The Contract for the Supply of Educational Services and Unfair Contract Terms: Advancing Students' Rights as Consumers

LISA GOLDACRE*

Extensive consumer protection legislation has existed in Australia for nearly four decades. The new Australian Consumer Law ('ACL')[1] 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.[2] However, students have seldom sought

* Curtin Teaching and Learning, Curtin University. This article is based on the thesis submitted for my MPhil (Curtin), conferred April 2013. I would like to dedicate this article to my supervisor, the late Professor Pauline Sadler, without whom the completion of my thesis was unlikely. She is greatly missed by many.

1 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 I July 2010. The second Bill was passed on 24 June 2010 and took effect on 1 January 2011.

2 There is a significant body of literature on this issue. A detailed consideration is beyond the scope of this article. See, eg, 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; 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; 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; Patty Kamvounias and Sally Varnham, 'Getting What They Paid For: Consumer Rights of Students in Higher Education' (2006) 15 *Griffith Law Review* 306; 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; Bruce Lindsay, 'Student Subjectivity and the Law' (2005) 10(2) *Deakin Law Review* 628; Mike Molesworth, Elizabeth Nixon and Richard Scullion, *The Marketisation of Higher Education and the Student as Consumer* (Routledge, 2011); 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; Francine Rochford, 'The Contested Product of a University Education' (2008) 30(1) *Journal of Higher Education, Policy and Management* 41; Francine Rochford, 'The Relationship Between The Student and The University' (1998) 3(1) *Australian & New Zealand Journal of Law & Education* 28; Margaret Thornton, 'The Law School, the

redress in relation to infringement of their rights as consumers under consumer protection legislation and if they have, they are rarely successful. A number of barriers are faced by students seeking redress before the courts. First, 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 to claims made against higher education institutions ('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 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[3] of HEIs.[4] 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 service provided. This article is specifically concerned with whether the introduction of an Unfair Contract Terms ('UCT')[5] regime in the ACL overcomes identifiable barriers faced

Market and the New Knowledge Economy' (2007) 17(1–2) *Legal Education Review* 1; Sally Varnham, 'Liability in Higher Education in New Zealand: Cases for Courses?' (1998) 3(1) *Australian & New Zealand Journal of Law & Education* 3; 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.

3 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 ('*Pilmer*'); *Fennell v Australian National University* [1999] FCA 989 ('*Fennell*'); cf *Shahid v Australasian College of Dermatologists* (2008) 248 ALR 267 ('*Shahid'*).There has been mixed success at the tribunal level, see, eg, *Kwan v University of Sydney Foundation Program P /L (*General) [2002] NSWCTTT 83('*Kwan*'); cf *Jones v Academy of Applied Hypnosis P/L* (General) [2005] NSWCTTT 841('*Jones*'); *Cotton v Blinman Investments P/L & Blinman* (General) 2004 NSWCTTT 723 ('*Cotton*'). See also 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 Section 52 and 53 of the *Trade Practices Act 1974* (Cth)' (2002) 6 *Southern Cross University Law Review* 106; Kamvounias and Varnham, 'Getting What They Paid For' above n 2.

4 The nomenclature 'higher education institution' ('HEI') is adopted as this is seen as a broad definition consistent with policy and international literature. 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. The phrase 'higher education' 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. 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, 2nd ed, 2004).

5 Unfair contract terms provisions are contained in Schedule 2 of the *Australian Consumer*

by students using consumer protection as a means to ensure they receive services as promised and to advance their rights as consumers. 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.

Of academic independence and other concerns (or the special position of universities)[6]

The legal relationship between the student and HEI is multifaceted, overlaid by principles at common law and under statute.[7] Similarly, claims made by students against HEIs are varied in their diversity of causes of action, reflecting the complex nature of the relationship.[8] Frequently claims brought against HEIs by students can be categorised as 'omnibus litigation (there being an unwieldy bundle of claims)'.[9] Two significant studies have recently been undertaken to determine the nature of student litigation against HEIs and the outcomes and trends in this regard.[10] These

Law (ACL) ch 2 pt 2–3. 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.

6 *Griffith University v Tang* (2005) 221 CLR 99, 156–7 [165]–[166] (KirbyJ).

7 See generally Dennis Farrington and David Palfreyman, *The Law of Higher Education* (Oxford University Press, 2nd ed, 2012); Jim Jackson and Sally Varnham, *Law for Educators: School and University Law in Australia* (LexisNexis Butterworths, 2007); 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; 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; Rochford, 'The Relationship Between The Student and The University', above n 2; 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; Suzanne Corcoran, 'Living on the Edge: Utopia University Ltd' (1999) 27(2) *Federal Law Review* 265.

8 See especially 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; Patty Kamvounias, and Sally Varnham, 'In-House or in Court? Legal Challenges to University Decisions' (2006) 18(1) *Education and the Law* 1; Whittaker, 'Public and Private Law-Making', above n 7.

9 *Hanna V University of New England* [2006] NSWSC 122, [2] ('*Hanna*').

10 Jim Jackson, Helen Fleming, Patty Kamvounias and Sally Varnham, 'Student Grievances and Discipline Matters Project: Final Report to Australian Learning and Teaching Council,

studies also report an increase in the number of cases being brought before courts and tribunals by students.[11]

Many of the claims brought before the courts do not involve consumer protection legislation. Lindsay[12] 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. Students can seek reparation either internally through the domestic procedures of the HEI,[13] or possibly judicial review of the same,[14] or bring their grievance before the relevant Ombudsman.[15] Students also have significant private rights, albeit complex.[16] Students' rights are also reinforced by the considerable ancillary and supporting statutory frameworks around the regulation of the higher education sector,[17] 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.[18] Consequently a claim under

(May 2009) epublications@scu; Astor, 'Why do Students Sue Australian Universities?', above, n 8; Astor, 'Australian Universities in Court', above n 8; 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.

11 Astor, 'Australian Universities in Court', above n 8. Astor reports that 'the number of Universities has doubled and the number of students tripled but the levels of the litigation have increased about eightfold': at 166.

12 Lindsay, 'Complexity and Ambiguity in University Law', above n 7.

13 All universities within the sector are special purpose statutory corporations with their own enabling acts, see, eg, the *University of Western Australia Act 1911* (WA).The university Visitor has been abolished for all but ceremonial functions in every state in Australia with the exception of Western Australia, see, eg, *Murdoch University Act 1973* (WA) s 9. Thus there may be difficulties for students in Western Australia bringing claims against universities, as the jurisdiction of the Visitor is exclusive. *Murdoch University v Bloom* [1980] WAR 193: at 116. See generally J L Caldwell, 'Judicial Review of Universities—the Visitor and the Visiting' (1982) 1 *Canterbury Law Review* 307. See also below n 124. HEIs have significant by-laws and rules dealing with matters such as student discipline and academic progression.

14 *Griffith University v Tang* (2005) 221 CLR 99. See generally Bruce Lindsay, 'University Hearings: Student Discipline Rules and Fair Procedures' (2008) 15 *Australian Journal of Administrative Law* 146; Patty Kamvounias and Sally 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; Kamvounias and Varnham, 'Legal Challenges to University Decisions Affecting Students', above n 8, 157–71; 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.

15 Astor, 'Australian Universities in Court', above n 8; Kamvounias and Varnham 'Legal Challenges to University Decisions Affecting Students', above n 8, 150, nn 61–72. See also 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.

16 See, eg, 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.

17 See, eg, the 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').

18 *Educational Services for Overseas Students Act 2000* (Cth). See Jim Jackson, 'Regulation

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 causes of action available to students, the impediment remains that claims made by students in relation to academic matters are not justiciable. Historically courts have been reluctant to disturb decisions that have been seen as within the domain of the learned academic.[19] Ordinarily, claims concerned with the nature of the educational service provided are considered matters that involve questions of academic judgement. [20] 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. Subject to few exceptions,[21] 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.[22] Interestingly the issue of judicial review of academic matters does not often arise in cases where claims are made under consumer protection legislation.[23] The focus is often whether the conduct complained of was in 'trade or commerce' and a consideration of the factual evidence. The issue of justiciability in relation

of International Education: Australia and New Zealand' (2005) 10(2) & (2006) 11(1) *Australia & New Zealand Journal of Law & Education* 67. Overseas students have their own Ombudsman. See Overseas Students Ombudsman (6 August 2012) <http://www.oso.gov.au/>.

19 *Clark v University of Lincolnshire and Humberside* [2000] 3 All ER 752 ('*Clark*'). Generally adopted by the courts in Australia *Griffith University v Tang* (2005) 221 CLR 99, (Gummow, Callinan and Heydon JJ) 121 [58], (Kirby J) 156, [165]; *Hanna* [2006] NSWSC 122; *Walsh v University of Technology Sydney* [2007] FCA 880. Cf the matter of *Mathews v University of Queensland* [2002] FCA 414 ('*Mathews*'). Similarly in New Zealand see *Norrie v Auckland University Senate (1984)* 1 NZLR 129 cf *Grant v Victoria University of Wellington* [2003] NZAR 186 ('*Victoria University'*).

20 *Clark* [2000] 3 All ER 752; in *Griffith University v Tang* (2005) 221 CLR 99 Kirby J 156, [165]. See also Mark Davies, 'Challenges to "Academic Immunity"—The Beginning of a New Era?' (2004) 16(2–3) *Education and the Law* 75; Kamvounias and Varnham, 'Legal Challenges to University Decisions Affecting Students', above n 8, 159–60.

21 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'. *Humzy-Hancock, Re* [2007] QSC 34; *Re Legal Profession Act 2004; re OG* [2007] VSC 520 (Unreported Warren CJ, Nettle JA and Mandie J, 14 December 2007);see generally 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; Francesca Bartlett, 'Student Misconduct and Admission to Legal Practice—New Judicial Approaches' (2008) 34(2) *Monash University Law Review* 309; 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.

22 *Griffith University v Tang* (2005) 221 CLR 99, 156 [165] (Kirby J); Davies, 'Challenges to "Academic Immunity"', above n 20; Kamvounias and Varnham, 'Legal Challenges to University Decisions Affecting Students', above n 8, 159–60.

23 *Fennell* [1999] FCA 989; *Shahid* (2008) 248 ALR 267. Cf *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' at [25]–[26] (Davies J).

to academic matters, although forming part of the factual basis of the students' claims, is not usually considered by the court specifically.[24]

Outside of the consumer tribunals, [25] there is no Australian 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 will for other professional services. It is arguable that this may not be so easily over looked by the higher courts.[26] This is, and continues to be, a significant hurdle for students seeking redress for what they perceive to be poor quality educational services.[27] 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. 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.[28] Students may well be concerned that decision making processes are fair, but this is not mutually exclusive of claims in relation to substantive 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.[29] It is suggested 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

24 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': Corones, above n 2. 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.

25 *Kwan* [2002] NSWCTTT 83. The small claims tribunals have reviewed the merits of academic matters involving private providers concerning the admission of unsuitable fellow students into the course *St Clair v College of Complimentary Medicine Pty Ltd* (General) [2008] NSWCTT 1309 ('*St Clair'*); the learning environment, including staff–student ratios and the condition of premises and pre-existing knowledge of students *Qayam v Shillington College* (General) [2007] NSWCTT 620 ('*Qayam*'); teaching methodologies *Cui v Australian Tesol Training Centre* (General) [2003] NSWCTT 329 ('*Cui*'); assessment of students' suitability for study based on age, workload *Evans v Australian Institute of Professional Counsellor Laws* (General) [2004] NSWCTTT 108 ('Evans'); qualifications and experience of teaching staff *Cotton* [2004] NSWCTTT 723; the quality and amount of tuition given and an award of fail grade in academic assessment *Jones* [2005] NSWCTTT 841.

26 *Griffith University v Tang* (2005) 221 CLR 99. See especially Kamvounias and Varnham, 'Legal Challenges to University Decisions', above n 8, 179.

27 See Jackson et al, above n 10, especially student survey results at 26. 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.

28 See, eg, *Griffith University v Tang* (2005) 221 CLR 99; Kamvounias and Varnham, 'Legal Challenges to University Decisions Affecting Students', above n 8, 164, 152–169; Astor, 'Why do Students Sue Australian Universities?', above n 8, 30. See generally Lindsay, 'University Hearings', above n 14.

29 Jackson et al, above n 10. The authors state 'complaints about the quality of teaching or supervision were the second largest category': at 32. Cf Astor, 'Why do Students Sue Australian Universities?', above n 8, 24.

immunity as other causes of action. 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,[30] and focus instead on the essence of the term. The legislation prevents a HEI from relying on a term in the student–HEI contract that is unfair. As will be seen below, 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.

Are educational services supplied in 'trade or commerce'?

Prior to the introduction of the ACL, one significant barrier for students bringing claims under consumer protection legislation had been the view that the services supplied by the HEI may not be supplied in 'trade or commerce'.[31] Promotional activities[32] have been identified by courts[33] and commentators as clearly being activities in 'trade or commerce'. [34] In many cases the issue does not arise for discussion, but is assumed to apply by the complainant, provider and the court. If considered, the application is often a cursory one [35] and there is disparity in the approach taken by the courts across the jurisdictions in which these cases are

30 Davies, 'Challenges to "Academic Immunity"', above n 20; 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.

31 *Fasold v Roberts* (1997) 145 ALR 548; *Plimer* (1997) 150 ALR 235; *Quickenden v O'Conner* (2001) 184 ALR 260 ('*Quickenden*'). See generally Francine Rochford, 'Traders of the Lost Ark—Lecturers and Liability' (2001) 13(2) *Education and the Law* 127.

32 Jackson, 'Regulation of International Education', above n 18, 76–7. These activities 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.

33 *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 31. See also above n 3 and accompanying text.

34 See, eg, Clarke, above n 3; Jackson, 'The Marking of University Courses', above n 3, 114; Kamvounias and Varnham, 'Getting What They Paid For', above n 2, 315–21; Lynden Griggs, 'Tertiary Education, the Market and Liability "In Trade or Commerce"' (2004) 12 *Competition & 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; Varnham, 'Straight Talking, Straight Teaching', above n 2, 308; Lindsay, 'Complexity and Ambiguity in University Law', above n 7, 12. 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.

35 See *ACCC v Black on White Pty Ltd* (2001) 110 FCR 1, 21.

heard, notably the lower courts[36] and consumer tribunals.[37] One could speculate that this is influenced by the complex nature of student litigation,[38] and many of the decisions relate to interlocutory applications, strike out applications or applications for summary judgment[39] against in-person litigants. [40]

It is clear that some academic activity will not be considered to be conduct in 'trade or commerce', but is instead considered to be internal to the student–HEI relationship, for example, statements made in public lectures.[41] The test in *Concrete Constructions*[42] was applied in the Full Court of the Federal Court of Australia in *Plimer v Roberts* (1997) 150 ALR 235 ('*Noah's Ark'*). Justice Lindgren found 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.*[43] The 'delivery of the lectures was not inherently a trading or commercial activity' and would not ordinarily be in 'trade or commerce'.[44] 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.

In order to attract the UCT provisions, the contract for educational services must be 'provided, granted or conferred in trade or commerce'.[45] Thus this article is concerned only with whether the student–HEI contract is a service supplied in

36 In *Mathews* [2002] FCA 414 claims regarding particular academic activities were struck out, largely on the basis that they were not conduct in 'trade or commerce'. See also *Dudzinski v Kellow* [1999] FCA 390 at [26].

37 The following cases specifically considered this issue: *Kwan* [2002] NSWCTT 83; *Shu Fen Li v Jia Cheng International Pty Ltd* (General) [2008] NSWCTT 944; *Lan v The International College of Management, Sydney P/L* (General) [2007] NSWCTT 299; *Evans* [2004] NSWCTTT; *Cotton* [2004] NSWCTTT 723; *Qayam* [2007] NSWCTT 620; *Nguyen v Anderson* (General) [2009] NSWCTT 278. Cf the following cases where it was simply assumed to apply: *St Clair* [2008] NSWCTT 1309; *Cui* [2003] NSWCTT 32; *Navarro v Academies Australasia P/L* (General) [2003] NSWCTTT 678 ('*Navarro'*); *Jones* [2005] NSWCTTT 841. See also above n 3 and accompanying text.

38 See Megumi Ogawa, 'The Courts' Jurisdiction Over Student/University Disputes in Australia', (2012) 2(1) *International Journal of Public Law and Policy* 96; Astor, 'Why do Students Sue Australian Universities?', above n 8 ,28

39 See, eg, *Hanna* [2006] NSWSC 122, [36].

40 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); *Fennell* [1999] FCA 989.

41 *Fasold v Roberts* (1997) 145 ALR 548; *Plimer* (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 31, 133.

42 *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 ('*Concrete Constructions'*), 602–4.

43 *Plimer* (1997) 150 ALR 235, 257.

44 Ibid 258.

45 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'; ACL s 2 (definition of 'trade or commerce').

'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 as misleading or deceptive conduct. This 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.[46]

The difference is illustrated in the matter of *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* (2002) 122 FCR 110 ('*Monroe Topple*'). Here the provision of education services for professional development and accreditation was held to be in 'trade or commerce'. This issue was considered at length by Lindgren J at first instance.[47] His findings were upheld on appeal.[48] Lindgren J found that the provision of the educational service by the Institute included 'devising of the CA Program modules and of the methods of assessment appropriate for them were closely interrelated activities'.[49] Justice Lindgren distinguished the particular facts of the *Noah's Ark* case[50] and found that the educational services provided to students by the Institute were for 'a very substantial monetary return on a highly organised, systematic and ongoing basis'[51] sufficient to be conduct in 'trade or commerce'. 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.[52] On the basis of the particular factual scenario in the *Noah's Ark* case and the decision of *Monroe Topple*, it is arguable that in some circumstances academic activities of the modern HEI are conduct in 'trade or commerce', even under the *Concrete Construction* test, when what is under consideration is the provision of educational services to students for reward 'on a highly organised, systematic and ongoing basis'. In those circumstances it could be said that 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.[53]

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46 Such as the Consumer Guarantees contained in ACL ch 3 pt 3-2 div 1 sub-div A-D ss 51–68. See especially Corones, above n 2.

47 *Monroe Topple and Associates Pty Ltd v Institute of Chartered Accountants in Australia* [2001] FCA 1056.

48 *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* (2002) 122 FCR 110. Only Heerey J (with whom Black CJ agreed) specifically addressed the issue in relation to the question of whether the Institute's supply of education and training in connection with its CA Program was a provision of services in 'trade or commerce'130–1, [76]–[79].

49 *Monroe Topple* [2001] FCA 1056 [132]–[133].

50 *Monroe Topple* [2001] FCA 1056, [139].

51 Ibid [139] Lindgren J applied the construction taken *Concrete Constructions*.

52 Ibid [147].

53 See Griggs, 'Tertiary Education, the Market and Liability', above n 34 for a detailed consideration of the application of the requirement of in 'trade or commerce' to the higher education sector and individual academic activities See also Varnham, 'Straight Talking, Straight Teaching', above n 2, 309–11.

Significantly, the ACL contains a new extended definition of 'trade or commerce'.[54] It is suggested that the effect of the new definition is to bring the contract for the supply of educational services as an activity occurring in 'trade or commerce'. The definition of the ACL adopts the wording of that found in former state fair trading acts[55] and introduces the notion that 'trade or commerce' includes any 'business activity' or any 'professional activity' whether or not for profit.[56] It is suggested that the addition of the words 'any business activity' will add very little to the test as formulated in *Concrete Construction*.[57] However, the addition of the words 'any professional activity' will arguably impact on the application of the ACL to providers of educational services.

This supposition is borne out by the decision in *Shahid v Australasian College of Dermatologists*[58] ('*Shahid*'). This case concerned the matter of a general medical practitioner seeking to obtain further qualifications in the speciality of dermatology. Shahid claimed that the College 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 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, programme assessments, the substantial fees for textbooks, course materials and right to sit the examination.[59]

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'.[60] 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.[61] In particular he rejected the argument that the phrase 'professional activity' was a qualification to 'trade or commerce'.[62] Rather, in his opinion it was clearly an addition[63] and that 'the introduction of a further limitation, that the professional

54 ACL s 2 (definition of 'trade or commerce').

55 See, eg, *Fair Trading Act 1987* (NSW) s 42(1) and s 4 (definition of 'business').

56 ACL s 2 (definition of 'trade or commerce').

57 *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594, 603; *Fasold v Roberts* (1997) 145 ALR 548, 558. In *Monroe Topple* [2001] FCA 1056, [148] the concept of 'business' and 'trade or commerce' was used interchangeably.

58 *Shahid* (2008) 248 ALR 267.

59 *Shahid* (2008) 248 ALR 267, 277 (Jessup J), 270 [2] (Branson and Stone JJ).

60 *Shahid* (2008) 248 ALR 267, 270, 323. 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*: at 275.

61 *Shahid* (2008) 248 ALR 267 at 316–319.

62 *Shahid* (2008) 248 ALR 267 at 319. His Honour casts doubts on the reasoning in *Prestia v Aknar* (1996) 40 NSWR 165 and that Court's consideration of the phrase 'any professional activity' and the narrow construction given therein: at 317–18.

63 Ibid 323.

activity must bear a trading or commercial character, would bring confusion'. [64] 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'.[65] The Court held that 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'. [66] This concept is not limited to the engagement of professional practice. [67] If the activities are characteristic of the carrying on of a profession, then those activities will occur in 'trade or commerce'.

His Honour held that the activities of associations of professionals such as the College were not excluded from the expression 'any professional activity'.[68] Five particular points[69] were critical to his finding that the conduct of the College was a 'professional activity' and these can be extrapolated to HEIs more generally. First, academics and their institutions are likely to regard themselves as a profession, or a collection of professionals.[70] Second, HEIs 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. 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.[71] Fourth, transactions with students in relation to the delivery of educational services occur as an instrumental act of the HEI. 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 and therefore come within the extended meaning of 'trade or commerce' under the ACL.

Commentators support the view that the market culture in the higher education sector has the resulting effect that the consumer protection legislation applies to

64 Ibid 322, 324.
65 Ibid 323.
66 Ibid 268, 323.
67 Ibid 324.
68 Ibid.
69 Ibid 325.
70 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 21st Century Higher Education' (2008) 56 *Higher Education* 533; Mark Davies, 'Universities, Academics and Professional Negligence' (1996) 12(4) *Tolley's Professional Negligence* 102.
71 This is strengthened by the development of learning and teaching standards in the higher education sector: TEQSA Act; Corones, above n 2, 11–14.

educational services,[72] although some note the potential issues with the Higher Education Contributions Scheme ('HECS').[73] The decision in *Quickenden v O'Connor, Commissioner of Australian Industrial Relations Commission* (2001) 184 ALR 260 ('*Quickenden*') 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 undertaken in 'trade or commerce', although it was not necessary to decide this point.[74] 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 was of the view that dealings with students under the HECS could be regarded as a trading activity on the part of the University.[75] In his 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.[76]

It is the proposition of this article 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 the professional activities of HEIs aligns the sector with other professions, their activities being subject to the consumer protection provisions of the ACL.[77] 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. It is arguable that this supply in 'trade or commerce' includes Commonwealth funded students.

72 Above n 3 and accompanying text.

73 Pursuant to the *Higher Education Funding Act 1988* (Cth) now *Higher Education Support Act 2003* (Cth). See, eg, Clarke, above n 3, 17; Jackson, 'Regulation of International Education', above n 18; cf Bessant, above n 34; Corones, above n 2; Griggs, 'Knowing the Destination', above n 2; Kamvounias and Varnham, 'Getting What They Paid For', above n 2, 315.

74 *Quickenden* (2001) 184 ALR 260. See, eg, *Hughes v Al-Hidayah Islamic Education Administration Inc.* (2009) WAIRC 00967 at [12].

75 *Quickenden* (2001) 184 ALR 260, 272.

76 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.' Corones, above n 2, 6.

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

The nature and terms of the student–HEI contract for educational services

Legal commentators in Australia and other common law jurisdictions have acknowledged the coexistence of statutory and contractual rights as regards the relationship between the HEI and student.[78] It is settled law in the United Kingdom that a student–HEI contract exists.[79] There is very little direct Australian authority[80] 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.[81] The matter presents no difficulties in relation to 'fee-paying students',[82] particularly if supplied by a private provider of higher educational services or postgraduate training.[83] 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.[84]

The situation regarding a Commonwealth-funded student is more complex.[85] 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

78 Rochford 'The Contested Product', above n 2, 42. See also Martin Davis, 'Students, Academic Institutions and Contracts—A Ticking Time Bomb?' (2001) 13(1) *Education and the Law* 9; Kós and McVeagh, above, n 7, 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; Whittaker, 'Public and Private Law-Making', above n 7.

79 *Clark* [2000] 3 All ER 752, 756 (Sedley LJ); *Moran v University College, Salford* [1994] ELR 187 ('*Moran*'). See generally Farrington and Palfreyman, above n 7, 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; Davis, above n 78; Hoye and Palfreyman, above, n 7; Middlemiss, above, n 7; David Palfreyman, '*Phelps* ... *Clark* ... and now *Rycotewood*? Disappointment Damages for Breach of the Contract to Educate' (2003) 15(4) *Education and the Law* 237.

80 The accepted authority in the Australian context is *Bayley-Jones v University of Newcastle* (1990) 22 NSWR 424 ('*Bayley-Jones'*); in *Shahid* (2008) 248 ALR 267. Justice Jessup held that there was a mutual intention to create legal relations: at 332 [216].

81 See Kamvounias and Varnham, 'In-House or in Court?', above n 8, 10; Griggs, 'Knowing the Destination', above n 2; Lindsay, 'Complexity and Ambiguity in University Law', above, n 7, 10–11.

82 *Clark* [2000] 3 All ER 752.

83 See, eg, *Monroe Topple* (2002) 122 FCR 110.

84 See, eg, *Kwan* [2002] NSWCTTT 83. 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. See, eg, *St Clair* [2008] NSWCTTT 1309; *Qayam* [2007] NSWCTTT 620 (17 October 2007); *Cotton* [2004] NSWCTTT 723 (13 December 2004); cf *Navarro* [2003] NSWCTTT 678 (4 October 2003); *David Joseph Crook v Holmesglen Institute of TAFE* (Civil Claims) [2010] VCAT 1808; *Chan v Sellwood* [2009] NSWSC 135.

85 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.*

Federal Government who provides the consideration,[86] although the submissions made by UWA in *Quickenden* support the notion of obligations and liability imposed on the institution and the student upon acceptance of a place, even if a Commonwealth-funded student.[87] The changes made in 2012 to 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, as in the absence of quotas, funding travels with the student.[88] 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.[89] It has also been suggested that 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.[90] Furthermore, it is arguable that there is sufficient consideration simply in the student declining another place and thereby suffering a detriment should the HEI not meet its contractual obligations.[91]

However, even if it can be said that the contract does exist, 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 the HEI is a contract 'to admit'.[92] 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.[93] The second contract, the contract 'to educate' (alternately a contract for tuition or matriculation),[94] arises upon enrolment. The process in Australia in relation to application for Commonwealth-funded places (largely by school leavers) through

86 *Price v Easton* (1833) 4 B& Ad 433. See Rochford, 'The Relationship Between The Student and The University', above n 2, 36; Davis, above n 78, 14; Lindsay, 'Student Subjectivity', above n 2, 634.

87 *Quickenden* (2001) 184 ALR 260, 266; See also Bernard McCabe, 'Concrete Constructions Turns 15' (2005) 13 *Trade Practices Law Journal* 6.

88 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>. See also Corones, above n 2, 6.

89 Griggs, 'Knowing the Destination', above n 2, 320, n 30; Middlemiss, above n 7, 72.

90 Griggs, 'Knowing the Destination', above n 2, 320, n 30; Birtwistle and Askew, above n 79, 94.

91 This is consistent with the decision in *Moran* [1994] ELR 187. See Griggs, 'Knowing the Destination', above n 5, 320, nn 30–1; Farrington and Palfreyman, *The Law of Higher Education,* above n 4, 337–8 [12.08]–[12.09]; Davis, above n 78. See also Rochford, 'The Relationship Between The Student and The University', above n 2, 35.

92 *Moran* [1994] ELR 187; See generally Farrington and Palfreyman, above n 7, 336–350 [12.08]–[12.240]; Davis, above n 78; but see Middlemiss, above n 7, 85; Birtwistle and Askew, above n 79.

93 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, above n 7, 336 [12.08].

94 *Moran* [1994] ELR 187. See generally Farrington and Palfreyman, above n 7; Davis, above n 78; but see Middlemiss, above n 7; Birtwistle and Askew, above n 79.

a centralised system supports the idea in practice of the formation of two separate contracts, one to admit and one to educate,[95] with the terms of the first contract rolling into or as part of the second, as described by Davis.[96] Difficulties do arise in the Australian context with particular regard to the issue of second round offers.[97] It is suggested that the second round offer is a condition subsequent to the initial contract to admit.[98] The second contract is then formed upon the student completing the enrolment process in relation to the preferred offer.

As this article is concerned with the UCT regime in the ACL, the contract for the supply of educational services must also be a 'service' within the meaning of the legislation.[99] The definition of 'services' provides an inclusive definition of various contractual arrangements under which rights, benefits,[100] privileges or facilities are conferred. The only specific exclusion is in relation to a contract of employment. [101] For the purpose of the ACL, the contract for the supply of educational services, [102] whether comprised of one or two contracts, is a 'service' as required by the legislation.

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 and a far more complex process.[103] Guidance from the case law on the content of the contract is limited. Counsel involved in the landmark New Zealand case of *Victoria University*[104] 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.'[105] It is worth noting

95 *Moran* [1994] ELR 187.

96 Davis, above n 78, 11.

97 Rochford, 'The Relationship Between The Student and The University', above n 2, 36.

98 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, 5th ed, 2005) 388.

99 ACL s 2 (definition of 'services').

100 Ibid. See also *Griffith University v Tang* (2005) 221 CLR 99, 110 where Gleeson CJ refers to the conferment of a benefit under the relationship.

101 ACL s 2 (definition of 'services').

102 While the idea of the 'product' in higher education being a positional good has been noted by a few commentators, see, eg, Simon Marginson, 'Competition in Higher Education in the Post-Hilmer Era' (1996) 68(4) *Australian Quarterly* 23, 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. See generally Rochford, 'The Contested Product', above n 2.

103 Lindsay, 'Complexity and Ambiguity in University Law,' above, n 7, 10–11.

104 *Grant v Victoria University of Wellington* [2003] NZAR 186.

105 Kós and McVeagh, above n 7, 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

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.[106]

Although important, a detailed consideration of the entirety of the terms of the contract for the supply of educational services, both express and implied, are beyond the scope of this article. Commentators have suggested that the contract for educational services is potentially broader than merely the ordinances and statutes of a HEI.[107] The express terms of the contract arising on enrolment 'would appear to comprise not only the various charters,[108] codes[109] and other HEI "regulations"[110] usually referred to explicitly (and in writing) at the time a student enrols',[111] but also published course handbooks.[112] Implied terms of the contract could include pre-contractual information such as the promotional information contained in the

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 18, 80.

106 *Oxford Student Contract* (13 August 2012) <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/studentsupervisoragreement.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 2, 313.

107 Kaye, Bickel and Birtwistle, above n 2, 114. But see Rochford, 'The Relationship Between The Student and The University', above n 2, 33.

108 Davis, above n 78, 15. See generally Simon Smith, 'Customer Charters the Next Dimension in Consumer Protection?' (1997) 22(3) *Alternative Law Journal* 138; Ruth Gaffney-Rhys and Joanna Jones, 'Issues Surrounding the Introduction of Formal Student Contracts' (2010) 35(6) *Assessment & Evaluation in Higher Education* 711 at 719.

109 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 >.

110 Including policies of a HEI, see, eg, Curtin University, *Legislation, Policies and Procedures* (12 July 2012) <http://policies.curtin.edu.au/home/>.

111 Davis, above n 78, 15.

112 Ibid 18; *Kwan* [2002] NSWCTTT 83; Gaffney-Rhys and Jones, above n 108, 714, 719.

prospectus and the like.[113] Difficulties arise in relation to the determination of when the terms of the contract for educational services are complete; whether the contract is informed by pre-admission promises[114] or varied over the course of the entire period of study[115] (as opposed to discharge and creation of new contracts upon each re-enrolment with each new academic study period). [116]

However, it is the terms of any 'standard form' contract with which this paper is concerned, as the UCT provisions only apply to 'standard form' contracts.[117] There is no definition of 'standard form contract' in the ACL,[118] although 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).The accepted view of the government regulator is that it will ordinarily be a standard form contract if it is prepared by one party with no negotiation on the terms and offered on a 'take it or leave it basis'.[119] If a student were to allege that the contract is a 'standard form' contract, it would be presumed to be so unless the supplier HEI was able to prove otherwise.[120] It is suggested that the only contract capable of being a 'standard form' contract arises during the enrolment process, specifically the express terms of the contract arising on enrolment. It is therefore the express terms agreed to in the enrolment process that will be considered.

Enrolment processes and documents across Australian HEIs are strikingly similar. Typically the enrolment process occurs online and not necessarily in person on campus.[121] Below is the student declaration used in the online enrolment process

113 Birtwistle and Askew, above n 79, 95; Middlemiss, above n 7, 85.

114 As has been argued in a number of cases, see, eg, *Fennell* [1999] FCA 989; *Victoria University* [2003] NZAR 186; and especially in matters before the consumer tribunals, see, eg, *Kwan* [2002] NSWCTTT 83.

115 Kós and McVeagh, above n 7, 28; Davis, above n 78, 21.

116 Davis, above n 78, 21.

117 ACL s 23(1)(b).

118 ACL s27. Economics Legislation Committee, The Senate (Cth), Trade Practices Amendment (Australian Consumer Law) Bill 2009 [Provisions] September 2009, 18–20.

119 Australian Attorney-General, *The Australian Consumer Law: A Guide to Provisions,* 2010, 8; 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 at 5; Sirko Harder, 'Problems in Interpreting the Unfair Contract Terms Provisions of the Australian Consumer Law' (2011) 34 *Australian Bar Review* 306, 31.

120 ACL s 27(1). 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. 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 118, 19.

121 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.

at Curtin University,[122] which is typical of online student declarations used at many HEIs.[123] 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.

Importantly, in this example, the student agrees to be bound by the 'Statutes, Rules and Policies' of the University. This has the effect of incorporating a myriad of Statutes, Rules and Policies as express terms of the contact,[124] available on a website accessed through a hyperlink.[125] This is common practice by all Australian HEIs.[126] The numerous policies cover diverse subjects from facilities to research,

122 As at January 2012, hard copy provided by Greenwood above n 121.

123 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>.

124 Incorporated by reference *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. See also 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.

125 Curtin University, *Legislation, Policies and Procedures*, above n 162.

126 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/

to library services, student discipline, and teaching and learning matters. [127]

In the absence of a clear definition of the meaning of 'standard form contract', when determining whether the contract for the supply of educational service is a 'standard form contract' regard is had to the matters listed for consideration in sections 27(2). The HEI has all or most of the bargaining power.[128] In relation to the contract of admission (whether to accept the place or not), the power between the parties may be more balanced as Commonwealth funding now travels with the individual student. The enrolment documentation however is prepared by one party, the HEI, prior to any discussion[129] with the enrolling student, which that student has to accept on a 'take it or leave it' basis.[130] There is no real opportunity for an enrolling student to negotiate individual terms of the contract[131] that take into account their specific characteristics.[132] Any impression of negotiation is illusory.[133]

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.[134] 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 above, 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 appearance of the standard form contract.[135] As early as 1970, despite the division in views regarding the appropriateness of classifying the student–university relationship as

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student-administration/policies-procedures-guidelines-and-forms/index.htm>.

127 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. There remain over one hundred policies in existence in addition to more than 30 statues and rules available on the University website. Again this is common to all Australian universities.

128 ACL s 27(2)(a). As discussed above, 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 2, 320, n 30. See also Birtwistle, and Askew, above n 79, 94.

129 ACL s 27(2)(b).

130 Ibid s 27(2)(c).

131 Ibid s 27(2)(d).

132 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 outside of the contract arsing on enrolment: Francine Rochford, 'The Relationship Between The Student and The University', above n 2, 35.

133 Lindsay, 'Student Subjectivity', above n 2, 364;

134 Minister for Competition Policy and Consumer Affairs, Australian Government, *An Australian Consumer Law Fair Markets—Confident Consumer* (2009) 33.

135 Farrington and Palfreyman, above n 7, 338 [12.10]; Kaye, Bickel and Birtwistle, above n 2, 118–19; Birtwistle and Askew, above n 79, 96.

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'.[136] 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 arising on enrolment) bears the traits of a standard form contract.

'Consumer contract'—the student as consumer[137]

In order for students to avail themselves of the protections available under the UCT provisions in ACL, the contract for educational services must be a consumer contract[138] for the 'supply of goods or services … to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption' as defined in section 23(3). The meaning of 'acquisition' is defined in section 2 and in relation to services means 'accept'. [139] This is expanded in section 11 of the ACL so as not to limit 'acquisition' to 'purchase'.[140] 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.

The other definitions of 'consumer' within the ACL are based on objective tests determined on the facts.[141] However, the definition of a 'consumer contract' pursuant to section 23(3) is subjective.[142] Therefore, the definition of a consumer contract for the purposes of the UCT provisions refers to the use that the goods

136 J W Bridge, 'Keeping the Peace in the Universities: The Role of the Visitor' (1970) 86 *The Law Quarterly Review* 531, 548.

137 As noted in above n 2, there is a significant body of literature as regards this issue outside of the legislative definitions in the ACL.

138 ACL s23(3). 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). For the purpose of this article, only the definition relevant to UCT will be considered. Thus, the more widely known definition of 'consumer' in now ACL s 3, 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 paper.

139 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).

140 ACL s 11; Miller, above, n 5, 1537 [1.S2.2.10].

141 For a consideration of previous or other legislative definitions of 'consumer' see Griggs, Lynden, Aviva Freilich and Eileen Webb, 'Challenging the Notion of a Consumer: Time for Change' (2011) 19 *Competition and Consumer Law Journal* 52; Lindsay, 'Complexity and Ambiguity in University Law,' above, n 7, 12; Kamvounias and Varnham, 'Getting What They Paid For', above n 2, 322–3.

142 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 of Affairs Victoria v AAPT Ltd* [2006] VCAT 1493 cited in Miller, above n 5, 1699 [1.s2.23.30].

or services *are put to*, not, as in the other definitions of consumer, 'of a kind ordinarily used or put to'.[143] 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.[144] 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.[145] 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.[146] It would seem clear that a contract for the provision of educational services would indeed be a consumer contract under the legislative definition.

Unfair Contract Terms and the student–HEI contract

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.[147] 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.[148] It is the accepted view that courts have hitherto confined their examination to matters concerning procedural fairness in the formation of the contract.[149] It can be said:

143 ACL s 3.

144 Harder, above n 119, 310; Jeannie Marie 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 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; John W Carter, 'The Commercial Side of Australian Consumer Protection Law' (2010) 26 *Journal of Contract Law* 221.

145 Corones is of this view even under the object test of consumer in ACL s3: Corones, above n 2, 5.

146 See Kamvounias and Varnham, 'Getting What They Paid For', above n 2, 322; Corones, above n 2, 5. See generally 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 144, 115–16.

147 See Jeannie Paterson, 'The Australian Unfair Contract Terms Law', above n 144, 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, above n 119.

148 Paterson, 'The Australian Unfair Contract Terms Law', above n 144, 937–8. See generally, Andrew Robertson, 'The Limits of Voluntariness in Contract' (2005) 29 *Melbourne University Law Review* 179.

149 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 144, 937–9; Svantesson and Holly, above n 119, 4; Lynden Griggs, 'The [Ir] rational Consumer and Why We Need National Legislation Government Unfair Contract Terms' (2005) 13 *Competition & Consumer Law* 1, 11; Chris Willett, 'The Functions

> 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.[150]

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.[151] The terms need to be balanced, so that they are a proportionate response to a legitimate risk of the supplier.[152] In the higher education context this poses some challenges, not least because of the difficulty in ascertaining the terms of the contract. Further, what comprises the higher education sector market and thus the legitimate interests of the suppliers of those services is a complex question.[153] There are also parallels in student litigation regarding the division of substantive and procedural fairness. As discussed above, the notion that claims going to procedural fairness are justiciable[154] but those relating to the substance of academic judgement are not reviewable is a common theme in student claims. It is arguable 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.

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 relevant exemptions to the UCT regime. Section 26 of the ACL excludes from the operation of section 23 terms that define the 'main subject matter of the contract' or 'sets the upfront price payable'.[155] 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

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of Transparency in Regulating Contract Terms: UK and Australian Approaches' (2011) 60(2) *International and Comparative Law Quarterly* 355, 369–70; James Davidson, 'Unfair Contract Terms and the Consumer: A Case for Proactive Regulation?' (2007) 15(1) *Competition & Consumer Law Journal* 74, 84. Cf Anthony Gray, 'Unfair Contracts and the Consumer Law Bill' (2009) 9(2) *Queensland University of Technology Law and Justice Journal* 155. 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.

150 Davidson, above n 149, 84.

151 ACL ss 24(2) and 24(3); Jeannie Marie Paterson, 'The Elements of a Prohibition on Unfair Terms in Consumer Contracts' (2009) 37 *Australian Business Law Review* 184, 188. See generally Willett, above n 149.

152 Paterson, 'The Elements of a Prohibition on Unfair Terms', above n 151, 184.

153 See, eg, Roger Brown (ed), *Higher Education and The Mark*et (Routledge, 2011); Kathryn McMahon, 'Universities and Market Discourse' (2001) 27(1) *Monash University Law Review* 105.

154 See generally Lindsay, 'University Hearings', above n 14.

155 ACL s 26(1)(2).

provided in accordance with accepted common law principles.[156] This is unlikely to be an issue in the context of 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.[157] 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'.[158]

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.[159] 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.[160] The basis for the carve out of the main subject matter from the operation of the UCT provisions was to ensure that a party could not challenge a term on the basis of unfairness, simply because they had changed their mind as regards their purchase.[161] As with other exemptions, it is arguable that the section should be interpreted narrowly to protect the student acquirer.[162] 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 to educate more generally. 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

156 See 'EM1' 26 [2.70]; Harder, above n 119, 313–16; Australian Attorney-General, above n 119, 10.

157 Paterson, 'The Elements of a Prohibition on Unfair Terms', above n 151, 198, upfront price may be unfair if there is not transparent disclosure; Australian Attorney-General, above n 119, 10.

158 Whittaker, 'Judicial Review', above n 16, 209; Farrington and Palfreyman, above n 7, 413 [12.102] where the authors state that in the UK there can be no review of the basis of price-quality ration as per Reg 3(2) of the UCTCCR.

159 Farrington and Palfreyman, above n 7, '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)': at 413 [12.102]. See also Whittaker, 'Judicial Review', above n 16, 209.

160 Kaye, Bickel and Birtwistle, above n 2, 119; Davis, above n 78, 20.

161 EM1, 25 [2.65].

162 See Harder, above n 119, 315–16 in relation to the interpretation of 'upfront price'.

engineering on the grounds that 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.[163] The rationale of this carve out is to prevent a consumer challenging a term as unfair simply because they changed their mind.[164] This is less clear when having regard to the other terms of the contract of enrolment.

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'.[165] 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.'[166] This is very relevant to the terms of the contract for educational services. As outlined above, generally it is 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.[167] He considers both the express contractual term that the student is bound by, the by-laws, and the contents of the rules themselves.[168] In his opinion the exclusion[169] 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 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

163 *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd & Matrix Pilates and Yoga Pty Ltd* (Civil Claims) [2008] VCAT 482.

164 Australian Attorney-General, above n 119, 9.

165 ACL s26(1)(c).

166 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.

167 Whittaker, 'Public and Private Law-Making', above n 7; Whittaker, 'Judicial Review', above n 16.

168 Whittaker, 'Judicial Review', above n 16, 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.

169 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.

and plain and intelligible.[170]

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[171] and will not be excluded.[172]

Unfair Terms

Pursuant to section 24 of the ACL, a term will be unfair in a consumer contract if it would cause a significant imbalance in the parties' rights and obligations;[173] is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term;[174] and it would cause detriment (whether financial or otherwise) to a party.[175] Therefore the term of the contract is only unfair if all three parts of section 24(1) 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.[176] This is a factual enquiry[177] 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.[178]

The precise meaning of the term 'significant imbalance' is unclear. The matter of *Jetstar Airways Pty Ltd v Free* [2008] VSC 539('*Jetstar*') dealt with similar provisions in the Victorian UCT legislation and considered the meaning of this phrase at length. The Court looked to the counterbalancing effect of the substantial

170 Whittaker, 'Judicial Review', above n 16, 210.

171 They operate in the terms described by Whittaker, 'Judicial Review', above n 16, 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 7.

172 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.

173 ACL s 24(1)(a).

174 Ibid, s 24(1)(b).

175 Ibid s 24(1)(c).

176 Willett, above n 149, 363; Paterson, 'The Australian Unfair Contract Terms Law', above n 144.

177 EM1, 19 [2.3]; Miller, above n 5, 1701 [1.S2.24.15]; Paterson, 'The Elements of a Prohibition on Unfair Terms', above n 151, 190.

178 Miller, above n 5; Paterson, 'The Elements of a Prohibition on Unfair Terms', above n 151, 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 144, 944; Freilich and Webb, above n 124, 267; Willett, above n 149, 363.

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. The Court 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 rather than independently,[179] as is required under the ACL.[180] 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".'[181] 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 compared to 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 legitimate interests

What will be considered here is the response by the supplier to the 'risks inherent in the transaction'.[182] The inclusion of the word 'reasonably' indicates that the term must be a 'proportionate response to the risks it seeks to address'.[183] It is also the 'actual effect of the term' that is relevant to the inquiry. [184] Section 24(4) of the ACL shifts the onus of proof to the party advantaged by the term, here the HEI supplier, to show 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.[185] 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 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.[186] 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

179 *Jetstar Airways Pty Ltd v Free* [2008] VSC 539, [127]–[135]('*Jetstar*'); *Contra* the outcome of the counterbalancing effect in *Kucharski v Air Pacific Ltd* (General) [2011] NSWCTTT 55, [36].

180 ACL s 24(2)(b).

181 *Jetstar* [2008] VSC 539, [105]. See also Doherty, above n 147, 75 [5.12]–[5.13].

182 Paterson, 'The Elements of a Prohibition on Unfair Terms', above n 151, 193; Paterson, 'The Australian Unfair Contract Terms Law', above n 144, 945.

183 Paterson, 'The Elements of a Prohibition on Unfair Terms', above n 151, 193; Paterson, 'The Australian Unfair Contract Terms Law', above n 144, 945.

184 Harder, above n 119, 318.

185 EM1, 19 [2.32] and the provision would require the HEI to establish, at the very least, that it's legitimate interest is sufficiently compelling on the balance of probabilities to overcome any detriment caused to the consumer student; Wallwork and White, above n 166; See also Australian Attorney-General, above n 119, 11.

186 Varnham, 'Liability in Higher Education in New Zealand', above, n 2, 12.

not so burdensome to the student.[187]

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.[188] It is any form of detriment suffered, or likely to be suffered, by the party disadvantaged by the 'practical effect of the term'. [189] As discussed below, one of the problems for students in relation to their claims have been the difficulties in demonstrating quantifiable loss. The UCT provisions clearly allow the court to take into account other forms of detriment, including delay or distress suffered as a consequence of the unfair term.[190]

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.[191] 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,[192] as noted above in the *Jetstar* case. 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'[193] of the HEI when making a determination of fairness, as a consumer contract of 'a somewhat unusual character'. [194] It is possible that the degree of notice, explanation and transparency of the terms will in fact be of greater consequence in these circumstances. [195]

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.[196] Paterson observes that the requirement

187 Paterson, 'The Australian Unfair Contract Terms Law', above n 144, 945; Doherty, above n 147, 76.
188 EM1, 20 [2.39], [2.41].
189 EM1, 20 [2.39], [2.41].
190 Australian Attorney-General, above n 119, 3. See also the reference to the December 2007 research paper 'Unfair Contract Terms in Victoria' as quoted in Doherty, above n 147, 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.
191 ACL s 24(2).
192 Paterson, 'The Australian Unfair Contract Terms Law', above n 144, 949.
193 Whittaker, 'Judicial Review', above n 16, 211.
194 Ibid.
195 Ibid.
196 Paterson, 'The Australian Unfair Contract Terms Law', above n 144, 955; Willett, above n 149; Harder, above n 119.

of transparency is a result of 'information asymmetry between parties to standard form consumer contracts',[197] 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.[198] 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 'may be a strong indication of the existence of the significant imbalance in the rights and obligations of the party under the contract'.[199] In the contract for educational services, the lack of transparency in the enrolment contract may be an indication of significant imbalance of the parties' rights and obligations, especially in the actual express term incorporating the rules and policies (by reference or accessible by hyperlinks). This could of itself be unfair, with the result that the rules and policies would not be binding as contractual terms,[200] especially if the scale, complexity and nature of the rules and policies is considered.[201] 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, or they continue to take students on a never-ending series of layers of information.

Additionally when the demographic of the student is considered,[202] a court is unlikely to find that terms expressed in the rules and policies are in 'plain language', 'legible' or 'presented clearly'.[203] Reference is had to the example of the enrolment document described above. 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 and level of detail of policies at the modern HEI are significant. There is also a noteworthy use of legal jargon in the incorporated documents, notably the statutes and rules.[204] 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 to be exacerbated if there are distractions in the decision making process.[205]

197 Paterson, 'The Australian Unfair Contract Terms Law', above n 144, 949.

198 Ibid.

199 EM1, 21 [2.45].

200 Because they would be void, but still operative as ordinances and public law. Whittaker, 'Judicial Review', above n 16, 213.

201 Jackson et al, above n 10, 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.

202 See Freilich and Webb, above n 124, 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.

203 Jackson et al, above n 10, 77 [11.2.3].

204 Ibid.

205 Paterson, 'The Australian Unfair Contract Terms Law', above n 144. 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 the impact of advertising: at

Furthermore, in the event that any term or clause within the rules and policies is especially onerous or unusual, this process is unlikely to provide sufficient notice of those terms.[206] Issues of notice, unusual or onerous terms, and transparency overlap and are part of the overall consideration of whether a term may be considered unfair.[207]

Another issue is whether transparency can cure an otherwise 'unfair term'. The Explanatory Memorandum would suggest not.[208] This would have the effect of procedural fairness being able to rectify any substantive unfairness.[209] 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.[210]

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.[211] This is interesting given the term in the enrolment example above where students 'tick' a box acknowledging that they have sought academic counselling in relation to their choices prior to enrolment. In practice it is unclear how in fact the professional advice sought is actually given, especially when students are increasingly enrolling online[212] without even having to have come to campus or contact staff by other means.

Potentially unfair contract terms in the higher education sector.

Section 25 of the ACL sets out examples of potentially unfair contract terms.[213]

954.

206 For example, fines or penalties for not following HEI processes. In relation to the relationship between substantive unfairness, transparency and notice see Paterson, 'The Australian Unfair Contract Terms Law', above n 144, 951–6, including an analysis of behavioural economic theory that suggests complex information presented in these circumstances is difficult for consumers to assimilate.

207 See Paterson, 'The Australian Unfair Contract Terms Law', above n 144, 951–6; Freilich and Webb, above n 124, 270–2 in the context of notice in retail leases.

208 EM1, 21 [2.46].

209 See Paterson, 'The Elements of a Prohibition on Unfair Terms', above n 151, 188–9.

210 Willett, above n 149, 373, but see his comments that this is uncertain as currently drafted: at 384.

211 Paterson, 'The Australian Unfair Contract Terms Law', above n 144, 950.

212 Curtin University, *How to enrol*, above n 121.

213 For examples from the UK 'grey list' in higher education setting see Farrington and Palfreyman, above n 7, 413 [12.101]; Birtwistle and Askew, above n 79, 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 149, 171–3; Carter, above n

As indicated in the Explanatory Memorandum, these 'examples provide statutory guidance on the types of terms which may be regarded as being of concern'.[214] There is however no presumption that a term corresponding to one in the indicative list is unfair,[215] although concerns have been expressed that this will be the effect in practice.[216] It is also not clear whether in the event of ambiguity in the impugned term it is to be read *contra proferentum*.[217]

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 involves the imposition of penalties for breach of the contract. This will be demonstrated by reference to the enrolment example discussed above. 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 Australian HEIs.

Terms that allow one party but not the other to limit or avoid performance: section 25(1)(a)

Terms in the enrolment documents that operate as disclaimers may be open to scrutiny as unfair.[218] Course handbooks are expressly incorporated as enrolment documents, which characteristically require a student to agree that their enrolment is correct. This can only be done with reference to the course handbooks. The following statement appears in the Curtin Course Handbook 2013 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.[219]

144, 238–9.

214 EM1, 23 [2.52].

215 EM1, 23 [2.55].

216 Carter, above n 144, 238.

217 Harder, above n 119, 322, n 66, whereas the position in relation to this is clear in the UK under UTCCR Reg 7(2).

218 They are also likely to be in breach of other parts of the ACL dealing with consumer guarantees (ACL s64(1)) as noted by Corones, above n 2, 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.

219 Curtin University, *Courses Online Handbook 2013*, (17 June 2013) <http://handbook.curtin.edu.au/courses/13/130099.html>.

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 example above, a student agrees 'to be bound by the Statutes, Rules and Policies of the University as amended from time to time.' Interestingly the Curtin legislation website (which includes the rules as well as the statutes and is hyperlinked in the enrolment contract) contains a broad disclaimer limiting the University's liability in relation in accuracies, including any loss suffered as a result of reliance on the information contained therein.[220] This disclaimer clause is very wide and purports to exclude non-contractual causes of action such as negligence, even if the University has been advised of the possibility of any such loss, damage or injury. 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.[221]

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 that 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'. One example of a potentially unfair term in relation to course handbooks is given above.[222]

220 Curtin University, *Legislation, Polices and Procedures*, above n 110, *Disclaimer and definitions*.

221 See Paterson, 'The Elements of a Prohibition on Unfair Terms', above n 151, 198.

222 Or sometimes the exact terms regarding course requirements may be more difficult to locate, including any provisions allowing for changes to course structures. See, eg, the Handbook for the University of Sydney; University of Sydney, *Handbooks Online* (12 July

There are a number of examples in HEI 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 HEI. The 'Discontinuing Courses Policy and Procedures' [223] at Curtin University is such an example. In circumstances where the University determines that it will 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.[224]

However, there are a plethora of policies within all HEIs governing the provision of the educational service as contracted.[225] Many of these polices allow variation or discontinuance of individual units or stated graduate attributes without notice or consultation with the student consumer.[226] It is possible that these policies, which are expressly incorporated as terms of the standard form contract, are unfair terms as they permit the HEI to unilaterally vary the characteristics of the services supplied. This is especially so for students whose course of study can be comprised of a selection of units from various providers, as in the case of Open Universities Australia.[227] 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,[228] even the ones that are 'fair'. It is suggested that the HEI supplier cannot, through reliance on a complex maze of policies and rules, unilaterally vary the terms of the contract so

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*.

223 Curtin University, *Legislation, Polices and Procedures*, above n 110, *Discontinuing Courses Policy and Procedures.*

224 Ibid cl 7.

225 Typically each HEI will have policies and legislation page, linking to increasing layers of policies and rules. See, eg, University of Queensland (12 June 2013) < http://www.uq.edu.au/study/?page=12450>.

226 These policies are usually able to be unilaterally amended by Academic Boards, Pro-vice chancellors or other staff. See, eg, Deakin University, *Higher Education Courses Policy, Schedule A: Deakin Graduate Learning Outcomes*, (12 June 2013) http://theguide.deakin.edu.au/TheGuide/TheGuide2011.nsf/W2POLAZ?OpenForm&StartKey=H.

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

228 Jackson et al, above n 10, 77 [11.2.5].

as 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.[229] 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.'[230] Willett refers to these as terms that allow for 'onerous and disproportionate enforcement by a trader'.[231] There are two common terms in contracts of enrolment that are likely to be unfair on this basis.

In the contract of enrolment example above, there 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.' The Victorian Tribunal considered a clause of similar import to be unfair because of its breadth.[232]

The other is the very common rule made under university legislation regarding the imposition of academic sanctions for failure by a student to pay *any* charge imposed by the HEI. Sanctions typically include suspension from the university, withholding of results, cancelation of enrolment, or deferring conferral of a degree. The sanctions can be imposed as a result of non-payment of a fee, charge, fine or penalty imposed by the university in relation to such things as overdue library loans or parking fines, student amenities and services levies or even the costs associated with processing a late payment fee.[233] 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 (such as withholding conferment of the degree) unlimited in time for a late payment of any charge, which may well be incidental to the students' studies, seems entirely too wide.[234]

229 EM1, 24 [2.60].

230 Australian Attorney-General, above n 119, 16.

231 Willett, above n 149, 374 discussing the types of terms that might or should be subject to outright bans.

232 *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd* (Civil Claims) [2009] VCAT 754, [330]–[334].

233 Edith Cowan University, *University Fee Rules,* (13 June 2013) http://www.ecu.edu.au/__data/assets/pdf_file/0010/378334/fee_rules.pdf.

234 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.

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 section 25(h), one party is not permitted to unilaterally determine whether the contract has been breached or determine its meaning. Similarly the example in section 25(k) refers to a term that limits, or *has the effect* of limiting one party's right to sue another.[235] This can include the presentation of the term in a manner that might deter, even though there is no intention to exclude.[236] This is interesting in two respects. 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. It is suggested that statements to the effect that 'the decision of the Student Discipline Appeals Board is final'[237] following the description of a lengthy appeals process in relation to a finding of academic misconduct, or that the right to external appeal is with a particular designated external provider, such as an Ombudsman, [238] may have the effect of hindering the student consumers' right to take legal action.[239] It is suggested that general statements, such as 'a student who has exhausted the avenues of appeal available within the University may pursue their case through any appropriate government body or official'[240] are preferred.

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235 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-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.

236 Australian Attorney-General, above n 119, 21.

237 *Curtin University of Technology Act 1966* (WA), Statute No. 10—Student Discipline, Curtin University, *Statute and Rules* cl 4.6(7) (23 May 2012) <http://policies.curtin.edu.au/local/docs/statute_no_10_2010.pdf>.

238 See, eg, Curtin University, *Assessment and Student Progression Manual*, cl 37.12, above n 110. 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.

239 See Carter, above n 144. He observes that the UK provisions have much clearer reference points in relation to this type of term: at 239.

240 University of Western Australia, *Appeals Process in the Case where there is Dissatisfaction with an Assessment Result, Outcome of an Application for Special Consideration and/or Progress Status* (approved by Senate Resolutions—49/04 and 68/05; amended by Academic Council R83/07 Legislative Committee R/12),cl 49, < http://calendar.publishing.uwa.edu.au/latest/partd/appeals?childfx=on>.

It is worth noting here the experience in the UK higher education sector, particularly when the UCT regulations initially came into operation.[241] At that time the UK Office of Fair Trading ('OFT') identified[242] training and education institutions as 'problem sectors'.[243] A number of reports from the OFT deal with HEIs, but typically in relation to university residence and issues concerning student property and accommodation.[244] Of particular interest is the case report for Southbank University[245] 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.[246]

Redress for the student consumer.

The effect of section 23 is that if a term in a standard form consumer contract is unfair it will be void. An application for a declaration that a term is unfair pursuant to section 250 can be sought by a party to the contract or by the regulator.[247] A declaration that a term is an unfair term is not a contravention of the provisions of the Competition and Consumer Act 2010 ('CCA'), unless a party were to continue to rely on the term subsequent to the declaration.[248] Consequently no civil penalties apply if a consumer contract contains an unfair term unless relied on after such a declaration.[249]

241 Davis, above n 78, 21.

242 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: Gray, above n 149, 165.

243 Office of Fair Trading, *Unfair Contract Terms Bulletin 6* (1999) <http://www.oft.gov.uk/OFTwork/publications/publication-categories/guidance/unfair-terms-consumer/>, 8 [1.15].

244 Office of Fair Trading, *Unfair Contract Terms Bulletin 5* (1998) <http://www.oft.gov.uk/OFTwork/publications/publication-categories/guidance/unfair-terms-consumer/>; Office of Fair Trading, *Unfair Contract Terms Bulletins 27 and 28* (2004) <http://www.oft.gov.uk/OFTwork/publications/publication-categories/guidance/unfair-terms-consumer/>.

245 Office of Fair Trading, *Unfair Contract Terms Bulletin 6*, above n 244, 72.

246 Ibid.

247 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 2, 22–3 for a detailed discussion of the conferral of jurisdiction in proceedings in the state courts and tribunals.

248 ACL s 224; EM1, 33 [2.104]–[2.105].

249 ACL s 224; EM1, 33 [2.106] where orders in those circumstances may include exemplary damages.

To the extent that the contract is capable, the contract continues to operate to bind the parties without the unfair term.[250] 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 above, students' rights to substantive fairness in public law judicial review are limited to issues of a procedural nature. 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.[251]

Upon a declaration being made that a term is unfair,[252] pursuant to section 237, an application for compensatory orders may be made by either the 'injured person'[253] or by the regulator.[254] Under this section,[255] compensation orders can be sought within six years from the date of declaration.[256] 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.[257] 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.[258] In effect this 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.[259]

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.[260] The types of orders that a court can make in addition to monetary damages are listed

250 ACL s 23(2).

251 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 *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.

252 See also ACL s 242 whereby an application can be made under s 237 or s 239 in relation to the term in consumer contract even if the proceeding for the declaration has not been instituted.

253 Ibid s 237(1)(a)(ii).

254 Ibid s 237(1) (1)(b).

255 Cf ACL s 236, which is an order for actual loss suffered.

256 ACL s 237(3)(b).

257 Ibid s 239(1)(a)(ii) for unfair terms.

258 Ibid ss 239(1)(b) and (c); Australian Attorney-General, above n 119, 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.

259 Ogawa, above n 38; Kamvounias and Varnham, 'Getting What They Paid For', above n 2, 324–6. See also Corones, above n 2, 27. He suggests that this amendment to the ACL addresses this issue in relation to representative actions for consumer guarantees.

260 ACL s 237(1).

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.[261] Injunctions are available pursuant to section 232(2).[262]

Any order for the payment of damages to compensate for loss[263] will be in accordance with the general principles for assessment of damages under the CCA.[264] 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.'[265] In relation to damages, a claimant like the student in *Fennell v Australian National University* [1999] FCA 989 will still have difficulties; 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'.[266]

Therefore, it is suggested 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. The case law and commentary is clear that the capacity of students to recover damages for breach of contract or otherwise demonstrate loss is extremely difficult.[267] It is the intangible nature[268] of the loss sought to be recovered that is problematic.[269] The success of claims for damages by students for more than direct losses, such as a refund of fees,[270] appears to be

261 Ibid s 243.

262 These provisions are 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. As noted in Lindsay, 'Complexity and Ambiguity in University Law', above n 7, 11, n 50–3.

263 ACL s 237(2).

264 See generally Miller, above n 5, 1919–20 [1.S2.237.10]–[1.S2.237.80].

265 Miller, above n 5, 1921 [1.S2.237.40] citing *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109.

266 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.

267 See, eg, *Fennell* [1999] FCA 989; *Mathews* [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 38, 97.

268 Rochford, 'The Relationship Between the Student and the University', above n 2, 34; Francine Rochford, 'Suing the Alma Mater: What Loss Has Been Suffered?' (2001) 13(4) *Education and the Law* 319.

269 Related to these difficulties is the courts' reluctance to review matters of academic judgement and in fact sit in the shoes of an assessor. Middlemiss, above n 7, 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.

270 Lindsay, 'Complexity and Ambiguity in University Law', above n 7, 11, nn 50–3 regarding

reliant on courts likening their claims to cases where the subject matter of the contract is the experience itself, the so called 'holiday cases'.[271] 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,[272] or alternatively to be able to prove loss at all.[273] To a lesser extent this is so even in the consumer tribunal matters.[274]

The contrast between a claim for damages for breach of a contract for educational services at common law and under consumer protection legislation was considered in the *Shahid* case.[275] Shahid claimed damages for anxiety and distress in relation to the College's failure to adhere to the promised appeals process.[276] Her claim for damages for anxiety and distress was unsuccessful in contract. She was, however, successful in relation to anxiety damages under the state consumer protection legislation. The Court found that the anxiety and distress experienced by the appellant amounted to an 'injury' under the statute,[277] and the conduct of

the quantification of damages. See also Kamvounias and Varnham, 'In-House or in Court?', above n 8.

271 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344; Jarvis v Swan Tours Ltd [1973] 1 All ER 71. One of the few reported decisions where students have been successful in this regard is *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, OX004741/0X004343). See Palfreyman, '*Phelps … Clark …* and now *Rycotewood*?', above n 79.

272 *Mathews* [2002] FCA 414. 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. 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 failed to show reasonable cause of action against the University and the proceedings were struck out as frivolous and vexatious.

273 Davis, above n 78, 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* [1999] FCA 989, 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. 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.

274 See, eg, *Cotton* [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 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 the availability of a particular teacher and awarded $400 as fair and equitable compensation for the unavailability of the particular teacher.

275 *Shahid* (2008) 248 ALR 267.

276 Ibid 336 [221].

277 Ibid [230]. Under the TPA s 4K expanded the reference to loss or damage (s 87 and s 82) to include injury.

the College had caused the loss as claimed.[278] Justice Jessup 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'[279] and should not be limited to actions for recovery of economic loss.[280] The decision in *Shahid* is clearly important in the context of assessment of damages for loss sustained in relation to a claim made by a student based on the UCT provisions.

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. 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.

The impact of the UCT regulation on the higher education sector is potentially significant. The 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. The purpose of the law is to provide clarity, certainty and better informed contractual consent.[281] 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 concern is the impact of the lack of transparency and notice of a large number of terms of the contract

278 Ibid 336 [230].
279 Ibid 335 [225], 336 [227].
280 Ibid 335 [226]. The appellant was awarded damages for the 'injury' suffered within the meaning of the Act in the sum of $2500.
281 Whittaker, 'Judicial Review', above n 16, 214; EM1, 6. See generally Australian Government, *An Australian Consumer Law Fair Markets*, above n 134, ch 6.

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 use of formal student contracts common in other jurisdictions and drafted in a manner that complies with the requirements of transparency under the ACL. [282] It is difficult to see how a HEI might otherwise overcome the difficulties of transparency and notice. Greater transparency and improved notice may also have the consequence of improving students' awareness of their rights as consumers.

Conclusion

The provisions of the UCT are enlivened in relation to the supply of educational services. The contract for the supply of educational services is at least 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 'trade or commerce' within the new extended definition of the ACL. This includes the contract with Commonwealth-funded students. The contract arising on enrolment bears the traits a standard form consumer contract, to which the ACL attaches. Students clearly acquire educational services for their personal use. The exemptions available under the ACL will not operate to exclude HEIs beyond the upfront price or the main subject matter of the contract (the acceptance of a 'place' to undertake a particular course of study).

The significance of the UCT provisions is that rather than just focusing on procedural unfairness, they attempt to deal with substantive unfairness. 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 is 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. 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 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.

282 The model contract with accompanying explanatory notes developed by leading UK scholars Farrington and Palfreyman is an appropriate precedent. Farrington and Palfreyman, above n 7, 443.