

# GETTING WHAT THEY PAID FOR

## Consumer Rights of Students in Higher Education

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Consumer rights of students in higher education: hot or not? Higher education institutions are increasingly viewed as service providers, and students are increasingly referred to as customers. This trend gives rise to questions as to the application of consumer protection laws in a university context. Recent judicial authority in Australia has arguably limited the public law rights of students in respect of universities. The way forward for aggrieved students now may be to take private law actions in contract and pursuant to consumer laws. There is evidence that suggests a use of consumer protection legislation beyond what was contemplated when this legislation was introduced. This paper will review recent developments in the case law in Australia and New Zealand and consider the effectiveness and appropriateness of consumer law as a means of redress for disgruntled university students.

### Introduction

The application of consumer law to the student–university relationship has become a hot topic for discussion, attracting much attention both in the media and in academic journals.<sup>1</sup> Clearly, in Australia and New Zealand, and in the comparative jurisdictions, there has been a fundamental shift in the nature of the relationship between tertiary institutions and their students. There is now a general acceptance that the relationship is contractual.<sup>2</sup> This redefinition of the student–university relationship is frequently referred to as the ‘commodification’ of higher education.<sup>3</sup> It has led many disgruntled students to look to consumer law to resolve grievances. Increasingly, debate is focusing on whether this is an easy association. The question now is not so much whether the principles contained in consumer laws apply, but whether this is a correct and appropriate application. While consumer law may be useable by students, is it useful to them?

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<sup>1</sup> Bessant (2004); Clarke (2003); Considine (1994); Jackson (2002); McCabe (2000); Rorke (1996); Rochford (1998); Varnham (1998); Varnham (2001a).

<sup>2</sup> Bessant (2004); Davenport (1985); Davies (1996); Davis (2001); Farrington (1998); Lewis (1983); Middlemiss (2000); Palfreyman (2003).

<sup>3</sup> Bessant (2004); Griggs (2004); McMahon (2001); Thornton (2001).

This paper first considers the changing nature of the student–university legal relationship and gives an overview of the different types of complaints pursued by aggrieved students in the courts. The paper reviews private law actions taken by students in Australia and New Zealand based on negligence and breach of contract. It then considers situations in which students have taken complaints under consumer legislation to the courts. Against this background, the paper discusses the problems for students highlighted by these decisions. It asks the question: while consumer law may not yet be out of fashion for disgruntled students, is it a good fit?

## Students and Universities: The Legal Relationship

By tradition [students] were members of an academic, self-regulating community that, in a craft-like way, passed knowledge from scholar to student. Now students are individual consumers of credentials, often disengaged from campus life, with unclear private law remedies for their grievances and an academic world tightly yet indirectly regulated by virtue of federal funding power.<sup>4</sup>

Fundamental to any discussion of students' rights is a determination, as far as is possible, as to the legal nature of the student–university relationship. This issue has received much attention from academic commentators and, to a lesser extent, from the courts.<sup>5</sup> Long since gone is the view, based on the doctrine of *in loco parentis*,<sup>6</sup> that the relationship was quasi-parental. The duty of a reasonably prudent parent was replaced by a duty to exercise reasonable care to protect students from reasonably foreseeable harm.<sup>7</sup> Another view, based on a corporate model, emphasises that the student, as a member of the university, is part of the university corporation rather than a mere recipient of its services.<sup>8</sup> Most modern universities are corporations established by statutes which generally provide that students are members of the university who, on enrolment, become subject to university statutes and are bound by by-laws and rules lawfully made in accordance with those statutes.<sup>9</sup> This view of the student–university relationship reinforces the notion that the resolution of disputes is solely an internal matter and thus invites a more private settlement

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<sup>4</sup> Bernard Lane, 'Student Litigation Likely to Increase', *The Australian*, 23 November 2005, p 30.

<sup>5</sup> Considine, Goldring and Stoianoff (1992); Dodd (1985); Furay (1970); Hoye and Palfreyman (2004); Lewis (1983); Lindsay (2005); Middlemiss (2000); Palfreyman (1999); Rochford (1998).

<sup>6</sup> For a discussion, see Hoye and Palfreyman (2004), pp 97–98.

<sup>7</sup> Hoye and Palfreyman (2004), p 98.

<sup>8</sup> Rochford (1998), p 29. This was argued by the university in *Grant, Woolley, Staines & Grant v Victoria University* (High Court of New Zealand, Wellington Registry, unreported, Ellis J, CP 312/96 13 November 1997).

<sup>9</sup> Rorke (1996), p 197.

of disputes within the university according to its own rules.<sup>10</sup> More recently, Ellis J of the High Court of New Zealand<sup>11</sup> found that the student–university relationship was only partly based on statute<sup>12</sup> and therefore: ‘It is ... on the basis of contract, tort or judicial review that a student may seek redress against a university.’<sup>13</sup>

### Students and Universities: Causes of Complaint

No one really worried if you got a crap course when they were fully funded. But now students are paying for it themselves and they’re anxious to get jobs.<sup>14</sup>

In the current competitive and costly higher education environment, there is huge potential for student dissatisfaction on a range of matters related to their courses of study. Many are now questioning whether students undertake university courses primarily in pursuit of greater knowledge or simply for the guarantee of a higher status and a more affluent economic future. It is now relatively common to see newspaper reports such as the following:<sup>15</sup>

A UK student who took legal action over her substandard university education has won an unprecedented 30,000 pounds (\$74,500) compensation for future loss of earnings ... She wanted to become a social worker but claimed that, as a result of the debacle, she had to give up her ambition.

<sup>10</sup> Rochford (1998), p 43; Considine, Goldring and Stoianoff (1992), p 9. This view has been argued in Australia and New Zealand by defendant universities to support their proposition that the courts could not revisit a decision made by the University Visitor. Although the judicial attitude in New Zealand, as shown in *Norrie v University of Auckland* [1984] 1 NZLR 129, was that the Visitor did not have exclusive jurisdiction over disputes between a university and one of its members, the New South Wales Court of Appeal took the opposite view in *Bayley-Jones v University of Newcastle* (1990) 22 NSWLR 424. In terms of visitorial jurisdiction, the importance of this debate may have been diminished by the abolition of the position of the visitor in New Zealand and in most Australian states for all but ceremonial functions: see Kamvounias and Varnham (2006).

<sup>11</sup> *Grant, Woolley, Staines & Grant v Victoria University of Wellington* (High Court of New Zealand, Wellington Registry, unreported, Ellis J, CP 312/96 13 November 1997).

<sup>12</sup> The relevant statute in New Zealand being the *Education Act 1989* (NZ).

<sup>13</sup> *Grant, Woolley, Staines & Grant v Victoria University of Wellington* (High Court of New Zealand, Wellington Registry, unreported, Ellis J, CP 312/96 13 November 1997).

<sup>14</sup> Tara Ross, ‘Useless — So Students Seek Compo’, *Sunday Star-Times*, August 2005.

<sup>15</sup> Judith O’Reilly, ‘Redress for Uni’s ‘Poor Course’, *Australian*, 4 August 1999, p 35.

Students who view higher education as an investment in their future will undoubtedly demand greater accountability of education providers. Although all universities will have their own internal procedures to deal with student complaints and grievances, these matters have the potential to end up in court.

Complaints by aggrieved students fall largely into three categories:

- 1 *Complaints about the accuracy of information provided to students before or upon enrolment.* Representations made to students may influence their decisions to enrol in a particular course or at a particular institution. Such representations may be contained in written material used in promotional or course documentation or may be made orally by representatives of the university, either at the institution or at, for example, education fairs. The information may be directly provided or it may be more subtle — for example, implied representations about a student's chances of successfully completing a course.
- 2 *Complaints about the quality of the educational services provided by the university.* These may relate to the alleged failure of the university to comply with the written and oral representations made about courses or the institution before enrolment. It also includes complaints about a range of other matters that only became evident after students commence the course — for example, the adequacy of facilities and resources, the academic standard of a course, the provision of suitably qualified and experienced teachers and research supervisors, and the handling of disputes within the university.
- 3 *Complaints about adverse decisions made by universities affecting students.* Decisions are made by universities about enrolment, credit for prior study, assessment, academic progression, and so on. Whether such decisions are subject to judicial review is a question that has been canvassed elsewhere, and it is beyond the scope of this article to consider how the principles of natural justice may apply in a university setting.<sup>16</sup>

Should any of these complaints not be resolved and result in litigation, the type of legal action that may be brought by the disgruntled student against the university will vary according to the type of complaint and the remedy sought, and whether a student's case is founded in common law or in statute. Common law actions against universities have been framed in negligence, in misrepresentation and in breach of contract. Actions in respect of a university's pre-contractual conduct have alleged misleading or deceptive conduct under consumer protection legislation.<sup>17</sup> Where the allegations relate to the quality or fitness for the purpose of the educational services provided, they may be based on the statutory guarantees and implied terms in consumer contracts.<sup>18</sup>

<sup>16</sup> Davies (2004); Fleming (1997); Kamvounias and Varnham (2005, 2006); Rochford (2005); Stewart (2005); Varnham (2001b, 2002).

<sup>17</sup> Pursuant to s 52, *Trade Practices Act 1974* (Cth) and s 9, *Fair Trading Act 1986* (NZ).

<sup>18</sup> Pursuant to s 74, *Trade Practices Act 1974* (Cth) and ss 28 and 29, *Consumer Guarantees Act 1993* (NZ).

## Students and the Common Law

Putting aside the precise nature of the student–university legal relationship, it was noted by commentators some decades ago that ‘it was only a question of time before the high tide of litigation ... reached the universities’.<sup>19</sup> The first wave of legal actions was based on the public law obligations of universities and the associated rights of students to judicial review of adverse decisions.<sup>20</sup> The second wave is based in private law, such as tort, contract and, more recently, consumer law. This wave, in the view of many, is yet to reach its crest and break.

First, to what extent do the principles contained in tort and contract apply to the student–university relationship?

### *Negligence*

In the United Kingdom, the application of the tort of negligence in the education context is well established, and there is a body of authoritative case law supporting actions by students for ‘educational malpractice’.<sup>21</sup> In the context of higher education, students in New Zealand have initiated several negligence actions, but the institutes concerned have been quick to settle.<sup>22</sup> The result is that, while there is a great deal of anecdotal evidence of student allegations of carelessness, there is a dearth of case law. In Australia, where such actions have reached the courts, they have been met with strike-out applications on the part of the universities concerned, and it is these, rather than the substance of the actions, that have occupied the courts’ time.

There are two Australian cases that clearly demonstrate the difficulties students encounter when suing a university in negligence. In *Dudzinski v Kellow & Ors*,<sup>23</sup> the plaintiff pleaded negligence, as well as many other causes of action, against Griffith University and nine of its staff members. The student completed four subjects in a Master of Engineering Science in Waste Management and, while still enrolled in that course, enrolled in a combined law and environment science course. Academic staff of the university declined his application for exemption from certain requirements for the latter degree. He claimed that this decision was negligently made and that the staff member concerned lacked the necessary expertise ‘to make a proper comparison of the relevant subjects’. He pleaded professional negligence, negligent misstatement, defamation, intimidation, injurious falsehood, conspiracy, deceit, assault, racial and sex discrimination, undue influence and breaches of the *Trade Practices Act 1974* (Cth) (TPA). While seeking to reserve the

<sup>19</sup> Wade (1969), pp 468–69.

<sup>20</sup> Davies (2004); Fleming (1997); Kamvounias and Varnham (2005, 2006); Rochford (2005); Varnham (2001b, 2002).

<sup>21</sup> *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 and *Phelps v London Borough of Hillingdon* [2000] 3 WLR 776.

<sup>22</sup> For example, an action in 2001 by students studying for a Technician’s Certificate in Electronics at the Eastern Institute of Technology alleging negligence in the resourcing and delivery of the course.

<sup>23</sup> *Dudzinski v Kellow & Ors* [2000] 47 IPR 333.

argument as to whether the court had the jurisdiction to inquire into matters provided for by internal university processes for a later stage, the university applied to strike out the proceedings on the grounds that it disclosed no reasonable cause of action. The student represented himself, and Drummond J of the Federal Court of Australia was concerned to ensure that there was no potential for miscarriage of justice in granting the university's application. While the pleadings revealed problems in the manner in which the action was framed in negligence and in the losses that were claimed by the plaintiff, the judge was clear that the respondent university 'bore a heavy burden in seeking to terminate an action summarily'. Applying this stringent standard, while being careful to state that his decision in no way indicated his belief or otherwise in whether the claims were well founded, he declined to strike out the actions in negligence.<sup>24</sup>

Without a clear outcome also is the case of *Ogawa v University of Melbourne*.<sup>25</sup> The plaintiff transferred her PhD candidature from the University of Queensland to the University of Melbourne in 2001. Issues arose there about supervision arrangements and she was unable to complete her doctorate in the time allocated. When the university refused her late application to re-enrol, Ogawa, an international student, commenced legal proceedings alleging *inter alia* negligence on the part of the university due to inadequate supervision of her doctoral work. She also alleged defamation, breach of contract, breach of natural justice, and breaches of certain provisions of the TPA including unconscionable conduct. She was essentially self-represented, having only the benefit of *pro bono* counsel from time to time. Her quest for redress was met by a string of interlocutory applications on the part of the university and, at the time of writing, she has yet to have had her claims heard in substance by a court.

With these examples of negligence actions against universities, it is hardly surprising that there is very little 'take-up' by students in Australia and New Zealand. The reasons are obvious, not the least of which is the risk of a strike-out application by the institution. The students, often self-represented, are faced with the weight of highly experienced lawyers retained by the defendants. The reality is that, should a negligence action ever be heard in substance, it may be that there are difficulties in establishing the professional standard of care to be placed on academics<sup>26</sup> and in claiming losses for failure to educate because of problems in establishing a causal link between the breach of duty and the loss for which compensation is being sought.<sup>27</sup> As was noted by Drummond J in *Dudzinski v Kellow & Ors*,<sup>28</sup> there are considerable difficulties for the courts in determining the losses for which a university should be responsible. It is one thing to claim for negligent information, advice

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<sup>24</sup> Drummond J also held that the District Court was the appropriate forum to determine the matter. It is unclear whether the student pursued the action further.

<sup>25</sup> *Ogawa v University of Melbourne* [2004] FCA 1275; [2004] FMCA 536.

<sup>26</sup> Davies (1996), pp 102–16.

<sup>27</sup> See generally Rochford (2001b).

<sup>28</sup> *Dudzinski v Kellow & Ors* [2001] 47 IPR 333.

or course delivery, but quite another to fit the losses claimed within principles well established by the courts in respect of economic loss and mental anxiety and distress.<sup>29</sup>

Both Dudzinski and Ogawa framed their allegations in a multitude of causes of action, of which negligence was only one. Could it be that pleading in this way was counter-productive in that it acted to obscure the merits of their cases, rendering them vulnerable to strike-out applications? Perhaps actions relying solely on contract and consumer law would have met with more success as following a more clearly definable path.

### *Breach of Contract*

The principal message of this article will be that the status of students has changed irrevocably. The change has been from one of being in a subordinate role in the *studium generale* to one of a consumer of services.<sup>30</sup>

For some time, commentators have considered that the legal relationship of a university with its students is 'more suitably governed by the ordinary law of contract and by ordinary contractual remedies'.<sup>31</sup> Indeed, some argue that contract law is 'perhaps the most promising area of legal claims for academic challenges plaintiffs'.<sup>32</sup> A breach of contract action may offer a potential avenue for a student who seeks damages because the university has failed to live up to its commitments in any manner, including in the validity of its decisions.<sup>33</sup>

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<sup>29</sup> It may be that actions in negligence against higher education providers could be more appropriately confined to allegations of negligent misstatement that are independent of pedagogical matters. *Young v Bella* [2006] 1 SCR 108, a recent Canadian decision, provides persuasive authority that a university may be liable in negligence to compensate a student prevented from pursuing their chosen career because of the careless statements of a university teacher. In that case, a lecturer marking the plaintiff's assignment had wrongly formed the opinion, and passed it on to the relevant authorities, that the student's case study was based on her own experience as a sexual abuser. The student was prevented from obtaining registration as a counsellor without being told that this was the reason why until a considerable time later. The Supreme Court of Canada upheld the finding of liability and the award of damages to the plaintiff.

<sup>30</sup> Farrington (1998), p 319.

<sup>31</sup> Wade (1969), p 471.

<sup>32</sup> Schweitzer (1992), p 339.

<sup>33</sup> Lewis (1983), p 255. This is particularly the case when judicial authority in the United Kingdom not only clearly accepts a student/university 'contract to educate' but also recognises damages as the appropriate remedy for a student's 'disappointment with the educational experience'. See Palfreyman (2003). See also the comments of Kirby J in the case of *Griffith University v Tang* (2005) 213 ALR 724 prefaced below.

There is judicial authority in Australia that recognises the contractual relationship between students and private education providers,<sup>34</sup> including private universities,<sup>35</sup> but no clear authority yet on whether the relationship between students and public universities is also contractual.<sup>36</sup> In recent litigation involving a public university where the student relied solely on judicial review under the relevant statute,<sup>37</sup> Kirby J of the High Court of Australia was troubled by the omission of the plaintiff to plead breach of contract. He addressed counsel for the university in the following terms:

Can I just ask a question? It was common ground when we were told of 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? I just have to put it out of my brain even though it will not seem to go away.<sup>38</sup>

Judicial authority in the United States, Canada and the United Kingdom has accepted that there is a contract between a university and its students and that this is a source of the rights and obligations between the parties.<sup>39</sup> Similarly, Ellis J of the High Court of New Zealand, in dismissing the university's argument that contract law did not apply as the relationship was exclusively governed by statute, said:<sup>40</sup>

I think it is beyond argument that the relationship between a student ... and the University is partly based on contract and partly based on the Act itself ... The Courts will not adjudicate upon matters which impinge on academic freedom and independence, but they will entertain an action brought by a student based on tort or his or her contract with the university which does not so impinge.

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<sup>34</sup> *Commonwealth of Australia v Noel Ling* (1993) 44 FCR 397; *Noel Ling v Commonwealth of Australia* (1994) 51 FCR 88.

<sup>35</sup> *Orr v Bond University* (Supreme Court of Queensland, unreported, Dowsett J, No 2337, 3 April 1996).

<sup>36</sup> Hence the importance of an outcome in the *Ogawa* litigation.

<sup>37</sup> *Griffith University v Tang* (2005) 213 ALR 724.

<sup>38</sup> Transcript of proceedings, *Griffith University v Tang* [2004] HCA Transcripts 227 (21 June 2004).

<sup>39</sup> Bessant (2004); Davenport (1985); Davies (1996); Davis (2001); Farrington (1998); Lewis (1983); Middlemiss (2000); Palfreyman (2003).

<sup>40</sup> *Grant, Woolley, Staines & Grant v Victoria University of Wellington* (High Court of New Zealand, Wellington Registry, unreported, Ellis J, CP 312/96 13 November 1997) at 12.



The content of the student–university contract was at issue in the more recent action, also in New Zealand, against Massey University.<sup>41</sup> Lamb, who had been studying to become a primary school teacher, alleged that the university had breached the contract with her by its failure to reconsider the courses she had failed and to allow her to complete her teaching practice course. She contended that the provisions of the charter of the College of Education comprised part of the contract with her, and that certain of these had been breached. Wild J held that the charter of an education institution<sup>42</sup> is more in the nature of a ‘mission statement’, and does not form part of a student/institute contract. Consequently he was of the view that the plaintiff’s claim in contract must fail. Importantly, his finding on those particular facts did not differ from Ellis J previously (in *Grant*) and did not dismiss the possibility of a student’s claiming in breach of contract. His judgment did help to make clear, however, what a court is and is not likely to include within a student’s contract.

It is of interest to note here the comments of New Zealand lawyer Stephen Kos, counsel for the students in their case against Victoria University (above) to the effect that ‘it is difficult to imagine any other key service provider taking so relaxed and chaotic an approach to defining the terms of a contractual relationship’.<sup>43</sup> It is also interesting to note here that both Massey University and Victoria University in New Zealand have now introduced student–university contracts that are formed upon enrolment.<sup>44</sup>

### **Students and Consumer Protection Statutes: The Answer to University Accountability?**

Recent decades have seen the progressive enhancement and clarification of consumer rights and supplier responsibilities in Australia and New Zealand and in the comparative jurisdictions. Statutory regimes aimed at redressing the

<sup>41</sup> *Lamb v Massey University* (High Court of New Zealand, Palmerston North Registry, unreported, Wild J, CIV 2003 454 336 & 337, 19 October 2004). The student applied at the same time for judicial review of decisions made by the College of Education which, by the time the action was commenced in 2000, had been disestablished and incorporated into the defendant, Massey University. The judicial review claim also failed. Her appeal from the judgment insofar as it rejected her claim for judicial review of her results was also dismissed (Court of Appeal of New Zealand, William Young P, Hammond and Allan JJ, CA241/04, 13 July 2006).

<sup>42</sup> As required by ss 184–91 of the *Education Act 1989* (NZ).

<sup>43</sup> Quoted in Gavin Moodie, ‘Fees Open Up Free Trade’, *Australian*, 23 June 2004, p 38.

<sup>44</sup> For further details and the terms of these contracts, see the Massey University Student Contract at <http://calendar.massey.ac.nz/statutes/sc.htm> and the Victoria University of Wellington Student Contract at [www.vuw.ac.nz/home/studying/student\\_contract.html](http://www.vuw.ac.nz/home/studying/student_contract.html). There is evidence also that there are similar moves in UK universities: Jonathon Richards and Tony Halpin, ‘Students Forced to Sign “I’ll Try Harder” Contracts’, *Times*, 31 January 2006; and ‘Oxford Students Forced to Sign Up’, *Australian*, 1 February 2006, p 23.

imbalance between consumers and suppliers of goods and services are now firmly embedded. The imposition of market culture on education supports the view that this legislation applies to educational services. Although this application may not initially have been intended by the legislatures, it is difficult to argue against its use in the current higher education environment. The particular consumer protection legislation that has potential application in Australia is the TPA and the state and territory fair trading legislation.<sup>45</sup> The equivalent legislation in New Zealand is the *Fair Trading Act 1986* (NZ) (FTA) and the *Consumer Guarantees Act 1993* (NZ) (CGA).

### *Misleading and Deceptive Conduct: 'It's Not What the Blurb Said'*<sup>46</sup>

This reality gap is also familiar to Australian students, whether it be the glossy handbook suggesting an outer metropolitan campus is 'only' 15 minutes from the CBD — by ambulance with a police escort maybe — to more serious misrepresentations about the availability of academic resources and services.<sup>47</sup>

The most litigated sections in the Australian and New Zealand consumer protection statutes, and the ones with the greatest scope for protection of students and others, are those prohibiting misleading or deceptive conduct and false or misleading representations.<sup>48</sup> These sections impose strict liability so there is no need to prove an intention to mislead or deceive or to make a false representation in order to prove a contravention of the relevant statute.

Section 52 of the TPA simply states that: 'A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive.' In the FTA, corporate status is not a requirement as the prohibition is aimed at any person engaged in trade.<sup>49</sup> Universities in Australia

<sup>45</sup> *Fair Trading Act 1992* (ACT); *Fair Trading Act 1987* (NSW); *Consumer Affairs and Fair Trading Act 1990* (NT); *Fair Trading Act 1989* (Qld); *Fair Trading Act 1987* (SA); *Fair Trading Act 1990* (Tas); *Fair Trading Act 1999* (Vic); *Fair Trading Act 1987* (WA).

<sup>46</sup> Frank Puredi, *Australian*, 28 August 2002, p 32.

<sup>47</sup> Natasha Stott Despoja, 'Students Aren't Mere Consumers', *Australian*, 4 September 2002, p 39, discussing what she calls the 'growing gulf' between what universities claim and the students' experience of courses.

<sup>48</sup> Sections 52 and 53, *Trade Practices Act 1974* (Cth); ss 9 and 13, *Fair Trading Act 1986* (NZ); ss 12 and 14, *Fair Trading Act 1992* (ACT); ss 42 and 44, *Fair Trading Act 1987* (NSW); ss 42 and 44, *Consumer Affairs and Fair Trading Act 1990* (NT); ss 38 and 40, *Fair Trading Act 1989* (Qld); ss 56 and 58, *Fair Trading Act 1987* (SA); ss 14 and 16, *Fair Trading Act 1990* (Tas); ss 9 and 12, *Fair Trading Act 1999* (Vic); ss 10 and 12, *Fair Trading Act 1987* (WA).

<sup>49</sup> Section 9, *Fair Trading Act 1986* (NZ): 'No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.' Corporate status is also not a requirement for an action under the Australian state and territory fair trading legislation referred to in n 45. See, for example, s 38,

and New Zealand are incorporated under statute,<sup>50</sup> but this in itself is not sufficient for universities to be ‘corporations’ within the meaning of the TPA because that term is defined for the purposes of the TPA to mean certain types of corporations only — namely, foreign corporations or trading or financial corporations formed within Australia.<sup>51</sup> So the initial inquiry becomes: is an Australian university a trading corporation?<sup>52</sup> In recent years, universities in Australia have moved exponentially to operating as businesses in the higher education industry. Providers of higher education services compete with each other nationally and internationally. Although their activities are mainly teaching and research, other activities such as consultancy work, commercial research in the private sector, and offering accommodation or other services are becoming increasingly important sources of revenue for universities.<sup>53</sup> Whenever the activities of universities amount to providing goods or services in exchange for fees, those activities become commercial activities and are subject to the TPA.<sup>54</sup>

In *Quickenden v O'Connor*,<sup>55</sup> the Full Court of the Federal Court of Australia found that the University of Western Australia was a trading corporation and as such was subject to federal legislation. Lee J, at first instance, was of the same view and remarked:

When the elements of constitutional law were taught in the Faculty of Law of the University forty years ago, it would not have occurred to the Dean of the Faculty, who delivered those lectures, that the institution assisting students to seek wisdom was a trading corporation, much less that the university would assert that it was.<sup>56</sup>

Few would argue now that university corporations which provide education and other services should not be required to adhere to the same standards of honesty in promotion and quality in provision of those services as is required of all other service providers. Commentators in the media certainly

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*Fair Trading Act 1989* (Qld): ‘A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.’

<sup>50</sup> For example, *University of Sydney Act 1989* (NSW) and *Griffith University Act 1998* (Qld) in Australia; *Victoria University of Wellington Act 1961* (NZ) and *Massey University Act 1963* (NZ) in New Zealand.

<sup>51</sup> Section 4, *Trade Practices Act 1974* (Cth).

<sup>52</sup> This inquiry is only relevant if legal action is to be taken against an Australian university under the TPA. Universities which are not ‘trading corporations’ are still subject to the equivalent provisions in the state and territory fair trading legislation referred to in n 45.

<sup>53</sup> Rorke (1996), p 186.

<sup>54</sup> Bessant (2004); Bhojani (1998); Fels (1998); Griggs (2004); Jackson (2002); McCabe (2000).

<sup>55</sup> *Quickenden v O'Connor* (2001) 184 ALR 260.

<sup>56</sup> *Quickenden v O'Connor* (1999) 166 ALR 385 at 392–93.

adhere to the view that there is no justification for university immunity from the TPA.<sup>57</sup>

As a matter of law, whether universities are or are not affected by these prohibitions depends on whether university activities amount to conduct 'in trade' (in New Zealand) or 'in trade or commerce' (in Australia). In the FTA, 'trade' is defined as 'any trade, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services'.<sup>58</sup> The phrase 'in trade or commerce' has been interpreted very widely for the purposes of the TPA,<sup>59</sup> but still requires the activity complained of to 'itself bear a trading or commercial character'.<sup>60</sup> In the higher education context, it is therefore necessary to distinguish between activities and representations that might induce students to enrol and pay fees and those that do not.<sup>61</sup> For example, could anyone seriously argue that representations made by universities in promotional material are not made in trade or commerce? Communications with students after they have enrolled represent more of a 'grey' area.

In this respect, academics and their universities may take comfort from the decision in *Plimer v Roberts*.<sup>62</sup> The defendant, an historical researcher, delivered unpaid public lectures on behalf of an association known as the Noah's Ark Research Foundation. The purpose of the lectures was to encourage interest in a boat-shaped geological formation near Mount Ararat. A member of the Australian Skeptics Group alleged the defendant had falsely represented in his lectures that *inter alia* he had personally carried out certain archeological and scientific investigations.<sup>63</sup> The court held that Dr Roberts was not engaged 'in trade or commerce', as he was not paid and the subject-matter of his lecture was designed to excite interest rather than for pecuniary gain. Furthermore, the alleged misrepresentations related to the lecture content rather than to the provision of the lecture itself. Errors made in class<sup>64</sup> or

<sup>57</sup> 'Universities Need to be Careful Not to Mislead', *Australian*, 13 January 1999, p 26; 'Students Aren't Mere Consumers', *Australian*, 4 September 2002, p 39; 'The Law Cuts Both Ways', *Australian*, 30 October 2002, p 37; 'Redress Available to All under *Trade Practices Act*', *Australian*, p 30.

<sup>58</sup> Section 2(2), *Fair Trading Act 1986* (NZ). 'Trade or commerce' is defined in s 4, *Trade Practices Act 1974* (Cth) to mean: 'trade or commerce within Australia or between Australia and places outside Australia'.

<sup>59</sup> See, for example, *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 22 ALR 621.

<sup>60</sup> *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594. See also the discussion on this point in Clarke (2003), Griggs (2004) and Rochford (2001a).

<sup>61</sup> McCabe (1995), p 174.

<sup>62</sup> *Plimer v Roberts* (1997) 150 ALR 235.

<sup>63</sup> The action was taken under the New South Wales equivalent of s 52 of the *Trade Practices Act 1974* (Cth), namely, s 42, *Fair Trading Act 1987* (NSW) so corporate status was not necessary.

<sup>64</sup> McCabe (1995), p 174.

comments made in lectures on the subject-matter of the lectures are therefore unlikely to be 'in trade or commerce' and actionable.<sup>65</sup>

This above case was clear. But what if the offending representations or conduct occur in some other context during the course of study? Spender J of the Federal Court of Australia had to consider this question in *Mathews v University of Queensland*.<sup>66</sup> Mathews complained about the grade he had been awarded, and alleged that the registrar and secretary of the university had wrongly represented to him that the Senate Student Appeals Committee (SSAC) would 'fairly and expeditiously address all of his concerns regarding alleged improper actions by the University and its staff'<sup>67</sup> in respect of his grade. The SSAC held they did not have jurisdiction and thus did not consider the matters raised in his complaint. Mathews also claimed that the university had wrongfully represented that it would not 'countenance plagiarism' when in fact it did so for other students, and that lecturers would provide a statement of the goals and the nature of assessment for their subjects and be available for discussion of assessments with students, and this had not happened. He claimed that he had relied on these representations and as a result he suffered a loss for which he claimed compensatory and exemplary damages. The court noted that these representations could not be said to have been made 'in trade or commerce'. However, what was even more fatal for Mathews' case was the fact that he did not identify any losses suffered by him as a result of the alleged representations. The judge, while taking care to ensure that the student was not denied access to justice through lacking legal representation, was nonetheless of the view that the action had no chance of success and granted the university's application to strike out the statement of claim.<sup>68</sup>

The marketing of university services is a relatively new phenomenon, as is radio and television advertising of those services. To attract students, information about universities is widely distributed in brochures, prospectuses, calendars and handbooks at education fairs, as well as during school visits and university open days. All statements, claims and representations made to prospective students about courses, resources and facilities being offered by the university and about the students' chances of successful completion of particular courses and their future employment opportunities must be neither false nor misleading or deceptive, or likely to mislead or deceive. Universities

<sup>65</sup> Rochford (2001a), p 139.

<sup>66</sup> *Mathews v University of Queensland* [2002] FCA 414 (8 April 2002).

<sup>67</sup> *Mathews v University of Queensland* [2002] FCA 414 (8 April 2002) at para 8.

<sup>68</sup> Mathews' allegations of deceit and defamation also failed because he was unable to show a causal link between the matters he alleged and the losses he claimed. Interestingly, although he was essentially complaining about how his academic results were dealt with by the university, he did not seek judicial review of the university's decisions with respect to his results. One can only speculate as to why he chose not to proceed against the university on public law grounds. Had he done so, his success may have turned on whether he had sought review under the common law (as in *Clark v University of Lincolnshire and Humberside* [2000] 3 All ER 752) or pursuant to the relevant statute, namely, *Judicial Review Act 1991* (Qld) (as in *Griffith University v Tang* (2005) 213 ALR 724).

cannot expect to engage in these marketing practices without being answerable for failures to achieve their claims.<sup>69</sup> One of the most significant areas of concern is the recruitment and support of international students. Referring to the hard-sell recruiting of overseas students and the 'colourful adjectives' being utilised in the service of university salesmanship,<sup>70</sup> Considine quotes the International Students Officer at Queen Mary College in London who said: 'In my experience, second-hand car salesmen are models of good practice when contrasted with the representatives of some UK universities and polytechnics.'<sup>71</sup>

In New Zealand, there are reports of not insignificant numbers of students who have been prepared to commence proceedings under the FTA. Generally, they allege that their education provider made certain representations that led them to enrol, and that those representations were misleading and were the cause of their loss. In all known cases, the institutes were quick to settle and the students concerned were bound by confidentiality agreements. One case that received much media attention in New Zealand concerned the lack of accreditation of a naturopathy degree course at Aoraki Polytechnic. Fifteen students instigated legal action complaining about the institute's assurances at the time of their enrolment that accreditation of the course as a degree was a mere formality. The course failed to achieve degree status and the students took action under the FTA. The Polytechnic reached a financial settlement with the students.<sup>72</sup> Similarly, lack of accreditation for a course was a cause of complaint against Wairariki Polytechnic in Rotorua where, in August 2005, it was reported that 60 graduates of the Bachelor of Social Sciences 'kaupapa Maori and adventure therapy classes' were threatening legal action after discovering they were unable to get registration as social workers due to the lack of accreditation of their courses with the Social Workers' Registration Board. While the fate of this complaint is unknown, it may be assumed to be within those referred to in *Tertiary Update*<sup>73</sup> where it was reported that:

eight of New Zealand's nineteen polytechnics have paid nearly \$220 000 in compensation or fees refunds to disgruntled students, while several more are dealing with new complaints. They include the Christchurch Polytechnic Institute of Technology, which currently faces claims of \$100,000 from two students.

The report does not give the grounds for the students' complaints; it does, however, point to a concern with institutes paying out students who complain

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<sup>69</sup> Rorke (1996), p 176; Symes and Hopkins (1994).

<sup>70</sup> Considine (1994), p 38.

<sup>71</sup> J. Belcher, International Students Officer at Queen Mary College, London, quoted in D. Walker 'Hard Sell Recruiting by British Universities Assailed' (1985) 30 *Chronicle of Higher Education* 39; quoted in Considine (1994), p 38.

<sup>72</sup> See Varnham (2001a).

<sup>73</sup> The Association of University Staff weekly newsletter, vol 8 no 36, 6 October 2005, p 3.

as this prevents such information being available to other students, or to prospective students.

Similarly, there have been several reports in the Australian media about students commencing legal proceedings against Bond University, claiming damages for misleading and deceptive conduct in the promotion of a postgraduate medical program.<sup>74</sup> Essentially, the students' complaint is that they were given incorrect information which caused them to enrol in a biomedical science degree thinking they could start a postgraduate medical degree in 2004. Their claims include a full refund of course fees and loss of income.<sup>75</sup> It is not known whether these proceedings are continuing or whether they have been settled.

The first Australian student to base a legal action exclusively on section 52 of the TPA was reportedly Steve Jones, a postgraduate student at Deakin University.<sup>76</sup> Jones claimed he had been persuaded to enrol in a two-year Master's degree course in developmental studies after having seen a glossy booklet produced by the university. He alleged that the promotional material contained in this booklet was misleading and contravened the TPA because the study guides used for the course were seriously out of date so much of the material was 'obsolete' and the materials and assessments used for the postgraduate course were in many cases identical to those used with undergraduates. Once again, the university acted quickly to reach a settlement with the student.<sup>77</sup>

However, in *Fennell v Australian National University*,<sup>78</sup> the plaintiff, a full-fee paying student at the Australian National University (ANU) enrolled in the Master of Business Administration (Managing Business in Asia) program got his day in court, but to no avail. Fennell claimed that the main inducement for him to enter this program was an advertisement published by the ANU in *The Age* newspaper in Melbourne stating that the ANU would arrange a work placement in Asia for students enrolled in the course. He also claimed that this was later reinforced at an interview with a representative from the university. The course handbook did, however, say that students were primarily responsible for arranging their own work placement in Asia. Fennell's argument was that he did not receive this handbook until after he had enrolled, had paid his fees and had resigned from his job. Ultimately he did arrange his

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<sup>74</sup> Kate Marshall, 'Medical Course that Isn't There', *Australian Financial Review*, 29 March 2004, p 29; Kate Marshall, 'Student Sues Bond Over Course', *Australian Financial Review*, 5 April 2004, p 31; Dorothy Illing and Dani Cooper 'Litigious Students Courting Justice', *Australian*, 7 April 2004, p 35.

<sup>75</sup> Kate Marshall, 'Five More to Sue Bond', *Australian Financial Review*, 16 August 2004, p 29.

<sup>76</sup> Geoffrey Maslen, 'His Master's Angry Boice', *Bulletin*, 12 July 1994, p 27.

<sup>77</sup> See n 72. The media report states that the student's latter complaint is supported by other postgraduate students' complaints and surveys undertaken over the previous four years by the Council of Australian Postgraduate Associations who claimed that this case was only 'the tip of the iceberg'.

<sup>78</sup> *Fennell v Australian National University* [1999] FCA 989 (22 July 1999).

own work placement in Borneo and graduated from the program, but nevertheless he claimed compensation for his losses, which he alleged, resulted from the misleading statement. The losses he claimed were for wages allegedly lost as a result of his ceasing his employment, and for the anxiety and distress he suffered as a result of his having to arrange his own work placement and his consequential late graduation. Not only did Sackville J not question the potential for liability of the university under the TPA, but he began his judgment by remarking that this case could be said to be a 'by-product of the relatively new phenomena in Australian tertiary education, namely competition among universities for full fee-paying graduate students'.<sup>79</sup> His Honour was of the view that the advertisement was ambiguous, and so it was plausible that those reading it would get the impression that the ANU would organise all work placements for students in the program. However, on the facts, he was satisfied that Fennell had been 'disabused ... of any misapprehension'<sup>80</sup> at the interview before his enrolment, when he was advised that although assistance would be provided in finding a suitable work placement, this was primarily his responsibility. The court therefore held against the student on the question of liability.

### *The Quality of the Services: Implied Terms/guarantees*

Unfortunately I also endured lecturers with IQs to match Einstein's, who had written a series of theses and libraries of books but who could not teach a dog to sit.<sup>81</sup>

In addition to ensuring that suppliers of services provide honest and accurate information, a further aim of consumer protection statutes is to provide consumers with certain guarantees with respect to the quality of those services. Consumers with no real bargaining power to determine the terms of the contracts they enter with suppliers of services are protected by having certain non-excludable terms implied into those contracts. The relevant section in the TPA states that:

In every contract for the supply by a corporation in the course of a business of services to a consumer there is an implied warranty that the service will be rendered with due care and skill and that any materials supplied in connexion with those services will be reasonably fit for the purpose for which they are supplied.<sup>82</sup>

<sup>79</sup> n 78, at para 1.

<sup>80</sup> n 78, at para 35.

<sup>81</sup> Anna Tobin (1997) 'Couldn't Teach a Dog to Sit', *Times Higher Educational Supplement*.

<sup>82</sup> Section 74, *Trade Practices Act 1974* (Cth). See also the equivalent sections in the Australian state and territory legislation: s 40S, *Fair Trading Act 1987* (NSW); s 66, *Consumer Affairs and Fair Trading Act 1990* (NT); s 7, *Consumer Transactions Act 1972* (SA); ss 32J-32K, *Fair Trading Act 1999* (Vic); s 40, *Fair Trading Act 1987* (WA).



The New Zealand equivalent is as follows:

Where services are supplied to a consumer there is a guarantee that the service will be carried out with reasonable skill and care.<sup>83</sup>

Where services are supplied to a consumer there is a guarantee that the service and any product resulting from the service, will be —

- (a) reasonably fit for any particular purpose; and
- (b) of such a nature and quality that it can reasonably be expected to achieve any particular result ... that the consumer makes known to the supplier ...<sup>84</sup>

Are students consumers? This question has given rise to much debate in both the education and the marketing literature. Although it is by no means universally accepted,<sup>85</sup> it is now common to view the student as a customer. It has been argued that universities which do not treat their students as customers entitled to an efficient and high-quality service will lose out to those which do.<sup>86</sup> Although the idea of treating students as customers is controversial because of the implied shift in power, it may simply mean that teachers should be more open to student feedback and should measure success by how well students are learning.<sup>87</sup> This view is consistent with that prevailing in the higher education literature that states that good teaching is student-focused.<sup>88</sup> However, difficulties arise because students participate in the education process and must also take some responsibility for the quality of their learning.<sup>89</sup> In the view of a senior participant in the UK higher education sector, it is 'regrettable' that 'students see themselves as consumers rather than participants in a process. Higher Education is not a consumer product, but a participatory product ...'<sup>90</sup>

However, this debate in the literature has little relevance here. The primary inquiry relates to the statutory definition of 'consumer' in the TPA and the CGA. 'Consumer' is a term used in law to identify persons given special protection in various statutes. A 'consumer' is defined in the CGA as a person who 'acquires from a supplier goods or services of a kind which are normally acquired for 'personal, household or domestic use'.<sup>91</sup> The TPA defines 'consumer' for the purposes of the Act as follows:

<sup>83</sup> Section 28, *Consumer Guarantees Act 1993* (NZ).

<sup>84</sup> Section 29, *Consumer Guarantees Act 1993* (NZ).

<sup>85</sup> Baldwin (1994).

<sup>86</sup> Williams (1993), p 235.

<sup>87</sup> Turner (1995), p 108.

<sup>88</sup> Biggs (2003); Ramsden (1992).

<sup>89</sup> Hall (1996), p 27.

<sup>90</sup> Baroness Ruth Deech, the Independent Adjudicator for Higher Education in the United Kingdom.

<sup>91</sup> Section 2 *Consumer Guarantees Act 1993* (NZ). See also the equivalent sections in the Australian state and territory legislation: s 6, *Fair Trading Act 1992* (ACT); s 5, *Fair Trading Act 1987* (NSW); s 5, *Consumer Affairs and Fair Trading Act*

[A] person shall be taken to have acquired particular services as a consumer if, and only if:

- (i) the price of the services did not exceed the prescribed amount; or
- (ii) where that price exceeded the prescribed amount — the services were of a kind ordinarily acquired for personal, domestic or household use or consumption ...<sup>92</sup>

Thus it is only when the cost of services exceeds \$40 000 that an inquiry is made as to whether the services are of a kind ordinarily acquired for personal domestic or household use or consumption, and only then would a court have to decide whether educational services are such services.<sup>93</sup> As annual fees paid by students for particular courses are as yet unlikely to exceed \$40 000, students are 'consumers' for the purposes of the TPA. Even if they were to exceed that amount, it would be difficult for a university to argue that educational services were not acquired for an individual's 'personal' use. This would be the case even if it is considered that the primary purpose of higher education is vocational, as it does not alter the fact that educational services are of a type acquired by a person for their own personal advancement.

As 'consumers' under the consumer protections statutes, students will therefore benefit from having a term implied in their contract with the university that university services will be provided with due care and skill.<sup>94</sup> Importantly, any such term implied by the relevant legislation cannot be excluded by any other term in the student-university contract.<sup>95</sup> The discussion above regarding the contractual nature of the student-university relationship and the characterisation of some universities' activities as trading or business activities is clearly also relevant in this context. To determine whether the services provided to students by universities were rendered with due or reasonable care and skill, it would be necessary to consider standards adopted by other universities and to provide evidence of what constitutes good practice. If a university breached its obligations by not providing its services with due care and skill, an aggrieved student could bring an action against the university for breach of the term implied in the contract by the relevant statute.

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1990 (NT); s 6, *Fair Trading Act 1989* (Qld); s 48, *Fair Trading Act 1987* (SA); s 5, *Fair Trading Act 1990* (Tas); s 32D, *Fair Trading Act 1999* (Vic); s 6, *Fair Trading Act 1987* (WA).

<sup>92</sup> Section 4B(1)(b), *Trade Practices Act 1974* (Cth).

<sup>93</sup> The 'prescribed amount' is \$40 000 — see s 4B (2), *Trade Practices Act 1974* (Cth).

<sup>94</sup> Section 74, *Trade Practices Act 1974* (Cth); ss 28 and 29, *Consumer Guarantees Act 1993* (NZ); see also the equivalent sections in the Australian state and territory legislation referred to in n 82.

<sup>95</sup> Section 68, *Trade Practices Act 1974* (Cth); s 43, *Consumer Guarantees Act 1993* (NZ); s 40M, *Fair Trading Act 1987* (NSW); s 68, *Consumer Affairs and Fair Trading Act 1990* (NT); s 38, *Consumer Transactions Act 1972* (SA); s 32L, *Fair Trading Act 1999* (Vic); s 34, *Fair Trading Act 1987* (WA).

There is very little evidence, however, of students having pursued redress under these provisions, either in Australia or New Zealand.<sup>96</sup> This absence gives rise, once again, to the question of the usefulness of this avenue of complaint.

### **Consumer Protection Legislation: How Useful is it to Students?**

The eagerness of higher education institutions to settle legal disputes with their students undoubtedly reinforces the proposition that the threat of litigation acts more in favour of students than does the litigation itself.<sup>97</sup> This is, perhaps, as it should be.<sup>98</sup> The prospect of student litigation may be offensive to some but 'it is difficult to ignore'.<sup>99</sup> Some universities have, however, responded positively — for example, by developing online resources about their responsibilities under the TPA.<sup>100</sup>

The lack of success for students involved in litigation with universities highlights issues that are common whenever consumers seek redress in the courts. The first relates to the obvious imbalance in resources of the litigants. With many students being forced by financial constraints to represent themselves, is it possible for the litigation process to achieve a fair and just outcome? The second difficulty relates to the remedy sought. What losses may a student rightly claim to have suffered as a result of a university's offending conduct?

#### *The Imbalance in Financial Power*

Problems relating to the cost of litigation are illustrated by most of the cases discussed above. With many students being self-represented, there is an even greater need for courts to consider carefully before striking out a case — no

<sup>96</sup> See Varnham (2001c). There are two actions in the author's knowledge which have been filed by students relying on the *Consumer Guarantees Act 1993* (NZ) — one against the Eastern Institute of Technology and one against the Media Design School — and these were both settled confidentially, almost at the outset. The author was consulted by the solicitors acting for the student plaintiffs and the ensuing statements of claim were provided to the author in confidence.

<sup>97</sup> For example, in Jones' case against Deakin University, referred to in n 76, the university 'acted quickly to defuse a situation that had already damaged its reputation' and reached a confidential settlement with the student: Geoffrey Maslen, 'His Master's Angry voice', *Bulletin*, 12 July 1994, p 27.

<sup>98</sup> This has also been the case in the United Kingdom, where there are frequent reports of students commencing legal actions seeking remedies for poor quality courses that are usually settled by the institutes concerned. For example: 'Law Student Wins £30 000 Payout', *BBC News World Edition*, 31 July 2002, [http://news.bbc.co.uk/2/hi/uk\\_news/education/2163300.stm](http://news.bbc.co.uk/2/hi/uk_news/education/2163300.stm). Interestingly, in the same edition, the view was expressed by Jaswinder Gill, education lawyer and author, that: 'Student Payout "Will Open Floodgates"'. Of even more interest is the fact that this prophecy is yet to be realised.

<sup>99</sup> Bessant (2004), p 261.

<sup>100</sup> See, for example, the Trade Practices Compliance Guide on La Trobe University's Legal Services website at [www.latrobe.edu.au/legalservices/trade\\_guide.html](http://www.latrobe.edu.au/legalservices/trade_guide.html).

matter how nebulous it may seem on the pleadings. In *Mathews v University of Queensland*, Spender J referred to the concerns of (then) Kirby P in the case of *Wentworth v Rogers (No 5)* which he put as:<sup>101</sup>

the appellant being a litigant now appearing in person, care must be taken to ensure that this significant disadvantage does not deprive her of the opportunity to have her claim, if any, determined according to law. Persons unfamiliar with the rules of pleading and the technicalities which surround the drafting of a statement of claim in adequate and permissible legal form are inevitably, if unrepresented, at a disadvantage ... If this can be done, the court should avoid the summary termination of the proceedings for this will prevent the Court from examining any merits of the case, once the statement of claim is struck out ...

The potential for a miscarriage of justice where there is such an imbalance between the litigating parties once again seriously concerned Kirby J in *Griffith University v Tang*.<sup>102</sup> His Honour felt that the financial ability of the university to continue all the way to the High Court of Australia with its strike-out application was of considerable significance in that it denied the student the right to have her case heard in substance. The potential for litigation to take this path, which works inevitably against the student, is currently being demonstrated by the plight of Ogawa, who looks unlikely to ever have her 'day in court'.<sup>103</sup>

The imbalance is inevitable.<sup>104</sup> More students in public universities could perhaps avoid the problem by enlisting the help of the Australian Competition and Consumer Commission (ACCC) or, in New Zealand, the Commerce Commission. However, while the records of the latter reveal a large number of queries and complaints in recent years from students, they show that very few are actioned. The reason for this is uncertain.

There are some aggrieved students of private education providers in Australia who have taken their complaints to the ACCC, which has pursued the matter on their behalf. One such complaint was made by students enrolled at the Australian Early Childhood College. There it was alleged that the

<sup>101</sup> *Mathews v University of Queensland* [2002] FCA414 (8 April 2002) at para 4.

<sup>102</sup> *Griffith University v Tang* (2005) 213 ALR 724.

<sup>103</sup> While involved in the litigation against the University of Melbourne, Ogawa has also had an ongoing dispute with the Department of Immigration. In May 2006, she was detained in Sydney's Villawood Detention Centre as she no longer had a valid visa. She was released from detention in July 2006 and her deportation was averted by an application for a protection visa. See Harriet Alexander and Ben Cubby, 'Deportation Looms for Gifted Law Student', *Sydney Morning Herald*, 24 July 2006, p 6; and Harriet Alexander, 'Surprise Release for Student Facing Deportation', *Sydney Morning Herald*, 29 July 2006, p 3.

<sup>104</sup> This power imbalance could potentially be addressed in part by class actions by groups of students. Alternatively, legal counsel may be encouraged to act on a *pro bono* or a no win, no fee basis. A discussion of these alternatives is beyond the scope of this article.

institute had made misleading representations relating to the enrollees' right to cancel their enrolment and receive a fees refund. Spender J of the Federal Court found that representatives of the institute had engaged in misleading and deceptive conduct and ordered that compensation be paid to those students who had suffered loss as a result.<sup>105</sup> In a similar case, the Federal Court found that the Australasian Institute Pty Ltd, an internet education provider, had breached section 52 of the TPA in the claims it had made to students regarding its courses. It was ordered to offer refunds of fees to students and to 'display corrective advertising on its website'.<sup>106</sup> It is perhaps significant that in these instances the students' claims and the subsequent redress allowed by the courts were confined to refund of course fees and not consequential damages.

### *Can Students Get the Losses They Claim?*

Establishment of loss is a further problem highlighted by the cases. This undoubtedly also flows in part from a student's lack of legal representation.

Mathews clearly encountered difficulties in establishing the damages claimed and a causal link between his alleged losses and the misleading conduct in which the university allegedly engaged. He claimed a considerable sum in compensatory and exemplary damages which was way beyond any amount which could be reasonably contemplated by a court (the former were calculated on what he may have earned as a mathematics professor until his retirement). The judge concluded that he was in fact claiming an expectation loss which did not satisfy the requirement of section 82 of the TPA that it be a loss sustained as a result of a 'prejudice or disadvantage as a result of altering [his] position in reliance upon the misleading conduct'.<sup>107</sup> Fennell was legally represented in his action against the ANU, yet had he been successful in persuading the court of liability on the facts, he would still have encountered this equally problematic hurdle. Sackville J noted the difficulties with respect to damages, holding that the student had not proved on the facts that as a result of the university's conduct he had suffered a lesser benefit or a greater detriment than he would have otherwise. So again, quite apart from the difficult question of liability, a student arguably had greater difficulty in proving that he had suffered a loss that was compensable under the Act.<sup>108</sup>

The identification of compensable losses was of significance also in a case taken by a student to the New South Wales Consumer, Trader and Tenancy Tribunal. In *Kwan v University of Sydney Foundation Program Pty*

<sup>105</sup> Australian Competition and Consumer Commission 'Federal Court Orders Payment of Compensation to Student Victims of Unconscionable Conduct', [www.accc.gov.au/content/index.phtml/itemId/88112](http://www.accc.gov.au/content/index.phtml/itemId/88112).

<sup>106</sup> Australian Competition and Consumer Commission, 'Court Finds The Australasian Institute misled students', [www.accc.gov.au/content/index.phtml/itemId/322703](http://www.accc.gov.au/content/index.phtml/itemId/322703).

<sup>107</sup> *Mathews v University of Queensland* [2002] FCA 414 (8 April 2002) at para 14.

<sup>108</sup> *Fennell v Australian National University* [1999] FCA 989 (22 July 1999).

*Ltd & Ors*,<sup>109</sup> the student had enrolled in a program aimed at introducing international students to undergraduate university study. He claimed that he did not receive what he bargained for in that the course was held in a building that was being renovated and was noisy and dirty. In addition to alleging that the respondent had misrepresented the facilities and services that would be provided for the course, he also alleged that the program document 'implies that students in the Foundation program would have access to all the University [of Sydney] facilities and the standard of teaching would be akin to that of a university course'<sup>110</sup> and that had not been the case. The Tribunal found that there had been no breach of contract and the presiding member stated that he did not believe there to have been misleading and deceptive conduct.<sup>111</sup> The Tribunal was influenced in its decision by the fact that the student had completed the program and gone on to university studies: the student therefore had 'got what he paid for' and there was no evidence of loss.

## Conclusion

So what may be learned from the experiences of student litigants? Does consumer protection legislation do better than the common law in assisting students to get what they paid for?

There can be little doubt that the 'misleading and deceptive conduct' provisions of consumer protection legislation have the potential to influence the conduct of higher education institutions in the promotion and marketing of their courses. It is important, and indeed it may be sufficient, that these particular legislative provisions play their part in promoting honest competition in the higher education marketplace. However, the cases also indicate that litigation using consumer protection legislation is not likely to be easier or to yield better results for students than the common law. Furthermore, these provisions may be of even less use to students when the conduct complained of took place after their enrolment.

So does the legislation assist students in respect of course quality? Non-excludable terms may be implied into a student–university contract, but students faced with the might and pedagogical expertise of a university will very likely encounter problems in persuading a court that there has been a breach of that contract. There may also be difficulties in ascertaining what of the university documentation and representations is part of the contract with the student and what is not — unless, of course, clear student–university contracts have been formed at enrolment.<sup>112</sup>

The conundrum is that, while litigation initiated by aggrieved students does demonstrate a clear acceptance that consumer law applies in today's higher education environment, very seldom does it appear to help students in

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<sup>109</sup> *Kwan v University of Sydney Foundation Program Pty Ltd & Ors* [2002] NSWCTTT 83 (8 May 2002).

<sup>110</sup> *Kwan v University of Sydney Foundation Program Pty Ltd & Ors* [2002] NSWCTTT 83 (8 May 2002) at para 18.

<sup>111</sup> Although he believed he was unable to rule on this allegation specifically.

<sup>112</sup> See n 44.

the courts. Rhetoric aside, and adopting a cynical view, it may be that the courts simply have difficulty in determining in each particular case whether the aggrieved student is frivolous and vexatious or whether he or she is rightly wronged. Undoubtedly the ability of students to initiate legal action focuses attention on the responsibilities of universities and all higher education providers. The courts however may not be the appropriate forum in which to resolve these matters. Indeed, disputes between students and universities should be able to be resolved without recourse to the courts.<sup>113</sup> In the absence of clear and inexpensive avenues of complaint for students outside of their universities,<sup>114</sup> the protection afforded by the legislation will not be enough in the long run. There is clearly a need for an alternative forum for such complaints to be resolved, preferably in a body especially dedicated to such a purpose.<sup>115</sup> The demonstrated readiness of universities and other education providers to settle student claims and thus avoid publicity indicates that they too would welcome any positive innovation in this area.

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<sup>113</sup> Kos and McVeagh (1999); Stuhmcke (2001).

<sup>114</sup> In other contexts, consumers have the opportunity to resolve disputes outside the courts, for example by having free access to industry ombudsmen such as the Banking and Financial Services Ombudsman and the Insurance Ombudsman Service in Australia and the Office of the Banking Ombudsman and the Insurance and Savings Ombudsman in New Zealand.

<sup>115</sup> Astor (2005); Jackson (2004); Ogawa (2003) and Reddy (2004). However, it is of interest to note a recent article headed 'Students Urged to Sue Institutions', *Dominion Post*, 26 April 2006. This states that students in the United Kingdom are being urged to sue institutions for breach of contract if their degree courses are disrupted by striking academics. This indicates the part the threat of litigation may play in encouraging institutions to settle pay disputes with their employees, and interestingly makes no reference to the UK Office of the Independent Adjudicator for Higher Education.

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