 5, 320, nn 30, 31. The determinant is in forgoing other opportunities to enrol at other institutions or alternate courses consistent with the decision in *Moran (No2)* [1994] ELR 187, OxCHEPS, above n 6. Griggs also suggests that the consideration may also be seen in meeting the burden of agreeing to comply with the burden imposed by university ordinances and by-laws.

notes that the situation in Australia prior to enrolment may be a little less clear as a result of students being able to accept second round offers without consequence in terms of a breach of the admissions contract.<sup>79</sup> This may be an argument in favour of the one contract analysis (discussed below), at least for the Australian situation. In all, it would appear that any difficulty with consideration can be overcome.

#### *Agreement — one contract or two?*

The formation of an enforceable contract requires a 'meeting of minds' between the parties to the agreement. Identification of the mutual assent is achieved through an analysis of where the offer and acceptance lays.<sup>80</sup> Given the dearth of authority in relation to detailed consideration of the student–HEI contractual relationship in Australia, regard will be had to UK authority and commentators in this regard. Based on *Moran*,<sup>81</sup> the accepted view in the UK is that there are two contracts in existence between the student and HEI.

In *Moran* the plaintiff student brought a claim for breach of contract. The student, Mr Moran, received an 'unconditional offer' of a place in the University's physiotherapy course. The application by the student, the advice of the offer, the acceptance of the offer by the student and acknowledgement of the acceptance all occurred through the centralised 'clearing system' operating at the time in the UK. The student resigned from his employment and quit his accommodation in anticipation of commencing his studies. Shortly before the start of the semester and at a point when the clearing system had virtually closed, the student was informed that the offer was the result of a clerical error and there was in fact no place available for him. Farrington and Palfreyman summarise the Courts decision thus:

The unconditional offer of a place on the course was on the face of it intended to create legal relations and appeared to be an offer capable of acceptance. When Mr Moran accepted it, at the latest when he notified UCS on July 8, there was strong case for saying that an agreement was reached under which UCS agreed to offer him a place if he sought to enrol on the due date. However, he would not have been bound to enrol or pay fees under the terms laid down by PCAS. His Lordship rejected the argument that Mr Moran

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<sup>78</sup> *Moran* [1994] ELR 187, OxCHEPS, above n 6; Farrington and Palfreyman, *The Law of Higher Education*, above n 4, 337–8 [12.08]–[12.09]; Davis, above n 4. See also Rochford, 'The Relationship Between The Student and The University', above n 57, 35.

<sup>79</sup> Rochford, 'The Relationship Between The Student and The University', above n 57, 36.

<sup>80</sup> See, eg, *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153,179 (Heydon JA). One of the issues will be what constitutes invitations to treat by the HEI i.e. open days and promotional material: *Partridge v Crittenden* [1968] 2 All ER 421. See also Farrington and Palfreyman, *The Law of Higher Education*, above n 4, 337 [12.09].

<sup>81</sup> *Moran* [1994] ELR 187, OxCHEPS, above n 6; Farrington and Palfreyman, *The Law of Higher Education*, above n 4, 337–8 [12.08]–[12.09]; Birtwistle and Askew, above n 4.



could have sought to rejoin the clearing system after speaking to the course leader on August 16. He was not then told the reason why there was no place and only learned the correct reason on September 3. By then it was too late, as the clearing was by then almost finished. His Lordship concluded that there was a strong and clear case, on which Mr Moran has a good chance of success, that in late June/early July 1993 the parties reached a binding agreement, for good consideration, that UCS would accept Mr Moran for the degree course in physiotherapy commencing in September or October 1993.<sup>82</sup>

Therefore upon acceptance of the university's offer of a place, the student and the HEI enter into a contractual relationship whereby the HEI agrees to keep open that student's place in the course of their choice and the student agrees to enrol. A separate contract to educate is formed once the student completes the enrolment process. The first contract is therefore a contract of admission, the second a contract of enrolment or matriculation.<sup>83</sup> Davis explains how the two contracts interrelate:

... an analysis is that there are *two* contracts — an initial contract entitling a student to enrol at the institution and a subsequent contract centred on enrolment itself (a sequence of events not unlike the acquiring of an option followed by its subsequent take-up). As a starting point this seems a sensible approach, but it leaves open the question of the relationship between the two contracts. In particular if, as suggested above, the initial application is made on the basis of information provided by the institution to what extent does this oblige the institution to honour any (apparent) commitments which may not be specifically repeated at the enrolment stage? This is a particularly acute question if it is assumed that the only 'core' obligations attaching to the institution at this initial stage is to fulfil its commitment to enrol the student, and that it is only subsequent to enrolment that its wider obligation as 'service provider' may arise. Perhaps the best way of resolving this dilemma is to state the pre-enrolment (or 'admission') contract obliges the institution to enrol the applicant onto the course in question, on the basis of the pre-admission information which the applicant has received.<sup>84</sup>

Some commentators are of the view that the idea of two contracts may be 'unnecessarily complex'<sup>85</sup> and that the 'admission stage merely includes the pre-contractual arrangements and agreement based on offer and acceptance that applies to most contracts'.<sup>86</sup> Birtwistle and Askew propose a model of one contract as a new analysis for the student-HEI contractual relationship.<sup>87</sup> The authors are of the view

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<sup>82</sup> *Moran* [1994] ELR 187, OxCHEPS, above n 6.

<sup>83</sup> Farrington and Palfreyman, *The Law of Higher Education*, above n 4, 336–50 [12.08]–[12.240]; Davis, above n 4.

<sup>84</sup> Davis, above n 4, 11.

<sup>85</sup> Middlemiss, above n 4, 85.

<sup>86</sup> *Ibid.*

<sup>87</sup> Birtwistle and Askew, above n 4, 97.

that the then new admissions process in the UK (a centralised ‘clearing system’ similar to the process operating in all Australian states)<sup>88</sup> and the impact of consumer protection law on the student–HEI relationship lends weight to ‘the contention of a single contract, be that rolling or merely single’.<sup>89</sup> In this way the student indicating to the HEI that it intends to accept the ‘offer’ of a place on enrolment is a declaration of intention only and the acceptance does not occur until the student completes the enrolment process.<sup>90</sup>

So where does the offer capable of acceptance and effective acceptance occur? Students are provided with many sources of information (and attending puffery) in determining their choice of HEI. For example, there are open days, advertisements in print media, social media platforms advertising and informing students in relation to their courses through media such as Facebook and Twitter.<sup>91</sup> There are numerous course finder web pages for future students detailing the courses available, facilities that students can expect to have access to by attending particular institutions and the quality of the courses provided.<sup>92</sup> There are of course the institutional prospectuses that students avail themselves in the selection process. The prospectus is of interest because while part of the invitation to treat, it is referred to frequently in the existing case law on this issue as forming part of the terms of the contract.<sup>93</sup> It is apparent from the authorities that courts will readily hold that a contract exists in relation to full fee paying students and the requisite offer and acceptance of those students contracting direct for educational services is manifest.<sup>94</sup> Where the ‘offer’ and ‘acceptance’ occurs in relation to Commonwealth-funded students is more

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<sup>88</sup> For example, in NSW and the ACT, see Universities Admission Centre (‘UAC’), (13 August 2012) <<http://www.uac.edu.au/general/>>. In WA see Tertiary Institutions Service Centre (‘TISC’), (13 August 2012) <<http://www.tisc.edu.au/static/home.tisc>>.

<sup>89</sup> Birtwistle and Askew, above n 4, 97.

<sup>90</sup> Birtwistle and Askew, above n 4, 100 table 3. This appears to have some resonance with the actual practicalities of how the clearing system works in Australia, whereon at least in relation to the ‘acceptance’ of offers, students have the option of doing nothing more than enrolling at the HEI in accordance with their process and by a particular date. See TISC, (17 December 2011) <[http://www.tisc.edu.au/static/guide/admission-offers.tisc#main\\_what\\_now](http://www.tisc.edu.au/static/guide/admission-offers.tisc#main_what_now)>.

<sup>91</sup> Tim Winkler, ‘Exposing the Lie About Gen Y’ *The Australian* (online), 21 September 2011 <<http://www.theaustralian.com.au/higher-education/opinion/exposing-the-lie-about-gen-y/story-e6frgcko-1226141829157>>.

<sup>92</sup> The HEI will have such a page for their individual institution, see, eg University of Sydney, *Future Students*, (13 August 2012) <<http://sydney.edu.au/future-students/>>; Government sites, Australian Government, *MyUniversity* (13 August 2012) <<http://myuniversity.gov.au/>>; The Good Universities Guide, *Degree Costs and Loans* (28 September 2010) <<http://www.gooduniguide.com.au/School-Leavers/Paying-Your-Way/Degree-costs-and-loans>>; Jill Rowbotham, ‘Students Go Online to Find Course Advice’, *The Australian* (online), 10 August 2011 <<http://www.theaustralian.com.au/higher-education/students-go-online-to-find-course-advice/story-e6frgcyj-1226111949713>>.

<sup>93</sup> See eg, *Moran* [1994] ELR 187, OxCHEPS, above n 6; *Shahid v Australasian College of Dermatologists* (2008) 248 ALR 267; *Kwan* [2002] NSWCTTT 83; below n 136.

<sup>94</sup> Below n 136, as would be the case for many postgraduate students, or domestic full fee paying students as well as international students enrolled at HEIs.

complicated than that of full fee paying students. In relation to the four public universities in Western Australia, the process in relation to application, admission and enrolment at universities for school leavers is described below.<sup>95</sup> The process is similar across all Australian jurisdictions.<sup>96</sup>

Early in the year preceding the students' enrolment (approximately March), the four public universities will submit to the Tertiary Institutions Service Centre ('TISC') information in relation to the courses they will be offering for the coming academic year, including indicative Australian Tertiary Admission Rank ('ATAR') scores.<sup>97</sup> TISC then publish their guides to schools and students based on this information. Students are then required to complete an application process wherein they indicate their preferences for institutional courses through the TISC online registration process. This information is stored on the TISC database. In this sense TISC operates like a clearing house for the four public universities. In late November/early December, TISC then receives data from the School Curriculum and Standards Authority (previously the Western Australia Curriculum Council<sup>98</sup>) in relation to students' results. TISC holds all the information from the universities about which students are eligible for courses or not (in terms of quotas). Universities then access the TISC database and download from the TISC website the first preferences of eligible students. From this list of eligible students, the 'offer' is made to the student. The 'offer' typically congratulates the student and says something along the lines of 'We are very pleased to offer you a place in the ... course at XY University'.<sup>99</sup> Typically this 'offer' will provide the students with information on how to accept the 'offer' of a place or deferment and more information on the enrolment process. Once a student has 'accepted' the 'offer', the student is then required to enrol into the particular course.<sup>100</sup> So the 'acceptance' is to a course or a major, and after completing any relevant government information the students then enrol into the accepted course. In some universities this means that students initially enrol into an expanded study

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<sup>95</sup> Interview with Deb Greenwood, Manager Student Central — Admissions, Curtin University, (Perth, 28 September 2011). See generally TISC, above n 88.

<sup>96</sup> See, eg, Victorian Tertiary Admissions Centre ('VTAC') (13 July 2012), <<http://www.vtac.edu.au/about-vtac.html>>; NSW and the ACT, UAC, (13 July 2012) <<http://www.uac.edu.au/general/>>. In some states the participating institutions is wider than in WA.

<sup>97</sup> ATAR is a number between 0 and 99.95 with increments of 0.05. It provides a measure of overall academic achievement in relation to that of other students, and helps universities rank applicants for selection: UAC (10 July 2012) <<http://www.uac.edu.au/undergraduate/faq/atar.shtml>>.

<sup>98</sup> On Thursday, 1 March 2012 the Curriculum Council became the School Curriculum and Standards Authority. The new Authority will continue the work of the Curriculum Council with some new responsibilities and functions: Western Australian Government, Schools Curriculum and Standards Authority, (13 July 2012) <<http://www.curriculum.wa.edu.au/>>.

<sup>99</sup> See Annexure 1 for an example of a letter of offer from Curtin University to prospective students, both school leavers and non-school leavers, postgraduate and undergraduate.

<sup>100</sup> Subject to completion of any relevant documentation for Commonwealth-funded students.

plan.<sup>101</sup> Each year students are then required to enrol into individual units or modules (this can be either each study period or over the course of a full academic year). It could be said therefore that the second contract, the contract to educate, is either varied or renewed each year, still informed by the pre-admission information and the initial enrolment document. This is discussed more fully below.

The process outlined above in relation to application for Commonwealth-funded places (largely by school leavers) supports the idea in practice of the formation of two separate contracts, one of admission and one for a contract to educate, with the terms of the first contract of admission rolling into or as part of the second as described by Davis.<sup>102</sup> The prospectus, open days etc. is the invitation by the universities to students to make an application to them (although also potentially terms of the contract). Through the centralised system, students' results are uploaded to the TISC site and collated against information already provided to that site by the universities. This is potentially an invitation by the student for a university to make an offer to them. The offer then comes from the university, to be accepted or not by the student according to the processes outlined by the relevant HEI. This is then the contract of admission. Difficulties do arise in the Australian context with particular regard to the issue of second round offers.<sup>103</sup> It is suggested that the second round offer is a condition subsequent to the initial contract to admit.<sup>104</sup> The second contract is then formed upon the student completing the enrolment process in relation to the preferred offer.

There are problems with either classification of the contract as a single contract or two separate contracts for full fee paying students and Commonwealth-funded students alike. If, as proposed by Birtwistle and Askew, there is one contract only, formed upon enrolment, from a consumer protection point of view this leaves students potentially exposed. If the status of the initial 'offer' letter from the HEI to the student is simply an invitation to treat and the students' 'initial acceptance' of that 'offer' is merely a declaration of their intent, students' are left then without any

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<sup>101</sup> As is the case at Curtin University: Interview with Deb Greenwood, Manager Student Central — Admissions, Curtin University, (Perth, 28 September 2011).

<sup>102</sup> Davis, above n 4, 11.

<sup>103</sup> Rochford, 'The Relationship Between The Student and The University', above n 57, 36.

<sup>104</sup> This may be a *Masters v Cameron* (1954) 91 CLR 353 situation, although it is more likely a condition subsequent. Therefore the initial contract to admit would be said to have a term stipulating that if a second offer occurs, and is accepted by the student then either the student or HEI can bring the contract to an end *Head v Tattersall* (1871) LR 7 Ex 7. This is preferable to a classification of a condition precedent, because if the second round offer did not eventuate it is possible that the first contract to admit is unenforceable: *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537; Stephen Graw, *An Introduction to the Law of Contract* (Thompson Law Book Co, 5<sup>th</sup> ed, 2005) 388.

protection in contract law and perhaps even under consumer protection law.<sup>105</sup> As students are not members of the HEI at that point in time, they would have no protection under public law, such as judicial review. This is indeed the point that was made in the *Moran* case.

However, concerns about the 'workability' of the binding nature of the contract of admission have weighed on commentators. There are obvious practical considerations for a HEI in the offering of courses that are undersubscribed, which the HEI may not have accurate information until the enrolment process is completed. If there is a contract of admission, a HEI may find itself compelled to offer the course regardless. Varnham comments:

The English Court of Appeal in *Moran v University College of Salford (no.2)* took the view that a contract was formed when the student accepted an unconditional offer of a place. This view may cause problems in a number of areas, for example when the student receives the full course information and rules and regulations of the institute of a late date and they wish to reconsider. It would also leave the institution at risk of breach of contract should they find it necessary to cancel the course due to lack of numbers. A more realistic view may be that the contract is formed on the student's enrolment.<sup>106</sup>

Other potential problems for a HEI also arise in the form of administrative errors in the process leading to the formation of a contract of admission where agreement is reached upon the student 'accepting' the place 'offered' in the initial letter. If, as happened with Curtin University at the beginning of the academic year in 2011, there is an error in the offer, then the existence of an admission contract may prove unworkable.<sup>107</sup> This would require the HEI to revoke any offer before there had been acceptance by the students of the erroneous offer (as was the case with Curtin).<sup>108</sup>

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<sup>105</sup>Although one could perhaps argue that conduct withdrawing an offer not made in good faith may well contravene other areas of law such as misleading or deceptive conduct or unconscionable conduct under the ACL. See Jim Jackson, 'The Marketing of University Courses Under Section 52 and 53 of the Trade Practices Act 1974 (Cth)' (2002) 6 *Southern Cross University Law Review* 106, 110; Jim Jackson, 'Regulation of International Education: Australia and New Zealand', (2005) 10(2) & (2006) 11(1) *Australia & New Zealand Journal of Law & Education* 67, 75-7.

<sup>106</sup> Sally Varnham, 'Liability in Higher Education in New Zealand: Cases for Courses?' (1998) 3(1) *Australia and New Zealand Journal of Law and Education* 3, 12.

<sup>107</sup> Bethany Hiatt, 'Curtin Makes Bizarre Offers to Applicants', *The West Australian* (Perth), 22 January 2011, <<http://global.factiba.com.dbgw.lis.curtin.edu.au/hp/printsavews.aspx?ppstype=Article>>.

<sup>108</sup> Interview with Deb Greenwood, Manager Student Central — Admissions, Curtin University, (Perth, 28 September 2011); This involves some risk as even though a HEI is entitled to revoke any offer, *Routledge v Grant* (1828) 130 ER 920, the revocation must be communicated to the student before acceptance for that revocation to be effective: *Byrne v van Tienhoven* (1880) 5 CPD 344; *Henthorne v Fraser* [1892] 2 Ch 27.

It is suggested however that the risks identified should properly lie with the HEI as these are not matters that students can influence or contribute to (except perhaps for the student who changes their mind upon more closely reading course advice. Of course this may be as a result of having been provided insufficient relevant information in the first place). They are issues that are related to the proper and efficient management of a HEI, not with the conduct of the student. To this end the proposition of Davis that 'the pre-enrolment (or 'admission') contract obliges the institution to enrol the applicant onto the course in question, on the basis of the pre-admission information which the applicant has received',<sup>109</sup> is the preferred approach.

*Summary — the formation of the student–HEI contract*

While higher courts in Australia have not had an abundance of occasions to consider the question of whether a student–HEI contract does exist in Australia, on balance it would seem justified that there exists in Australia a student–HEI contractual relationship, as in other common law countries. It also seems clear that there are two contracts. First, there is a contract of admission, which obliges the HEI to enrol the student into the course on the bases of the pre-admission information received by the student. The second contract, the contract to educate, arises on the student completing the enrolment process. While acknowledging the body of authority and commentary suggesting the existence of the contract, there is recognition by commentators that the relationship is complex.<sup>110</sup> There remain difficulties with the contractual classification, particularly in relation to determining the terms of the contract and remedies upon any breach.<sup>111</sup>

The question is then, what is the nature and terms of the contract in the context of the application of the UCT provisions under the ACL?

**What is the nature of the contract?**

Whether there are two separate contracts between the student and the HEI or one, it seems fairly well accepted by commentators and the courts that the contract to

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<sup>109</sup> Davis, above n 4, 11.

<sup>110</sup> See, eg, Lindsay, 'Complexity and Ambiguity in University Law', above n 25. Lindsay concludes that the relationship cannot be easily reduced to a contractual basis alone and that the students' relationship to the university remains one of status: at 18. Rochford is stridently critical of the classification of the student–HEI relationship as a contractual one, see Rochford, 'The Contested Product of a University Education', above n 3, 43, although seeming resigned to the contractual analysis of the relationship being the predominate one in Rochford, 'The Relationship Between the Student and the University', above n 57.

<sup>111</sup> Kaye, Bickel and Birtwistle, above n 74, 100.

educate (alternately a contract for tuition or matriculation)<sup>112</sup> is a contract for service for the supply of educational services.<sup>113</sup> Hoye and Palfreyman suggest that the student–HEI contract is a ‘contract to supply a business-to-consumer service (teaching in preparation for, and access to, the examination/assessment process for the award of a degree).’<sup>114</sup> Interestingly a leading UK commentator in this area has suggested that the student–HEI contract is a hybrid contract ‘consisting of a combination of elements of a consumer contract and a training contract.’<sup>115</sup> It is not entirely clear what this would necessarily add, although the training contract would encompass the idea that the student must contribute to their own learning.

As this research is concerned with the UCT regime in the ACL, the contract for the supply of educational services must be a ‘service’ within the meaning of the legislation. Services are defined in the ACL as follows:

**services** includes:

- (a) any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce; and
- (b) without limiting paragraph (a), the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under:
  - (i) a contract for or in relation to the performance of work (including work of a professional nature), whether with or without the supply of goods; or
  - (ii) a contract for or in relation to the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or
  - (iii) a contract for or in relation to the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction; or
  - (iv) a contract of insurance; or
  - (v) a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking; or
  - (vi) any contract for or in relation to the lending of money;

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<sup>112</sup> See generally Farrington and Palfreyman, *The Law of Higher Education*, above n 4, chapter 12; Birtwistle and Askew, above n 4, 95; Davis, above n 4; Lindsay, ‘Complexity and Ambiguity in University Law’, above n 25; below n 136.

<sup>113</sup> Davis, above n 4. In considering the UK position, Davis is of the view that: ‘At its simplest the student’s college/university contract, founded on enrolment, can be analysed as a contract for the provision of educational services by the college. From this perspective the student is the ‘consumer’ of the services and the college the supplier’: at 15; See generally Stephen Corones, ‘Consumer Guarantees and the Supply of Educational Services by Higher Education Providers’ (2012) 35(1) *UNSW Law Journal* 1; Kamvounias and Varnham, ‘Getting What They Paid For’, above n 47; Kamvounias and Varnham, ‘In-house or in Court?’, above n 5, 10; Griggs, ‘Knowing the Destination’, above n 5; Jackson, ‘Regulation of International Education’, above n 105; cf Gleeson CJ above n 45 *Griffith University v Tang* (2005) 221 CLR 99, where he states obiter that it may be unrealistic in practice to regard the contract between the student and HEI in the same way you would an ordinary contract for the supply of services: at 110 [17]–[19].

<sup>114</sup> Hoye and Palfreyman, above n 4, 108. The authors also go on to say ‘As with any such service (say, architectural design, dentistry, surgery, litigation) there is no guarantee of success, although the service must be rendered with ‘reasonable care and skill’ according to both the common law and also in accord with consumer law’: at 108. This is relevant to the statutory guarantees available under the ACL, but beyond the scope of this research.

<sup>115</sup> Middlemiss, above n 4, 73. ‘The consumer aspect would relate to well-defined standards of educational provision which student can, or at least have a right to, expect. The training contract could be utilised here to define the nature of the relationship and express the rights and obligations of both parties arising from it’: at 73.

but does not include rights or benefits being the supply of goods or the performance of work under a contract of service.<sup>116</sup>

Thus the provision of educational services even if not conferring a 'right' can be said to be one in which 'benefits, privileges or facilities' are, or will be, 'provided, granted or conferred in trade or commerce'. That these services are supplied in 'trade or commerce' has been addressed in Chapter 2. The definition of 'services' above provides an inclusive definition of various contractual arrangements under which these benefits<sup>117</sup> or privileges of facilities are conferred. The only specific exclusion is in relation to a contract of employment. In terms of the specific contractual arrangements listed, two are applicable to the supply of educational services.

The first is a 'contract for or in relation to the performance of work (including work of a professional nature), whether with or without the supply of goods'.<sup>118</sup> It can be said that the HEI agrees to contract with the student to supply work of a professional nature. Consideration of the professional nature of academic work was discussed in Chapter 3 in relation to the meaning of the phrase in 'trade or commerce'. It was established that it is very probable that for the purpose of that requirement, academic activities are likely to be considered activities undertaken as a 'professional activity'. In the matter of *Monroe Topple*,<sup>119</sup> the Court had occasion to consider the nature of the educational and training functions of the Institute of Chartered Accountants in Australia. Justice Lindgren considered that these functions included the 'enrolment in ... modules, the compilation and selling of the module syllabuses, the writing, production and sale of module support materials, the conduct of "focus sessions" and the provision of "feedback" to the candidates.'<sup>120</sup> It also included examination as 'the devising of the ... modules and of the methods of assessment appropriate for them were closely interrelated activities'.<sup>121</sup> This is clearly a contract in relation to the performance of work. The second example relates to a contract regarding the provision, use or enjoyment of facilities for instruction. This would be relevant for any terms of the contract for educational services in which the HEI promised the provision or use of facilities such as libraries, computing or internet facilities and possibly even the standard of teaching venues.

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<sup>116</sup> ACL s 2 (definition of 'services').

<sup>117</sup> Ibid. See also *Griffith University v Tang* (2005) 221 CLR 99, above n 45, 110 [17]–[19] where Gleeson CJ refers to the conferment of a benefit under the relationship.

<sup>118</sup> ACL s 2 (definition of 'services' (b)(i)).

<sup>119</sup> See Chapter 3.

<sup>120</sup> *Monroe Topple & Associates Pty Ltd v The Institute of Chartered Accountants in Australia* [2001] FCA 1056, [132]–[133].

<sup>121</sup> Ibid [32]–[133].



Some academic commentators have likened the contract for educational services to be rather a contract for the supply of a positional good.<sup>122</sup> In one instance in the New South Wales Consumer, Trader and Tenancy Tribunal, a respondent HEI in fact pleaded that the college concerned had ‘sold’ to the student and the student had ‘purchased’ a Diploma of Business Administration<sup>123</sup> in the same terms as a good might be sold and purchased.<sup>124</sup> While the idea of the ‘product’ in higher education being a positional good has been noted by a few commentators,<sup>125</sup> it is unlikely that the attainment of further education, typically a degree or associate degree, will be seen as the supply of a good at law.<sup>126</sup> Moreover, the ACL defines ‘goods’ as follows:

**goods** includes:

- (a) ships, aircraft and other vehicles; and
- (b) animals, including fish; and
- (c) minerals, trees and crops, whether on, under or attached to land or not; and
- (d) gas and electricity; and
- (e) computer software; and
- (f) second-hand goods; and
- (g) any component part of, or accessory to, goods.<sup>127</sup>

Educational services are not likely to be considered a ‘good’ in the same way a computer program might be goods,<sup>128</sup> and is certainly more analogous to the supply of a service such as the supply of blood administered by a hospital during an operation.<sup>129</sup> Given the case law in relation to other service sectors, for the purpose of the ACL the product in the ‘higher education market’, (discussed more fully in the

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<sup>122</sup> Simon Marginson, ‘Competition in Higher Education in the Post-Hilmer Era’ (1996) 68(4) *Australian Quarterly* 23. He states ‘Education produces positional goods in that it assigns people to social positions: it determines selection into the professions and increasingly, the upper echelons of management. Positional goods in education are those places in education which provide students with relative advantage in the competition for jobs, income, social standing and prestige (Marginson 1996; Hirsch 1976: 20–22). Places in the elite schools and the sought-after university faculties are the most desired form of positional good because these places are associated with a high probability of career success, though many other places in education confer a more modest competitive advantage’: at 25; See also Griggs, ‘Knowing the Destination’, above n 5. He adopts this definition, although he goes on to deal with the provision of this good as the supply of educational services for the purpose of the TPA: at 315. This is significant in the context of the provisions of the ACL as some provisions, such as consumer guarantees, apply differently whether goods or services are being transacted. A consideration of those provisions is not within the scope of this research; Roger Brown, ‘Markets and Non-Markets’ in Roger Brown (ed), *Higher Education and the Market* (Routledge, 2011) 7 referring to the work by Marginson, Brown summarises what might be being produced and traded in the ‘higher education market’: at 7. The nature of the ‘higher education market’ is discussed in Chapter 5.

<sup>123</sup> *Navarro v Academies Australasia P/L* (General) [2003] NSWCTTT 678 (4 October 2003), 3.

<sup>124</sup> *Ibid.* The Member observed ‘It might appear novel to describe the award of a Diploma in terms of sale and purchase, but this was how the Respondent chose to present material to the Tribunal.’

<sup>125</sup> Above n 122.

<sup>126</sup> See generally Rochford, ‘The Contested Product of a University Education’, above n 3.

<sup>127</sup> ACL s 2.

<sup>128</sup> *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (no. 1)* (1990) 27 FCR 460; 97 ALR 513.

<sup>129</sup> *E v Australian Red Cross Society* (1991) 31 FCR 299; 105 ALR 53. On the facts of this case the supply of blood was held to be a supply of service rather than of goods.

next chapter) is likely to be considered the provision of educational services rather than a good.

Therefore, for the purpose of the ACL the contract for the supply of educational services is a 'service' as required by the legislation. The contract relates to the performance of work, including work of a professional nature and is not limited to being attached to the supply of goods. This contract is analogous to the supply of services by other professionals such as architects, engineers, and lawyers.<sup>130</sup> It will also include a contract that relates to the provision and use of facilities for instruction.

### **Determining the terms of the contract for educational services**

The general consensus amongst commentators is that while it may be comparatively straight forward to establish the existence of a contract between the student and the HEI, the determination of what the terms of that contract are is less certain (be that a single contract or a contract of admission and a contract of enrolment) and a far more complex process. As a number of authors have observed:

The collection of regulations, ordinances, rules, codes of practice and representations made on university websites or in hard-copy prospectuses serve rather to obscure the parties' relative positions than to make them clear.<sup>131</sup>

Counsel involved in the landmark New Zealand case of *Victoria University*<sup>132</sup> remarked:

It is difficult to imagine any other major service provider taking so relaxed and chaotic an approach to defining the duties and responsibilities of a contractual relationship. This is especially so when the reality is that universities have the ability to dictate terms (the student-university relationship is not negotiated) and to reinforce or supplement contractual terms with subordinate statutes. Yet if you ask a simple question – What *is* the student-university contract? – the answer is not found in a single sensible instrument but in a multitude of ephemera.<sup>133</sup>

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<sup>130</sup> Guzyal Hill, 'The New Consumer Legislation and the Legal Profession' (2012) 20 *Australian Journal of Competition and Consumer Law* 18. See also Mark Davies, 'Challenges to "Academic Immunity" — The Beginning of a New Era?' (2004) 16(2-3) *Education and the Law* 75, 77 where he uses this analogy as an argument to remove 'academic immunity, as discussed in Chapter 3. The delivery of other professional services, as with educational services, also encompasses more than the simple delivery of a good or service, often requiring participation, input and cooperation from the client and frequently over a lengthy period of time or on a repeating basis.

<sup>131</sup> Kaye, Bickel and Birtwistle, above n 74, 114.

<sup>132</sup> *Victoria University* [2003] NZAR 186.

<sup>133</sup> Kós and McVeagh, above n 3, 28. See also *WU, Mr Ying Ching* [2003] MRTA 8095 (28 November 2003) [77]–[78] where Member Hurly stated 'Strangely, the Tribunal is yet to see a sound written contract (leaving aside enrolment forms and what can be inferred out of them) between a student and an education provider' as cited in Jackson, 'Regulation of International Education', above n 105, 80.

It is worth noting that a significant number of universities in the UK and New Zealand now have formal written student contracts, the most notable being the Oxford University student contract.<sup>134</sup>

The first issue is to determine when it might be said that the terms of the contract to educate are complete. It is suggested that the second contract is informed by any pre-admission promises made by the HEI to the student.<sup>135</sup> As a result, information contained in the HEI prospectus and promotional material may be classified as terms of the contract to educate.<sup>136</sup> More difficult is the issue of whether the contract arising on enrolment is either varied over the course of study or discharged at the end of each academic year or study period and a new contract formed upon re-enrolment. Some commentators suggest that it is commonly accepted that a new contract is

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<sup>134</sup> See especially the *Oxford Student Contract* (13 August 2012) <[http://www.st-annes.ox.ac.uk/fileadmin/STA/Documents/University\\_Contract.pdf](http://www.st-annes.ox.ac.uk/fileadmin/STA/Documents/University_Contract.pdf)> Annexure 2; Formal student contracts are used extensively in the UK, see, eg, University of Bristol <<http://www.bris.ac.uk/secretary/studentrulesregs/agreement.html/>>; University of Leeds, *Taught Student Contract*, (13 August 2012) <<http://www.leeds.ac.uk/ssc/studentcontract.htm>>. There are even professional development courses that can be taken in this area, see, eg, JISC Legal Information (UK) <<http://www.jisclegal.ac.uk/ManageContent/ViewDetail/ID/1866/ARMED--Student-contract-and-charters.aspx>>. Some examples of formal student contracts in New Zealand are Massey University, *Student Contract* (13 August 2012) <<http://www.massey.ac.nz/massey/about-massey/calendar/statutes-and-regulations/student-contract.cfm>>; University of Victoria, Wellington, *Student Contract*, (13 August 2012) <<http://www.victoria.ac.nz/home/admisenrol/enrol/studentcontract>>; Canterbury Christ Church University, *Student Agreement* (13 August 2012) <<http://www.canterbury.ac.uk/courses/about/student-agreement.pdf>>. The only formalised agreement that could be found for an Australian HEI was in relation to HDR degrees at the University of New England in NSW (13 August 2012) <<http://www.une.edu.au/research-services/forms/student-supervisor-agreement.pdf>>. See also Julia Pedley, 'The Development of a Student Contract and Improvement in Student Disciplinary Procedures at Massey University' (2007) 12(1) *Australian & New Zealand Journal of Law & Education* 73; Kamvounias and Varnham, 'Getting What They Paid For', above n 47, 313.

<sup>135</sup> Davis, above n 4, 11.

<sup>136</sup> As has been argued in a number of cases see, eg, *Fennell v Australian National University* [1999] FCA 989; *Victoria University* [2003] NZAR 186 and especially in matters before the consumer tribunals see, eg, *Kwan* above n 93. In determining the contents of the contract the applicant relied on oral representations made during a visit to the 'services centre' and the 'programme document'; *St Clair v College of Complimentary Medicine Pty Ltd* (General) [2008] NSWCTTT 1309 where the tribunal referred to the prospectus as containing the terms of the contract which the applicant agreed that she had signed a contract with the college which included her acknowledge that she had read and understood the conditions in the prospectus; In the matter of *Jones v Academy of Applied Hypnosis Pty Ltd* (General) [2005] NSWCTTT 841 (30 December 2005), the applicant sought a refund of course fees in the amount of \$12 750 and an additional \$12 250 for further economic and non-economic loss in relation to a two-year course of student for a Certificate IV in clinical hypnotherapy and a diploma/graduate diploma in applied hypnosis. The claims made by the applicant included claims in relation to the fact that the course and tuition had not been provided within a reasonable time, and importantly that the quality and amount of tuition given were less than promised. The Tribunal had regard to oral representations made to the applicant by academic staff at the open day, the prospectus outlining the quality of the course and the amount of tuition to be given and the decision to fail the applicant in the final assessment for the award of the certificate in clinical hypnotherapy. The Member found that this constituted a breach of the agreement for tuition. The Tribunal found that '...the applicant could have reasonably expected to receive competent, considered tuition and support throughout her period at the respondent's academy. I am satisfied that she did not receive the level of tuition, supervision, support and service she could have reasonably expected having regard to the various statements and representations made to her in writing and orally prior to her entering into the contract for tuition: at 6.

formed with each enrolment period.<sup>137</sup> One factor that would support the idea that the contract is a new contract each time the student enrolls in a module or study period is the manner in which students are charged for their degree.<sup>138</sup> The charges are by module or unit and the obligations regarding those units of study are discharged upon delivery by the HEI and participation and payment by the student.<sup>139</sup> However, the presence of additional or new charges also supports the need for consideration for any variation of a contract.<sup>140</sup> Additionally, subject to meeting HEI's course and institutional requirements, enrolled students are entitled to re-enrol in order to progress their academic studies. If the position was that the original or proceeding contract of enrolment was discharged by performance at the end of each study period or academic year, then students may be left without any contractual right on which to assert the right to re-enrol on completion of satisfactory academic progression. Thus the preferred view is that the contract to educate is a rolling one, whereby it is understood that the terms of the contract will vary from time to time, in much the same way as a contract of employment would.<sup>141</sup> Therefore, terms agreed to in the initial enrolment process whereupon the contract to educate is formed are relevant, subject to any subsequent variation.

In the context of this research, this issue may be less critical. It is the terms of any 'standard form' contract with which this thesis is concerned<sup>142</sup> as the UCT provisions

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<sup>137</sup> Or even possibly that the contract to educate is a series of interrelated agreements. Davis, above n 4, 21 states 'It is a widely held view that a student makes a new contract every year when they re-enrol and that, in effect, the university can begin with a blank page as regards course, modules and the like. This is surely questionable'.

<sup>138</sup> Thereby providing sufficient consideration for the new agreement as it is not 'past consideration. *Stilk v Myrick* (1809) 170 All ER 1168: See *Rycotewood (re damages: 28/2/2003, Warwick Crown Court, His Honour Judge Charles Harris QC, OX004341/42, Buckingham v Rycotewood College (26/3/2002, Oxford County Court, OX004741/OX004343) ('Rycotewood')* dealing with a breach of contract in relation to one unit of study, below nn 199–200; cf *Victoria University [2003] NZAR 186* where the claim was in relation to the entire degree.

<sup>139</sup> Australian Government, Study Assist, (7 August 2012) <<http://www.goingtouni.gov.au/main/coursesandproviders/gettingstarted/costsandentrancerequirements/provider-tuition+costs.htm>>.

<sup>140</sup> See generally Graw, above n 104, 411–12 [11.17] regarding partial bilateral discharge and modification of the contract requiring additional consideration and the extent of the variation. Citing *Federal Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Ltd* (2000) 172 ALR 346.

<sup>141</sup> Davis, above n 4, 21. See also Tim Kaye, 'Academic Judgement, The University Visitor and the Human Rights Act 1998' (1999) 11(3) *Education and the Law* 165, 178–9 regarding the analogy to the contract of employment. He refers to the views of Simon Arrowsmith and Nicola Hart for support in this regard, where they are of the view that the relationship takes 'the form of a rolling contract which matures and changes shape in the course of its life, with both parties apprehending from the start the prospect of the introduction of new terms as the contractual relationship develops' quoting Simon Arrowsmith and Nicola Hart, 'The Higher Education Institution–Student Contract' in David Palfreyman and David Warner (eds) *Higher Education and the Law: A Guide for Managers* (Open University Press, 1998) 80.

<sup>142</sup> As regards other provisions, such as consumer guarantees the terms of the contract for the supply of educational services is possibly broader, including terms implied regarding quality; See Corones, above n 113.

only apply to 'standard form'<sup>143</sup> 'consumer contracts'.<sup>144</sup> Whether the contract for educational services is a 'standard form' 'consumer contract' is considered in detail the next chapter. It is suggested that the only contract capable of being a 'standard form' contract arises during the enrolment process. The UCT provisions invoke a rebuttable presumption to the effect that once it is alleged that a contract is a 'standard form' contract, it is presumed to be so unless the other party, typically the supplier (the HEI), is able to prove otherwise.<sup>145</sup> Therefore, the remainder of this chapter will proceed on the basis that the contract for the supply of educational services contract is at least in part a 'standard form' contract.

Guidance from the case law on the content of the contract is limited. This is partly due to the courts reluctance to intervene in matters of academic judgement, so often the consideration of terms has been restricted to those terms relating to the process of the decision making.<sup>146</sup> Another difficulty is that as students are largely self-represented, pleadings are often poorly framed or the claims are the subject of strike out applications or summary judgment.<sup>147</sup> Another trait identified previously is that the courts are often concerned in interlocutory matters to make a determination as to whether the claimant has reasonable prospects of success and deal with substantive issues, such as whether any loss can be shown.<sup>148</sup> In contrast to the higher federal and state courts, the consumer tribunals demonstrate a willingness to consider the particular terms of the contract to educate. The success of applicants in these matters is not necessarily important when determining the existence of terms.<sup>149</sup> What is instructive is what alleged terms tribunals are prepared to review in the context of whether in fact there has been a breach. This includes terms relating to tuition patterns<sup>150</sup> and methodology,<sup>151</sup> the quality<sup>152</sup> and competency of staff,<sup>153</sup> and

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<sup>143</sup> ACL s 27.

<sup>144</sup> Ibid s 23(3).

<sup>145</sup> Ibid s 27(1).

<sup>146</sup> *Clark* [2000] 3 All ER 752.

<sup>147</sup> See, eg, *Mathews v University of Queensland* [2002] FCA 414; *Dudzinski v Kellow* [1999] FCA 390; *Ogawa v The University of Melbourne* [2005] FCA 1139.

<sup>148</sup> See, eg, *Fennell v Australian National University* [1999] FCA 989.

<sup>149</sup> As often even if the term is found to exist insufficient evidence can be lead to establish the breach. See, eg, *Kwan* (2002) NSWCTTT 83, [68]–[69]. The Tribunal held 'the applicant successfully completed his course. That was the bargain with the Foundation. He got what he paid for': at 83, [69].

<sup>150</sup> See, eg, *Qayam v Shillington College (General)* [2007] NSWCTTT 620 (17 October 2007) where the tribunal did not specifically address the issue of whether there was a contract and appeared to proceed on the basis that the respondents had agreed to supply and the applicant participate in a certificate IV course in design upon enrolment. The issue related to the students expectations that she receive one on one tutoring. After referring to the materials relating to the handbook and enrolment court found that the college provided an appropriate learning environment that met the obligations under the agreement.

<sup>151</sup> In the matter of *Cui v Australian Tesol Training Centre (General)* [2003] NSWCTT 329 the application concerned a claim under the *Consumer Claims Act 1998* (NSW) in relation the refund fees for the Cambridge certificate in English Language Teaching to Adults course, which is an international qualification accredited by the University of Cambridge (UK). The applicant student complained that 'he

facilities.<sup>154</sup> These terms have been found to be incorporated into the contract either expressly through a 'contract of enrolment',<sup>155</sup> which included the published handbook, or implied variously through other documents including oral representations made or other promotional material.<sup>156</sup>

If the terms of the contract comprise just the statutes and regulations of a HEI, the question arises whether this takes the students' position any further than if the relationship was analysed on a corporate model.<sup>157</sup> As Rochford notes:

So although the statutory rules of a university may be enforceable contractually, they will not provide assistance to the student for any purposes other than the enforcement of the

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was not made aware that teaching in "lecture mode" was not an acceptable methodology for this course.' The applicant, who had obtained a Master of Arts Degree from the University of Western Sydney, received a 'borderline pass' for the first assessment in week three of the course. He felt therefore that he would be unable to pass the course, advised the centre that he wished to withdraw from the course and sought a refund of his fees. Although the basis for the applicant's claim is not clear, the Tribunal found that the student had not been misled as to the nature of the teaching experience, and the teaching methodology, which involved interaction with the teacher and students, was to be reasonably expected and appropriate. The Tribunal found that the respondent had 'complied with its contractual obligations...and was ready, willing and able to continue to supply the contracted services'. The student was therefore not entitled to a refund of fees: *Cui v Australian Tesol Training Centre (General)* [2003] NSWCTT 329, [3].

<sup>152</sup> *Kwan* (2002) NSWCTTT 83, [18], [22] Mr Kwan claimed that the standard of teaching was in fact poor. The complaints in relation to academic standards and poor facilities, while capable of being terms of the contract, were in the end not supported by any evidence.

<sup>153</sup> Above n 49; *Cotton v Blinman Investments Pty Ltd and Blinman (General)* [2004] NSWCTTT 723 (13 December 2004) this matter concerned a claim for her breach of contract and false representations in relation to the qualifications and experience of the respondents teaching staff at the Strand College of Beauty Therapy. Again it was accepted that a contract was an existence and the focus of the tribunal's time was on whether or not a false representation had in fact been made and what loss if any had been suffered if there was a breach of contract. The applicant failed to provide sufficient evidence that there was a breach of contract in relation to the standard of teaching or alternatively that the supply of services had not been rendered with due care and skill pursuant to the Trade Practices Act. The court proceeded on the basis that the contract was contained in a document entitled 'Course Enrolment; In the matter of *Jones v Academy of Applied Hypnosis Pty Ltd (General)* [2005] NSWCTTT 841 (30 December 2005), the claims made by the applicant included claims in relation to the fact that the course and tuition had not been provided within a reasonable time, and importantly that the quality and amount of tuition given were less than promised. The Tribunal had regard to oral representations made to the applicant by academic staff at the open day, the prospectus outlining the quality of the course and the amount of tuition to be given and the decision to fail the applicant in the final assessment for the award of the certificate in clinical hypnotherapy. The Tribunal found that the applicant did not receive competent, considered tuition and support throughout her period at the respondent's academy, as could have been reasonably expected.

<sup>154</sup> *Kwan* (2002) NSWCTTT 83, [5]. The student applicant claimed that the Foundation misrepresented the facilities and services which would be available to him during the course, that he would have access to all University's facilities.

<sup>155</sup> *Ibid* [54]. The Tribunal noted that the program document contained a 'Contract of Enrolment'. This included 'a covenant on the part of the student to his or her best endeavours to meet the Foundation's requirement and to abide by the rules and regulation of Taylors in the administration of the program and the conduct of students': at [54].

<sup>156</sup> Above nn 49, 152.

<sup>157</sup> In particular, problems remain for Western Australian students as the domestic jurisdiction of the Visitor would likely to be considered exclusive if the terms of the contract were simply the internal rules of the HEI. For the student to be assisted in relation to contractual protection and remedies there must be incorporated into the contract more than simply the internal rules of the HEI. See *Bayley-Jones v University of Newcastle* (1990) 22 NSW 424; *Victoria University* [2003] NZAR 186. See especially Rochford, 'The Relationship Between The Student and The University', above n 57, 43-5; Lindsay, 'Student Subjectivity and the Law', above n 74, 663-4; Davis, above n 4, 17.

statute ... the statute and statutory rules are rarely specific on the obligation of the university to teach students. Where does that lead the students alleging a failure to comply with a contractual duty to teach effectively, or to provide sufficient facilities, or to hire competent staff? This must be the subject of some other contract, aside from the statute.<sup>158</sup>

In the *Ogawa* matter discussed earlier, in one of the strike out applications by the University, Phipps FM made the following comments:

The documents alleged to be part of the contract are extensive. Included in the matters alleged to give rise to implied terms is a Commonwealth Statute, the *Education Services for Overseas Student Act 2000* (Cth) and the statutes and regulations of the Respondent. This may include the *University of Melbourne Act 1958* (Vic). Even if it does not, the act of Parliament which constitutes the respondent may well be relevant to the terms of any contract which exists between the respondent and the applicant.<sup>159</sup>

A number of commentators have suggested that the contract for educational services is potentially broader than merely the ordinances and statutes of a HEI. The express terms of the contract arising on enrolment 'would appear to comprise not only the various charters,<sup>160</sup> codes<sup>161</sup> and other HEI 'regulations'<sup>162</sup> usually referred explicitly (and in writing) at the time a student enrolls',<sup>163</sup> but also published course handbooks.<sup>164</sup> Implied terms of the contract could include pre-contractual information such as the promotional information contained in prospectus and the like.<sup>165</sup> In relation to implied terms, the *Victoria University* case is instructive. In their claim for a breach of contract regarding the quality of the course provided, the students relied on 'statements made in a prospectus and in a practicum guide published by the

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<sup>158</sup> Rochford, 'The Relationship Between The Student and The University', above n 57, 33.

<sup>159</sup> *Ogawa v The University of Melbourne* (no.3) [2004] FMCA 536, [31].

<sup>160</sup> Davis, above n 4, 15. The inclusion by Davis of student charters is interesting and imbues the student with corresponding contractual obligations. Student charters which developed from the customer charter movement are couched very much in the language of the client and their rights and expectations in relation to the provision of quality services. See generally Simon Smith, 'Customer Charters the Next Dimension in Consumer Protection?' (1997) 22(3) *Alternative Law Journal* 138. The legal status of Student charters is not always clear; see Gaffney-Rhys and Jones, above n 9, 714. See especially the example of Southampton Solent University and discussion of possible content of formalised learning agreements: at 719.

<sup>161</sup> See, eg, Australian Vice-Chancellors' Committee, *Provision of Education to International Students Code of Practice and Guidelines for Australian Universities*, 2005; Curtin University Codes of Conduct for both students (21 September 2011) <<http://students.curtin.edu.au/rights/conduct.cfm>> and staff (21 September 2011) <<http://policies.curtin.edu.au/local/docs/Code%20of%20Conduct%20-%20Approved%2030%20June%202009.pdf>>.

<sup>162</sup> Including policies of a HEI, see, eg, Curtin University, *Legislation, Policies and Procedures* (12 July 2012) <<http://policies.curtin.edu.au/home/>>.

<sup>163</sup> Davis, above n 4, 15.

<sup>164</sup> *Ibid* 18; above n 49, 152; Gaffney-Rhys and Jones, above n 9, 714, 719.

<sup>165</sup> Above nn 91–3.

University.<sup>166</sup> The alleged implied terms of the contract went to matters concerning the actual course content (the particular subject-matter to be incorporated into the syllabus), the requisite standard of knowledge, the range of appropriate assessment, and adequate planning and supervision of research and practicum work.<sup>167</sup> The students claimed that despite being diligent students the University failed to deliver the course as promised.<sup>168</sup> The University failed in its application to strike out the statement of claim. Therefore, it is probable that statements contained in teaching material, such as unit outlines or course materials, that go beyond the information in the published handbook regarding matters such as learning outcomes, graduate attributes, and the quality of the student learning experience are implied terms. It has been suggested that increasing quality assurance in the higher education sector<sup>169</sup> and the development of academic standards by regulatory authorities<sup>170</sup> also impacts on what terms may be implied into the contract for the supply of educational services.<sup>171</sup> Thus there is potential for a wide range of terms to be implied into the student–HEI contract.<sup>172</sup>

As noted earlier, the UCT provisions apply only to a ‘standard form’ contract. Thus the relevant terms under consideration in this research will necessarily only be the express terms of the contract arising on enrolment. This thesis argues that the express terms of any standard form contract for the supply of educational services are contained in the documentation created on enrolment. The determination of the express terms in the absence of a clearly expressed formal document remains

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<sup>166</sup> Kós and McVeagh, above n 3, 28.

<sup>167</sup> *Victoria University* [2003] NZAR 186,186–7.

<sup>168</sup> *Victoria University* [2003] NZAR 186 and the particulars of the breach, 187–8.

<sup>169</sup> See generally Gabrielle Baldwin, ‘The Student as Customer: The Discourse of ‘Quality’ in Higher Education’ (1994) 16(1) *Journal of Tertiary Education Administration* 125; Jill Blackmore, ‘Academic Pedagogies, Quality Logics and Performative Universities: Evaluating Teaching and what Students want’ (2009) 34(8) *Studies in Higher Education* 857; Mahsood Shah and Chenicheri sid Nair, ‘Renewing Quality Assurance at a Time of Turbulence: An Attempt to Reenergise Quality in Australian Higher Education’ (2001) 15 (3) *Perspectives: Policy and Practice in Higher Education* 92.

<sup>170</sup> The Australian Qualifications Framework and *Tertiary Education Quality and Standards Agency Act 2011* (Cth) (‘TEQSA Act’); Corones, above n 113, 11–14. This in turn promotes an understanding as to what a court may consider to be the provision of educational services with ‘due care and skill’ (and indeed the parties expectations) as required by the ACL pt 3-2 ACL s 60 and provides an objective form of measurement of the requisite standard. The exact content or terms of the contract do not derogate from other obligations are overlaid by the ACL.

<sup>171</sup> Birtwistle and Askew, above n 4. After considering the nature of the student–HEI contract, conclude in relation to the consumer protection regulation in the United Kingdom: ‘The contract itself does have many expressed terms but are there also implied terms? What is the effect of the volume of quality assessment that abounds today? If there are objective standards of delivery and supervision and these are not delivered then surely those standards are implied as terms in the student contract. Failure to deliver is therefore breach and consequences flow – these could be far reaching if the consequences of breach reasonably include lack of achieving in later life regarding a career etcetera. The financial flood gates could open’: at 95.

<sup>172</sup> Middlemiss, above n 4, 85 suggests that an implied term of requiring the HEI to act reasonably with their students may be helpful to give certainty in regards the contents of the contract.



challenging, not least because this contract can include variations on re-enrolment.<sup>173</sup> It is therefore the enrolment process and the documents signed thereon that are particularly important in the context of this research question. Enrolment processes and documents across Australian HEIs are strikingly similar.<sup>174</sup> Typically the enrolment process occurs online and not necessarily in person on campus.<sup>175</sup> Below is the student declaration used in the online enrolment process at Curtin University.<sup>176</sup> The words and phrases underlined are indicative of a hyperlink:

#### **Student Declaration**

- I understand it is my responsibility to ensure that my enrolment is correct.
- I have sought appropriate academic counselling in relation to my enrolment.
- I agree to be bound by the Statutes, Rules and Policies of the University as amended from time to time and agreed to pay all fees, levies and charges directly arising from my enrolment.
- I consent to receiving information electronically from the University.
- I agree to access OASIS (student portal) at least once a week to receive official communications from the University (unless approval for exemption is granted).
- I am aware of the conditions under which I am permitted to use University (computer) facilities (refer to the ICT Policy).
- I acknowledge that I have read and understood the information regarding Guild Membership.
- I acknowledge that I have read and understood the University's Privacy Statement.
- I acknowledge that any expense, costs or disbursements incurred by the University in recovering any monies owing by me shall be the responsibility of the debtor, including debt collection agency fees and solicitor's costs on the amount outstanding and all other reasonable costs incurred in the recovery of outstanding monies.<sup>177</sup>

In the example given above, a student expressly certifies that their enrolment is correct. This can only be based on what is contained in the relevant Course Handbook. The express terms of the 'standard form contract' are also likely to include any published course handbook as students need to have regard to in order

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<sup>173</sup> Kós and McVeagh, above n 3, 28 where they suggest that the contract needs to be more formalised; Davis, above n 4, 21.

<sup>174</sup> For example, the process is similar to the University of Adelaide and their checklist includes the following information: 'Declaration Read this information carefully before you select "I Agree"' as this indicates that you agree to be bound by the statutes, regulations, rules and policies of the University and the release of information to statutory authorities, as required by law': University of Adelaide, *University Enrolment* (12 July 2012) <<http://www.adelaide.edu.au/enrol/steps/step4.html>>.

<sup>175</sup> Interview with Deb Greenwood, Manager Student Central — Admissions, Curtin University, (Perth, 28 September 2011); Curtin University, *How to enrol*, (13 August 2012) <<http://students.curtin.edu.au/administration/enrolment/howto.cfm>> where the webpage speaks to the University moving to 'self-management' in re-enrolment and 'large numbers' of students use the online enrolment process.

<sup>176</sup> As at January 2012. Annexure 3.

<sup>177</sup> Ibid.

to complete their enrolment. Course handbooks typically set out the requirements for the course, including limited detail in relation to content, assessment and tuition patterns. While the minutiae of this document may not contain terms relevant to the UCT (in the sense that a term in relation to the assessment criteria or tuition pattern, for example, is not of itself unfair),<sup>178</sup> broader terms in these documents that operate as disclaimers may be, as discussed further in Chapter 5.<sup>179</sup>

Importantly, in the Curtin example, the student agrees to be bound by the 'Statutes Rules and Policies' of the University.<sup>180</sup> This has the effect of incorporating those Statutes, Rules and Policies as express terms of the contract.<sup>181</sup> There are a myriad of Statutes, Rules and Policies available on the Curtin website accessed through the hyperlink<sup>182</sup> as is the case with all Australian HEIs.<sup>183</sup> The numerous policies<sup>184</sup> are grouped in the following categories: 'Campus Life', 'Community Relations', 'Facilities', 'Finance', 'Human Resources', 'Information Management', 'Legal', 'Library Services', 'Research', 'Strategic Management', 'Students', and 'Teaching and Learning'. Within the categories of 'Students', there are 30 individual policies ranging in matters from admission, enrolment, assessment and plagiarism to lost property. In the 'Teaching and Learning' category, there are 36 individual policies, which include, in addition to policies concerning admission and assessment, maximum numbers for classrooms, discontinuing courses, flexible learning, graduate attributes, fieldwork and unit

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<sup>178</sup> This is to be contrasted with a claim for breach of contract in relation to standards of knowledge or promised course content as in *Victoria University* [2003] NZAR 186. These terms will also operate differently in relation to other provisions of the ACL, such as statutory guarantees.

<sup>179</sup> Or sometime the exact terms regarding course requirements may be more difficult to locate, including any provisions allowing for changes to course structures. See for example the Handbook for the University of Sydney; University of Sydney, *Handbooks Online* (12 July 2012), <<http://sydney.edu.au/handbooks/>> where the web page states:

Handbooks Online is the University of Sydney's central source of official information for students undertaking study. The handbook and its updates, along with the Policy Register form the official source of information relating to study at the University of Sydney.

All handbook information should be read together with *the University of Sydney (Coursework) Rule 2000* (as amended), the *University of Sydney (Higher Degree by Research) Rule 2011* and *University of Sydney (Student Appeals against Academic Decisions) Rule 2006*.

<sup>180</sup> See also the language of the Curtin University brochure outlining the appropriate use of ICT by students, which is linked through the contract of enrolment by hyperlink, specifically states that 'students are bound by the policy on enrolment' Curtin University, *ICT Appropriate Use Guidelines*, (23 July 2012) <<https://cits.curtin.edu.au/local/docs/ICT-AppropriateUse.pdf>>.

<sup>181</sup> Contractual terms can be incorporated by reference, rather than setting them out in full, especially when the contract is in writing and signed. *L'Estrange v F Graucob Ltd* [1943] 2 KB 394 and the 'ticketing cases', see, eg, *Thompson v London, Midland and Scottish Railway Co* [1930] 1KB 41; *Sydney City Council v West* (1965) 114 CLR 481.

<sup>182</sup> Curtin University, *Legislation, Policies and Procedures*, above n 162.

<sup>183</sup> See, eg, La Trobe University (12 July 2012) <<http://www.latrobe.edu.au/policy/all-policies>>; Bond University (12 July 2012) <<http://www.bond.edu.au/student-resources/student-administration/policies-procedures-guidelines-and-forms/index.htm>>.

<sup>184</sup> It is understood that at Curtin University since the beginning of 2012, 14 policies have been amended, 10 procedures have been amended, and 56 policies and procedures have been rescinded. Email from Naomi Yellowlees, Director of Legal and Compliance Services, Curtin University, to all Curtin Staff, 27 June 2012.

outlines. In relation to the statutes and rules governing the University, there are listed some 35 statutes and rules on the University's website. These cover matters as varied as academic misconduct to the payment of fees imposed by the University, including penalties.

This potential variety and width of terms expressly incorporated into the contract should be of some concern to HEIs. The UCT provisions are concerned especially with any terms that are unilateral terms allowing variation of the contract or terms that seek to avoid or limit performance.<sup>185</sup> Potentially the terms as incorporated through the hundreds of documents are wide ranging and include terms that allow the HEI to unilaterally vary the characteristics of the services to be supplied.<sup>186</sup> The breadth of the express terms incorporated through the policies could encompass such matters as the delivery of the course content or promised instruction, assessment and appeal process or the provision of services and facilities. Furthermore, the policies, statutes and rules also include terms that deal with termination of courses, impose penalties for breach (by the student, such as non-payment of fines) and mandatory procedures for how grievances are resolved. What is considered here is the type and array of terms that may be considered to be part of the standard form contract. Whether particular terms are potentially unfair will be considered in Chapter 5.

#### *Summary — nature and terms of the student–HEI contract*

It is likely that the contract to educate is a contract for service for the supply of educational services, informed by pre-contractual information and as varied over the course of study. There is significant uncertainty and potential difficulties in determining the terms of the student–HEI contract. This research is however only concerned with those terms that can be said to be express terms of any 'standard form' 'consumer contract'. It is probable that this will contain those terms referred to expressly on enrolment and by incorporation of at least the published course handbook and statutes, rules and policies of the HEI.

#### **Redress under the student–HEI contract**

It is the proposition of this research that redress pursuant to a claim under the ACL, specifically the UCT is more effective than remedies available students in other causes of action, including contract law. Leaving aside the issue of whether matters

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<sup>185</sup> ACL s 25.

<sup>186</sup> *Ibid* s 25(1)(g).

of academic judgement can be reviewed by the courts,<sup>187</sup> the case law and commentary is clear that the capacity of students to recover damages for breach of contract is extremely difficult.<sup>188</sup> If the accepted position is that there are in fact two contracts, a claim for damages for an admission contract is more obvious and is on a loss of bargain basis.<sup>189</sup> The more difficult claim arises under the second enrolment contract. This is particularly so if the claim is in relation to issues surrounding quality of the provision of the educational services. It is apparent from the case law that even if a student is able to establish a breach of contract, it is very difficult to establish a causal link to the losses claimed<sup>190</sup> or alternatively to be able to prove loss at all.<sup>191</sup> To a lesser extent this is so even in the consumer tribunal matters.<sup>192</sup>

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<sup>187</sup> It is worth noting here that even the Visitor in the exercise of his exclusive jurisdiction is required to determine an award for damages in accordance with the ordinary principles of law (be that in contract or negligence or otherwise) once he or she has made a determination that an award for compensation is appropriate, unless the Visitor is able to make an order not within the 'competence of the ordinary courts' 'to make good' the harm done to the plaintiff. See *Bayley-Jones v University of Newcastle* (1990) 22 NSW 424, 436–7.

<sup>188</sup> See, eg, *Fennell v Australian National University* [1999] FCA 989; *Mathews v University of Queensland* [2002] FCA 414. In both matters the students failed to demonstrate any cause or link between the alleged misrepresentations and/or breach of contract and any loss suffered: See also *Victoria University* [2003] NZAR 186, 191–2 where the Court noted that the damages claimed may appear excessive or remote, but this was a matter for resolution at trial, not in interlocutory proceedings; Ogawa, above n 36, 97.

<sup>189</sup> Davis, above n 4, 22; *Moran* [1994] ELR 187.

<sup>190</sup> *Mathews v University of Queensland* [2002] FCA 414. The matter of *Mathews* has been discussed in detail in Chapter 3 in relation to Mathews' claims against the University regarding its conduct in respect of various mathematics subjects being in 'trade or commerce'. One cause of action was founded in breach of contract. The difficulty for Mathews was in fact demonstrating that he had suffered any loss or damage. The Court identified that the significant problem for the applicant student was his inability to establish a causative link between the conduct that was alleged to have breached the TPA or contract and any damage or loss suffered by him. Mr Mathews claimed damages in excess of \$400 million which included diminished prospects of an academic career and the lost opportunity to undertake his PhD in Logical Equivalence of Legal Decisions, which would have been commercialised as a computer program. Mr Mathews failed to show reasonable cause of action against the University and the proceedings were struck out as frivolous and vexatious.

<sup>191</sup> Davis, above n 4, 22. See, eg, *Harding v University of New South Wales* [2001] NSWSC 301 where the breach of contract was made out, but no remedy could be awarded because she was unable to establish loss caused by the University's actions; In *Fennell v Australian National University* [1999] FCA 989 while the applicant's claim was heard, he was unsuccessful. Here a former MBA student brought a claim under the TPA alleging that he had been induced by false representations to enrol in an MBA with the University. At trial, it became apparent that the applicant would face difficulties regarding his claim under the TPA. Consequently the applicant sought to resuscitate his claim in contract. The difficulty of this approach was discussed in detail by the Court. In relation to his loss, he failed because he had in fact graduated with his MBA and was employed in a new position that paid substantially more than his employment as engineer prior to completing his MBA.

<sup>192</sup> See *Cotton v Blinman Investments Pty Ltd and Blinman (General)* [2004] NSWCTTT 723 (13 December 2004). This matter concerned a claim for breach of contract and false representations in relation to the qualifications and experience of the respondent's teaching staff at the Strand College of Beauty Therapy. The applicant claimed that the respondent had misrepresented the qualifications and experience of the teaching staff and particularly that the teachers named in the 'prospectus' were no longer teaching at the respondent. The applicant was unable to demonstrate on the balance of probabilities that the level of teaching provided was at a level that amounted to a breach of contract or that there was a breach of the implied warranty that the services would be rendered with due care and skill. The Tribunal did find however that the respondent had falsely represented that availability of a particular teacher and awarded \$400 as fair and equitable compensation for the unavailability of the particular teacher.

It is the intangible nature<sup>193</sup> of the loss sought to be recovered that is problematic.<sup>194</sup> The success of claims for damages by students for more than direct losses, such as a refund of fees,<sup>195</sup> appears to be reliant on courts likening their claims to cases where the subject matter of the contract is the experience itself, the so called 'holiday cases'.<sup>196</sup> Damages for breach of contract are not normally available for injured feelings, inconvenience, disappointment, anxiety, discomfort or distress.<sup>197</sup> However, 'where the disappointment or distress is not merely a reaction to the breach and its resulting consequences but is itself the resulting damage — damages for annoyance, vexation, frustration, anxiety, distress and disappointment can be recovered.'<sup>198</sup>

Palfreyman considers the decision in *Rycotewood (re damages: 28/2/2003, Warwick Crown Court, His Honour Judge Charles Harris QC, OX004341/42, Buckingham v Rycotewood College (26/3/2002, Oxford County Court, OX004741/OX004343)*<sup>199</sup> whereupon students were successful in their claim for damages for breach of the contract to educate when the HEI failed to provide the course as advertised, that being historical vehicle restoration with significant practical content. The provision of the course was 'low and often poorly taught'.<sup>200</sup> The Court awarded damages in the amount of £10,000 per student. Of that amount, £2,500 was for mental distress in relation to the annoyance, anger, frustration, anxiety and disappointment suffered by the students as a result of the educational service not being provided as it should have been.<sup>201</sup> In his analysis of the case, Palfreyman comments 'The judgement ... brings "a course for the provision of education" firmly within the exceptions "as something which contains, or should contain, important elements of satisfaction, pleasure and tranquillity of mind"'.<sup>202</sup>

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<sup>193</sup> Rochford, 'The Relationship Between the Student and the University', above n 57, 34; Francine Rochford, 'Suing the Alma Mater: What Loss Has Been Suffered?' (2001) 13(4) *Education and the Law* 319.

<sup>194</sup> Of course related to these difficulties is the courts' reluctance to review matters of academic judgment and in fact sit in the shoes of an assessor. Middlemiss, above n 4, proposes an example where students might claim that inadequacies in the teaching or assessment in breach of the contract contributed to their poor results: at 72.

<sup>195</sup> Lindsay, 'Complexity and Ambiguity in University Law', above n 25, 11, nn 50–3 regarding the quantification of damages; See also Kamvounias and Varnham, 'In-House or in Court?', above n 5.

<sup>196</sup> *Baltic Shipping Co v Dillon* (1993) 176 CLR 344; *Jarvis v Swan Tours Ltd* [1973] 1 All ER 71.

<sup>197</sup> Graw, above n 104, 431 [16.4.7].

<sup>198</sup> *Ibid* 432 [16.4.7], 433 where he observes that the calculation of the amount of these types of damages is more restrained in the UK than Australia.

<sup>199</sup> Palfreyman, '*Phelps ... Clark ... and now Rycotewood?*', above n 4.

<sup>200</sup> *Rycotewood (re damages: 28/2/2003, Warwick Crown Court, His Honour Judge Charles Harris QC, OX004341/42*, as quoted in Palfreyman, '*Phelps ... Clark ... and now Rycotewood?*', above n 4, 238.

<sup>201</sup> The remaining £7500 was for 'loss of value of the course' as quoted in Palfreyman, '*Phelps ... Clark ... and now Rycotewood?*', above n 4, 239.

<sup>202</sup> *Ibid* 238–9. He comments '... the Judge commented that "three years of high-quality teaching and all ancillary stimulus and opportunity which might be available at a leading university will or should be of inestimable life-long utility and value, and could not sensibly be said to be limited to the sum the college or university received from the Government and/or the student as a fee" (4B–D) ... In respect of what

This issue of a claim for damages, and in particular damages for anxiety and distress, in the context of the breach of a contract for educational services was considered in Australia in the *Shahid*<sup>203</sup> case. In that matter the appellant claimed damages on three grounds.<sup>204</sup> First, for the loss of opportunity to establish herself as the best candidate for the position of trainee registrar in dermatology. Second, that the conduct of the College had caused her anxiety and distress under both breach of contract and pursuant to section 79 of the *Fair Trading Act 1987* (WA). Third was a claim for 'out of pocket expenditure'.<sup>205</sup> The Court noted that a claim for damages for loss of opportunity was the most relevant in relation to the claim for damages for breach of contract.<sup>206</sup> The appellant was not successful in relation to the loss of opportunity claim as she was unable to establish by evidence that she would have been the best candidate for any of the single positions of trainee registrar in each of the relevant years.<sup>207</sup>

In relation to the College's failure to adhere to the promised appeals process, Shahid claimed damages for anxiety and distress.<sup>208</sup> The Court found that the situation did not fall within the exceptional category referred to *Baltic Shipping*,<sup>209</sup> so the claim in contract for anxiety damages failed.<sup>210</sup> However, the appellant was successful in her claim for anxiety damages pursuant to section 79 of *Fair Trading Act 1987* (WA)<sup>211</sup> as the anxiety and distress experienced by the appellant amounted to an 'injury' under the statute.<sup>212</sup> Justice Jessup was of the view<sup>213</sup> that the High Court has indicated

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the Judge accepted was the students' "acute annoyance, unhappiness and frustration" (6A&B, citing one student's description of the course as "fraught, not pleasant and productive; it was stressful and not enjoyable"), there was recognition by the Court of "mental distress" damages as "an interesting, and probably developing, area of the law" (6B). The judgement ... brings "a course for the provision of education" firmly within the exceptions "as something which contains, or should contain, important elements of satisfaction, pleasure and tranquillity of mind"; the Judge indeed waxes lyrical: "It can pellucidly be appreciated that, for example, the assimilation of literature, history, art or philosophy should, and generally will, provide pleasure and relaxation as well as employment opportunity. So, too, no doubt, will mathematics and science, where an appreciation of the harmonies of numbers and the secrets of creation ought to provide limitless intellectual pleasure and satisfaction. The enjoyment of these pleasures is part of the purpose of university and many other educational courses" (7A–D): at 239.

<sup>203</sup> *Shahid v Australasian College of Dermatologists* 248 ALR 267.

<sup>204</sup> *Ibid.* The appellant also sought orders for a declaration that the College had been in contravention of the TPA/FTA. The Court declined to make the orders requested as nothing would be gained by such an order: at 341 [252] (Jessup J). Similarly there were no legitimate grounds for the granting of an injunction to restrain the college as the events had ceased to exist: at 342 [253] (Jessup J).

<sup>205</sup> *Ibid* 332 [218] (Jessup J).

<sup>206</sup> *Ibid* 332 [219] (Jessup J).

<sup>207</sup> *Ibid.*

<sup>208</sup> *Ibid* 336 [221] (Jessup J).

<sup>209</sup> *Baltic Shipping Co v Dillon* (1993) 176 CLR 344.

<sup>210</sup> *Shahid v Australasian College of Dermatologists* (2008) 248 ALR 267,337 [233] (Jessup J).

<sup>211</sup> Which corresponds with the TPA s 82, and for this research ACL s 236.

<sup>212</sup> *Shahid v Australasian College of Dermatologists* (2008) 248 ALR 267, 336 [230] (Jessup J).

that the meaning of ‘injury’ in the FTA/TPA ‘is not confined to personal injury, but may extend to any detriment’<sup>214</sup> and should not be limited to actions for recovery of economic loss.<sup>215</sup> His Honour found that the conduct of the College had caused the loss as claimed.<sup>216</sup> The appellant was awarded damages for the ‘injury’ suffered within the meaning of the Fair Trading Act in the sum of \$2,500.<sup>217</sup>

This case is particularly significant as this thesis is concerned with the application of the UCT and the situation where a term in the contract is declared unfair and thus rendered void. The ACL makes provision for compensatory orders for loss or damage suffered, or likely to be suffered, by an injured person, when another person seeks to rely on a term that has been declared to be void.<sup>218</sup> Moreover, the recent amendment to the ACL and the ability of the regulator to seek orders to redress any loss or damage suffered by non-party consumers strengthens students’ potential ability to secure reparation.<sup>219</sup> Additionally, the range of orders available at common law or in equity is limited as the courts are unlikely to order specific performance or a mandatory injunction to that effect.<sup>220</sup> The orders available under the ACL provide for significant judicial discretion<sup>221</sup> and include the ability of the court to order injunctions and specific performance in relation to unfair contract terms.<sup>222</sup> These provisions will be considered further in Chapter 5. It is clear from the reasoning in *Shahid* that the potential for students to successfully claim damages in relation to claims made against a HEI has better prospects under consumer protection legislation when compared to a claim in damages for breach of contract.

## Conclusion

On balance it would seem justified that there exists in Australia a student–HEI contractual relationship, which co-exists with other legal rights accruing to students as in other common law countries. The preferred view is that there are two contracts. First, there is a contract of admission, which obliges the HEI to enrol the student into

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<sup>213</sup> Ibid. The Court reviewed the authorities in relation to the meaning of the word ‘injury’ and took an expansive view: at 335–6 (Jessup J).

<sup>214</sup> Ibid 335 [225], 336 [227] (Jessup J).

<sup>215</sup> Ibid 335 [226] (Jessup J).

<sup>216</sup> Ibid 336 [230] (Jessup J).

<sup>217</sup> Ibid 336 [231] (Jessup J). The applicant was also successful in relation to a claim for out of pocket expenses in relation to costs associated with the expense in the lodgement of the appeals, (\$10,684.92) and legal costs incurred in connection with the internal appeals (\$2200): at 337–41 (Jessup J). Her claim for airfares for her husband to fly interstate to Perth for ‘emotional support’ was disallowed: at 341 (Jessup J).

<sup>218</sup> See, eg, ACL pt 5-2 div 4 ss 237–9 compensation orders for injured persons.

<sup>219</sup> Ibid div 4 ss 237, 239–40.

<sup>220</sup> As described by Lindsay, ‘Complexity and Ambiguity in University Law’, above n 25, 11, nn 50–3.

<sup>221</sup> ACL s 243.

<sup>222</sup> Ibid s 232.

the course on the bases of the pre-admission information received by the student. Second, the contract to educate arises on the student completing the enrolment process.<sup>223</sup> The terms of this contract may be varied over the course of the study period, in much the same way a contract of employment might be varied. The contract for the supply of educational services is a 'service' as required under the ACL. There are nevertheless difficulties with the contractual classification, particularly in relation to determining the terms of the contract and remedies upon any breach.<sup>224</sup> This research is however only concerned with those terms that can be said to be express terms of any 'standard form' 'consumer contract'. In the absence of a formal agreement, it is probable that this will contain those terms referred to expressly on enrolment and by incorporation of at least the published course handbook and statutes, rules and policies of the HEI. Further, it is suggested that the remedies available under the ACL are more effective mechanisms for redress for students than at common law.

The following chapter will examine the application and effect of the specific UCT provisions to identify any connection between the UCT provisions regarding substantive unfairness and the protection afforded students by the legislation in the context of the provision of educational services. The chapter will include an investigation of whether particular express terms typically contained in the enrolling documents are potentially unfair under the legislation. It will also include an analysis as to whether the UCT regime provides effective protection for students as consumers of educational services in the context of the student–HEI contract and provision of educational services.

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<sup>223</sup> This relationship will also coexist with others, notably in administrative law and obligations arising under legislation as discussed in Chapter 2.

<sup>224</sup> Kaye, Bickel and Birtwistle, above n 74, 100.



## Chapter 5: The Student–HEI Contract and the UCT

### Introduction

As indicated in preceding chapters, the protections available under the ACL regarding unfair contract terms require the existence of several factors before the provisions are enlivened. The thesis so far has examined the nature of the contract between the student and the HEI and argued that the contract for educational services that exists in Australia is a ‘service’ supplied in ‘trade or commerce’ as defined by the ACL. Additionally there must be a ‘standard form’<sup>1</sup> ‘consumer contract’<sup>2</sup> between the supplier of the services (the HEI) and the consumer of those services (the student).

The examination and analysis of whether the contract for the supply of educational services is a ‘standard form’ contract will be continued from the previous chapter. The chapter will then analyse the case law, legislation and literature to establish whether there is a ‘consumer contract’ as defined for the purpose of the UCT provisions.. Whether students are consumers for the purpose of the UCT provisions will be considered in the light of academic commentary from other related disciplines as well as a detailed examination of the statutory definitions contained in the ACL. The last two decades have seen increasing debate in higher education commentary regarding the ‘marketisation’ or ‘commodification’ of higher education.<sup>3</sup> Legal commentators have been less concerned with the conceptualisation of the student as consumers in general and have focused largely on whether the student is a consumer for the purpose of the relevant legislative provisions under consumer protection law. There has been a general acceptance of the student as consumer for the purpose of consumer protection law.<sup>4</sup>

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<sup>1</sup> ACL s 23(1)(b).

<sup>2</sup> Ibid s 23(3).

<sup>3</sup> See, eg, Roger Brown (ed) *Higher Education and the Market* (Routledge, 2011); Mike Molesworth, Elizabeth Nixon and Richard Scullion, *The Marketisation of Higher Education and the Student as Consumer* (Routledge, 2001).

<sup>4</sup> See, eg, Damien Considine, ‘The Loose Cannon Syndrome: University as Business & Students as Consumers’ (1994) 37(1) *Australian Universities’ Review* 36; Patty Kamvounias and Sally Varnham, ‘Getting What They Paid For: Consumer Rights of Students in Higher Education’ (2006) 15 *Griffith Law Review* 306, although the authors have not placed as much significance on the wider debate for the purpose of the legislative provisions: at 322. In some instances the student as a consumer is assumed while other matters under the statutory provisions are considered, see, eg, Lynden Griggs, ‘Knowing the Destination Before the Journey Starts — Legal Education and Fitness for Purpose’ (2007) *Murdoch ELaw Journal* 315  
<[https://elaw.murdoch.edu.au/archives/issues/2007/1/eLaw\\_knowing\\_destination.pdf](https://elaw.murdoch.edu.au/archives/issues/2007/1/eLaw_knowing_destination.pdf)>.

However, reference to wider, cross-disciplinary discussions is significant for a deeper understanding of the issues arising under the ACL. A broader understanding of what is meant by the student as consumer and its impact on the sector, while strictly cannot assist with the interpretation of the statutory provisions arising at law, can inform the notion of what is meant by a consumer in the context of the higher education sector and place the operation of the provisions in context.<sup>5</sup> The decline of the jurisdiction of the Visitor and the commodification of higher education impacts on the development of the acceptance of the student–HEI contract and the positioning of the student as a consumer within that market.

This chapter will then consider the operation and application of the specific provisions and whether there are any terms in the contract for the supply of educational services that are potentially unfair terms as proscribed under the ACL. Particular regard will be had to the case law emanating from the Australian state of Victoria,<sup>6</sup> which is the only Australian jurisdiction to have previously enjoyed a UCT regime in its consumer protection legislation, and the experience in the United Kingdom.<sup>7</sup> While the UK experience informs the discussion, this thesis is not a comparative study. Importantly the analysis will identify any connection between the UCT provisions regarding substantive unfairness and the effectiveness of the protection afforded students by the legislation for students as consumers of educational services. The analysis will evaluate the implications for the sector and make recommendations for any necessary change in current practice.

### **Unfair Contract Terms in Australia**

In July 2010, the new national consumer legislation introduced provisions rendering unfair terms in consumer contracts void.<sup>8</sup>

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<sup>5</sup> Lynden Griggs, Aviva Freilich and Eileen Webb, 'Challenging the Notion of a Consumer: Time for Change' (2011) 19 *Competition and Consumer Law Journal* 52, 59. The idea of the student as a consumer impacts on traditional views of both the academe and the approach taken by the judiciary in reviewing academic judgement; Geoffrey Alderman and David Palfreyman, 'The Birth of the Market Place in English Higher Education' (2011) 15(3) *Perspectives: Policy and Practice in Higher Education* 79; Gabrielle Baldwin, 'The Student as Customer: The Discourse of "Quality" in Higher Education' (1994) 16(1) *Journal of Tertiary Education Administration* 125; Francine Rochford, 'The Contested Product of a University Education' (2008) 30(1) *Journal of Higher Education, Policy and Management* 41; Tim Kaye, Robert D Bickel and Tim Birtwistle, 'Criticizing the Image of the Student as Consumer: Examining Legal Trends and Administrative Responses in the US and UK' (2006) 18(2–3) *Education and the Law* 85, 222. See also Tim Kaye, 'Academic Judgment, the University Visitor and the Human Rights Act 1998' (1999) 11(3) *Education and the Law* 165, 182.

<sup>6</sup> *Fair Trading Act 1999* (Vic) pt 2B. See generally Consumer Affairs, Victoria *Preventing Unfair Terms in Consumer Contracts* (2007).

<sup>7</sup> *Unfair Terms in Consumer Contracts Regulations 1999* ('UTCCR') (UK).

<sup>8</sup> *Trade Practices Amendment (Australian Consumer Law) Act (No.1) 2010* (Cth); This Act received assent on 14 April 2010 operative from 1 July 2010. Unfair contract terms provisions are contained in Schedule 2 of the *Australian Consumer Law (ACL)* ch 2 pt 2-3. See generally Jeannie Marie Paterson,

This was the first time there had been national regulation in relation to UCTs. Previously the only jurisdiction to regulate specifically for UCTs in consumer transactions was Victoria. Consequently there is very little case law in relation to the interpretation and application of these provisions, save a small body of jurisprudence from Victorian state courts and tribunals.<sup>9</sup> An unfair contracts regime also exists in the UK, although there are notable differences in the UK legislation, including the need for a consideration as to whether the impugned term is contrary to the requirements of good faith, and important differences in the examples of unfair terms.<sup>10</sup> Further, the role of the regulator in the UK is proactive rather than reactive, which has resulted in a minimisation of litigation in this area.<sup>11</sup> The Office of Fair Trading ('OFT') in the UK is empowered to enter into discussions with traders and if necessary seek undertakings in relation to potentially unfair terms, which has been observed to deliver real benefits to consumers.<sup>12</sup> While regard will be had to the UK experience, this thesis is not a comparative study.

It is suggested that the UCT provisions attempt to deal with not just the procedural unfairness of terms but indeed the substantive unfairness of terms.<sup>13</sup> Prior to the introduction of a UCT regime nationally, Australian jurisdictions outside of Victoria were limited in the examination of 'fairness' in contractual terms due to the

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'The Elements of a Prohibition on Unfair Terms in Consumer Contracts' (2009) 37 *Australian Business Law Review* 184; Tracey Atkins, 'The Regulation of Unfair Contract Terms and the New Australian Consumer Law' (2010) 38 *Australian Business Law Review* 318. The ACL applies only to contracts entered into after the commencement date. Existing contracts are only affected to the extent that the renewal or variation is made after 1 July 2010. See *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010, (No. 103, 2010)* s 3 and sch 7 item 8 quoted in Russell Miller, *Miller's Australian Competition and Consumer Law Annotated* (Thomson Reuters, 34th ed, 2012) editor's note, 1697; Patrick Dwyer, 'Fair Terms: New consumer Contract Rights Now in Play' *Law Society Journal* (NSW) July 2010 53, 55.

<sup>9</sup> See generally Frank Zumbo, 'Dealing with Unfair Terms in Consumer Contracts: The Search for a New Regulatory model' (2005) 13 *Trade Practices Law Journal* 194; Dan Jerker B Svantesson and Loren Holly, 'An Overview and Analysis of the National Unfair Contract Terms Provisions' (2010) 24(3) *Commercial Law Quarterly* 3; Paul O'Shea, 'All's Fair in Love and War — But Not Contract' (2004) 23 *The University of Queensland Law Journal* 227.

<sup>10</sup> See generally Anthony Gray, 'Unfair Contracts and the Consumer Law Bill' (2009) 9(2) *Queensland University Law and Justice Journal* 155; Chris Willett, 'The Functions of Transparency in Regulating Contract Terms: UK and Australian Approaches' (2011) 60 *International Law Quarterly* 355 at 363–7, 374–5; John W Carter, 'The Commercial Side of Australian Consumer Protection Law' (2010) 26 *Journal of Contract Law* 221, 238–9.

<sup>11</sup> James Davidson, 'Unfair Contract Terms and the Consumer: A Case for Proactive Regulation?' (2007) 15 *Competition & Consumer Law Journal* 74, 78–80 where he examines the UK OFT statistics from 1999–2004 and concludes that the UK regulations have achieved results without the need for recourse to the courts. See also Simone Watson, 'Unfair Terms in Consumer Contracts: The Issues and the UK Solution' (2005) September *Proctor* 35, 36.

<sup>12</sup> Davidson, above n 11. See also Watson, above n 11.

<sup>13</sup> See Jeannie Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts' (2009) 33(3) *Melbourne University Law Review* 934, 937–9 particularly in the distinction between procedural and substantive unfairness; Peter Doherty, 'Unequal Bargaining Position' (Paper presented at Law Summer School 2011, University of Western Australia Law School, Perth, 25 February 2011) 65; Australian Attorney-General, *The Australian Consumer Law: A Guide to Provisions*, 2010.

development and complexity surrounding common law or statutory causes of action founded in unconscionability.<sup>14</sup> The courts' reluctance to interfere with contractual terms on the basis of unfairness has a long tradition founded on the guiding principle of 'freedom to contract' and concepts of voluntariness in entering into contractual relations.<sup>15</sup> It is the accepted view that courts have hitherto confined their examination to matters concerning procedural fairness in the formation of the contract.<sup>16</sup> It can be said:

Substantive unfairness in contractual dealings refers to an objective assessment of the fairness of individual contract terms agreed to between parties. This is in contrast to procedural unfairness which is concerned with factors which may erode the ability of one of the contracting parties to give a fully informed consent to the terms.<sup>17</sup>

The UCT regime in the ACL is concerned with both. Notions of transparency, accessibility and legibility are matters to be taken into account in the determination of whether a term is substantively unfair.<sup>18</sup> A leading Australian scholar in this area proposes that:

Fairness in standard form consumer contracts requires terms that are balanced and transparent in their effect. Terms need not neglect the legitimate business interests of suppliers of goods and services but must be a proportionate response to the risks to which those terms are responding.<sup>19</sup>

In the higher education context this poses some challenges, not least because of the difficulty in ascertaining the terms of the contract. Further as discussed below, what comprises the higher education sector market and thus the legitimate interests of the suppliers of those services is a complex question. There are also parallels in student

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<sup>14</sup> A claim in equity can arise on a number of grounds where a court may consider vitiating factors that have impacted on the validity of the terms of the agreement, such as unconscionability or duress. Under legislation, the former TPA ss 51AB–51AC (now ACL ss 21–22) dealt with unconscionable actions by a party who sought to take advantage of a vulnerable party, or the *Contracts Review Act 1980* (NSW) in relation to 'unjust contracts'. So the focus has been on the conduct of parties in the negotiation and formation of contracts and procedural fairness. See Paterson, 'The Australian Unfair Contract Terms Law', above n 13, 937–9; Svantesson and Holly, above n 9, 4; Griggs, 'The [Ir]rational Consumer', above n 14, 11; Davidson, above n 11, 84; Willett, above n 10, 369–70.

<sup>15</sup> Paterson, 'The Australian Unfair Contract Terms Law', above n 13, 937–8. See generally, Andrew Robertson, 'The Limits of Voluntariness in Contract' (2005) 29 *Melbourne University Law Review* 179.

<sup>16</sup> Above n 14. The focus has been on the conduct of parties in the negotiation and formation of contracts and procedural fairness. See Paterson, 'The Australian Unfair Contract Terms Law', above n 13, 937–9; Svantesson and Holly, above n 9, 4; Griggs, 'The [Ir]rational Consumer', above n 14, 11; Willett, above n 10, 369–70; Davidson, above n 11, 84. Cf generally Gray, above n 10. He comments that the distinction between procedural and substantive unfairness in the existing doctrines is artificial because substantive unfairness may be evidence of procedural unfairness, therefore intertwined and somewhat circular: at 166.

<sup>17</sup> Davidson, above n 11.

<sup>18</sup> ACL ss 24(2) and 24(3); Paterson, 'The Elements of a Prohibition on Unfair Terms', above n 8, 188. See generally Willett, above n 10.

<sup>19</sup> Paterson, 'The Elements of a Prohibition on Unfair Terms', above n 8, 184.

litigation regarding the division of substantive and procedural fairness. As discussed in Chapter 2, the notion that claims going to procedural fairness are justiciable<sup>20</sup> but those relating to the substance of academic judgement are not reviewable is a common theme in student claims. It is possible that the examination of the substantive fairness of contractual terms under the UCT provides some measure of advancement in the rights of students as consumers of educational services.

Section 23 defines unfair terms in a consumer contract as follows:

**23 Unfair terms of consumer contracts**

- (1) A term of a consumer contract is void if:
  - (a) the term is unfair; and
  - (b) the contract is a standard form contract.
- (2) The contract continues to bind the parties if it is capable of operating without the unfair term.
- (3) A **consumer contract** is a contract for:
  - (a) a supply of goods or services; or
  - (b) a sale or grant of an interest in land;to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

The test for unfairness is set out in section 24 and illustrative examples of what may be unfair terms are listed in section 25. A term will be unfair 'if it causes a significant imbalance in the parties' rights and responsibilities' and if it is not 'reasonably necessary' to protect the 'legitimate interests of the supplier',<sup>21</sup> so as to cause detriment to the consumer. Terms and contracts unaffected by the UCT are set out in sections 26 and 28 respectively. Pursuant to section 23, if a term is found to be unfair it will be void, but the rest of the contract remains in effect to the extent that it is capable of operation.<sup>22</sup> A number of consequences arise on a declaration of unfairness, including the ability for the court to compensate parties who have suffered injury as a result of the application of any unfair term.<sup>23</sup> Applications for a declaration and compensatory orders can be made by either an individual or by the regulator, who is now empowered to seek redress on behalf of those who have or are

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<sup>20</sup> See generally Bruce Lindsay, 'University Hearings: Student Discipline Rules and Fair Procedures' (2008) 15 *Australian Journal of Administrative Law* 146.

<sup>21</sup> Economics Legislation Committee, The Senate (Cth), Trade Practices Amendment (Australian Consumer Law) Bill 2009 [Provisions] September 2009, 1.

<sup>22</sup> A declaration is made pursuant to ACL s 250 on the application of either the regulator or individual.

<sup>23</sup> ACL pt 5-2. The court has a very wide discretion to make 'any order it thinks appropriate': s 237(1).

likely to suffer loss or damage, including non-party consumers.<sup>24</sup> A declaration that a term is void is not a contravention of the ACL; however, if a party continued to rely on such a term it would then be a breach of the Act.<sup>25</sup> The elements of the UCT provisions and avenues for redress will be considered in turn below.

### Standard form contract

As argued in Chapter 4, a contract for the provision of educational services between the student and the HEI exists in Australia. The sections regulating unfair contract terms will apply to the student–HEI contract if the contract can be said to be a ‘standard form’ ‘consumer contract’ within the terms of the legislation. Standard form contracts are a ubiquitous part of consumers’ lives. How they are to be treated at law under classical contract law principles is the subject of much academic commentary, as the fundamental principle of parties’ freedom to enter into a contract that represents their bargain is undercut.<sup>26</sup> Paterson helpfully summarises the commentary and sentiment as follows:<sup>27</sup>

Standard form contracts may benefit contracting parties by reducing the transaction costs associated with negotiating and drafting individualised contracts.<sup>28</sup> However, there is likely to be an inequality of bargaining power between the parties to standard form consumer contracts due to the disparities in resources, information and experience that typically exist between traders and consumers.<sup>29</sup> In this context, standard form contracts appear to offer little potential for genuine consent on the part of the consumers to whom such contracts are presented. The whole point of standard form contracts is that there will be no negotiation over, or variation of, the terms of the contract. They are presented on a ‘[t]ake

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<sup>24</sup> Ibid.

<sup>25</sup> Australian Attorney-General, above n 13, 24.

<sup>26</sup> John J A Burke, ‘Reinventing Contract’ (2003) 10 (2) *Murdoch ELaw Journal* 18 <http://www.murdoch.edu.au/elaw/issues/v10n2/burke102.html>. See generally Andrew Robinson, ‘The Limits of Voluntariness in Contract’ (2005) *Melbourne University Law Review* 5 for a discussion on the notion of voluntariness in contract law and assumption of contractual obligations.

<sup>27</sup> Paterson, ‘The Australian Unfair Contract Terms Law’ above n 13, 940, n 36–9, below n 28–31. See further discussion on the contractual realities and the effect of standards of objectivities on contracts of adhesion in Katherine Hall, ‘Power and Privilege: Objectivity, Commercial Interest and Standard Form Contracts’ (1997) 6 *Griffith Law Review* 30.

<sup>28</sup> Michael J Trebilcock, ‘Rethinking Consumer Protection Policy’ in Charles E F Rickett and Thomas G W Telfer (eds), *International Perspectives on Consumers’ Access to Justice* (2003) 68, 93 cited in Paterson, ‘The Australian Unfair Contract Terms Law’, above n 13, 940, n 36.

<sup>29</sup> *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616, 624 (Lord Diplock) (‘*Schroeder Music Publishing*’); *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284, 302 (Lord Denning MR) (‘*George Mitchell*’). See also Hugh Collins, *Regulating Contracts* (1999) 47 cited in Paterson, ‘The Australian Unfair Contract Terms Law’, above n 13, 940, n 37.

it or leave it' basis.<sup>30</sup> The opportunities for consumers to read, comprehend or take advice on the terms of the contracts are typically limited.<sup>31</sup>

The rationale for statutory intervention in relation to standard form contracts are many and encompass the reasons given by Paterson above. A number of commentators<sup>32</sup> have also referred to the accepted reality of consumer experience in relation to standard form contracts, which include a recognition that consumers rarely read standard form contracts;<sup>33</sup> that if read, comprehension of those terms is limited;<sup>34</sup> that consumers often underestimate the risks associated with the terms,<sup>35</sup> and that they perceive themselves to be powerless.<sup>36</sup> These factors are heightened in the case of young people,<sup>37</sup> and in any event, consumers' ability to counter any of these effects is limited because generally similar terms are employed across a marketplace<sup>38</sup>. Therefore intervention by the legislature is on the basis that 'the rational consumer does not and cannot be expected to fully appreciate the embedded contractual complexity ... the rational behaviour of consumers focusing on price, rather than contractual terms.'<sup>39</sup>

There is no definition of 'standard form contract' in the ACL.<sup>40</sup> The accepted view of the government regulator is that it will ordinarily be:

... one that has been prepared by one party to the contract and is not subject to negotiation between the parties — that is, it is offered on a 'take it or leave it basis'.<sup>41</sup>

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<sup>30</sup> *George Mitchell* [1983] QB 284, 297 (Lord Denning MR); *Schroeder Music Publishing* [1974] 3 All ER 616, 624 (Lord Diplock) cited in Paterson, 'The Australian Unfair Contract Terms Law', above n 13, 940, n 38.

<sup>31</sup> Robertson, above n 15, 188; Robert A Hillman and Jeffrey J Rachlinski, 'Standard-Form Contracting in the Electronic Age' (2002) 77 *New York University Law Review* 429, 432–3; Melvin Aron Eisenberg, 'The Limits of Cognition and the Limits of Contract' (1995) 47 *Stanford Law Review* 211, 242 cited in Paterson, 'The Australian Unfair Contract Terms Law', above n 13, 940, n 39.

<sup>32</sup> See generally Griggs, 'The [Ir]rational Consumer', above n 14; Watson, above n 11; Aviva Freilich and Eileen Webb, 'The Incorporation of Contractual Terms in Unsigned Documents — Is It Time for a Realistic, Consumer-Friendly Approach?' (2009) 34 *University of Western Australian Law Review* 261; Chris Field, 'The Death of Unfair Contracts' *Alternative Law Journal* (2004) 35; Zumbo, above n 9; Willett, above n 10; Economics Legislation Committee, above n 21, ch 4, 22–5.

<sup>33</sup> Freilich and Webb, above n 32, 263.

<sup>34</sup> Watson, above n 11.

<sup>35</sup> Ibid.

<sup>36</sup> Freilich and Webb, above n 32, 264.

<sup>37</sup> Ibid 266.

<sup>38</sup> Watson, above n 11; Field, above n 32.

<sup>39</sup> Griggs, 'The [Ir]rational Consumer', above n 14, 2. See also Willett, above n 10, 357–8; Paterson, 'The Australian Unfair Contract Terms Law' above n 13, 952–6.

<sup>40</sup> Economics Legislation Committee, above n 21, 1, 18–20. See the submission made by the Consumer Action Law Centre, *The Consumer Protection Provisions of the Trade Practices Act 1974: Keeping Australia Up To Date*, May 2008, which the Committee found most persuasive: at 9, 19. The submission suggested that 'a more proscriptive definition would provide opportunities for avoidance'. Cf Sirko Harder, 'Problems in Interpreting the Unfair Contract Terms Provisions of the Australian Consumer Law' (2011) 34 *Australian Bar Review* 306, 311 where he is of the view that it is difficult to see a real danger of this, also noting that this was the view also of the Commonwealth Treasury in their submissions on the draft provisions.

A rebuttable presumption is invoked by section 27. Once it is alleged that a contract is a 'standard form' contract, it is presumed to be so unless the other party, typically the supplier (the HEI), is able to prove otherwise.<sup>42</sup> The rationale for the use of the rebuttable presumption is based on the fact that it is likely that the respondent (supplier) is best placed to bring evidence in relation to the nature of the contract used.<sup>43</sup> Even though there is no definition of what is a standard form contract, section 27(2) provides a list of matters a court *must* take into account when considering whether the contract is standard form (and other matters it thinks relevant):

(2) In determining whether a contract is a standard form contract, a court may take into account such matters as it thinks relevant, but must take into account the following:

- (a) whether one of the parties has all or most of the bargaining power relating to the transaction;
- (b) whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
- (c) whether another party was, in effect, required either to accept or reject the terms of the contract (other than the terms referred to in section 26(1)) in the form in which they were presented;
- (d) whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in section 26(1);
- (e) whether the terms of the contract (other than the terms referred to in section 26(1)) take into account the specific characteristics of another party or the particular transaction;
- (f) any other matter prescribed by the regulations.

The legislation in the UK applies to contractual terms 'not individually negotiated'. The Victorian legislation applied to terms in consumer contracts in general (although the use of a standard form contract was a consideration in the assessment of

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<sup>41</sup> Australian Attorney-General, above n 13, 8; Svantesson and Holly, above n 9, where they add that it contains 'a generic set of terms': at 5. But this is absent from the list although present in the Victorian legislation; Harder, above n 40, 31, n 21.

<sup>42</sup> ACL s 27(1).

<sup>43</sup> Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) ('EM1') 29 [2.88]. Note the submission received by the Senate from Mr Tonking SC highlighting the potential problem that while particular terms may be beyond dispute as unfair, whether or not the contract is a 'standard form' contract may remain in dispute: Economics Legislation Committee, above n 21, 19.



unfairness).<sup>44</sup> As Harder has observed, the application of the provisions to the whole contract rather than the impugned terms creates some difficulties in interpretation and application.<sup>45</sup> The focus of the list in section 27 is on the level of negotiation regarding the terms and regard is to be had to all of the terms or the whole contract.<sup>46</sup> One problem arises as to whether a contract can still be said to be a standard form contract if some of the terms are in fact individually negotiated.<sup>47</sup> It is suggested that there would have been greater certainty if the UK approach had been adopted and there was reference only to contractual *terms* not individually negotiated.<sup>48</sup> The practical effect of the difference may be seen when examining the UK scholarship on the application of the UK unfair contract terms legislation to the student–HEI contract. UK commentators have been able to consider simply the nature of the contractual terms without having reference to whether they form part of a standard form contract.<sup>49</sup> The need to establish a ‘standard form’ contract may prove to be an additional complexity for Australian students bringing their claims.<sup>50</sup>

In Chapter 4 it was proposed that the only contract capable of being a ‘standard form’ contract arises during the enrolment process and the terms of that ‘standard form’ contract are contained in the documentation created on enrolment. It is possible that the terms of the admission contract, particularly those contained in the prospectus, may also form part of the standard form contract.<sup>51</sup> In the absence of a clear definition of the meaning of ‘standard form contract’, regard is had to the matters the court is directed to take into account when determining whether a contract is a

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<sup>44</sup> *Unfair Terms in Consumer Contracts Regulations 1999* (UK) rr 4 and 5; *Fair Trading Act 1999* (Vic) pt 2B; Gray, above n 10, 169–70; Zumbo, above n 9; Paterson, ‘The Elements of a Prohibition on Unfair Terms’, above n 8, 185–7; O’Shea, above n 9, 229.

<sup>45</sup> Harder, above n 40, 311–13.

<sup>46</sup> *Ibid* 311–12.

<sup>47</sup> *Ibid* 312.

<sup>48</sup> *Ibid* 313. Harder’s suggested approach to overcome this difficulty is to ‘classify the contract as a “standard form contract” whenever a significant part of the terms [are] imposed and not individually negotiated’: at 213. See also Gray, above n 10, 166–9 who is of a similar view.

<sup>49</sup> Simon Whittaker, ‘Judicial Review in Public Law and in Contract Law: The Example of “Student Rules”’ (2001) 21(2) *Oxford Journal of Legal Studies* 193, 193–217, 207–14; Dennis Farrington and David Palfreyman, *The Law of Higher Education* (Oxford University Press, 2<sup>nd</sup> ed, 2012) 339 [12.100]–[12.104]. In regards the application of UTCCR regulations to the contract ‘they control the use of std terms’: at 412 [12.100]; Kaye, Bickel and Birtwistle, above n 5, 118–19; Tim Birtwistle and Melissa Askew, ‘The Teaching and Higher Education Act 1998 – Impact on the Student Contract’ (1999) 11(2) *Education and the Law* 89, 96; Martin Davis ‘Students, Academic Institutions and Contracts — A Ticking Time Bomb?’ (2001) 13(1) *Education and the Law* 9, 20–2.

<sup>50</sup> Economics Legislation Committee, above n 21. Submission received from Mr Tonking SC above n 43. Although this is practically less problematic in terms of formulating complex pleadings and arguments if the application for the declaration is sought by the regulator as permitted under the Act, discussed in detail below.

<sup>51</sup> Australian Attorney-General, above n 13, 7 explicitly points out that contracts can be made orally or in writing and includes contracts made over the phone or a ‘click-wrap agreement’. This seems in contrast to the matters to be considered in the determination of whether the term is transparent point to the examination of written terms ACL s 24(3) i.e. legibility, presented clearly.

'standard form contract' in sections 27(2). The HEI has all or most of the bargaining power,<sup>52</sup> at least for the second contract of enrolment, hence the hesitation in definitively including the terms of the prospectus as part of the 'standard form contract'. It is arguable that in relation to the contract of admission (whether to accept the place or not) the power between the parties is at least equal in this context. This may become particularly acute given that the Commonwealth funding now travels with the individual student. The enrolment documentation is prepared by one party, the HEI, prior to any discussion<sup>53</sup> with the enrolling student, which that student has to accept on a 'take it or leave it' basis.<sup>54</sup> There is no real opportunity for an enrolling student to negotiate individual terms of the contract<sup>55</sup> that take into account their specific characteristics.<sup>56</sup> Any impression of negotiation is illusory.<sup>57</sup>

The ACL consultation paper released by the Federal Government specifically states that a contract for 'publically and privately provided vocational training and professional development services' is a type of contract covered by the UCT regulation.<sup>58</sup> It is suggested that the qualification of the type of educational services affected reflects the uncertainty surrounding whether the provision of educational services by a HEI is in 'trade or commerce'. As maintained in Chapters 3 and 4, the provision of educational services by HEI is in 'trade or commerce'. It seems that it has been accepted in the UK that the student-HEI contract does have the

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<sup>52</sup> ACL s 27(2)(a). As discussed in Chapter 4, there are many factors supporting this, including, as observed by Griggs, significant regulation in the sector and the prescription of contractual documents and terms by the stronger party, resulting in the court using these factors to assist the weaker party, the student: Griggs, 'Knowing the Destination', above n 4, 320, n 30. See also Birtwistle, and Askew, above n 49, 94.

<sup>53</sup> Ibid s 27(2)(b).

<sup>54</sup> Ibid s 27(2)(c).

<sup>55</sup> Ibid s 27(2)(d).

<sup>56</sup> Ibid s 27(2)(e). Even equity students are governed by 'standard form' policy in that regard. Any negotiation is limited to other potential terms of the contract noted in Chapter 4, including the course materials, marketing statements and any advice provided by employees of the HEI: Francine Rochford, 'The Relationship Between The Student and The University' (1998) 3(1) *Australian & New Zealand Journal of Law & Education* 28, 35.

<sup>57</sup> Bruce Lindsay, 'Student Subjectivity and the Law' (2005) 10(2) *Deakin Law Review* 628, 364; Rochford, 'The Relationship Between The Student and The University', above n 56. In considering the source for the content of the agreement, Rochford notes that not only is there very little individual student input into the process of negotiating the contract of enrolment, the statutes and rules of the HEI, which form part of the terms of the contract, are not capable of renegotiation by an individual as they are enabling acts and exist in the form of by-laws (no negotiation is the point of the standard form contract). This seems to contradict her proposition later in the article (below at n 62) that the student-university relationship is not that of a standard form contract but rather more like an employment contract under an award structure, so that there is in fact a form of negotiation. It is submitted that the hybrid model proposed by Rochford creates difficulty. The better view is to see the rights as coexisting. On this see Simon Whittaker, 'Public and Private Law-making: Subordinate Legislation, Contracts and the Status of "Student Rules"' (2001) 21(1) *Oxford Journal of Legal Studies* 103; Whittaker, 'Judicial Review', above n 49, 193-217.

<sup>58</sup> Minister for Competition Policy and Consumer Affairs, Australian Government, *An Australian Consumer Law Fair Markets — Confident Consumer* (2009) 33.

appearance of the standard form contract.<sup>59</sup> As early as 1970, despite the division in views regarding the appropriateness of classifying the student–university relationship as a contractual one, it was accepted that if it were to be so, it was ‘much closer to a *contrat d’ adhesion* than to the classic type of contract on a consensual basis’.<sup>60</sup> Similarly in Australia, when the matters listed in section 27 (2) of the ACL are examined, the contract for the supply of educational services (at least the contract of enrolment) bears the traits of a standard form contract.

An interesting proposition is made by Rochford as to why the student–HEI agreement is not comparable to a standard form consumer contract.<sup>61</sup> Rochford is of the view that there is substantially more negotiation in the student–HEI agreement than acknowledged. This negotiation process determines the rules governing entry into the institution (and therefore the contract of admission):

Although the negotiation is not in the hands of the individual student working on his or her own entry into the institution, it is in the hands of the student union members, of governing bodies, committees and boards making representations on behalf of the entire existing and prospective student body. The resulting ‘contract’, if that is what it is called, looks more like an employment contract under an award structure rather than a one-off consumer transaction governed by a standard form. This is not to say that the mechanism is a particularly effective one from the point of view of protecting individual rights of members, but it is an interesting comparison with the process of creation of a standard form contract in a straight forward commercial context.<sup>62</sup>

She opines further:

In addition, student representation occurs at most levels of decision-making in the modern university, and the likelihood of senior administrators ‘having it all their own way’ in debate is not great.<sup>63</sup>

Therefore, her view of the student–HEI contract as being an award-based contractual arrangement seems to be predicated on the view that student input into this process and indeed that of the academy is equal to that of administrators and managers within the HEI, thereby taking into account the legitimate interests of the student and

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<sup>59</sup> Farrington and Palfreyman, above n 49, 338 [12.10]; J W Bridge, ‘Keeping the Peace in the Universities: The Role of the Visitor’ (1970) 86 *The Law Quarterly Review* 531; Kaye, Bickel and Birtwistle, above n 5, 118–19; Birtwistle and Askew, above n 49, 96.

<sup>60</sup> Bridge, above n 59, 548.

<sup>61</sup> As discussed, Rochford is reluctant to reduce the student–HEI relationship to simply a contractual one. Her preferred view is of the students as incorporators of the institution or at least a hybrid approach: Rochford, ‘The Relationship Between The Student and The University’, above n 56, 43.

<sup>62</sup> *Ibid* 40.

<sup>63</sup> *Ibid* 45.

society. It is submitted that while perhaps this collegial approach to university matters, including formulation of rules and regulations, was once de rigueur, it is, with respect, now dated and somewhat idealistic. As will be seen below, the marketisation of the higher education sector has transformed the way HEIs operate in all aspects of their 'business'. The analysis or promotion of the student–HEI contract as being one that is negotiated in the same way a union might negotiate an award on behalf of its members is not a plausible analogy in the current higher education sector.

### **'Consumer contract' — the student as consumer**

#### *Consumerism and the higher education market*

An analysis wider than the legal definition of the consumer in the ACL is important to place this research in context. Certainly the idea of the student as consumer is promulgated in the popular press both in Australia and internationally.<sup>64</sup> The precise legal definition of consumer under the ACL is discussed below. A broader definition of student consumerism is set out by Kaye et al and adopted here:

Consumerism ... is used to denote the belief that individuals obtain gratification and social standing primarily through their purchase of commodities and consumption of tangible products. So far as higher education is concerned, consumerism implies that students will want to see obvious, tangible benefits from their studies, whether in terms of an inherently-valuable qualification or as a route to a particular form of employment. Students of a consumerist bent are unlikely to be interested in studying or working at anything which has no clear connection with their grades or future employment prospects, but are increasingly ready to challenge as inaccurate any grades that are not as high as they feel they require for their chosen career path ... there can be no doubt that the very notion of bringing claims to court for alleged educational negligence or breach of contract appears more legitimate than it did in the past, and seems based on the image of education as a service to be consumed, or as a commodity to be bought and sold, rather than as an activity in which to participate.<sup>65</sup>

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<sup>64</sup> Heather Ewart, Australian Broadcasting Commission Television, 'International Student Market Corrupt, Industry Says', *The 7.30 Report*, 20 March 2007 <<http://www.abc.net.au/7.30/content/2007/s187721.htm>>; Heather Ewart, Australian Broadcasting Commission Television, 'International Students a Lucrative Market In Australian Tertiary Institutions', *The 7.30 Report*, 3 April 2007 <<http://www.abc.net.au/7.30/content/2007/s1888001.htm>>; Dorothy Illing, 'Deliver Service or We'll Sue', *The Australian* (Canberra) 21 July 2004, 33; Debra Jopson, 'Unis Face Legal Challenge From Students' *Sydney Morning Herald* (Sydney), 6 June 2005; Eric Jensen, 'Overseas Pupils Losers In Scramble For Fees', *The West Australian* (Perth), 18 July 2007, 18. For an analysis of the portrayal of students as consumers in the UK press see Joanna Williams, 'Constructing Consumption: What Media Representations Reveal About Today's Students' in Molesworth, Scullion and Nixon, above n 3, 170. See also Hon Senator Chris Evans, Minister for Tertiary Education (Cth), 'Better Consumer Protection for International Students' (Media Release, 23 September 2011) <<http://www.aei.gov.au/Pages/default.aspx?2>> to provide a system for refunds for international students in the event of a higher education providers closing.

<sup>65</sup> Kaye, Bickel and Birtwistle, above n 5, 86–7. It is interesting to note that in the authors' view, education has always been a commodity in a sense that it has always been available for purchase and

What is being 'produced' and 'traded' has been discussed earlier.<sup>66</sup> The idea of the marketisation of higher education and placement of the student at the centre of that market as a consumer<sup>67</sup> is not without strongly expressed concerns from the academe. The concerns are wide ranging, from the impact on the status of staff and students as members of a community of scholars,<sup>68</sup> to the pedagogical effects in relation to students' learning and participation in teacher–student relations. There are difficulties accepting the student as a passive consumer.<sup>69</sup> Commentators are apprehensive about the move from the traditional role of higher education within society as a producer of knowledge and primarily facilitating an informed and knowledgeable citizenry, to something else that resembles commerce.<sup>70</sup> There is

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that it is the impact of the notion of education as a right that has been influential in changing perceptions: at 93–9.

<sup>66</sup> That is a service rather than a positional good. See the earlier discussion in Chapter 4.

<sup>67</sup> Not all commentators agree on the classification of the student as customer, client or consumer. Ronald Barnett, 'The Marketised University: Defending the Indefensible' in Molesworth, Scullion and Nixon, above n 3, 39 considers that it is more appropriate to view the student as a customer rather than a consumer; Cf Griggs, Freilich and Webb, above n 5, where they are of the view that the notion of customer is very transactional in a sense that it is short lived and tends to deny the notion of a long term relationship. See also Felix Maringe, 'The Student as Consumer: Affordances and Constraints in Transforming Higher Education Environment' in Molesworth, Scullion and Nixon, above n 3, 142, 146–7; Andrys Onsman, 'Tempting Universities' Marketing Rhetoric: A Strategic Protection Against Litigation or an Admission of Failure?' (2008) 30(1) *Journal of Higher Education Policy and Management* 77; Michael Potts, 'The Consumerist Subversion of Education' (2005) 18(3) *Academic Questions* 54.

<sup>68</sup> One particular concern is the shift of the student from that of the student as a corporator, member or citizen of the university to the individual consumer with rights based in a contractual relationship. Johan Nordensvärd, 'The Consumer Metaphor Versus the Citizen Metaphor: Different Sets of Roles for Students' in Molesworth, Scullion and Nixon, above n 3, 158. See also the extensive commentary by Francine Rochford on this issue in the Australian context. Note in her more recent article, Francine Rochford, 'The Contested Product of a University Education', above n 5, 43–4, Rochford seems to be now resigned to the emergence of the individual contractual relationship as opposed to the idea of the student as corporator, which she has championed in other works.

<sup>69</sup> Farrington and Palfreyman, above n 49, 341–3, n 6 in relation to the nature of the participatory product of obtaining a degree and the possibility that students for the most part (unfortunately) are complicit passive consumers as the (alleged) disengagement in the learning is in fact something they are happy with. See also Margaret Thornton, 'The Law School, the Market and the New Knowledge Economy' (2007) 17(1–2) *Legal Education Review* 1, where she states that students are interested in the obtaining of credentials only, not the actual learning process: at 25; Frank Ferudi, 'Introduction to the Marketisation of Higher Education and the Student as Consumer' in Molesworth, Scullion and Nixon, above n 3, 1. He states 'often it is [academic disquiet] the cultural, intellectual and pedagogic consequences or marketisation that represent a cause for concern. From a cultural perspective the project of marketisation represents the attempt to co-modify academic education. Specifically it is oriented towards the transformation of what is an abstract, intangible, non-material and relational experience into a visible, quantifiable and instrumentally driven process. The various rituals of commodification, such as quality control, auditing and ranking performance, quantifying the experience of students and constructing league tables, are essentially performance accomplishments': at 2.

<sup>70</sup> Alderman and Palfreyman, above n 5; Baldwin, above n 5; Tim Birtwistle, 'What is a "University"?' (The English Patient) (2003) 15(4) *Education and the Law* 227; Vivienne Brand, 'Decline in the Reform of Law Teaching? The Impact of Policy Reforms in Tertiary Education (1999) 10(2) *Legal Education Review* 109; David Dill, 'Allowing the Market to Rule: The Case of the United States' (2003) *Higher Education Quarterly* 1; Lynda Crowley-Cyr, 'Reflexive Professionals or Disempowered Technicians? A Case Study of the Risks of "McLearning" in a Regional Law School' (2008) 1 *Journal of the Australasian Law Teachers Association* 299; Michael S Harris, 'Out Out, Damned Spot: General Education in a Market-Driving Institution' (2006) 55(3–4) *The Journal of General Education* 186; Glyn Jones, 'Managing Student Expectations: The Impact of Top-Up Intuition Fees' (2010) 14(2) *Perspectives: Policy and Practice in Higher Education* 44; Mike Molesworth, Elizabeth Nixon and Richard Scullion, 'Having, Being

disquiet that such consumerism may lead to academics adopting 'defensive educative strategies'.<sup>71</sup> A number of commentators have also noted the effect of the position of the student as consumer on changed HEI marketing strategies and mission statements.<sup>72</sup> Some commentators have been able to find a balanced middle ground acknowledging the benefits as well as the negatives of the student as consumer and the marketisation of higher education.<sup>73</sup> However, generally commentary on this issue is polarised.

A consumer only exists in a marketplace. Defining what constitutes the higher education market is not without its difficulties; however, determination of the market informs what might be the legitimate interests of the HEI supplier in the test for unfairness. Economic and market analysis has been applied in some detail to the higher education sector.<sup>74</sup> Applying economic theory, Brown identifies four fundamental characteristics:

... the key ones in determining how far one can truly speak of a higher education market are market entry (determining the number of competing suppliers); consumer choice (how far purchasers have a choice of supplier); pricing (not only how free providers are to set a price for their product that at least covers the cost, but also how far students and other purchasers have to contribute to the cost from their own resources); and information (for both purchases and suppliers).<sup>75</sup>

The key characteristics are different in diverse systems across the world, although it seems clear that no one system operates as a pure market on these indicators, even in the US.<sup>76</sup> What is accepted by commentators is that the limitations in the higher

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and Higher Education: The Marketisation of the University and the Transformation of the Student into Consumer' (2009) 14(3) *Teaching in Higher Education* 277; Onsmann, above n 67; Potts, above n 67; Kaye, Bickel and Birtwistle, above n 5; Rochford, 'The Contested Product of a University Education', above n 5; Farrington and Palfreyman, above n 49; Dennis Hayes and Robin Wynyard (eds), *The McDonaldization of Higher Education* (Bergin and Garvey, 2002); Barnett, above n 67, 39.

<sup>71</sup> Ferudi, above n 69, 3; Birtwistle, above n 70.

<sup>72</sup> Onsmann, above n 67; Colin Symes and Susan Hopkins, 'Universities Inc.: *Caveat Emptor*' (1994) 2 *Australian Universities' Review* 47; Helen Sauntson and Liz Morrish, 'Vision Values and International Excellence: The "Products" that University Mission Statements Sell to Students' in Molesworth, Scullion and Nixon, above n 3, 73.

<sup>73</sup> Barnett, above n 67, 39; Roger Brown, 'The Impact of Markets' in Brown (ed), *Higher Education and the Market*, above n 3, 20; Maringe, above n 67, 142.

<sup>74</sup> See, eg, Brown (ed), *Higher Education and the Market*, above n 3; Molesworth, Scullion and Nixon, above n 3; Kathryn McMahon, 'Universities and Market Discourse' (2001) 27(1) *Monash University Law Review* 105; Hayes and Wynyard (eds), above n 69.

<sup>75</sup> Roger Brown, 'Markets and Non-Markets' in Brown (ed), *Higher Education and the Market*, above n 3, 9.

<sup>76</sup> See, eg, Christopher C Mophew and Barrett J Taylor, 'Markets in the US Higher Education System: Imperfect Competition for Undergraduates' in Brown (ed), *Higher Education and the Market*, above n 3, 53; Gavin Moodie, 'The Developing Student Market in Australian Higher Education' in Brown (ed), *Higher Education and the Market*, above n 3, 63; William Locke, 'False Economy? Multiple Markets, Reputational Hierarchy and Incremental Policy Making in UK Higher Education' in Brown (ed), *Higher Education and the Market*, above n 3, 74; Lydia Hartwig, 'Diversification and Competition in the German

education market means that it in truth operates as a 'quasi-market'.<sup>77</sup> In an Australian context, Moodie observes that the domestic student market is 'severely limited' by gaps and flaws in information, a lack of substitutability of product due to geographical and discipline limitations, further compromised by inadequate price signals.<sup>78</sup> The imperfections and limitations of the quasi-market add weight to the proposition that if students are consumers of educational services, they should be afforded adequate protection under legislative regimes such as ACL. In the context of protecting students' rights under consumer protection law, are there any reasons why we would encourage the student to be seen as a consumer? <sup>79</sup> There is strong evidence to suggest that students see themselves as consumers of educational services,<sup>80</sup> although to date seemingly reticent to seek protection under the various consumer protection regimes.<sup>81</sup> As will be seen below, the definition of consumer in the ACL is piecemeal, varied and inconsistent. As Griggs and colleagues note, the question regarding who exactly ought to be protected as a consumer under the ACL has not been clearly answered by the parliament or the courts.<sup>82</sup>

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Higher Education System' in Brown (ed), *Higher Education and the Market*, above n 3, 110; Futao Huang, 'The Marketisation of Higher Education: A Perspective from Japan' in Brown (ed), *Higher Education and the Market*, above n 3, 146.

<sup>77</sup> See generally Benedict Sheehy, 'Regulation by Markets and the Bradley Review of Australian Higher Education' (2010) 52(1) *Australian Universities' Review* 60; Stephen Coronos, 'Consumer Guarantees and the Supply of Educational Services by Higher Education Providers' (2012) 35(1) *University of New South Wales Law Journal* 1, 7 where he states that there is sufficient evidence to say conclusively that universities 'compete for students on the basis of price (tuition fees and other costs of attendance) and service (courses offered, teaching quality, the standard of facilities and research opportunities)'.

<sup>78</sup> Moodie, above n 76, 72 identifies that the price in the Australian context is that of the tertiary entrance rank.

<sup>79</sup> See generally Griggs, 'The [Ir]rational Consumer', above n 14.

<sup>80</sup> Jim Jackson et al, 'Student Grievances and Discipline Matters Project' (Final Report, Australian Learning and Teaching Council, May 2009). See also Ruth Gaffney-Rhys and Joanna Jones, 'Issues Surrounding the Introduction of Formal Student Contracts' (2010) 35(6) *Assessment & Evaluation in Higher Education* 711. In that study regarding the impact of formal student contracts on student satisfaction, 73% of respondents 'agreed that a university student is a customer of knowledge/skills'. There was a stronger correlation to this statement for those students who were full fee paying. The authors suggest that there may be a 'link between consumerist tendencies and propinquity of fee paying': at 717.

<sup>81</sup> See generally Chapter 2; Hilary Astor, 'Why do Students Sue Australian Universities?' (2010) 21 *Australasian Dispute Resolution Journal* 20; Patty Kamvounias and Sally Varnham, 'Legal Challenges to University Decisions Affecting Students in Australian Courts and Tribunals' (2010) 34 *Melbourne University Law Review* 141.

<sup>82</sup> Griggs, Freilich and Webb, above n 5, 53. The authors note Howells' and colleagues view: 'To the extent that consumers need special rules, this raises the complex and sensitive issue of how the 'consumer' should be defined. Individuals purchasing for private purposes are normally unproblematically treated as consumers ... The answer should probably depend on why one is protecting the consumer — lack of knowledge, lack of bargaining power — but legislators often agonise over these distinctions, which are not infrequently the subject of litigation in the courts' quoting G Howells, I Ramsay and T Wilhelmsson, 'Consumer law in its international dimension' in G Howells, I Ramsay and T Wilhelmsson with D Craft (eds), *Handbook of Research on International Consumer Law*, (Edward Elgar, Cheltenham UK, 2010) 3: at n 4.

*Is the contract for educational services a 'consumer contract' under the ACL?*

In order to avail themselves of the protections available under the UCT provisions in ACL, the contract for educational services must be a consumer contract as defined in section 23(3):

- (3) A **consumer contract** is a contract for:
- (a) a supply of goods or services; or
  - (b) a sale or grant of an interest in land;
- to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

Thus the supply of the educational service must be to an individual (the student) whose acquisition of those services is wholly or predominately for personal, domestic or household use or consumption.<sup>83</sup> The meaning of 'acquisition' is defined in section 2 and in relation to services means 'accept'.<sup>84</sup> This is expanded in section 11 of the ACL so as not to limit 'acquisition' to 'purchase'.<sup>85</sup> As this can include a reference to an agreement to supply services, this is of assistance to Commonwealth-funded students in the event of any debate as to whether they 'acquire' services.

There are a number of definitions of 'consumer' that apply to different parts of the ACL respectively. Legal commentators in Australia and New Zealand agree that students are consumers under the former TPA<sup>86</sup> and state fair trading Acts.<sup>87</sup> Apart from the definition of 'consumer contract' for the purpose of the UCT contained in

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<sup>83</sup> ACL s 2 (definition of 'acquire'). Harder, above n 40. Harder is of the view that the consumer contract definition will also be applied to consumer-to-consumer contracts because the acquisition or supply does not need to take place in the course of a business: at 308. With respect, this may be the situation with the acquisition of goods, but cannot be the case in relation to the supply of services, as is relevant to this thesis, as the definition of services includes the requirement that they be provided, granted or conferred in trade or commerce, as discussed in Chapters 3 and 4. This then leads to a curious anomaly where the UCT provisions will apply to consumer-to-consumer contracts for the acquisition of goods, but not in the case of services.

<sup>84</sup> It should be noted that while there is an expanded definition of the meaning 'acquiring goods as a consumer' in ACL s 3, this is not relevant to the UCT provisions. This definition is important for a number of Parts of the ACL, including s 18 (misleading or deceptive conduct) and consumer guarantees pt 3-2 div1.

<sup>85</sup> ACL s 11; Miller, above n 8, 1537 [1.S2.2.10].

<sup>86</sup> Previously the definition of consumer was contained in s 4B of the TPA (now CCA). This definition has not been repealed and remains relevant for any use of consumer outside of schedule 2 of the CCA, the ACL, or in Pt XI of the CCA. See CCH, *Competition and Consumer Law Commentary 2-000* (6 December 2011) <[http://intelliconnect.wkasiapacific.com.dbgw.lis.curtin.edu.au/scion/secure/index.jsp?node1=business\\_1aw&crc1=3EDEC6058158498D&1323144201876=&da=WKAP\\_TAL\\_104279029&link\\_type=7&cfu=defaul#page\[32\]](http://intelliconnect.wkasiapacific.com.dbgw.lis.curtin.edu.au/scion/secure/index.jsp?node1=business_1aw&crc1=3EDEC6058158498D&1323144201876=&da=WKAP_TAL_104279029&link_type=7&cfu=defaul#page[32])>.

<sup>87</sup> Kamvounias and Varnham, 'Getting What They Paid For', above n 4, 323. For a consideration of the consumer definition in New Zealand see Sally Varnham, 'Guarantees for Degrees?' (2001) *New Zealand Law Journal* 418; Sally Varnham, 'Straight Talking, Straight Teaching: Are New Zealand Tertiary Institutes Potentially Liable to Their Students Under Consumer Protection Legislation?' (2001) 13(4) *Education and the law* 303, 313; Griggs, 'Knowing the Destination', above n 4.



section 23(3), there are separate definitions in the ACL relating to consumer guarantees,<sup>88</sup> unsolicited goods,<sup>89</sup> lay-bys,<sup>90</sup> and unconscionable conduct.<sup>91</sup> This approach has attracted criticism,<sup>92</sup> especially the resultant lack of clarity due to the piecemeal approach to separate definitions within the ACL.<sup>93</sup> The idea of a single consumer for the purpose of the ACL has yet to be realised by the legislature.<sup>94</sup> For the purpose of this research, only the definition relevant to UCT will be considered. Thus, the more widely known definition of 'consumer' replete with two threshold steps going to the amount payable and failing that, whether the goods or services were of 'kind ordinarily' used in a personal way, will not be considered in this research.<sup>95</sup>

The other definitions of 'consumer' within the ACL are based on objective tests determined on the facts.<sup>96</sup> However, the definition of a 'consumer contract' pursuant to section 23(3) is subjective.<sup>97</sup> This is clearly set out in the Explanatory Memorandum:

This definition does not limit the operation of the unfair contract terms provision to things of a personal, domestic or household nature, and would include the supply for any good,

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<sup>88</sup> ACL ss 51–68. A student will need to be a consumer within the meaning of ACL s 3. In this context that will mean 'acquiring services as a consumer': see above n 83. The definition of 'consumer' for consumer guarantees in the ACL is similar to the original definition under s 4B of the TPA and the existing jurisprudence relating to s 4B remains relevant: Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010 (Cth) ('EM2') 24 [2.20].

<sup>89</sup> ACL s 3.

<sup>90</sup> Which relates to consumer goods ACL s 2 (definition of 'consumer goods').

<sup>91</sup> ACL ss 21(5)–(6) has its own definition of 'consumer' for this part. The definition of consumer in ACL s 3 is also relevant to unsolicited consumer agreements, the provision of itemised bills, continuing credit contracts and linked credit contracts: Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010 (Cth) ('EM2') 22 [2.11]. ACL s 22 (formerly s 51 AC of the TPA) deals with unconscionable conduct in relation to business consumers and ACL s 20 deals with the codification of the unwritten law.

<sup>92</sup> Aviva Freilich, 'A Radical Solution to Problems with the Statutory Definition of Consumer: All Transactions are Consumer Transactions' (2006) 33 *University of Western Australia Law Review* 108; Griggs, Freilich and Webb, above n 5; Carter, above n 10.

<sup>93</sup> A change to the definition of consumer was considered by the Treasury and the Senate Economics Legislation Committee but this was ultimately rejected and the old definition of consumer was retained. For a detailed analysis and summary of the different options of definition of consumer see Griggs, Freilich and Webb, above n 5, 65–70; Carter, above n 10, 225–8. Carter is of the view that the definition contained in s 23(3) in relation to UCT is the more logical approach and should be adopted for the entirety of the ACL. See also Economics Legislation Committee, above n 21, 31–2.

<sup>94</sup> Griggs, Freilich and Webb, above n 5, 70. The authors note that the idea of a unified concept of consumer is also preferred by Freehills (a major national law firm) and in particular Professor Baxt, a specialist in the area.

<sup>95</sup> Section 4B TPA now ACL s 3.

<sup>96</sup> For a consideration of previous or other legislative definitions of 'consumer' see Griggs, Freilich and Webb, above n 5; Bruce Lindsay, 'Complexity and Ambiguity in University Law: Negotiating the Legal Terrain of Student Challenges to University Decisions' (2007) 12(2) *Australian & New Zealand Journal of Law & Education* 7, 12; Kamvounias and Varnham, 'Getting What They Paid For', above n 4, 322–3. For a consideration of the consumer definition in New Zealand see Varnham, 'Guarantees for Degrees?' above n 87; Varnham, 'Straight Talking, Straight Teaching', above n 87, 313.

<sup>97</sup> The unfair contract terms were based on the experience in the Victorian jurisdiction and the *Fair Trading Act 1999* (Vic). The definition in the Victorian Act was slightly different and required an objective finding a fact also. See *Director of Consumer Affairs Victoria v AAPT Ltd* [2006] VCAT 1493 cited in Miller, above n 8, 1699 [1.s2.23.30].

service or interest in land to a consumer provided the *acquisition of what is supplied* under the contract is wholly or predominately for personal, domestic or household use or consumption.<sup>98</sup>

Therefore, the definition of a consumer contract for the purposes of the UCT provisions refers to the use that the goods or services *are put to*, not, as in the other definitions of consumer 'of a kind ordinarily used or put to'.<sup>99</sup> This means that the test of whether the services are within the definition of consumer contract for the purpose of the UCT sections is in fact far more subjective than the other consumer definitions elsewhere in the legislation, focusing on the actual intention of the acquirer of the services.<sup>100</sup> An educational service for the attainment of an undergraduate or higher degree is clearly predominately a service that is put to personal use by the student.<sup>101</sup> While there is an absence of case law directly on point, it is difficult to imagine any scenario where educational services would not be viewed as for personal use, even if an employer had contributed to the payment of the fees.<sup>102</sup> It would seem clear that a contract for the provision of educational services would indeed be a consumer contract under the legislative definition.

## Exemptions

Before considering the test required to ascertain whether a term is unfair and potential examples in contracts for educational services, it is important to have regard to any exemptions afforded as part of the UCT regime.<sup>103</sup> Section 26 excludes from the operation of section 23 terms that define the 'main subject matter of the contract' or 'sets the upfront price payable'.<sup>104</sup> The definition of 'upfront price' includes future payments and it seems clear that this provision is aimed at ensuring that consumers cannot challenge the adequacy of the consideration provided in accordance with accepted common law principles.<sup>105</sup> This is unlikely to be an issue in the context of

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<sup>98</sup> Miller, above n 8, 1699 [1.s2.23.30] (emphasis added).

<sup>99</sup> ACL s 3.

<sup>100</sup> Harder, above n 40, 310; Paterson, 'The Australian Unfair Contract Terms Law', above n 13, 940. See also Freilich, above n 92; Carter, above n 10.

<sup>101</sup> Corones is of this view even under the object test of consumer in ACL s3: Corones, above n 77, 5.

<sup>102</sup> There is general consensus on this issue. See Kamvounias and Varnham, 'Getting What They Paid For', above n 4, 322; Corones, above n 77, 5. See the commentary by Freilich in relation to the current difficulty in relation to judicial guidance on this issue in the context of the objective test in other sections, as to what is meant by personal, domestic or household use and irreconcilable cases: Freilich, above n 92, 115–16.

<sup>103</sup> ACL s 28 exempts particular types of contracts such as marine contracts. ACL s 23 also does not apply to contracts for financial services as this is provided for in the *Australian Securities and Investment Commission Act 2001* (Cth): CCA s 131A. See Miller, above n 8, 1705 [1.S2.28.10]. This will not be considered further as it is not relevant to this research.

<sup>104</sup> ACL s 26(1)(2).

<sup>105</sup> See 'EM1' 26 [2.70]; Harder, above n 40, 313–16; Australian Attorney-General, above n 13, 10.

the student–HEI contract, although the definition does require that there is disclosure at or before the time the contract is entered into. It is possible that there may be dispute over the veracity of the disclosure provided in relation to price, particularly when the complexity of the Commonwealth funding documents is taken into consideration. Commonwealth-funded students must complete this documentation at or before the time of enrolment.<sup>106</sup> It is arguable that inadequate disclosure may render the term subject to the UCT provisions.<sup>107</sup> It is clear however that students will be unable to use the UCT provisions to mount a challenge on the basis that they didn't receive 'value for money'.<sup>108</sup>

A potentially significant issue for the student consumer is that the 'main subject' of the contract is the entirety of the contract for educational services, that is the delivery of a specified course of study, and therefore outside the ambit of the UCT provisions. Thus any terms relating to the provision of that course of study may be specifically excluded from the operation of the UCT regime. Some commentators have indicated that with respect to the legislative provisions in the UK, the 'main subject matter' relates to the overall focus of the course or composition of courses offered within the degree programme.<sup>109</sup> This would not assist students with claims such as the one made in the *Victoria University* case discussed in Chapter 4 regarding the overall quality of the Masters course offered.<sup>110</sup> Other UK scholars are of the view that the potential impact of the UCT regulation is not so limited and its application is potentially very wide.<sup>111</sup> The Explanatory Memorandum sets out the rationale for the carve out of the main subject matter from the operation of the UCT provisions:

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<sup>106</sup> As per the enrolment process described in Chapter 4.

<sup>107</sup> Paterson, 'The Elements of a Prohibition on Unfair Terms', above n 8, 198, upfront price may be unfair if there is not transparent disclosure; Australian Attorney-General, above n 13, 10.

<sup>108</sup> Whittaker, 'Judicial Review', above n 49, 209; Farrington and Palfreyman, above n 49, 413 [12.102] where the authors state there can be no review of the basis of price-quality ration as per Reg 3(2) of the UCTCCR.

<sup>109</sup> Farrington and Palfreyman, above n 49, 413 [12.102]. 'Nor that overall the focus of the course should have been differently placed or that different courses should also have been offered for students chosen' as per Reg 3(2) of the UCTCCR. This is not as narrow as their earlier view expressed in *The Law of Higher Education OxCheps Law Update* <<http://oxcheps.new.ox.ac.uk/lawupdate/ilaw.php>>, where '*OFT v Abbey National & others* [2009] UKSC 6 by analogy "the main subject matter" of the student–HEI contract is the provision of a teaching-assessment service, and hence probably the UTCCR test for fairness (Reg 5) does not apply': at 14.12. The authors did however focus on the main subject matter being 'those aspects the typical consumer (student) will have regard to ... when deciding whether to enter into the contract (accept the offer of a place)': Farrington and Palfreyman, above n 49, 413 [12.102]. See also Whittaker, 'Judicial Review', above n 49, 209.

<sup>110</sup> *Grant v Victoria University of Wellington* [2003] NZAR 186.

<sup>111</sup> English commentators have indicated that the application of UCT legislation has a potentially very wide effect on the on the student–HEI contract notwithstanding the issue of the price and subject matter exemption and are of the view that 'The wide-ranging nature of this definition is sufficiently extensive to capture anything from the failure to provide a specific course or instruction of the type promised to the decision of the university to withhold the conferment of a degree until it has received payment for the library fine': Kaye, Bickel and Birtwistle, above n 5, 119; Davis, above n 49, 20.

Where a party has decided to purchase the goods, service, ... that is the subject of the contract, that party cannot then challenge the fairness of a term relating to the main subject matter of the contract at a later stage, given that the party had a choice of whether or not to make the purchase on the basis of what was offered.<sup>112</sup>

As with other exemptions, it is arguable that the section should be interpreted narrowly to protect the student acquirer.<sup>113</sup> It may be possible for the student to argue that any choice relates to the choice for the contract of admission only, rather than the contract of enrolment. As discussed in Chapter 4, it is likely that there are two contracts in existence. First, there is a contract of admission, which obliges the HEI to enrol the student into the course on the bases of the pre-admission information received by the student. The second contract, the contract to educate, arises on the student completing the enrolment process. It is suggested that the second contract is informed by any pre-admission promises made by the HEI to the student and that the contract to educate is a rolling one, whereby it is understood that the terms of the contract will vary from time to time. Both of these contracts are a contract for the supply of educational services as required by the legislation. However, the only contract capable of being a 'standard form' contract arises during the enrolment process for the reasons discussed above.

Thus the 'main subject matter' of the standard form contract for the supply of educational services is the acceptance of the 'place'. What is chosen as the 'purchase' is an acceptance of the overall focus of the course or composition of courses offered within the programme. So, for example, a student who chooses to undertake studies in physiotherapy at a particular HEI could not challenge a term preventing a change of enrolment to engineering on the grounds it was unfair as the term regarding the acceptance of a place in the physiotherapy course is the 'main subject' of the contract. It is submitted that it cannot realistically be said that a student chooses freely (in the sense of a voluntary bargain) in relation to the service provided beyond this initial choice. There is no genuine negotiation.<sup>114</sup> The rationale of this carve out is to prevent a consumer challenging a term as unfair simply because they changed their mind.<sup>115</sup> This is less clear when having regard to the other terms of the contract of enrolment. The contract of enrolment is informed by the first contract, so it can be said that a term of the contract to educate will relate to acceptance of the

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<sup>112</sup> EM1, 25 [2.65].

<sup>113</sup> See Harder, above n 40, 315–16 in relation to the interpretation of 'upfront price'.

<sup>114</sup> *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd & Matrix Pilates and Yoga Pty Ltd* (Civil Claims) [2008] VCAT 482.

<sup>115</sup> Attorney-General, *The Australian Consumer Law: A Guide to Provisions*, 2010, 9.

course and its overall composition. It is only this term that could be said to be the 'main subject matter' of the standard form contract. At most the exemption should not extend beyond what seems to be the position in the UK, that is, terms relating to the overall focus of the course or composition of courses offered within the degree programme. Consistent with the discussion in Chapters 2 and 3, this can be said to be the true exercise of academic judgement and freedom, so it is perhaps proper that the exclusion applies in this limited way. Terms going beyond this are considered below in relation to the examples provided in section 25.

The final exclusion in section 26(1)(c) is also especially relevant in a higher education context. A term is unaffected by the UCT provisions if it is a 'term required, or expressly permitted by a law of the Commonwealth, a State or a Territory'.<sup>116</sup> Regard is had to the specific wording of the legislation and the reference to 'required' and 'expressly permitted'. It has been suggested that 'a legislative permission is required rather than a mere lack of prohibition.'<sup>117</sup> This is very relevant to the terms of the contract for educational services. As outlined above and in Chapter 4, it is the proposition of this research that the standard form consumer contract for the supply of educational services is the contract arising on enrolment and the terms contained therein. It is generally an express term of the contract of enrolment that any statutes and rules of a HEI are incorporated as terms of the contract. The statute and rules of public universities in particular are at the very least permitted, if not required by law. This matter has been considered at length by English commentator Simon Whittaker in the context of 'student rules' or by-laws.<sup>118</sup> He considers both the express contractual term that the student is bound by the by-laws and the contents of the rules themselves.<sup>119</sup> In his opinion the exclusion<sup>120</sup> is:

... likely to be held to apply only to terms whose content is determined by law and not merely to those made by a body which has been authorized by law to make the term or require that a certain term be used. While a university may enjoy statutory or common law powers to require the use of a particular contract term in its dealings with students, as

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<sup>116</sup> ACL s26(1)(c).

<sup>117</sup> Fiona Wallwork and Georgia White, 'Consumer Law: Bolstering Consumer Protection Nationally Against Unfair Terms in Standard Form Contracts' 63 (5) *Keeping Good Companies* 295 (15 August 2012) <<http://search.informit.com.au/documentSummary;dn=109762129105942;res=IELBUS>>, 297.

<sup>118</sup> Whittaker, 'Public and Private Law-Making', above n 57; Whittaker, 'Judicial Review', above n 49.

<sup>119</sup> Whittaker, 'Judicial Review', above n 49, 209 where he notes that where the rules are made under charter or statutory powers, they do not possess the status of inferior legislation. It may be that the rules only take effect by way of contract.

<sup>120</sup> A very similar exclusion exists in the *Unfair Terms in Consumer Contracts Regulations 1999* (UK) Reg 4(2)(a). Terms are excluded if they 'reflect mandatory statutory or regulatory provisions'. It is suggested that the use of the words 'mandatory' and 'expressly' is of the same effect.

regards the student such a term would not be required by the law itself. The Regulations would require contract terms within their ambit to be fair and plain and intelligible.<sup>121</sup>

Therefore, while it is possible to say that the ordinances of a HEI may be excluded by operation of this provision as required for the establishment of the HEI, it is submitted that the exemption should be interpreted such that the rules of the HEI are not required or expressly permitted by law<sup>122</sup> and will not be excluded.<sup>123</sup>

## Unfair Terms

Pursuant to section 24, a term will be unfair in a consumer contract if:

### 24 Meaning of unfair

(1) A term of a consumer contract is **unfair** if:

- (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

(2) In determining whether a term of a consumer contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:

- (a) the extent to which the term is transparent;
- (b) the contract as a whole.

(3) A term is **transparent** if the term is:

- (a) expressed in reasonably plain language; and
- (b) legible; and
- (c) presented clearly; and
- (d) readily available to any party affected by the term.

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<sup>121</sup> Whittaker, 'Judicial Review', above n 49, 210.

<sup>122</sup> They operate in the terms described by Whittaker, 'Judicial Review', above n 49, 210; See generally the incorporation of student rules into the contract and coexistence and relationship with public law: Whittaker, 'Public and Private Law-Making', above n 57.

<sup>123</sup> Note that in the matter of the matter of *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd* [2008] VCAT 2092 there is reference to the 'rules and regulations' of the health club. These are however entirely based in contract and do not have any basis of power in statute. The situation may be less clear for Western Australian university students where the office of the Visitor remains operational and the jurisdiction exclusive. An argument may arise where the exclusive jurisdiction of the Visitor is said to be required or expressly permitted by the law and any term relating to that office, including rules, may be exempt from the UCT. However, as was seen in Chapter 1, there remains an argument that even in these circumstances the office remains subject to obligations arising in other areas of the law.

(4) For the purposes of subsection (1)(b), a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

Therefore the term of the contract is only unfair if all three parts of subsection one are satisfied.

### **Significant imbalance**

The accepted view is that the 'significant imbalance' in the obligations and rights accruing under the contract is concerned with the substantive fairness of the term.<sup>124</sup> This is a factual enquiry<sup>125</sup> and it has been suggested that the assessment will include a consideration of whether the term detracts from rights held at common law or departs from the reasonable expectations of the consumer.<sup>126</sup> Willett helpfully summarises the test regarding 'significant imbalance' in the UK<sup>127</sup> as follows:

... terms may violate this element of the test by allocating substantive rights and obligations in ways that are unduly detrimental to the consumer (e.g. by adding to the responsibilities of the consumer by comparison with the legal default position or subtracting the responsibilities of the trader relative to the default position); where there cannot be said to be a counterbalancing substantive benefit for the consumer (whether in the term itself or in another provision of the contract or another contract on which this one is dependent).<sup>128</sup>

The precise meaning of the term 'significant imbalance' is unclear. The matter of *Jetstar Airways Pty Ltd v Free* [2008] VSC 539 dealt with similar provisions in the Victorian UCT legislation and considered the meaning of this phrase at length. The respondent, Ms Free, had purchased two discounted airfares with Jetstar.<sup>129</sup> There were restrictions contained in the terms and conditions pertaining to refunds and the transfer of the tickets into another passenger's name. Ms Free was unable to use the tickets and sought to transfer them. This was only allowed by Jetstar on the payment

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<sup>124</sup> Willett, above n 10, 363; Paterson, 'The Australian Unfair Contract Terms Law', above n 13.

<sup>125</sup> EM1, 19 [2.3]; Miller, above n 8, 1701 [1.S2.24.15]; Paterson, 'The Elements of a Prohibition on Unfair Terms', above n 8, 190.

<sup>126</sup> Miller, above n 8; Paterson, 'The Elements of a Prohibition on Unfair Terms', above n 8, 191 n 19–20 citing Chris Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (Ashgate, 2005) 47–8; Paterson, 'The Australian Unfair Contract Terms Law', above n 13, 944; Freilich and Webb, above n 32, 267.

<sup>127</sup> Note that even though there is also the test of good faith in the UK, it is accepted that 'significant imbalance' and 'good faith' are distinct elements of the test of unfairness so this remains useful in the Australian context. See Cavanough J in *Jetstar Airways Pty Ltd v Free* [2008] VSC 539, [106].

<sup>128</sup> Willett, above n 10, 363.

<sup>129</sup> Through an online booking system and by clicking 'I agree' to the terms and conditions.

of an additional (substantial) charge. Ms Free sought orders that Jetstar had relied on an unfair term to impose the additional charge and for a refund of these monies on the basis. At the Tribunal it was held that the terms were unfair. On appeal to the Supreme Court the decision was reversed. The Court looked to the counterbalancing effect of the substantial price discount and the availability of airline tickets on other terms and conditions allowing for such changes, albeit at a more expensive price, at the time of entering into the contract. They also found that the Tribunal should have assessed the effect of the imposition of the charges on the rights and obligations of the parties in the context of the whole contract, not independently.<sup>130</sup> Justice Cavanough was of the view that ‘significant’ means ‘significant in magnitude’, or ‘sufficiently large to be important’, being a meaning not too distant from ‘substantial’.<sup>131</sup>

Doherty is of the view that all that can be said with certainty is that ‘a term that produces a trivial or inconsequential imbalance is unlikely to be caught; when making the assessment, consideration must be given to the contract as a whole and the court may be disinclined to intervene unless the imbalance is substantial’.<sup>132</sup> In the context of students and HEIs, it is possible that terms may be drafted in a manner that will cause a significant imbalance in the rights of the parties in favour of the HEI. This is particularly so if one considers the nature of the bureaucracy and size of the institutional organisation vis-à-vis individual students and the fact that the terms of the contract are drafted by the HEI prior to the making of any ‘offer’ to students.

### **Reasonably necessary to protect the legitimate interests**

What will be considered here is the response by the supplier to the ‘risks inherent in the transaction’.<sup>133</sup> The inclusion of the word ‘reasonably’ indicates that the term must be a ‘proportionate response to the risks it seeks to address’.<sup>134</sup> It is also the ‘actual effect of the term’ that is relevant to the inquiry.<sup>135</sup> Section 24(4) of the ACL shifts the onus of proof to the party advantaged by the term, here the HEI supplier, to show

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<sup>130</sup> *Jetstar Airways Pty Ltd v Free* [2008] VSC 539, [127]–[135]; *Contra* the outcome of the counterbalancing effect in *Kucharski v Air Pacific Ltd (General)* [2011] NSWCTTT 55, [36] where the Tribunal found the airlines cancelation policy to be unfair notwithstanding the lower cost fares. The Tribunal was particularly concerned with the lack of notice of onerous terms and a deficiency of transparency.

<sup>131</sup> *Jetstar Airways Pty Ltd v Free* [2008] VSC 539, [105].

<sup>132</sup> Doherty, above n 13, 75 [5.12]–[5.13].

<sup>133</sup> Paterson, ‘The Elements of a Prohibition on Unfair Terms’, above n 8, 193; Paterson, ‘The Australian Unfair Contract Terms Law’, above n 13, 945.

<sup>134</sup> Paterson, ‘The Elements of a Prohibition on Unfair Terms’, above n 8, 193; Paterson, ‘The Australian Unfair Contract Terms Law’, above n 13, 945.

<sup>135</sup> Harder, above n 40, 318.



that the term is reasonably necessary in order to protect the legitimate interests of the HEI. It is expected that the party seeking to rely on the term would lead evidence of the same.<sup>136</sup> The HEI of course may well be able to show that any particular term is reasonably necessary to protect its legitimate interests. The most obvious example here is the potential unfairness of a term that allows a unilateral variation to a course or even an entire degree programme by the HEI without consultation or notice to the student. The HEI would clearly want to argue that it needs to retain the flexibility to alter its offerings so as to respond to change in student demand and/or public funding arrangements.<sup>137</sup> As noted in the Explanatory Memorandum:

While it is ultimately a matter for the court to determine whether a term is reasonably necessary to protect the legitimate interest of the respondent, the provision would require the respondent to establish, at the very least, that its legitimate interest is sufficiently compelling on the balance of probabilities to overcome any detriment caused to the consumer, or class of consumers, and that therefore the term was 'reasonably necessary'.<sup>138</sup>

What will be important is how proportionate the term is to the risk. The courts may well consider if there were in fact other ways of protecting the HEIs' interests that were not so burdensome to the student.<sup>139</sup>

### **Detriment**

In relation to the third limb of the test for unfairness, the meaning of detriment is not limited to simply financial detriment, or actual detriment, just the substantial likelihood of detriment relating to the application of, or reliance on the term.<sup>140</sup> It is any form of detriment suffered, or likely to be suffered by the party disadvantaged by the 'practical effect of the term'.<sup>141</sup> As was noted in Chapter 4, one of the problems for students in relation to claims for breach of contract has been the difficulties in demonstrating quantifiable loss. The UCT provisions clearly allow the court to take

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<sup>136</sup> EM1, 19 [2.32] and is on the balance of probabilities; Wallwork and White, above n 117. Their recommendations for business include checking terms to ensure they are not disproportionate to the need to protect the legitimate interest of the business; keeping detailed reasons why terms were included to provide the necessary justification; incorporate outlines and acknowledgements as to why certain terms are included in the contract; See also Attorney-General, *The Australian Consumer Law: A Guide to Provisions*, 2010, 11.

<sup>137</sup> Sally Varnham, 'Liability in Higher Education in New Zealand: Cases for Courses?' (1998) 3(1) *Australia and New Zealand Journal of Law and Education* 3, 12.

<sup>138</sup> EM1, 19.

<sup>139</sup> Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness', above n 13, 945; Doherty, above n 13, 76.

<sup>140</sup> EM1, 20 [2.39], [2.41].

<sup>141</sup> EM1, 20 [2.39], [2.41].

into account other forms of detriment, including delay or distress suffered as a consequence of the unfair term.<sup>142</sup>

### **Other matters: the contract as a whole and transparency**

In determining whether a term is unfair, the court must also have regard to the contract as a whole and the extent to which a term in question is transparent.<sup>143</sup> The reference to the court having regard to the contract a whole is to take into consideration any counterbalancing measures within the contract. This presumably is to prevent a term that taken on its own and perhaps out of context could be classified as being unfair when on balance it is in fact not so.<sup>144</sup> The impact of this is seen above in the *Jetstar* case and the Court was very clear in regards the need to consider the 'unfairness' of the term in the context of the whole contract. It is possible that when considering the contract for educational services, a court will take account of the 'special nature of the educational and 'degree-endowing services'<sup>145</sup> of the HEI when making a determination of fairness, as a consumer contract of 'a somewhat unusual character'.<sup>146</sup> It is possible that the degree of notice, explanation and transparency of the terms will in fact be of greater consequence in these circumstances.<sup>147</sup>

The issue of transparency does not stand alone and is linked to the threshold requirements in section 24(1). The role of 'transparency' has been considered in detail by noted commentators in this field.<sup>148</sup> Paterson observes that the requirement of transparency is a result of 'information asymmetry between parties to standard form consumer contracts',<sup>149</sup> where consumers commonly do not read the detail of the terms, nor may the terms be available to the consumers at the time the contract is made.<sup>150</sup> Pursuant to section 24(3), a term is transparent if it is expressed in reasonably plain language, is legible, presented clearly and is readily available to any party affected by the term. A lack of transparency of the terms of consumer contract

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<sup>142</sup> Attorney-General, *The Australian Consumer Law: A Guide to Provisions*, 2010, 3. See also the reference to the December 2007 research paper 'Unfair Contract Terms in Victoria' as quoted in Doherty, above n 13, 77, n 20 where the Department of Consumer Affairs, Victoria states that emotional and social detriment flowing from the unfair contract term is evidence of detriment for the purposes of the Victorian legislation.

<sup>143</sup> ACL s 24(2).

<sup>144</sup> Paterson, 'The Australian Unfair Contract Terms Law', above n 13, 949.

<sup>145</sup> Whittaker, 'Judicial Review', above n 49, 211.

<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.*

<sup>148</sup> Paterson, 'The Australian Unfair Contract Terms Law', above n 13, 955; Willett, above n 10; Harder, above n 40.

<sup>149</sup> Paterson, 'The Australian Unfair Contract Terms Law', above n 13, 949.

<sup>150</sup> *Ibid.*

'may be a strong indication of the existence of the significant imbalance in the rights and obligations of the party under the contract'.<sup>151</sup> The lack of transparency in the enrolment contract may be an indication of significant imbalance of the parties' rights and obligations. A lack of transparency in the actual express term incorporating the rules and policies (by reference or accessible by hyperlinks) could of itself be unfair, with the result that the rules and policies would not be binding as contractual terms.<sup>152</sup> This is especially so if the scale, complexity and nature of the rules and policies is considered.<sup>153</sup> There would be some doubt that terms presented in this manner could be said to be 'readily available', as it is common for hyperlinks not to work satisfactorily,<sup>154</sup> or they continue to take students on a never-ending series of layers of information.

Additionally when the demographic of the student is considered,<sup>155</sup> a court is unlikely to find that terms expressed in the rules and policies are in 'plain language', 'legible' or 'presented clearly'.<sup>156</sup> Reference is had to the example of the Curtin University enrolment document described above.<sup>157</sup> As is common in many HEIs across Australia, enrolment occurs largely in an online context. In the student declaration described, a box is ticked by the student acknowledging they have had regard to the HEI statutes, rules and policies. The magnitude of policies and the level of detail at the modern HEI are significant. There is also a noteworthy use of legal jargon in the incorporated documents, notably the statutes and rules.<sup>158</sup> Presumably this would be quite overwhelming for a first time student attempting to read and comprehend their meaning. In the context of the online enrolment document, the ability of the individual student to process large amounts of information is likely exacerbated if there are distractions in the decision making process.<sup>159</sup> Furthermore, in the event that any

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<sup>151</sup> EM1, 21 [2.45].

<sup>152</sup> Because they would be void, but still operative as ordinances and public law. Whittaker, 'Judicial Review', above n 49, 213.

<sup>153</sup> Jackson et al, above n 80,, above n 80, 76 [11.2] regarding conclusions from a review of universities' websites and processes where the authors conclude the information is not accessible, is not in plain language, and inconsistent.

<sup>154</sup> At the time of attempting to access these policies by hyperlink (28 September 2011) the Curtin ICT policy page came up as unavailable.

<sup>155</sup> See discussion of vulnerable consumer in Chapter 1 and Freilich and Webb, above n 32, 266 where the authors consider the decision of *eBay International AG v Creative Festival Entertainment Pty Ltd* (2006) 170 FCR 450. In this matter the Court specifically considered ticket sales for the 'Big Day Out' and notice of onerous terms in context of young people not experienced in the commercial world.

<sup>156</sup> Jackson et al, above n 80, 77 [11.2.3].

<sup>157</sup> Annexure 3.

<sup>158</sup> Jackson et al, above n 80, 77 [11.2.3].

<sup>159</sup> Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness', above n 13. Paterson suggests the need to look more closely at behavioural economics in relation to the factors that impact on decision making by individuals. She specifically refers to advertising: at 954; See also Dale Clapperton and Stephen Coronos, 'Unfair Terms in "Clickwrap" and Other Electronic Contracts' (2007) 35 *Australian Business Law Review* 152 where they consider unfair terms, but in the context of

term or clause within the rules and policies is especially onerous or unusual, this process is unlikely to provide sufficient notice of those terms.<sup>160</sup> Issues of notice, especially unusual or onerous terms and transparency overlap and are part of the overall consideration of whether a term may be considered unfair.<sup>161</sup>

Another issue is whether transparency can cure an otherwise 'unfair term'. The Explanatory Memorandum would suggest not.<sup>162</sup> This would have the effect of procedural fairness being able to rectify any substantive unfairness.<sup>163</sup> After examining the UK legislation and case law and the position in Australia, Willett suggests:

... transparency cannot legitimize a term that is sufficiently unfair in substance; but...a lack of transparency can render a term unfair where the term would not otherwise be sufficiently detrimental to be found to be unfair.<sup>164</sup>

Paterson observes that another relevant matter the court may consider in determining whether a term is unfair or not is whether the consumer has had a reasonable opportunity to consider the information and has sought professional advice.<sup>165</sup> This is interesting given the term in the Curtin University enrolment document where students 'tick' a box acknowledging that they have sought academic counselling in relation to their choices prior to enrolment.<sup>166</sup> In practice it is unclear how in fact the professional advice sought is actually given especially when students are increasingly enrolling online<sup>167</sup> without even having to have come to campus.

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other common law and statutory rights mentioned above. Interestingly they consider the former Victorian UCT legislation in relation to these contracts and conclude that contracts of these types are not contracts to which the legislation would apply as they are not 'standard form contracts for general use in a particular industry', rather they are drafted by individual vendors: at 164–5. It is unlikely that this argument for exclusion would be successful under the ACL for the reasons described above regarding the definition of standard form contract under the ACL.

<sup>160</sup> For example, fines or penalties for not following HEI processes — withdrawal, late fees library fines. In relation to the relationship between substantive unfairness, transparency and notice see Paterson, 'The Australian Unfair Contract Terms Law', above n 13, 951–6, including an analysis of behavioural economic theory that suggests complex information presented in these circumstances is difficult for consumers to assimilate.

<sup>161</sup> See Paterson, 'The Australian Unfair Contract Terms Law', above n 13, 951–6; Freilich and Webb, above n 32, 270–2 and suggestions regarding notice in retail leases.

<sup>162</sup> EM1, 21 [2.46] transparency, on its own account, cannot overcome underlying unfairness in a contract term.

<sup>163</sup> See Paterson, 'The Elements of a Prohibition on Unfair Terms', above n 8, 188–9.

<sup>164</sup> Willett, above n 10, 373, but that this is uncertain as currently drafted. He suggests that the addition of amendments to explicitly state the role of transparency i.e. 'transparency does not necessarily prevent a term from being unfair': at 384. Willett proposes other roles for transparency including it being a basic social right, as furthering market discipline and assisting consumers protect their interests post contractually, in the sense they know what their rights are and can make informed decisions regarding access to justice in the event of a dispute: at 375–8.

<sup>165</sup> Paterson, 'The Australian Unfair Contract Terms Law', above n 13, 950.

<sup>166</sup> This surely cannot be limited to counselling via schools or other forums such as open days.

<sup>167</sup> Interview with Deb Greenwood, Manager Student Central — Admissions, Curtin University, (Perth, 28 September 2011); Curtin University, *How to enrol*, (13 August 2012)

### Some examples of potentially unfair contract terms<sup>168</sup>

Section 25 of the ACL sets out examples of potentially unfair contract terms:

#### 25 Examples of unfair terms

(1) Without limiting section 24, the following are examples of the kinds of terms of a consumer contract that may be unfair:

- (a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
- (b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
- (c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;
- (d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;
- (e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;
- (f) a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;
- (g) a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract;
- (h) a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;
- (i) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;
- (j) a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;
- (k) a term that limits, or has the effect of limiting, one party's right to sue another party;

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<<http://students.curtin.edu.au/administration/enrolment/howto.cfm>> where the webpage speaks to the University moving to 'self-management' in re-enrolment and 'large numbers' of students use the online enrolment process.

<sup>168</sup> For examples from the UK 'grey list' in higher education setting see Farrington and Palfreyman, above n 49, 413 [12.101]; Birtwistle and Askew, above n 49, 95. There are notable differences in the UK list and Australia, notably that there seems to be more clarity in the UK list due to the amount of detail, see Gray, above n 10, 171–3; Carter, above n 10, 238–9.

- (l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;
- (m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract;
- (n) a term of a kind, or a term that has an effect of a kind, prescribed by the regulations.

As indicated in the Explanatory Memorandum, these ‘examples provide statutory guidance on the types of terms which may be regarded as being of concern’.<sup>169</sup> A significant number of the examples include terms that allow one party to make changes on a unilateral basis. There is however no presumption that a term corresponding to one in the indicative list is unfair,<sup>170</sup> although concerns have been expressed that this will be the effect in practice.<sup>171</sup> It is also not clear whether in the event of ambiguity in the impugned term it is to be read *contra proferentum*.<sup>172</sup>

Three main areas of concern arise in relation to the contract of enrolment. The first is any terms that may limit or avoid performance of the contract, such as disclaimers or exclusions. The second is those terms that allow for unilateral variations. The third area involves the imposition of penalties for breach of the contract. This will be demonstrated by reference to the enrolment contract from Curtin University discussed in Chapter 4. Space does not permit a detailed consideration of every term thus the analysis will be confined to illustrations that are indicative of terms likely to be common at other HEIs.

#### **Terms that limit or avoid performance: sections 25 (1)(a)**

The first example comes from those terms incorporated into the contract by reference to the Course Handbook. This is on the basis that the student certifies that their enrolment is correct, which can only be done with reference to the terms set out in the Course Handbook. As discussed in Chapter 4, Course Handbooks typically set out the requirements for the course, including detail in relation to content, assessment and tuition patterns. These terms in and of themselves are unlikely to be ‘unfair’. Furthermore, to the extent that they relate to the focus of the overall course or overall make-up of the course programme, they may be excluded on the basis that

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<sup>169</sup> EM1, 23 [2.52].

<sup>170</sup> EM1, 23 [2.55].

<sup>171</sup> Carter, above n 10, 238.

<sup>172</sup> Harder, above n 40, 322, n 66, whereas the position in relation to this is clear in the UK under UTCCR Reg 7(2).

they are concerned with the main subject matter of the contract, unless they can be said to fall within the example in 25(1)(g) discussed above.<sup>173</sup> However, broader terms in these documents that operate as disclaimers may be open to scrutiny as unfair.<sup>174</sup> For example, the following statement appears in the Curtin Course Handbook 2012 for the Bachelor of Commerce:

**Course Structure Disclaimer**

Curtin University reserves the right to alter the internal composition of any course to ensure learning outcomes retain maximum relevance. Any changes to the internal composition of a course will protect the right of students to complete the course within the normal timeframe and will not result in additional cost to students through a requirement to undertake additional units.<sup>175</sup>

Some parts of this term counterbalance what might appear to be the ‘significant imbalance’ between the parties. The term could be said to be reasonably necessary to protect the legitimate interests of the HEI. It allows the HEI to operate effectively in the higher education market and change offerings over the course of time or as necessary due to other factors such as funding shifts, government policy changes, course demand and staffing patterns, so as not be unfair. Students rights to complete the course in the ‘normal time frame’ are maintained, as is the concern that any change should not add to the cost (or debt) incurred. However, notably, this doesn’t speak to the impact or effect to substantive changes to course content and knowledge acquisition. The clause simply refers to ‘the course’. It is suggested that clauses such as these may still be drafted too broadly.

In the enrolment contract a student agrees ‘to be bound by the Statutes, Rules and Policies of the University as amended from time to time.’<sup>176</sup> Interestingly the Curtin legislation website (which includes the rules as well as the statutes and is hyperlinked in the enrolment contract) contains the following disclaimer:

**1. Disclaimer**

Although the University aims to ensure that the Legislation Information on the Legislation Website is accurate and up to date, the Legislation Information may be subject to change from time to time. Accordingly, the University:

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<sup>173</sup> See also Sam Middlemiss, ‘Legal Liability of Universities for Students’ (2009) 12(2) *Education and the Law* 69, 79–80 in relation to exclusion clauses.

<sup>174</sup> They are also likely to be in breach of other parts of the ACL dealing with consumer guarantees (ACL s64(1)) as noted by Coronos, above n 77, 28. The disclaimer itself could be a breach of ACL s 29(1)(m), giving rise to civil pecuniary penalties up to \$1.1 million for a body corporate: at s 151.

<sup>175</sup> Curtin University, *Courses Online Handbook 2012*, (12 July 2012) <<http://handbook.curtin.edu.au/courses/13/130099.html>>.

<sup>176</sup> The Curtin document also includes a specific reference that the student is ‘aware of the conditions under which [they are] permitted to use University (computer) facilities (refer to the ICT Policy).’

- a. reserves the right to change the contents of the Legislation Website;
- b. makes no warranty, representation or undertaking, whether express or implied, and assumes no responsibility or liability for, whether direct or indirect, the accuracy, completeness, or usefulness of any Legislation Information; and
- c. assumes no responsibility or liability for, whether direct or indirect, any loss (including loss of profits), damage or injury (including death) a person may suffer:
  - i. arising from any person's use of, or reliance on, any Legislation Information (including any such information which may be incomplete, out of date, wrong, inaccurate or misleading) expressed or implied in, or coming from, the Legislation Website;
  - ii. whether caused by any negligent or other unlawful act or omission of, by or on behalf of the University; and
  - iii. even if the University has been advised of the possibility of any such loss, damage or injury.<sup>177</sup>

This disclaimer clause is very wide and purports to exclude non-contractual causes of action such as negligence. It is difficult to ascertain the corresponding offset for the student in similar terms to the *Jetstar* case. The limitation of liability clause is similar in width to those found to be unfair in the matter of the *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd* (Civil Claims) [2008] VCAT 2092. It is suggested that clauses of this type are vulnerable to challenge on the grounds of unfairness. Exclusion clauses clearly detract from the common law rights of the consumer. The need for counterbalancing terms and transparency are problematic for exclusion clauses.<sup>178</sup>

One example of a term in a policy that avoids or limits performance by the HEI is contained in the Curtin University 'Classrooms — Maximum Student Numbers Policy and Procedures'. This policy is concerned with ensuring that classrooms are safe and not overcrowded. Under this policy, if an academic staff member becomes aware of overcrowding they must first ask students not registered for the class to leave and attend an alternative class. However, 'if the situation recurs at the next scheduled

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<sup>177</sup> Curtin University, *Legislation, Policies and Procedures*, (12 July 2012) <<http://policies.curtin.edu.au/legislation/>>.

<sup>178</sup> See Paterson, 'The Elements of a Prohibition on Unfair Terms', above n 8, 198.



class time the class may be suspended.<sup>179</sup> The HEI in this instance may claim an exemption applies to this term of the contract, as it being 'required' under the relevant state Occupational Safety and Health legislation.<sup>180</sup> As discussed above the exemption provisions are likely to be read down.<sup>181</sup> The objection is not to the term itself, but to the breadth. The term does not appear counterbalanced and allows for indefinite suspension of classes by the HEI in the event of overcrowding, with no corresponding obligation for the HEI to address the issue or make permanent alternate arrangements.

### **Unilateral variations: sections 25(1)(d) and (g)**

Particularly relevant in relation to the provision of educational services by the HEI to the student are unilateral terms that allow the HEI to alter the delivery of the course or content, or even to terminate the course in its entirety. It is submitted these types of terms, common in contracts of enrolment, are potentially void as unfair terms. In particular, reference is had to the example in section 25(1)(g), which is a term that 'permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the ... services to be supplied ... under the contract'. This section also assists in the interpretation of what is meant by the 'main subject matter' of the student-HEI contract. The inclusion of this example provides support for the proposition mentioned earlier that terms subject to exclusion on the basis that the term is the 'main subject matter' should be confined to the terms relating to the acceptance of the 'place'. This would then allow for the interpretation that terms in regard the provision of a course, or the content of individual modules, are subject to the UCT law.

There are a number of examples in the Curtin University policies where terms unilaterally varying the service supplied seek to ensure that there is a counterbalance of the corresponding rights and obligations of students and the University. The 'Discontinuing Courses Policy and Procedures'<sup>182</sup> and the 'Unit Outline Policy'<sup>183</sup> are two such examples. In circumstances where the University determines that it will

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<sup>179</sup> Curtin University, *Legislation, Polices and Procedures*, above n 177, *Classrooms — Maximum Student Numbers Policy and Procedures*.

<sup>180</sup> See Paterson, 'The Elements of a Prohibition on Unfair Terms', above n 8, 197 and her discussion of *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd* [2008] VCAT 2092 where the termination clause in question was found not to be unfair because the rules and regulations (contractual) provided for the 'safe running' of the club: at 197.

<sup>181</sup> See above n 116.

<sup>182</sup> Curtin University, *Legislation, Polices and Procedures*, above n 177, *Discontinuing Courses Policy and Procedures*.

<sup>183</sup> Curtin University, *Legislation, Polices and Procedures*, above n 177, *Unit Outline Policy and Procedures*.

discontinue a course or major because it is no longer viable or of strategic importance, there are clear provisions dealing with how this will be communicated to students currently enrolled. This includes written notice as soon as possible after the decision has been made. Students are given the option of transferring to another suitable course or major 'without significant disadvantage'. If students choose not to transfer they 'shall be given reasonable opportunity to complete' the original course or major, within a set time frame.<sup>184</sup> Individual units are also governed by the Unit Outline Policy.<sup>185</sup> This policy prescribes everything that must be included in the Unit Outline for the delivery of the unit. Any variation to the published Unit Outline 'may be altered only with the consent of the majority of the students enrolled in the unit.'<sup>186</sup> This is to be contrasted with the 'Units Policy and Procedures'<sup>187</sup> and 'Graduate Attributes Policy'.<sup>188</sup> The Units Policy and Procedures is the 'framework for the development, nomenclature, use and deactivation of units.'<sup>189</sup> The policy does not provide any terms equivalent to the notice provisions regarding discontinuance of the whole course. The variations to the individual units under this policy can include the 'text', which includes course content and learning outcomes. The policy applies to all units, including foundation units and units offered online in partnership with other providers such as Open Universities Australia. The Graduate Attributes Policy outlines the attributes 'that all Curtin graduates will have developed during their course in order to equip them for the future'.<sup>190</sup> The policy states that Curtin graduates will be able to 'show evidence' that they have a range of qualities including the ability to apply discipline knowledge, think critically, communicate effectively, use technology appropriately and have international and intercultural perspectives and awareness. These attributes can be unilaterally varied by the Curtin Academic Board, without consultation or notice to the student that the characteristics of the services have changed.

It is suggested that the policies which allow variation or discontinuance of individual units or stated graduate attributes without notice or consultation with the student consumer, may be unfair terms as they permit the University to unilaterally vary the characteristics of the services supplied. This is especially so for students whose

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<sup>184</sup> Curtin University, *Discontinuing Courses Policy and Procedures*, above n 182, cl 7.

<sup>185</sup> Curtin University, *Unit Outline Policy*, above n 183.

<sup>186</sup> *Ibid* cl 5.5.

<sup>187</sup> Curtin University, *Legislation, Policies and Procedures*, above n 177, *Units Policy and Procedures*.

<sup>188</sup> Curtin University, *Legislation, Policies and Procedures*, above n 177, *Graduate Attributes Policy*.

<sup>189</sup> Curtin University, *Units Policy and Procedures*, above n 187.

<sup>190</sup> Curtin University, *Graduate Attributes Policy*, above n 188. Additionally, students are 'presented with appropriate learning, teaching, and assessment experiences to enable them to develop and demonstrate the Curtin Graduate Attributes'.

course of study can be comprised of a selection of units from various providers, as in the case of Open Universities Australia.<sup>191</sup> The effect of the policies is not expressed clearly nor in a manner that is readily accessible. Further, all of the policies may be vulnerable to an interpretation of unfairness because of the lack of transparency. It is hard to determine exactly how the terms of each policy interrelate,<sup>192</sup> even the ones that are 'fair'. As the operation of numerous interlinking is unfair, it advances students' rights as consumers as this deals with substantive unfairness in relation to the provision of educational services. That is, the HEI supplier cannot, through reliance on a complex maze of policies and rules, unilaterally vary the terms of the contract so to alter the essential characteristics of the service it has agreed to supply.

### **Imposition of a penalty: section 25(h)**

The use of penalty clauses is also constrained at common law and must be a genuine pre-estimate of the loss likely to be suffered in the event of a breach.<sup>193</sup> The Federal Government guidelines indicate that 'a term may be considered unfair if it threatens sanctions over and above those that can be imposed at law' and that any penalty imposed 'should bear a reasonable relationship to the loss likely to be suffered by the business as a result.'<sup>194</sup> Willett refers to these as terms that allow for 'onerous and disproportionate enforcement by a trader'.<sup>195</sup> There are two common terms in contracts of enrolment that are likely to be unfair on this basis.

One is a term 'requiring consumers to pay trader enforcement costs irrespective of the reasonableness of the amounts.'<sup>196</sup> An example in the contract of enrolment is a term whereby the student agrees that '*any* expense, costs or disbursements incurred by the University in recovering *any* monies owing by me shall be the responsibility of the debtor, including debt collection agency fees and solicitor's costs on the amount outstanding and all other reasonable costs incurred in the recovery of outstanding monies.'<sup>197</sup> The Victorian Tribunal considered a clause of similar import to be unfair because of its breadth.<sup>198</sup>

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<sup>191</sup> Open Universities Australia scheme (20 September 2011) <<http://www.open.edu.au/public/home?gclid=CNmfgdz1q6QCFQdLbwod2EmCcA>>.

<sup>192</sup> Jackson et al, above n 80, 77 [11.2.5].

<sup>193</sup> EM1, 24 [2.60].

<sup>194</sup> Attorney-General, *The Australian Consumer Law: A Guide to Provisions*, 2010, 16.

<sup>195</sup> Willett, above n 10, 374 discussing the types of terms that might or should be subject to outright bans.

<sup>196</sup> Ibid 375.

<sup>197</sup> Annexure 3, final clause or 'tick box' (emphasis added).

<sup>198</sup> *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd* (Civil Claims) [2009] VCAT 754, [330]–[334].

The other is the very common rule regarding the imposition of academic sanctions for the failure by the student to pay *any* charge imposed in breach of the contract. That can include the non-payment of library or parking fines, and recently the new student amenities and services levy. Below is an extract from the relevant rule at Curtin University:<sup>199</sup>

#### 1.0 Purpose of Rule

This Rule explains how the University will set, approve, collect, and consider refunds for, University charges. For the purpose of this Rule, the term 'charges' includes:

1.1 The Amenities and Services Fee (ASF)

1.2 Charges, levies and penalties for materials or services provided which are *incidental to the student's studies*

1.3 Penalties which may be charged where documents or payments are accepted, or services provided, after published deadlines

1.4 Penalties under Statute No. 10: Student Disciplinary Statute.

3.2 Failure to pay the appropriate charge by the due date may incur a late fee. Regardless of whether a late fee is charged, *the following academic penalties shall be applied, until such time as the charge is paid:*

3.2.1 The student's results (for the relevant study period) will be withheld;

3.2.2 Where applicable, the student shall be excluded from the activity or service;

3.2.3 Where applicable, the item relating to the charge shall be withheld;

3.2.4 Where applicable, the student shall not be permitted to re-enrol; or

3.2.5 Where applicable, the student shall not be allowed to graduate.<sup>200</sup>

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<sup>200</sup> Curtin University of Technology Act 1966 (WA), Statute No. 26 — Fees and Charges r 5. Curtin University, *Legislation, Policies and Procedures, Statutes and Rules*, (23 July 2012) <[http://policies.curtin.edu.au/legislation/statutes\\_rules.cfm](http://policies.curtin.edu.au/legislation/statutes_rules.cfm)> (emphasis added). The Rule was repealed in June 2012 as part of the University's review and consolidation of policies as per email from Naomi Yellowlees, Director of Legal and Compliance Services, Curtin University, to all Curtin Staff, 27 June 2012. The new consolidated rule for the imposition of all fees and charges can be found at (14 August 2012) <<http://policies.curtin.edu.au/local/docs/Fees%20and%20Charges%20Rules%20-%20June%202012.pdf>>. Nothing in the new consolidated rule changes the impact of cl 3 above, as the new equivalent provision remains substantially the same. Further the rule is relied upon as an example of a type of rule that is found at HEIs in Australia, rather than an examination of the specific rule for the purpose of advice to the particular HEI. In the new rule the reasons for the imposition of charges are even less specific to be determined by the Vice-Chancellor and published by the Chief Financial Officer. Interestingly the amended rule specifically includes the following section allowing for changes under the new cl 1.2: section 4 of Statute No. 3 — Rules relevantly states 'A Rule is promulgated by posting a copy of it on the notice board located outside the main entrance to the Administration block at the University at Bentley ...'. When accessed on 23 July 2012, the new consolidated rule was not available on the University website, only the old rules. The unavailability of the actual current terms and difficulty in accessing the same impacts on notions of notice and transparency of terms.

This is clearly not proportionate to the risk of the transaction and is very likely unfair under the ACL. The imposition of the extreme academic sanctions (withholding conferment of the degree) unlimited in time for a late payment of *any* charge *incidental* to the students' studies seems entirely too wide.<sup>201</sup>

### **Other potential unfair terms**

Examples in section 25(1) (h) and (k) may have relevance in relation to assessment and disciplinary procedures common at HEIs. Under (h), one party is not permitted to unilaterally determine whether the contract has been breached or determine its meaning. This is interesting in two respects. As will be seen below, there are a number of policies and rules common to HEIs that state that the relevant academic committee is the sole adjudicator for disputes, although most HEIs provide for numerous procedures for students to be heard in accordance with administrative law principles. Secondly, it is perhaps possible that this provision could augment the idea that the substantive fairness of the arrangements between the student and HEI should be reviewable by the courts, so as to erode further the notion of academic immunity. It is suggested that any contractual provision that supports the HEI's unilateral power to determine a breach, or interpret the meaning of the contract, in effect the concept of academic matters being non-justiciable, is substantively unfair.

The example in (k) refers to a term that limits, or *has the effect* of limiting one party's right to sue another.<sup>202</sup> This can include the presentation of the term in a manner that might deter, even though there is no intention to exclude.<sup>203</sup> It is suggested that statements to the effect that 'the decision of the Student Discipline Appeals Board is final'<sup>204</sup> following the description of a lengthy appeals process in relation to a finding of academic misconduct,<sup>205</sup> or that the right to external appeal is with a particular

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<sup>201</sup> See *Director of Consumer Affairs Victoria v AAPT Pty Ltd* [2006] VCAT 1493 where the imposition of a variation clause was too wide as it permitted the telecommunications company a right to vary for *any* cause.

<sup>202</sup> Note the examples of these types of clauses in the student contract examples from New Zealand HEIs in Chapter 4 n 133 can exist as currently there is no equivalent UCT regime operating in New Zealand. See below n 205.

<sup>203</sup> Attorney-General, *The Australian Consumer Law: A Guide to Provisions*, 2010, 21.

<sup>204</sup> *Curtin University of Technology Act 1966* (WA), Statute No. 10 — Student Discipline, Curtin University, *Statute and Rules* (23 May 2012) <[http://policies.curtin.edu.au/local/docs/statute\\_no\\_10\\_2010.pdf](http://policies.curtin.edu.au/local/docs/statute_no_10_2010.pdf)>.

<sup>205</sup> This is potentially significant when one considers the potential for the internal rules of the HEI to provide that students must resolve their grievances by way of internal dispute and decisions made in this regard are final. In New Zealand, where there is no UCT regime, the student contract from Massey University at cl 12 states: 'Any dispute arising out of or in connection with this Contract, or otherwise relating to the performance by the University or its staff of their responsibilities to the Student shall be resolved through the Grievance Procedures prescribed by the *university calendar*, which shall be the exclusive procedures for the resolution of such a dispute.' Massey University, *Student Contract* (13 August 2012) <<http://www.massey.ac.nz/massey/about-massey/calendar/statutes-and->

designated external provider, may have the effect of hindering the student consumers' right to take legal action.<sup>206</sup> For example, in the Curtin University Assessment and Student Progression Manual the following appears:

**External Right of Complaint or Appeal**

Any student that is not satisfied with the result or conduct of the formal appeal process described above may request that their appeal be considered by an external person or body independent of and external to the University. Students will be notified of the process for lodging an appeal to the external person or body in the advice provided to the student of the outcome of their appeal to the Student Progress Appeals Committee (only required where the outcome is not favourable to the student).

The University has reached agreement with the Western Australian Ombudsman for that office to take on the role of external appeals body.<sup>207</sup>

This type of clause may suggest to the student consumer that they are required to take their dispute exclusively to the Ombudsman. The only way in which a clause in this regard might not be considered unfair is if it falls within the exemption under section 26(1)(c) where this is expressly permitted by law of the Commonwealth, state or territory. Therefore students in Western Australia may well be precluded from alleging such a term is unfair because the statutory jurisdiction of the university Visitor remains alive in that state.

Of interest for international students are the examples given section 25(i) and possibly (j). The example in (i) indicates that a term will be unfair if it limits vicarious liability for agents. If a term in a student's contract with the HEI contained a limitation or disclaimer in relation to the representations made by an agent of the HEI then this term in the student-HEI contract would be rendered void on the grounds of unfairness.<sup>208</sup> The issue regarding terms that provide for unilateral assignment of the contract to the detriment of the other party without their consent as set out in (k) may be relevant where a HEI closes. There has been at least one well-known dispute

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[regulations/student-contract.cfm](#)>. See also Julia Pedley, 'The Development of a Student Contract and Improvement in Student Disciplinary Procedures at Massey University' (2007) 12(1) *Australian & New Zealand Journal of Law & Education* 73. Terms such as these are likely to be unfair in Australia now.

<sup>206</sup> See Carter, above n 10. He observes that the UK provisions have much clearer reference points in relation to this type of term: at 239.

<sup>207</sup> See, eg, Curtin University, *Assessment and Student Progression Manual*, (23 July 2012) <<http://policies.curtin.edu.au>>.

<sup>208</sup> Australian Attorney-General, above n 13, 20. Although Carter observes it is not clear though what this adds to the common law and notes that the UK Regulation in this regard is much more effective and specific as it means a consumer can challenge any term where the supplier 'is entitled to question contracts made on its behalf by agents': Carter, above n 10, 239, 240. This is an area of dispute in the consumer tribunals: see, eg, *Shu Fen Liv Jia Cheng International Pty Ltd* (General) [2008] NSWCTTT 944(2 April 2008). As discussed below, the mechanisms for redress at least are more favourable to student consumers under the ACL.

regarding the assignment of contracts for educational services.<sup>209</sup> As in the matter of the *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd* (Civil Claims) [2009] VCAT 754, if the term operates to affect detrimentally the consumer's rights it will be considered unfair, particularly if the rights of assignment are to an 'unidentified non-party'.<sup>210</sup>

It is worth noting here the experience in the UK higher education sector, particularly when the UCT regulations initially came into operation.<sup>211</sup> At that time the UK Office of Fair Trading ('OFT') identified training and education institutions as 'problem sectors'.<sup>212</sup> A number of reports from the OFT deal with HEIs but typically in relation to university residence and issues concerning student property and accommodation.<sup>213</sup> Of particular interest is the case report for Southbank University<sup>214</sup> where the enrolment declaration for that University was examined and a number of terms were considered to be unfair. These terms included the right to the change the regulations, hidden administration fees, exclusion of liability for breach of contract, and exclusion of liability for poor services. The term in relation to the University's right to change their regulations was amended so that changes could only occur at the beginning of the next academic year and only for the benefit of the students. In relation to the exclusion of liability for breach of contract, that term was changed to ensure that the student indemnity only covered matters within the students' control. The exclusion of liability for poor services was deleted.<sup>215</sup>

#### *Summary — unfair contract terms and educational services*

Thus it can be said that the contract for educational services arising on enrolment is a standard form consumer contract. It is unlikely that the exemptions contained in section 26 will operate to exclude HEI from the operation of the UCT regime to any

<sup>209</sup> *Commonwealth of Australia v Noel Ling* (1993) 44 FCR 397; *Noel Ling v Commonwealth of Australia* (1994) 51 FCR; *Noel Ling v Commonwealth of Australia* [1996] FCA 1646 (25 July 1996) where proceedings were brought against Ling by the Commonwealth as the assignee of the contractual rights of 'overseas students' under contracts made between the students and Ling for the supply of 'educational services' to the students. See also Kamvounias and Varnham, 'Getting What They Paid For', above n 4, 312; Jim Jackson, 'Regulation of International Education: Australia and New Zealand' (2005) 10(2) & (2006) 11(1) *Australia & New Zealand Journal of Law & Education* 67.

<sup>210</sup> *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd* (Civil Claims) [2009] VCAT 754, [254 to 264].

<sup>211</sup> Davis, above n 49, 21.

<sup>212</sup> Office of Fair Trading, *Unfair Contract Terms Bulletin* 6 (1999) <<http://www.offt.gov.uk/OFTwork/publications/publication-categories/guidance/unfair-terms-consumer/>>, 8 [1.15].

<sup>213</sup> Office of Fair Trading, *Unfair Contract Terms Bulletin* 5 (1998) <<http://www.offt.gov.uk/OFTwork/publications/publication-categories/guidance/unfair-terms-consumer/>>; Office of Fair Trading, *Unfair Contract Terms Bulletins 27 and 28* (2004) <<http://www.offt.gov.uk/OFTwork/publications/publication-categories/guidance/unfair-terms-consumer/>>.

<sup>214</sup> Office of Fair Trading, *Unfair Contract Terms Bulletin* 6, above n 212, 72.

<sup>215</sup> *Ibid.*

great extent. The exemption that has the most potential impact is the exclusion of terms relating to the 'main subject matter' from the UCT provisions. It is argued in this thesis that the exemption should not extend beyond the overall focus of the course or composition of courses offered within the programme. This can be said to be the true exercise of academic judgement and freedom and therefore an appropriate exclusion.

The three limbs of the test for unfairness must all be met before there can be any finding of unfairness. Importantly for the student consumer, the detriment can include loss other than financial loss or damage. In determining whether a term of the contract for educational services is unfair or not, the court will look at the contract as a whole and may pay regard to the unique nature of the contractual relationship between a student and the HEI. However, the issue for any HEI is going to be one of transparency, or lack thereof. A lack of transparency can render a term unfair that is perhaps otherwise fair. Potentially the lack of transparency in the contract for educational services will render the terms of the contract unfair and void in two regards. First, the actual term incorporating the rules and policies of the HEI is likely to be unfair. It cannot be said that a term that states that the student is bound by the statutes rules and policies of the HEI (as is common practice in all HEI) and provides access by way of hyperlink is expressed in reasonably plain language, legible, presented clearly and readily available. Second, the individual terms, that is the content of the rules and policies, even if fair are clearly not transparent.

Additionally, any HEI will need to be able to produce sufficient market place evidence to establish, on the balance of probabilities, that in the event of a significant imbalance in the rights and obligations of the parties, any term is reasonably necessary to protect the legitimate interest of the HEI. Given the complexity in identifying what is the higher education market with any clarity, this may be a difficult exercise for the HEI.

This chapter has examined many examples of individual terms of the contract of enrolment which are potentially unfair when compared with the examples provided in section 25. The nature of the unfairness is not limited to procedural fairness, a concept with which HEIs are traditionally comfortable. The UCT provisions allow the courts to address issues of substantive unfairness in the student-HEI contract. This may even include judicial scrutiny of the actual effect of terms enabling a HEI to unilaterally vary the delivery and content of individual units if the term relied on alters



the characteristics of the services supplied. This, it is suggested, circumvents the principle that academic matters are non-justiciable. A consideration of the consequences of a term being unfair and the impact on current practice in higher education in Australia follows.

### **Effect and Redress**

The effect of section 23 is that if a term in a standard form consumer contract is unfair it will be void. To the extent that the contract is capable, the contract continues to operate to bind the parties without the unfair term.<sup>216</sup> An application for a declaration that a term is unfair pursuant to section 250 can be sought either by a party to the contract or the regulator.<sup>217</sup> Unlike the position in the UK and the previous Victorian legislation, the role of the regulator in Australia is based on an 'ex post model' where they can only intervene after the detriment has been suffered.<sup>218</sup> A declaration that a term is an unfair term is not a contravention of the provisions of the CCA, unless a party were to continue to rely on the term subsequent to the declaration.<sup>219</sup> Consequently no civil penalties apply if a consumer contract contains an unfair term unless relied on after such a declaration.<sup>220</sup>

A finding that the actual term incorporating the rules and policies of the HEI is unfair may prove problematic as regards the student-HEI contract. In these circumstances it may be difficult to say that the contract for educational services can continue to operate. Indeed this outcome may have a deleterious effect on students' rights as consumers because the ordinances of the HEI would continue to operate as a matter of public law. As discussed in Chapter 2, students' rights to substantive fairness in public law judicial review are limited to issues of a procedural nature. However, remedies for redress do arise on a determination that a term of the contract is unfair, and this can include more than an assessment of financial detriment. The risk for the HEI would be that in the event of the contract ceasing to operate, they may not be able to collect outstanding fees, at least in relation to full fee paying students.<sup>221</sup>

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<sup>216</sup> ACL s 23(2).

<sup>217</sup> Jurisdiction is conferred on the Federal Court by CCA s 138 pursuant to the *Federal Court of Australia Act 1976 (Cth)*, EM1, 32 [2.101]-[2.102]. See Corones, above n 77, 22-3 for a detailed discussion of the conferral of jurisdiction in proceedings in the state courts and tribunals.

<sup>218</sup> Gray, above n 10, 165. The UK and Victorian model had an 'ex ante aspect' where the regulator could be proactive or take pre-emptive action in working with business where they felt that terms were unfair; Davidson, above n 11, 78-80; Australian Attorney-General, above n 13, 24.

<sup>219</sup> ACL s 224; EM1, 33 [2.104]-[2.105].

<sup>220</sup> ACL s 224; EM1, 33 [2.106] where orders in those circumstances may include exemplary damages.

<sup>221</sup> See *ACCC v Yellow Pages Marketing BV (No2)* (2001) 195 FCR 1 cited in Sarah Russell, 'The Australian Consumer Law: The New Enforcement Powers and Remedies — The Story so Far' (2012) 20

Upon a declaration being made that a term is unfair,<sup>222</sup> pursuant to section 237, an application for compensatory orders may be made by either the 'injured person'<sup>223</sup> (the person who has suffered loss or damage or is likely to as a result of the unfair term) or by the regulator.<sup>224</sup> Under this section,<sup>225</sup> compensation orders can be sought within six years from the date of declaration.<sup>226</sup> Furthermore, the ACL now allows the regulator to seek orders to redress any loss or damage, or likely loss or damage suffered by non-party consumers.<sup>227</sup> Non-party consumers are the class of persons who have or are likely to suffer loss or damage and are not a party to enforcement action in relation to the declared term.<sup>228</sup> This is in effect provides for class actions and substantially strengthens students' potential for redress, who as a class of persons are largely impecunious and not as well-resourced or powerful as HEIs.<sup>229</sup>

The compensatory orders that can be made in relation to unfair terms are very wide in their scope. A court can make 'such orders as the court thinks appropriate against the person' who relied, or purported to rely on the unfair term.<sup>230</sup> The types of orders that a court can make in addition to monetary damages are listed in section 243 and provide for significant judicial discretion. In particular, the court is able to make orders for specific performance, vary the contract, refuse to enforce any part of the contract or declare part or the whole of the contract void.<sup>231</sup> This is in contrast to the range of orders available at common law or in equity, where courts are unlikely to order specific performance or a mandatory injunction to that effect.<sup>232</sup> Injunctions are available pursuant to section 232(2). It is also possible that the regulator may use its

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*Australian Journal of Competition and Consumer Law* 6, 16 where this meant that the supplier could not collect some \$6 million dollars in payments outstanding under the contracts.

<sup>222</sup> See also ACL s 242 whereby an application can be made under ACL s 237 or s 239 in relation to the term in consumer contract even if the proceeding for the declaration has not been instituted.

<sup>223</sup> *Ibid* s 237(1)(a)(ii).

<sup>224</sup> *Ibid* s 237(1) (1)(b).

<sup>225</sup> Cf ACL s 236 which is an order for actual loss suffered.

<sup>226</sup> ACL s 237(3)(b).

<sup>227</sup> *Ibid* s 239(1)(a)(ii) for unfair terms.

<sup>228</sup> *Ibid* ss 239(1)(b) and (c); Australian Attorney-General, above n 13, 24. Orders for non-party consumers are made in accordance with ACL ss 240–1 and impact on the orders a court may make under ACL s 239.

<sup>229</sup> *Ogawa v University of Melbourne* [2005] FCA 1139. Justice Ryan stated 'I am mindful of the need to ensure that an impecunious student is not shut out by a potential liability for costs from pursuing an apparently meritorious claim against a large and wealthy corporation like the University': at [95] (Ryan J); Kamvounias and Varnham, 'Getting What They Paid For', above n 4, 324–6. See also Corones, above n 77, 27. He suggests that this amendment to the ACL addresses this issue in relation to representative actions for consumer guarantees.

<sup>230</sup> ACL s 237(1).

<sup>231</sup> *Ibid* s 243.

<sup>232</sup> As noted in Lindsay, 'Complexity and Ambiguity in University Law', above n 96, 11, n 50–3.

new power to seek a substantiation notice<sup>233</sup> from the HEI to aid in any investigation as to whether any unfair terms are being relied on before bringing an application. Substantiation notices allow the regulator to request information and documents in order to assess whether claims made in the supply of goods or services can be verified.<sup>234</sup> It is unclear whether substantiation notices will apply to unfair contract terms, as the section seems to be directed to 'claims' and 'representations' 'promoting' the supply, although unlike infringement notices<sup>235</sup> there is no specific exclusion in relation to unfair contract terms.<sup>236</sup> Non-compliance with a substantiation notice is a contravention of the CCA, for which a pecuniary penalty can be imposed.<sup>237</sup>

Any order for the payment of damages to compensate for loss<sup>238</sup> will be in accordance with the general principles for assessment of damages under the CCA.<sup>239</sup> Thus a causal connection between the reliance on the unfair contract term (the conduct) and the loss will need to be established, although 'the amount recovered is not necessarily limited by drawing analogies with either the law of contract or tort.'<sup>240</sup> In relation to damages, a claimant like the student in *Fennell v Australian National University* [1999] FCA 989 discussed in chapter 4 will still have difficulties (although a different type of conduct alleged); however, the new compensation orders allow for compensation on the basis of more than just demonstrated economic loss. Section 13 of the ACL, like its predecessor section 4K of the TPA, states that for the purpose of the ACL, loss or damage 'includes a reference to injury'.<sup>241</sup>

Therefore, the decision in *Shahid* is clearly important in the context of assessment of damages for loss sustained in relation to a claim based on the UCT provisions. It will be recalled that Shahid claimed damages for anxiety and distress in relation to the College's failure to adhere to the promised appeals process.<sup>242</sup> Although

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<sup>233</sup> ACL s 219.

<sup>234</sup> Ibid s 219(2).

<sup>235</sup> CCA s 134A(1). These notices only apply to those sections which incur civil penalties under ACL s 224, which does not include a declaration that a term is unfair; Russell, above n 221, 9.

<sup>236</sup> See generally Russell, above n 221.

<sup>237</sup> ACL s 221.

<sup>238</sup> Ibid s 237(2).

<sup>239</sup> See Miller, above n 8, 1919–20 [1.S2.237.10]–[1.S2.237.80]. On expectation loss see generally David D Knoll, 'Assessing Commercial Losses in Private Trade Practices Litigation' (2002) 10 *Competition and Consumer Law Journal* 1.

<sup>240</sup> Miller, above n 8, 1921 [1.S2.237.40] citing *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109.

<sup>241</sup> The clear reference to compensatory orders for an injured person in ACL s 237 makes obvious the legislatures' intent that an award can be provided for more than financial loss or detriment. See generally EM2, ch 15.

<sup>242</sup> *Shahid v Australasian College of Dermatologists* (2008) 248 ALR 267, 336 [221].

unsuccessful in contract for her claim for damages for anxiety and distress, she was successful in relation to anxiety damages under the state consumer protection legislation. This was a result of the Court finding that the anxiety and distress experienced by the appellant amounted to an 'injury' under the statute.<sup>243</sup> The Court held that the conduct of the College had caused the loss as claimed<sup>244</sup> and following the High Court, Jessup J took an expansive view of the meaning of 'injury' in the consumer protection legislation; 'Injury' 'is not confined to personal injury, but may extend to any detriment'<sup>245</sup> and should not be limited to actions for recovery of economic loss.<sup>246</sup> The claim for expectation damages (loss of opportunity) was considered, although not made out on the evidence.

What loss may a student claimant suffer as a result of reliance by a HEI on an unfair term? Reference is had to the examples of potentially unfair terms considered above. A calculation of loss in relation to the imposition of a penalty is fairly straight forward, although the 'injury' suffered as a result of a HEI unfairly withholding conferment of a degree may not be so straight-forward. There is clearly the likelihood of an order compelling conferment, a claim for anxiety damages and possibly compensation for loss of opportunity in relation to future employment. Likewise, an order for compensation regarding an unfair variation that results in the change of the characteristics of the educational service could include similar orders that go beyond a refund of course fees. Unfair variations to the educational service are most likely to cause delay (and possibly increased debt) and attending anxiety and distress. This applies equally to claims made in relation to terms that have the effect of unfairly limiting or hindering legal rights or exclude or limit liability in relation to agents of the HEI. It is clear that the potential for students to successfully claim damages as a person 'injured' by reliance of the HEI on a UCT pursuant to the ACL has better prospects when compared to a claim in damages for breach of contract.

### **Impact on current practice**

For the reasons above, it is recommended that HEIs in Australia review their contracts of enrolment to ensure the absence of unfair terms.<sup>247</sup> Outside of terms that are inherently unfair, such as the imposition of disproportionate penalties or very

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<sup>243</sup> Ibid [230]. Under the TPA s 4K expanded the reference to loss or damage (s 87 and s 82) to include injury.

<sup>244</sup> Ibid 336 [230].

<sup>245</sup> Ibid 335 [225], 336 [227].

<sup>246</sup> Ibid 335 [226]. The appellant was awarded damages for the 'injury' suffered within the meaning of the Act in the sum of \$2500.

<sup>247</sup> Farrington and Palfreyman have produced an excellent example of a legal risk management review for the student contract: Farrington and Palfreyman, above n 49, 636–40, [22.18]–[22.24].

wide exclusion clauses (which should be amended as a matter of some urgency), the area of most concern is the impact of the lack of transparency and notice of especially unusual or onerous terms. Transparency will not assist to legitimise fundamentally unfair terms, but it will assist with terms that are otherwise fair and are reasonably necessary to protect the legitimate interests of the supplier. It is worth noting that significant number of universities, particularly in the UK and New Zealand, now have formal written student contracts, the most notable being the Oxford University student contract.<sup>248</sup> It is argued that in light of the UCT regime, Australian HEIs should adopt the practice of the use of formal student contracts, drafted in a manner that conforms with the requirements of transparency under the ACL.

Leading UK education law scholars Farrington and Palfreyman provide a model student contract in the new edition of their seminal text *The Law of Higher Education*.<sup>249</sup> What is immediately noticeable about the model contract is the absence of legalese and an attempt to explain clearly what is a complex relationship. This is assisted by breaking information into various headings entitled 'Introduction', 'The contractual background', 'Where can you find the small print', 'If things go wrong' and finally 'Accepting the above'. Directly preceding the signing clause, there is a paragraph clearly setting out in point form the obligations of the parties. It states that students should familiarise themselves with the various regulations, pay fees, behave appropriately and participate in academic studies.<sup>250</sup> Correspondingly the HEI is obliged to 'provide teaching and learning opportunities with reasonable care and skill', apply its rules 'fairly and consistently', give 'adequate notice of any reasonable changes to the academic programme' that may affect the student and 'take every

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<sup>248</sup> See Annexure 2 for a copy of the Oxford student contract Oxford *Student Contract* (13 August 2012) <[http://www.st-annes.ox.ac.uk/fileadmin/STA/Documents/University\\_Contract.pdf](http://www.st-annes.ox.ac.uk/fileadmin/STA/Documents/University_Contract.pdf)>; Student contracts are used extensively in the UK, see, eg, University of Bristol <<http://www.bris.ac.uk/secretary/studentrulesregs/agreement.html/>>; The University of Sheffield <<http://www.bris.ac.uk/secretary/studentrulesregs/agreement.html/>>; University of Leeds, *Taught Student Contract* (13 August 2012) <<http://www.leeds.ac.uk/ssc/studentcontract.htm>>. There are even professional development courses that can be taken in this area, see, eg, JISC Legal Information (UK) <<http://www.jisclegal.ac.uk/ManageContent/ViewDetail/ID/1866/ARMED--Student-contract-and-charters.aspx>>. Some examples of universities in New Zealand are Massey University, *Student Contract* (13 August 2012) <<http://www.massey.ac.nz/massey/about-massey/calendar/statutes-and-regulations/student-contract.cfm>>; University of Victoria, Wellington, *Student Contract* (13 August 2012) <<http://www.victoria.ac.nz/home/admisenrol/enrol/studentcontract>>; Canterbury Christ Church University, *Student Agreement* (13 August 2012) <<http://www.canterbury.ac.uk/courses/about/student-agreement.pdf>>. The only formalised agreement that could be found for an Australian HEI was in relation to HDR degrees at the University of New England in NSW (13 August 2012) <http://www.une.edu.au/research-services/forms/student-supervisor-agreement.pdf>. See also Pedley, above n 205; Kamvounias and Varnham, 'Getting What They Paid For', above n 4, 313.

<sup>249</sup> Farrington and Palfreyman, above n 49, 443. A copy can be obtained for use by HEIs by emailing [bursar@new.ox.ac.uk](mailto:bursar@new.ox.ac.uk).

<sup>250</sup> *Ibid* 443.

reasonable step' to keep the student informed of 'issues affecting their studies'.<sup>251</sup> Not only are the terms of the contract expressed in reasonably plain language and presented clearly, the corresponding obligations of the HEI are set out. It is arguable that this would assist the HEI defending claims in relation to particular terms as being unfair, as the court, along with with the student, will readily see the counterbalance in any term that is weighted in favour of the HEI.

Additionally the model contract, when adopted, is also accompanied by Explanatory Notes.<sup>252</sup> This approach accords with practice in other industries, such as the provision of Product Disclosure Statements in insurance contracts,<sup>253</sup> and with suggested reforms regarding one-page disclosure documents in retail leasing and standard form ticket sales, giving 'notice of critical terms governing the transaction they are entering into'.<sup>254</sup> Notice documents that are 'one-page summaries' of critical terms are not without their critics, as it is often difficult to reduce complex contractual terms to such a small space and there is a temptation by the consumer to regard the summary as the entirety of the contract, which is likely to expand over time.<sup>255</sup> Concerns regarding the idea of a one-page summary are overcome somewhat if framed more as Explanatory Note to a formal written contract, as suggested by Farrington and Palfreyman. It is difficult to see how HEI might otherwise overcome the difficulties with transparency and notice, other than by the adoption of formal written contracts that contain sufficient notice of terms that may cause a significant imbalance in parties' rights under the contract in a manner that is not reasonably necessary to protect the legitimate interests of the HEI supplier. Essentially, the purpose of the law is to provide clarity, certainty and better informed contractual consent.<sup>256</sup> HEIs would be well advised to take steps to ensure that their contractual relations with their student consumers do just this. Aside from the wide array of orders a court could make against a HEI in relation to reliance on an unfair term, the reputational consequences of such orders would be significant in an increasingly competitive higher education market.

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<sup>251</sup> Ibid.

<sup>252</sup> Ibid.

<sup>253</sup> Svantesson and Holly, above n 9, 7.

<sup>254</sup> Freilich and Webb, above n 32, 270.

<sup>255</sup> Ibid 272 n 61. See generally Griggs, 'The [Irr]rational Consumer', above n 14; Paterson, 'The Australian Unfair Contract Terms Law', above n 13.

<sup>256</sup> Whittaker, 'Judicial Review', above n 49, 214.

## Chapter 6: Conclusion

*Consumers of Higher Education in Australia: do the unfair contract term provisions in the Australian Consumer Law provide effective protection for students as consumers of educational services?*

### Chapter 1

The principal research question that is addressed in this thesis is whether the introduction of an UCT regime in the ACL advances students' rights as consumers by providing effective protection for students regarding the nature of educational services supplied. It has been recognised by courts and commentators that some rights do accrue to students as consumers of educational services under the ACL, principally with regard to promotional activities of HEIs.<sup>1</sup> This work seeks to identify whether there is an application of the protections afforded by the ACL beyond this known application. A review of the literature and case law revealed a number of barriers faced by students seeking redress before the courts. First, that claims relating to academic matters are almost without exception non-justiciable. Second, even if students have been able to establish their claim, proving loss or damage has been problematic. In relation claims made against HEIs in consumer protection litigation specifically, the principal barrier has been difficulties with categorising the provision of educational services as being a service supplied in 'trade or commerce'. This research contends that the introduction of a UCT regime in the ACL overcomes the identified barriers faced by students using consumer protection legislation as a means to ensure they receive services as promised and advance their rights as consumers.

The research question arises in the context of wider commentary surrounding the placement of the student as consumer in an expanding and complex market for higher education services. As discussed in the introductory chapter and Chapter 5, it is clear that the academic community is divided as to whether the acknowledgement of a higher education market and the attending consumerist theory will enhance the

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<sup>1</sup> Despite judicial affirmation that the provision will apply to the promotional activities of a HEI, claimants have had limited success in proving their case in the higher courts, see, eg, *Plimer v Roberts* (1997) 150 ALR 235; *Fennell v Australian National University* [1999] FCA 989; cf *Shahid v Australasian College of Dermatologists* (2008) 248 ALR 267. There has been mixed success at the tribunal level, see, eg, *Kwan v University of Sydney Foundation Program P/L* (General) [2002] NSWCTTT 83; cf *Jones v Academy of Applied Hypnosis P/L* (General) [2005] NSWCTTT 841; *Cotton v Blinman Investments P/L & Blinman* (General) 2004 NSWCTTT 723. See also Hilary Astor, 'Why do Students Sue Australian Universities?' (2010) 21 *Australasian Dispute Resolution Journal* 20; Patty Kamvounias and Sally Varnham, 'Getting What They Paid For: Consumer Rights of Students in Higher Education' (2006) 15 *Griffith Law Review* 306.

educational experience of students and be of benefit to the wider community. Despite an acknowledged unease, it is increasingly accepted by the academe that the landscape of the higher education sector has been transformed over recent decades into a culture of consumerism with the student at the centre as the consumer. This however has seldom translated into students seeking redress in relation to infringement of their rights as consumers under consumer protection legislation.

## **Chapter 2**

In order to address the first objective of the research, an examination of the case law and literature was undertaken in Chapter 2 to situate the research within the legal framework of the student–HEI relationship and identify the significance of the research within a broader legal context. The legal framework applying to the student–HEI relationship is multifaceted. The causes of action available to students with respect to a claim against a HEI are extensive, although frequently limited in their effectiveness, both in terms of suitability and adequacy of remedies. Students are often seen to ‘shoehorn’ their grievances in a way that will achieve success. Consequently a claim under the ACL by a student against their HEI for an alleged failure in the provision of educational services is only one option open to the student. The research argues that the UCT regime provides increased and potentially more effective protection for students than other causes of action available.

In evaluating the efficacy of the UCT provisions, the second objective of the research was to determine whether claims made by students in relation to academic matters are justiciable. The discussion in the thesis has shown that students are concerned about the educational experience they participate in. They do make claims in the courts regarding the nature of the educational service supplied that go to substantive issues including course content, design and delivery, the standards of teaching or the merits of an academic decision in the assessment of the standard of students’ work or academic progression. These issues relate to academic judgement and have been termed academic matters. The examination of the case law and literature in relation these types of claims revealed a common barrier to students’ success: subject to few exceptions, the part of the claim that relates to academic matters is not justiciable.<sup>2</sup> Outside of the consumer tribunals, there is no Australian precedent to indicate that

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<sup>2</sup> *Clark v University of Lincolnshire and Humberside* [2000] 3 All ER 752 Kirby J in *Griffith University v Tang* (2005) 221 CLR 99 156, [165]; Mark Davies, ‘Challenges to “Academic Immunity” — The Beginning of a New Era?’ (2004) 16(2–3) *Education and the Law* 75; Patty Kamvounias and Sally Varnham, ‘Legal Challenges to University Decisions Affecting Students in Australian Courts and Tribunals’ (2010) 34 *Melbourne University Law Review* 141, 159–60.



the courts will look to matters of quality and standards in the supply of educational services the same way as it will for other professional services. As the authorities stand, judicial review of academic matters attending to the quality of the service supplied is improbable.<sup>3</sup> Success is more certain if the basis of the claim rests on a challenge that relates to a lack of procedural fairness in the decision making process. Students may well be concerned that decision making processes are fair, but this is not mutually exclusive of claims in relation to substantive matters. Some of the difficulties in relation to what is justiciable appear to lie with the lack of clarity as to which particular academic matters comprise 'pure academic judgement'. It is the proposition of this research that once 'pure academic judgement' has been exercised in the determination of general course requirements, then to the extent that any other academic matters form part of the student-HEI contract, those terms are susceptible to judicial review in accordance with the UCT provisions in the ACL.

### Chapter 3

Chapter 3 addressed the third objective of the research and examined and analysed the ACL with reference to case law to determine the threshold issue of whether the ACL applies to the provision of higher education services to students in Australia. The chapter identified that prior to the ACL, the categorisation of educational services as occurring in 'trade or commerce' was an obstacle for students bringing a claim under the TPA. In order to attract the UCT provisions, the contract for educational services must be 'provided, granted or conferred in trade or commerce'.<sup>4</sup> Previously, under the TPA, academic activities such as statements made in lectures have been considered matters internal to the student-HEI relationship and therefore not within the scope of the legislation as conduct *in* trade or commerce.<sup>5</sup> This research is however a narrower inquiry than a consideration of the extensive range of individual academic activities that could arguably be conduct in 'trade or commerce' for the purpose of other protections available under the ACL.<sup>6</sup> The focus is therefore the contract for the supply of educational services and the terms contained therein.

In particular, the effect of the new extended definition of 'trade or commerce' was considered. The new definition is based on the definitions contained in the former

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<sup>3</sup> See especially Kamvounias and Varnham, 'Legal challenges to University Decisions', above n 2, 179.

<sup>4</sup> ACL s 2 (definition of 'services').

<sup>5</sup> *Fasold v Roberts* (1997) 145 ALR 548; *Plimer v Roberts* (1997) 150 ALR 235; *Quickenden v O'Conner* (2001) 184 ALR 260. See generally Francine Rochford, 'Traders of the Lost Ark — Lecturers and Liability' (2001) 13(2) *Education and the Law* 127.

<sup>6</sup> Such as the Consumer Guarantees contained in ACL ch 3 pt 3-2 div 1 sub-div A-D ss 51-68. See especially Stephen Coronos, 'Consumer Guarantees and the Supply of Educational Services by Higher Education Providers' (2012) 35(1) *University of New South Wales Law Journal* 1.

state consumer protection legislation and includes any business or professional activity, whether or not carried on for profit.<sup>7</sup> The extended definition in the ACL and the decisions of *Monroe Topple* and *Shahid*<sup>8</sup> strongly suggest that the contract for the supply of educational services of a HEI will be considered to be in 'trade or commerce'. It was argued first that to the extent that a student–HEI contract for educational services exists, this is an activity or transaction which of its nature bears a trading or commercial character. The provision of educational services by the modern HEIs is for reward on a highly organised, systematic and ongoing basis.<sup>9</sup> Ipso facto if there is an enforceable contract there is a trading or commercial relationship or dealing. Further, the rights of consumers will not be denied because the services are provided without profit for the supplier.

Alternatively, the supply of educational services is a 'professional activity' as an activity or transaction that is unequivocally and distinctly characteristic of the carrying-on of the profession<sup>10</sup> and therefore provided in 'trade or commerce' within the extended meaning of the ACL. This concept is not limited to the engagement of professional practice and HEIs are therefore not excluded from the ambit of the ACL on this basis. It is also arguable that the supply of educational services to Commonwealth-funded students falls within the definition of 'trade or commerce', both on law and on policy grounds. HEIs are unable to claim immunity from the operation of the ACL, which has an extended jurisdiction that impacts on the delivery of educational services in locations outside Australia, including via the internet.

However, the courts' have been concerned to ensure that consumer protection legislation does not impact negatively on intellectual debate in Australia.<sup>11</sup> Therefore it is possible to say that academic matters that attend to expressions of opinion or the divergence in views is not conduct in 'trade or commerce' under the ACL, as this is not the central concept of the commercial relationship or the 'carrying on' of the professional activity. However, other matters relating to the transaction for the delivery of educational services are. To the extent that academic activity forms part of

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<sup>7</sup> ACL s 2 (definition of 'trade or commerce').

<sup>8</sup> *Shahid v Australasian College of Dermatologists* (2008) 248 ALR 267; *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* (2002) 122 FCR 110. Cf the case of *Mathews v University of Queensland* [2002] FCA 414; however, this case was before a single judge of the Federal Court, was decided before *Shahid* and not referred to at all by the Full Court in *Shahid* as a binding authority.

<sup>9</sup> *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* (2002) 122 FCR 110.

<sup>10</sup> *Shahid v Australasian College of Dermatologists* (2008) 248 ALR 267.

<sup>11</sup> *Plimer v Roberts* (1997) 150 ALR 235 per Branson J at 245.

the student–HEI contract, it will be subject to the ACL provisions regulating unfair contract terms.

#### **Chapter 4**

The fourth objective of the research was to undertake an analysis of the case law, legislation and literature to establish whether there exists in Australia a contract between the student and the HEI, the nature of any contract, its terms and available remedies upon a breach. While higher courts in Australia have not had an abundance of occasions to consider the question of whether a student–HEI contract does exist in Australia, on balance it would seem justified that there is a student–HEI contractual relationship, as in other common law countries. The chapter determined that the critical elements required for the formation of an enforceable contract were met, including the provision of sufficient consideration by Commonwealth-funded students. The preferred view is that there are two contracts. First, there is a contract of admission, which obliges the HEI to enrol the student into the course on the basis of the pre-admission information received by the student. The second contract, the contract to educate, arises on the student completing the enrolment process. The terms of this contract are informed by the admissions contract and may be varied over the course of the study period, in much the same way a contract of employment might be varied.

An assessment of threshold issues regarding the application of the ACL was the third objective of this research and was in part relevant to the discussion of the nature of the contract in Chapter 4. The contract for the supply of educational services must be a ‘service’ as defined by the legislation.<sup>12</sup> The analysis undertaken in this chapter found that the contract for the supply of educational services relates to the performance of work, including work of a professional nature. A ‘service’ does not need to be attached to the supply of goods. For the purpose of this section, the contract for the supply of educational services is analogous to the supply of services by other professionals.<sup>13</sup> It will also include a contract that relates to the provision and use of facilities for instruction. Thus it is likely that the contract to educate is a contract for service for the supply of educational services, informed by pre-contractual information and as varied over the course of study.

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<sup>12</sup> ACL s 2 (definition of ‘service’).

<sup>13</sup> Guzyal Hill, ‘The New Consumer Legislation and the Legal Profession’ (2012) 20 *Australian Journal of Competition and Consumer Law* 18. See also Davies, above n 2.

A determination of the scope of the terms of the contract for the supply of educational services, with particular reference to the myriad of HEI enrolling, policy and other documents was then undertaken. In the absence of a formal written contract, there is significant uncertainty and potential difficulties in determining the terms of the contract. This research is however only concerned with those terms that can be said to be terms of any 'standard form' 'consumer contract'.<sup>14</sup> Therefore, the analysis was confined to the terms of the contract arising on enrolment, as the 'standard form' contract, discussed further in Chapter 5. An analysis of potential terms was undertaken with reference to the enrolment procedures and documentation at Curtin University as an example of a typical enrolment process. It is probable that the standard form consumer contract for the supply of educational services will contain those terms referred to expressly on enrolment and by incorporation of at least the published course handbook and statutes, rules and policies of the HEI.

The chapter also canvassed the remedies available at common law for breach of the student–HEI contract. Often such claims are brought in conjunction with other causes of action, including a breach of consumer protection legislation.<sup>15</sup> The case law and commentary is clear that the capacity of students to recover damages for breach of contract or otherwise is extremely difficult.<sup>16</sup> This is particularly so if the claim is in relation to issues surrounding academic matters and the nature of the educational service provided. It is apparent from the case law that even if a student is able to establish a breach of contract, it is very difficult to establish a causal link to the losses claimed<sup>17</sup> or alternatively to be able to prove loss at all.<sup>18</sup> To a lesser extent this is so even in the consumer tribunal matters.<sup>19</sup>

It is the intangible nature of the loss sought to be recovered that is problematic.<sup>20</sup> To date, awards of damages for more than direct losses, such as compensation for

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<sup>14</sup> ACL ss 23(1)(b) and 23(3).

<sup>15</sup> See, eg, *Shahid v Australasian College of Dermatologists* (2008) 248 ALR 267.

<sup>16</sup> See, eg, *Fennell v Australian National University* [1999] FCA 989; *Mathews v University of Queensland* [2002] FCA 414; Megumi Ogawa, 'The Courts' Jurisdiction over Student/University Disputes in Australia', (2012) 2(1) *International Journal of Public Law and Policy* 96, 97; Francine Rochford, 'Suing the Alma Mater: What Loss Has Been Suffered?' (2001) 13(4) *Education and the Law* 319.

<sup>17</sup> See, eg, *Mathews v University of Queensland* [2002] FCA 414.

<sup>18</sup> See, eg, *Harding v University of New South Wales* [2001] NSWSC 301; *Fennell v Australian National University* [1999] FCA 989; Martin Davis, 'Students, Academic Institutions and Contracts — A Ticking Time Bomb?' (2001) 13(1) *Education and the Law* 9, 22.

<sup>19</sup> See, eg, *Cotton v Blinman Investments Pty Ltd and Blinman* (General) [2004] NSWCTTT 723 (13 December 2004).

<sup>20</sup> Francine Rochford, 'The Relationship Between the Student and the University' (1998) 3(1) *Australia and New Zealand Journal of Law and Education* 28, 34; Rochford, 'Suing the Alma Mater', above n 16;

anxiety or distress suffered, have been very limited.<sup>21</sup> The case of *Shahid* was considered in detail as authority for the proposition that students' remedies are more extensive under the ACL than at common law. This case involved claims for damages for breach of contract and under state consumer protection legislation. The student claimant was able to recover damages for anxiety and distress as the meaning of 'injury' under the state legislation was given an expansive meaning and was not limited to recovery of economic loss.<sup>22</sup> This decision is significant as regards the compensation orders for 'injured persons' introduced under sections 237–239 of the ACL, discussed more fully in Chapter 5.

## Chapter 5

The fifth chapter addressed the remainder of the objectives of this research. The chapter first examined whether the specific protections available under the UCT of the ACL are enlivened for the contract of the supply of educational services. In addition to the threshold requirements, as addressed in Chapters 3 and 4, that the contract for the supply of educational 'services' must be in 'trade or commerce, in order for the UCT regime to apply the contract must also be a 'standard form' 'consumer contract'.<sup>23</sup> There is no definition of 'standard form contract' although a list of matters a court is to take into account is found in section 27(2). The list focuses on contracts that are prepared by one party and are not subject to individual negotiation. It is a contract offered on a 'take it or leave it basis'.<sup>24</sup> A rebuttable presumption that the contract for the supply of educational services is a 'standard form' contract will arise upon a student making a claim under these provisions. It will be up to a HEI to prove otherwise.<sup>25</sup> As a matter of proof this will assist students somewhat. When the matters listed in section 27(2) of the ACL are examined, the contract for the supply of educational services (at least the contract of enrolment) bears the traits of a standard form contract. However, the need to establish a 'standard form' contract may prove to be an additional complexity for Australian students bringing their claims.

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Sam Middlemiss, 'Legal Liability of Universities for Students' (2009) 12(2) *Education and the Law* 69, 72.

<sup>21</sup> See, eg, *Rycotewood (re damages: 28/2/2003, Warwick Crown Court, His Honour Judge Charles Harris QC, OX004341/42, Buckingham v Rycotewood College (26/3/2002, Oxford County Court, OX004741/OX004343)*; David Palfreyman, 'Phelps ... Clark ... and now Rycotewood? Disappointment Damages for Breach of the Contract to Educate' (2003) 15(4) *Education and the Law* 237; Bruce Lindsay, 'Complexity and Ambiguity in University Law: Negotiating the Legal Terrain of Student Challenges to University Decisions' (2007) 12(2) *Australia and New Zealand Journal of Law and Education* 7, 11 nn 50–3 regarding the quantification of damages. See also Patty Kamvounias and Sally Varnham, 'In-House or in Court? Legal Challenges to University Decisions' (2006) 18 *Education and the Law* 11.

<sup>22</sup> *Shahid v Australasian College of Dermatologists* (2008) 248 ALR 267, 335–6.

<sup>23</sup> ACL ss 23(1)(b) and 23(3).

<sup>24</sup> Australian Attorney-General, *The Australian Consumer Law: A Guide to Provisions*, 2010, 8.

<sup>25</sup> ACL s 27(1).

Additionally the contract in question must be a consumer contract as defined by section 23(3) of the ACL. The definition of a consumer contract for the purposes of the UCT provisions is a subjective test as it refers to the use that the goods or services are put to, not, as in the other definitions of consumer, 'of a kind ordinarily used or put to'.<sup>26</sup> Thus the test focuses on the actual intention of the acquirer of the services.<sup>27</sup> It seems clear that a contract for the provision of educational services would be a consumer contract under the legislative definition as they are services acquired by students for their personal use.

It is unlikely that the exemptions contained in section 26 will operate to exclude HEI from the operation of the UCT regime to any great extent. The exemption that has the most potential impact is the exclusion from the UCT provisions of terms relating to the 'main subject matter'. It is argued in this thesis that the 'main subject matter' exemption should not extend beyond the overall focus of the course or programme.<sup>28</sup> Thus the 'main subject matter' of the standard form contract for the supply of educational services is the acceptance of the 'place'. What is chosen as the 'purchase' is an acceptance of the overall focus of the course or programme.<sup>29</sup> This is consistent with the proposition of this research in Chapter 2 that once 'pure academic judgement' has been exercised in the determination of general course requirements, to the extent any other academic matters form part of the student-HEI contract those terms are subject to judicial review for the purpose of the UCT provisions.

Chapter 5 also examined a number of examples of individual terms of the contract of supply of educational services arising on enrolment that are potentially unfair when compared with the indicative list provided in section 25 of the ACL. Reference was had to the published Course Handbooks and Statutes, Rules and Policies of Curtin

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<sup>26</sup> Ibid s 3.

<sup>27</sup> Sirko Harder, 'Problems in Interpreting the Unfair Contract Terms Provisions of the Australian Consumer Law' (2011) 34 *Australian Bar Review* 306, 310; Jeannie Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts' (2009) 33(3) *Melbourne University Law Review* 934, 940. See also John W Carter, 'The Commercial Side of Australian Consumer Protection Law' (2010) 26 *Journal of Contract Law* 221; Aviva Freilich, 'A Radical Solution to Problems with the Statutory Definition of Consumer: All Transactions are Consumer Transactions' (2006) 33 *University of Western Australia Law Review* 108.

<sup>28</sup> As appears to be the position in the UK. See Dennis Farrington and David Palfreyman, *The Law of Higher Education* (Oxford University Press 2<sup>nd</sup> ed, 2012), 413 [12.102]; Simon Whittaker, 'Judicial Review in Public Law and in Contract Law: The Example of "Student Rules"' (2001) 21(2) *Oxford Journal of Legal Studies* 193, 209.

<sup>29</sup> See generally the rationale for the carve out Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) ('EM1') 25 [2.65].

University as an example of representative practice in the higher education sector. Three main areas of concern arise in relation to the contract. The first are terms that limit or avoid performance of the contract, such as disclaimers or exclusions. The second are those terms that allow for unilateral variations. The third area involves the imposition of penalties for breach of the contract. The test of unfairness was considered in relation to these types of terms.

The three limbs of the test for unfairness must all be met before there can be any finding of unfairness. A term of a consumer contract is unfair if it causes a significant imbalance in the parties' rights and obligations arising under the contract; it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.<sup>30</sup> In determining unfairness the court is to have regard to the contract as a whole and whether the term is transparent. Importantly for the student consumer, the detriment can include loss other than financial loss or damage.

The issue for any HEI is going to be one of transparency, or lack thereof. A lack of transparency can render a term that is perhaps otherwise fair, unfair.<sup>31</sup> Potentially the lack of transparency in the contract for educational services will render the terms of the contract unfair and void in two regards. First, the actual term incorporating the rules and policies of the HEI is likely to be unfair. It cannot be said that a term that states that the student is bound by the statutes, rules and policies of the HEI (as is common practice in all HEI) and provides access by way of hyperlink is expressed in reasonably plain language, legible, presented clearly and readily available. Second, the individual terms, that is the content of the rules and policies, even if fair are clearly not transparent. The terms may be even more oblique if the demographic of young inexperienced students enrolling online is taken into account. Additionally, any HEI will need to be able to produce sufficient marketplace evidence to establish, on the balance of probabilities, that in the event of a significant imbalance in the rights and obligations of the parties, any term is reasonably necessary to protect the legitimate interest of the HEI. Given the complexity in identifying what is the higher education market with any clarity, this may be a difficult exercise for the HEI.

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<sup>30</sup> ACL s 24.

<sup>31</sup> EM1, 21 [2.46]; Chris Willett, 'The Functions of Transparency in Regulating Contract Terms: UK and Australian Approaches' (2011) 60 *International Law Quarterly* 355, 373.

The nature of the unfairness is not limited to procedural fairness, a concept with which HEIs are traditionally comfortable. Although it is clear that students will be unable to use the UCT provisions as the basis of a claim that they have not received 'value for money' or have changed their mind about their 'purchase', the UCT provisions allow the courts to address issues of substantive unfairness in the student–HEI contract.<sup>32</sup> This will include judicial scrutiny of the actual effect<sup>33</sup> of terms enabling a HEI to unilaterally vary the delivery and content of individual units if the term relied on alters the characteristics of the services supplied. This, it is suggested, circumvents the principle that academic matters are non-justiciable and advances students' rights as consumers of higher education services as it is the substantive effect of the term that is reviewed, not the academic judgement executed in the supply of the service.

The chapter also considered the consequences of a term being declared unfair and redress available to students. The effect of section 23 of the ACL is that if a term in a standard form consumer contract is unfair it will be void. To the extent that the contract is capable, the contract continues to operate to bind the parties without the unfair term.<sup>34</sup> An application for a declaration that a term is unfair pursuant to section 250 can be sought either by a party to the contract or the regulator. A declaration that a term is an unfair term is not a contravention of the provisions of the CCA, unless a party were to continue to rely on the term subsequent to the declaration.<sup>35</sup> Consequently no civil penalties apply if a consumer contract contains an unfair term, unless a party contravenes the CCA by continuing to rely on the term following a declaration.<sup>36</sup>

The ACL makes provision for compensatory orders for loss or damage suffered, or likely to be suffered, by an injured person when another person seeks to rely on a term that has been declared to be void.<sup>37</sup> The orders available under the ACL provide for significant judicial discretion<sup>38</sup> and include the ability of the court to order injunctions and specific performance in relation to unfair contract terms.<sup>39</sup> Any order for the payment of damages to compensate for loss will be in accordance with the

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<sup>32</sup> See Paterson, 'The Australian Unfair Contract Terms Law', above n 27; Willett, above n 31.

<sup>33</sup> Harder, above n 27, 318.

<sup>34</sup> ACL s 23(2).

<sup>35</sup> Ibid s 224; EM1, 33 [2.104]–[2.105].

<sup>36</sup> ACL s 224; EM1, 33 [2.106] where orders in those circumstances may include exemplary damages.

<sup>37</sup> ACL pt 5-2 div 4 ss 237–9.

<sup>38</sup> Ibid s 243.

<sup>39</sup> Ibid s 232.



general principles for assessment of damages under the CCA.<sup>40</sup> Thus a causal connection between the reliance on the unfair contract term and the loss will still need to be established by student claimants. However, the assessment of damages for loss sustained in relation to a claim based on the UCT provisions is based on the 'injury' suffered. This issue was also addressed in Chapter 4 in relation to available remedies at common law for breach of contract and comparisons with claims made under state consumer protection legislation in the matter of *Shahid*.<sup>41</sup> The decision in *Shahid* is therefore clearly important as 'injury' was given an expansive meaning and extends to any detriment and should not be limited to actions for recovery of economic loss.<sup>42</sup>

The loss that a student claimant may suffer as a result of reliance by a HEI on an unfair term is potentially extensive. There may be straight forward direct loss, such as the imposition of a penalty or refund of course fees as a result of reliance on an unfair term. Following the reasoning in *Shahid*,<sup>43</sup> and assuming availability of proof, compensation for injury could include successful claims for anxiety damages and possibly for loss of opportunity in relation to future employment. It is clear that the potential for students to successfully claim damages as a person 'injured' by reliance of the HEI on an unfair contract term pursuant to the ACL has better prospects when compared to a claim in damages at common law. Moreover, the recent amendment to the ACL and the ability of the regulator to seek orders to redress any loss or damage suffered by non-party consumers strengthens students' potential ability to secure reparation.<sup>44</sup> This in effect provides for class actions by the regulator and substantially strengthens students' potential for redress, who as a class of persons are largely impecunious and not as well-resourced or powerful as HEIs.<sup>45</sup>

Chapter 5 also considered the impact on current practice in higher education in Australia and recommendations for change addressing the final objective of the research. The impact and recommendations for change are discussed in detail below.

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<sup>40</sup> See Russell Miller, *Miller's Australian Competition and Consumer Law Annotated* (Thomson Reuters, 34<sup>th</sup> ed, 2012), [1.S2.237.10]–[1.S2.237.80]. On expectation loss see generally David D Knoll, 'Assessing Commercial Losses in Private Trade Practices Litigation' (2002) 10 *Competition and Consumer Law Journal* 1.

<sup>41</sup> *Shahid v Australasian College of Dermatologists* (2008) 248 ALR 267.

<sup>42</sup> *Ibid* 335–6.

<sup>43</sup> *Ibid* 267.

<sup>44</sup> ACL s 239(1)(a)(ii) for unfair terms; ACL ss 239(1)(b)–(c); ACL ss 240–1.

<sup>45</sup> *Ogawa v University of Melbourne* [2005] FCA 1139 per Justice Ryan at [95]; Kamvounias and Varnham, 'Getting What They Paid For', above n 1, 324–6. See also Corones, above n 6, 27.

## Key findings

The nature of the student–HEI relationship is multifaceted and evolving in a changing marketplace. The student–HEI contract for the supply of educational services co-exists with other legal rights held by students in regards their relationship with the HEI. On balance, this contract also exists between HEIs and Commonwealth-funded students. Students have many avenues for redress in their grievances against a HEI and consumer protection is only one avenue. Successful claims pursuant to consumer protection legislation in Australia have not been significant to date. As discussed throughout the thesis, the reasons for this are varied and are likely to include matters distinct from the legal framework, such as students’ lack of knowledge of their rights as consumers, as is typical in young people, and a reluctance to enforce rights on the basis of disempowerment, lack of financial resources or possibly satisfaction with internal HEI grievance procedures.

Separate to barriers that may have existed within the consumer protection regulatory structure, two common obstacles in relation to student claims can be identified. First, claims that rest on judicial review of academic matters are likely to fail on the basis that in all but a few exceptional circumstances, academic matters are not justiciable. Second, even if students have been able to ‘shoehorn’ or reframe their claims in a manner that is acceptable to the courts, proof of loss and an award of damages beyond recovery of direct losses have proved insuperable. As regards the previous consumer protection regulatory framework, difficulties arose classifying the supply of education services by HEIs as being an activity in ‘trade or commerce’, with the consequence that the TPA did not apply.

The recent introduction of a single national consumer protection law, the ACL, has the potential to improve the protection afforded to students as consumers. The ACL is the most significant change to consumer rights since the introduction of the *Trade Practices Act 1974* (Cth). The first tranche of reforms resulted in the imposition of an unfair contract terms law from 1 July 2010. Now any term in a consumer contract that is unfair as defined by the ACL is void.<sup>46</sup> It is arguable that HEIs’ arrangements with their students’ falls within the ambit of the UCT provisions. The exemptions available under the ACL will not operate to exclude HEI beyond the upfront price or the main

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<sup>46</sup> ACL s 23.

subject matter of the contract. It was argued that the main subject matter of the student–HEI contract should be limited to the overall focus of a course of study.

The contract for the supply of educational services is a ‘service’ as defined by the ACL.<sup>47</sup> The enforceable contract that exists between the student and HEI is a dealing or transaction that bears a commercial or trading character. Alternatively it is an activity that is unequivocally and distinctly characteristic of the ‘carrying on’ of the profession of the HEI so as to be in in ‘trade or commerce’ within the new extended definition of the ACL.<sup>48</sup> This includes the contract with Commonwealth-funded students. The contract arising on enrolment bears the traits a standard form<sup>49</sup> consumer contract, to which the law attaches. Students clearly acquire educational services for their personal use.<sup>50</sup> Thus the provisions of the UCT are enlivened in relation supply of educational services.

The significance of the UCT provisions is that rather than just focusing on procedural unfairness they attempt to deal with substantive unfairness.<sup>51</sup> In the context of the student–HEI relationship and provision of educational services, the UCT provisions have the potential to ensure that the student–HEI contract does not contain terms that are substantively unfair. This, it is suggested, circumvents the principle that academic matters are non-justiciable, as it the substantive effect of the term that is reviewed, not the academic judgement executed in the supply of the service. As the UCT looks to the substantive fairness of terms, the provisions rely less on an adjudication of the quality and standard of educational services supplied by reference to analogous principles from other areas of law, such as professional negligence and focus instead on the essence of the term.

Notwithstanding commentators’ opinions, there is little precedent to support the view that courts will encroach on the academics’ purview and review academic matters. Despite decisions of specialist consumer tribunals and decisions in the emerging area of admissions law, superior courts remain reluctant to adjudicate on matters of academic judgement. Outside of the consumer tribunals, there is no Australian superior precedent to indicate that the courts will look to matters of quality and standards in the supply of educational services the same way as it does for other

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<sup>47</sup> Ibid s 2 (definition of ‘services’).

<sup>48</sup> Ibid s 2 (definition of ‘trade or commerce’).

<sup>49</sup> Ibid s 27.

<sup>50</sup> Ibid s 23(3).

<sup>51</sup> Paterson, ‘The Australian Unfair Contract Terms Law’, above n 27.

professional services. As the authorities stand, judicial review of the quality or standard of the teaching service delivered, even pursuant to the statutory guarantees under the ACL, is unlikely.<sup>52</sup> Thus the UCT provisions progress students' rights in relation to judicial consideration of at least the substantive fairness of a term of the contract. Claims regarding the nature of the educational service provided by a HEI under the UCT provisions are therefore not as limited by notions of academic immunity as other causes of action.

Additionally, the compensation orders and remedies available for students pursuant to the ACL upon the declaration that a term in a contract is unfair are more extensive and wide-ranging than those available at common law and other legislative schemes.

The impact of the UCT regulation on the higher education sector is potentially significant. An examination of examples of terms of the standard form contract of a typical university revealed a substantial number of potentially unfair terms, particularly in regard to terms that impose penalties, overly-wide exclusion and disclaimer clauses, and terms that unilaterally allow the HEI to vary the characteristics of the agreed service. The UCT regime will require a change in practice by providers of higher education who rely heavily on a myriad of ordinances and policies to regulate their relationship with the student consumer in a manner that is not transparent. It is suggested that HEIs should clarify what makes up the legitimate interests they seek to protect when drafting the contract of enrolment in a complex and changing market for higher education, including the boundaries of academic freedom. Aside from the wide array of orders a court could make against a HEI in relation to reliance on an unfair term, the reputational consequences of such orders would be significant in an increasingly competitive higher education market.

### **Recommendations for change**

The purpose of the law is to provide clarity, certainty and better informed contractual consent.<sup>53</sup> It is recommended that HEIs in Australia review their contracts of enrolment to ensure the absence of unfair terms. Outside of terms that are inherently unfair, such as the imposition of disproportionate penalties or very wide exclusion clauses (which should be amended as a matter of some urgency), the area of most

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<sup>52</sup> See also Kamvounias and Varnham, 'Legal Challenges to University Decisions', above n 2, 179; *Contra* Coronos, above n 6, but he does not consider the jurisprudence regarding non-justiciability of academic matters in this context.

<sup>53</sup> Whittaker, 'Judicial Review', above n 28, 214; EM1, 6. See generally Australian Government, *An Australian Consumer Law Fair Markets — Confident Consumer* (2009) ch 6.

concern is the impact of the lack of transparency and notice of a large number of terms of the contract for the supply of educational services. Transparency will not assist to legitimise fundamentally unfair terms, but it will assist with terms that are otherwise fair and are reasonably necessary to protect the legitimate interests of the supplier.

It is recommended that Australian HEIs adopt the practice of the use of formal student contracts common in other jurisdictions and drafted in a manner that complies with the requirements of transparency under the ACL. The model contract with accompanying explanatory notes developed by leading UK scholars Farrington and Palfreyman is an appropriate precedent.<sup>54</sup> It is difficult to see how a HEI might otherwise overcome the difficulties with transparency and notice. Greater transparency and improved notice may also have the consequence of improving students' awareness of their rights as consumers.

The research question can be answered in the affirmative. Many of the alternative causes of action available to students at common law and under statute are insufficient in relation to redress. All remain vulnerable to the inability of the court to review issues relating to academic matters, including other parts of the ACL such as consumer guarantees. The UCT provisions empower the court to address substantive unfairness in the contract for the supply of educational services, not just procedural unfairness. As it is the substantive effect of the term that is reviewed, not the academic judgement executed in the supply of the service, it is impervious to issues of justiciability. Students are provided with improved and more effective remedies, including representative action on their behalf by the regulator. The change in practice required by the sector will result in clearer, more transparent contracts and better informed consumers. The UCT provisions in the ACL provide effective protection for students regarding the nature of educational services supplied and advances their rights as consumers to receive services as promised.

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<sup>54</sup> Farrington and Palfreyman, above n 28, 443.

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*Every reasonable effort has been made to acknowledge the owners of copyright material. I would be pleased to hear from any copyright owner who has been omitted or incorrectly acknowledged.*

«Todays\_Date»

«Student\_Title» «Student\_First\_Given\_Name» «Student\_Family\_Name»  
 «Student\_Address\_Line\_1»  
 «Student\_Address\_Line\_2»  
 «Student\_Suburb» «Student\_State» «Student\_Postcode»

Your Curtin Student ID No: «Id\_Number»

Dear «Student\_First\_Given\_Name»

Congratulations! I am very pleased to offer you a place in the «Full\_Title» course at Curtin University.

Competition for places at Curtin is strong so this is a great achievement and just the start of what we hope will be a very successful experience for you as a Curtin student. I hope that you will accept the offer and that we will see you studying here this year.

Please take the time to read the following information carefully.

#### **Details of Your Offer**

<b>Course Title</b>	«Full_Title»		
<b>TISC Code</b>	«Admsn_Ctr_Course_Code»		
<b>Teaching Area</b>	«Organisational_Unit»		
<b>Campus Location</b>	«Location_Name»	<b>Study Mode</b>	«Study_Mode»
<b>Attendance Mode</b>	«Attendance_Mode»	<b>Liability Category</b>	«Liability_Category»
<b>Offer Lapse Date</b>	«Lapse_Date»	<b>Semester Start Date</b>	«Avail_Start_Date»

#### **How To Accept or Defer Your Offer**

The next step is to accept your offer and enrol, or defer. Please refer to the **EnrolNow!** card in this offer pack for instructions on how to activate your OASIS account and log into **EnrolNow!**: an online system inside OASIS that will guide you through the offer acceptance (or deferral) and enrolment process.

#### **You must accept your offer via EnrolNow!**

If you choose to accept your offer you must accept it before the offer lapse date (see 'Details of Your Offer' above). *If you have not accepted your offer before the lapse date your OASIS account will expire.*

If you have any questions please feel welcome to ask for help by emailing [admissions@curtin.edu.au](mailto:admissions@curtin.edu.au) or calling 9266 7805.

Thank you for choosing Curtin. Once again .... congratulations! .... and I hope we will be welcoming you to Curtin very soon.

John Rowe  
 Academic Registrar  
 (Director, Student Services)



**THE UNIVERSITY OF OXFORD**  
**STUDENT CONTRACT**



### **Introduction**

1. A student at Oxford University is a member both of the University and of one of its constituent colleges. The two relationships are governed by separate, though interlinking, contracts. The purpose of this document is to identify the terms of the contract which you will have with the University if you accept the offer of a place on a programme of study which has been made to you. By signing and returning pages 1 to 3 of this document you will enter into a contract with the University on the terms which this document identifies and explains. Please ensure that you print your full name as well as signing your name. Although all the data protection material on pages 5 to 9 will be incorporated in the contract, you do not need to return those pages.

### **University and college membership**

2. Your continuing relationship with the University is linked to your continuing relationship with your college. You agree as part of this contract to abide by the rules and regulations notified to you by your college from time to time in the course of your studies.
3. If your college membership is terminated, you will cease to be a member of the University. If you are suspended by your college or otherwise subject to college sanctions, the University may also impose similar or otherwise appropriate sanctions.

### **The University's duties**

4. Subject to what follows, the University will deliver your chosen programme of study in accordance with the descriptions set out in the University prospectus and on the University Admissions Offices' websites. However, where courses or options depend on placement at another institution or on specialist teaching, availability in a given year cannot be guaranteed in advance. The University also reserves the right to vary the content and delivery of programmes of study: to discontinue, merge or combine options within programmes of study; and to introduce new options or courses. Changes in course provision may arise from desirable developments in the relevant subject, or alterations in teaching practice and/or facilities; as well as from causes such as resource constraints or staff movements. Changes in course provision may occur either before or after admission, but they will take account of the reasonable expectations of any student admitted to or engaged on a specific programme of study. In the unlikely circumstance of the University deciding to make substantial and material changes to a programme of study after acceptance of a place by a student, the student will be able to withdraw from that programme of study.
5. In the case of students offered a place to undertake study for a research degree, your offer has been based on your choice of a subject area acceptable to the relevant University admitting body. If you should subsequently wish to change subject area or supervisor, this will require approval from the appropriate authority, and you should note that an alternative subject or supervisor may not be available.
6. Teaching for undergraduate students is the responsibility of both the University and the college concerned. Your college handbook will provide details of the facilities available in college, and the tutorial arrangements.
7. The University will provide library, laboratory, IT and other facilities in accordance with the descriptions set out in the University prospectus, unless prevented from doing so

by adverse circumstances beyond its control. If so prevented, the University will take all reasonable steps to provide an acceptable alternative.

### **The Student's duties**

8. You agree, as part of this contract, to abide by the University's Statutes and Regulations in force from time to time, and by the Statements and Codes of Policy, Practice and Procedure which from time to time are made under them. These include:
- regulations concerning your studies, residence, conduct and behaviour: examples are regulations relating to examinations, the ownership and exploitation of intellectual property, discipline, the use of IT and library facilities, and health and safety issues;
  - codes of practice for the conduct expected from members of the University and/or reflecting legislative requirements: for example, codes of practice on harassment and data protection.

This material (other than the *Examination Regulations*, of which you will be given a copy when you arrive) is made available at [www.admin.ox.ac.uk/iso](http://www.admin.ox.ac.uk/iso). You should read it carefully, since breach may lead to your expulsion from the University or other sanctions.

9. If you are registered on a programme of study leading to a professional qualification in medicine or teaching, you may also be subject to regulations relating to fitness to practise which are drawn up in the light of guidance issued by the relevant professional regulatory bodies. Your continuing registration on such a programme of study will be dependent upon your continuing to satisfy the relevant requirements as to fitness to practise. Details of the standards expected, and the relevant procedures, are set out in the handbook for the programme of study concerned; and include provision for appeal should you question a determination made by the relevant University authority in this connection.

### **Student fees**

10. By signing and returning this document, you agree to pay the fees and charges due from you to the University.
11. A failure to pay fees and charges when due may lead to the imposition of sanctions by the University, including suspension from access to University facilities or termination of membership of the University.
12. In certain circumstances you may be entitled to a refund of all or a proportion of the fees (if, for example, you withdraw from a programme of study under paragraph 4, or you decide to terminate your studies).

### **Personal Data**

13. By signing and returning this document
- you agree to the collection, processing and use of your individual personal data by the University for purposes connected with your studies, for the protection of your health and safety whilst on University premises, for the maintenance of alumni relations, and for any other lawful purposes;
  - you consent to the collection and processing of relevant sensitive personal data by the University as described in Section A2 of the note on the Data Protection Act 1998 which is set out below; and

- you agree to the University sharing the data referred to in this paragraph with the colleges (for the same purposes).

**Accommodation**

14. Any use by you of University accommodation will be subject to separate agreement.

**Jurisdiction**

15. This contract shall be governed and construed in accordance with English Law. By signing and returning this document you submit to the exclusive jurisdiction of the English courts for the resolution of any disputes which may arise out of or in connection with the contract.

I **ACCEPT** the terms set out above, and recognise that they make up a complete record of the contract for my participation in the programme of study at the University.

**All names, in full, as they appear on your birth certificate/passport  
PLEASE PRINT LEGIBLY**

**Last names:** .....

**First names:** .....

**Middle names:** .....

**Date of birth**

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 (e.g. 23-Jan-XX)

**dd**                      **mmm**                      **yy**

**College:** .....

**Start Date (please circle):** Michaelmas [Oct] Hilary [Jan] Trinity [Apr] 20\_\_ (year)

**Graduate students only:**  
Tick box if your studies require access to manuscripts, early printed books (pre 1801) or other rare materials

**Previously held cards**  
Tick box if you have ever been issued with an Oxford University Card or a Bodleian reader's Card   
Please give the old card number if you can:

Passport-sized  
PHOTO

Staple firmly

**BUT**

Do not obscure  
your face

**SIGNED by the STUDENT**

Signature: .....

Date: .....

FOR OFFICE USE STUDENT ID NO:						
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WD159-074

**If you are a Graduate Student:**

Please return your completed contract to

A/C Returns  
Examination Schools  
High St  
Oxford  
OX1 4BG  
United Kingdom

**If you are an Undergraduate Student:**

Please return your completed contract to your College

[*Fold here*]

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## DATA PROTECTION ACT 1998: INFORMATION ON STUDENT PERSONAL DATA

Please read this document carefully. It will help you to understand the purposes for which the University and the colleges process (i.e. collect and use) your personal data and any disclosures that they may make of your personal data outside the collegiate University. It is important that you are aware of the personal data which is held about you, especially the sensitive personal data as defined by the Data Protection Act 1998 where special provisions apply (see section A2 below).

If you have any concerns about the processing of any information in the sorts of circumstances outlined below you should contact the college Data Protection Officer (whose details may be obtained from the college office) or the University Data Protection Officer (via email to [data.protection@admin.ox.ac.uk](mailto:data.protection@admin.ox.ac.uk)).

### A. PROCESSING

#### 1. Non-sensitive personal data

*(a) Processing for the fulfilment of educational, pastoral and administrative responsibilities*

*(b) Additional processing*

#### 2. Sensitive personal data

### B. DISCLOSURE OF DATA TO OTHER BODIES

### C. KEEPING YOUR PERSONAL DATA UP-TO-DATE

### D. QUERIES AND ACCESS REQUESTS

### E. ARCHIVES

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### A. PROCESSING

In order to fulfil their educational, pastoral, and administrative responsibilities before, during and after your studies at Oxford, the University and the colleges need to collect and process personal data about you. Under the Data Protection Act 1998, any such information must be processed fairly and lawfully, held securely and kept up-to-date. There are two categories of personal data – non-sensitive and sensitive. Further information on both categories of data, the types of data the University and the colleges process and the consents required is provided below.

Data collected by the University may be passed to your college and vice versa, so that necessary processing can be undertaken. Some data will also be shared with other colleges.

#### 1. Non-sensitive personal data

*(a) Processing for the fulfilment of educational, pastoral and administrative responsibilities*

Your consent is not required where processing is permitted under the Data Protection Act 1998 as being necessary to enable the University and the colleges to fulfil their educational, pastoral and administrative responsibilities and where your rights and legitimate interests are not prejudiced by the processing.

A non-exhaustive list indicating the main categories of non-sensitive personal data which may be collected and processed without your consent is set out below:

**Personal information** including name, address, telephone number and email address; any other contact details; date of birth and gender; marital and family/household details; name of doctor; person to be contacted in case of emergency and contact details;

**Educational information** including school and admissions documentation; matriculation details and course studied; information on academic performance; examination details; distinctions, prizes;

**Other information** including positions of responsibility held; membership of University clubs and societies; disciplinary action taken; financial matters (including loans, fees, college invoices, scholarships and bursaries etc); information provided to the University/colleges during the course of your studies; information needed to permit access to college/University facilities such as computing facilities, libraries and for the issue of the University card, where access will be subject to regulations available from the provider of the facility; passwords and IDs used to access University or college facilities; advice and support provided to you by e.g. the University Student Union, the Careers Service.

#### **(b) Additional processing**

Unless you request otherwise, when you matriculate your details will also be added to the Development and Alumni Relations System (DARS). You are completely at liberty to opt out of having your personal data held on the DARS system and it is entirely your decision – no adverse consequences will flow from any decision not to allow your data to be held on DARS.

DARS is a single comprehensive database holding details of alumni, students, staff and friends, and allowing, on a regulated basis, each of those faculties, departments and colleges that are participating access to all the data held in it. We hope that this will lead to the details of our alumni, students, staff and friends being kept more up to date and that it will help improve our communications with them. The data held in DARS is held securely.

For full details on the way in which the data is held and used in DARS please see the DARS Data Protection Statement at [http://www.alumni.ox.ac.uk/data\\_protection](http://www.alumni.ox.ac.uk/data_protection) (or get in touch at the address below to request a hard copy). Note that while you are a student you will not receive donation requests (other than in relation to the Leavers' Gift Programmes organised in cooperation with, and with the support of, your student representative body).

If at any time you have any queries about the use of your personal data in DARS or wish to change the fact of, or extent of use of your personal data, please contact the University Database Team at this address:

University Database Team  
University of Oxford Development Office  
University Offices, Wellington Square,  
Oxford OX1 2JD, United Kingdom  
Email: [database@devoff.ox.ac.uk](mailto:database@devoff.ox.ac.uk)

## **2. Sensitive personal data**

The Data Protection Act 1998 defines sensitive personal data as information about racial or ethnic origins; political opinions; religious beliefs or other beliefs; trade union membership; physical or mental health; sexual life; criminal allegations, proceedings or convictions.

Save in limited circumstances specified in the Act, those collecting and processing sensitive personal data are required to seek explicit consent to do so.

The University and the colleges have no need or intention to collect information concerning the political beliefs, sexual life, or trade union affiliations of students. Nor do they have any need or intention to collect or process data on religious beliefs or practices except in so far as students may, for example, require special dispensation to avoid sitting examinations on certain days or have special dietary requirements. However the student will usually have volunteered the sensitive data him/herself so consent to collect and process is unlikely to present a problem.

There are very limited circumstances in which sensitive personal data may be collected and/or processed without consent:

- (a) If you are convicted of an offence under the criminal law, it may also be the subject of disciplinary proceedings within the colleges. If this is the case, data may be collected and processed but this will not happen without your knowledge. It may also, in certain limited circumstances, be necessary to mention conviction of a criminal offence in a reference provided to an employer or professional body.
- (b) The University and the colleges may need to process information relating to your health. For example, it may be necessary to ask for dispensation to miss an examination; or special provision may be needed for certain health problems or in cases of disability; or suspension of status may be needed for graduate students.
- (c) If you are following a course leading to a professional qualification, the University/college will need to be able to report to the appropriate professional body, such as the General Medical Council, that you are 'a safe and suitable entrant to a given profession'.
- (d) The Data Protection Act allows action to be taken to process personal sensitive data, and to disclose such information to an individual/body outside the University/college, without consent, where it is regarded as in your vital interest. However, this is generally likely to apply only in cases of illness or accident where you are unable or unwilling to give consent. This exemption will only be used in exceptional circumstances.
- (e) There is also an exemption in the Act to allow collection and processing of data without explicit consent in order to identify or keep under review the existence or absence of equality of opportunity or treatment between persons of different racial or ethnic origins. Such data is collected and processed by the University and the colleges for the purposes of monitoring and of upholding equal opportunities policies.

## **B. DISCLOSURE OF DATA TO OTHER BODIES**

The University and the colleges may disclose your personal data to other bodies as follows:

- (a) Personal details (name, home address, college address, herald webmail address, gender, degree course and first/ second undergraduate degree) relating to each student are supplied by the University to the University Student Union to enable the Student Union to provide you with information about, and access to, the Union and its services, including taking part in elections.
- (b) Personal details (name, home address, college address, gender, degree course, year of matriculation/graduation and first/second undergraduate degree) relating to each student may be supplied to mailing houses as part of the mailings and invitations sent to you from the University and the colleges.

(c) The University and the colleges may provide personal data to the Inland Revenue, Council Tax Officers, local authority electoral registration, assessment and valuation departments, other education and training establishments and examining bodies, funding councils (and including the Higher Education Statistics Agency – please see HESA website <http://www.hesa.ac.uk/index.php/content/view/141/171/#Student> for further information on the personal data provided to HESA and why)) and students' sponsors (for example local authority education departments, the Student Loan Company and other equivalent bodies).

(d) The University uses plagiarism detection systems to assist academic staff in helping you to learn to avoid plagiarism in your work; and in helping to detect plagiarism in assessed work submitted by you. In order for the University to use such systems, your work and your personal data relating to you (normally name, email address, course details and institution) may be submitted to the plagiarism detection service to which the University has subscribed. Your personal data may be stored electronically in a database and may be processed in countries not governed by EU data protection legislation. However, any company processing your data will be bound by the terms of its contract with the University to abide by the Data Protection Act 1998 at all times. Your personal data and the content of your work will not be disclosed to academic staff in other institutions which are subscribed to the service without your permission.

(e) The University and the colleges will respond to requests for references, transcripts or other information on your educational attainments from employers or prospective employers or from other educational institutions, funding bodies or recognised voluntary organisations. However, the information will not be provided unless the request is made in writing and appears to be bona fide.

(f) Disclosure may also be necessary in certain other circumstances, for example to comply with legal or statutory requirements; in any legal proceedings; or for medical reasons to medical staff.

The University and the colleges will not normally send information about you to outside organisations at home or overseas other than as indicated above. Your personal data will not be placed on any website accessible outside the collegiate University without your consent.

You should be aware that many countries outside the European Economic Area do not have data protection legislation and so may not always protect your personal data to the same standard.

### **C. KEEPING YOUR PERSONAL DATA UP-TO-DATE**

The Data Protection Act 1998 requires that the University and the colleges take reasonable steps to ensure that any personal data which they process is accurate and up-to-date. It is your responsibility to ensure that your personal details, including your UK Address, are kept up-to-date. It is important that the University and the colleges always hold an accurate current term time address so that they can contact you with important information. Once you have been issued your credentials you must check and amend all your personal details and register by logging on to:

<https://www.studentsystem.ox.ac.uk/>

### **D. QUERIES AND ACCESS REQUESTS**

The Data Protection Act 1998 gives you the right to know what personal data the University and the colleges are processing, subject to certain exemptions provided in the legislation



and to consideration of third party rights. If you wish to seek access under the Data Protection Act provisions:

- to information held about you by the University, you should contact the University's Data Protection Officer (via email to [data.protection@admin.ox.ac.uk](mailto:data.protection@admin.ox.ac.uk)); or
- to information held about you by your college, you should contact the relevant College Officer, whose details may be obtained from the college office.

A fee is required for such access.

General queries about the Data Protection Act 1998 may be addressed to the University's Data Protection Officer (via email to [data.protection@admin.ox.ac.uk](mailto:data.protection@admin.ox.ac.uk)).

If at any time you have any queries about the use of your personal data in DARS or wish to change the fact of, or extent of use of your personal data, please contact the University Database Team at this address:

University Database Team  
University of Oxford Development Office  
University Offices, Wellington Square,  
Oxford OX1 2JD, United Kingdom  
Email: [database@devoff.ox.ac.uk](mailto:database@devoff.ox.ac.uk)

## **E. ARCHIVES**

The University and college records are normally archived as a matter of routine, but the University and the colleges are not liable for any failure to archive or to maintain the archive, or for deletion of archive material however arising. You are advised to retain any original certificates issued by the University safely and securely.

As indicated in section A2 above it is possible that sensitive data (as defined by the Act) may appear on your file. **If when you leave Oxford you are concerned about the retention of any such material on your file, you should discuss these concerns with the college Data Protection Officer in the first instance.**

Unless you request otherwise, your details will continue to be stored on the Development and Alumni Relations System (DARS).

## Important Information

### OASIS



- It is a condition of enrolment at Curtin that students access OASIS at least once a week to receive official communications from the University via the Official Communications Channel (OCC).
- Students may be granted eExemption from the requirement to access OASIS in exceptional circumstances only.

### Student Guild and Guild Membership



- Under the Curtin University of Technology Act, all students automatically become Basic members of the Student Guild on enrolment. In order for the Guild to provide services to you whilst you are a member, your name, student ID number, preferred contact address, home phone number, email addresses, gender, year of birth, course of study, campus location and other basic enrolment details will be made available to the Guild. These details will remain confidential.
- You may elect not to become a Basic member of the Guild at the time of enrolment or may resign from the Guild at any time after enrolment. If you elect not to become a member, your details will not be provided to the Guild. If you resign from the Guild, the Guild will no longer have access to your details and you will cease to be eligible for membership benefits. If you do not wish to be a member of the Guild, you will need to complete a form advising that you do not wish to be a member. The form is available from Faculty Student Services Offices, Student Central or in the Quick Forms channel in OASIS (on the "My Studies & eVALUate" tab). The completed form must be returned to Student Central for processing.
- Basic Guild members are not eligible for the same level of benefits as Full Guild Members. For information of Full Guild Membership please refer to the Curtin Student Guild website.

### Privacy Statement

At Curtin University of Technology, the privacy of our students, staff and the people we deal with is very important. Much of the information that the University collects in order to provide the services that it does, is "personal information". For details of how the University will use, disclose and protect your personal information please refer to the full privacy statement.

### Student Declaration

- I understand it is my responsibility to ensure that my enrolment is correct.
- I have sought appropriate academic counselling in relation to my enrolment.

- I agree to be bound by the Statutes, Rules and Policies of the University as amended from time to time and agree to pay all fees, levies and charges directly arising from my enrolment.
- I consent to receiving information electronically from the University.
- I agree to access OASIS (student portal) at least once a week to receive official communications from the University (unless approval for exemption is granted).
- I am aware of the conditions under which I am permitted to use University IT (computer) facilities (refer to the ICT Policy).
- I acknowledge that I have read and understood the information regarding Guild Membership.
- I acknowledge that I have read and understood the University's Privacy Statement.
- I acknowledge that any expense, costs or disbursements incurred by the University in recovering any monies owing by me shall be the responsibility of the debtor, including debt collection agency fees and solicitor's costs on the amount outstanding and all other reasonable costs incurred in the recovery of outstanding monies.