Abstract

Higher education institutions increasingly are being viewed as service providers and students are increasingly referred to as customers. In recent years this trend has attracted much attention both in the media and in academic journals. All the available material clearly suggests a use of consumer protection legislation by students which is beyond what was contemplated when this legislation was introduced. However, and despite the fact that there now seems to be a general acceptance that this avenue of complaint is available to students, there is a distinct absence of student success in the courts or in consumer protection agencies. Many reasons may be advanced for why this is so.

This paper will consider the effectiveness and appropriateness of consumer law in Australia and New Zealand as a means of redress for students in higher education. We ask the questions: while consumer protection legislation may be usable by disgruntled students, is it useful to achieve the results they seek? And, from a policy perspective, does the mere possibility of litigation help to improve standards of conduct of higher education providers?

Key Words

Higher education institution, student, consumer protection, litigation, redress
Keeping them honest: higher education institutions and consumer protection laws*

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Introduction

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

This paper considers situations in which students have taken complaints under consumer legislation to the courts. Against this background the paper discusses the problems for students highlighted by these decisions. It asks the question: while consumer law may be useable by students, is it useful to them?

* This is a working paper only and should not be quoted without the authors’ prior consent

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1 Bessant (2004); Clarke (2003); Considine (1994); Jackson (2002); McCabe (2000); Rorke (1996); Rochford (1998); Varnham (1998), Varnham (2001a).
2 Bessant (2004); Davenport (1985); Davies (1996); Davis (2001); Farrington (1998); Lewis (1983); Middlemiss (2000); Palfreyman (2003).
3 Bessant (2004); Griggs (2004); McMahon (2001); Thornton (2001).
Students and Universities: Causes of Complaint

No one really worried if you got a crap course when they were fully funded. But now students are paying for it themselves and they’re anxious to get jobs.4

In the current competitive and costly higher education environment, there is huge potential for student dissatisfaction on a range of matters related to their courses of study. Many are now questioning whether students undertake university courses primarily in pursuit of greater knowledge or simply for the guarantee of a higher status and a more affluent economic future? It is not uncommon to see newspaper reports such as:5

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

There is no doubt that students who view higher education as an investment in their future inevitably will demand greater accountability of education providers. Although all universities will have their own internal procedures to deal with student complaints and grievances, these matters potentially may end up in court.

Complaints by aggrieved students fall largely into the following categories:

i. Complaints about the accuracy of information provided to students before or upon enrollment: Representations made to students may influence their decisions to enroll in a particular course or at a particular institution. Such representations may be contained in written material used in promotional or course documentation or may be made orally by representatives of the university either at the institution or at, for example, education fairs. The information may be directly provided or it may be more subtle, for example, representations implied by conduct about a student’s chances of successfully completing a course.

ii. Complaints about the quality of the educational services provided by the university: These may relate to the alleged failure of the university to comply with the written and oral representations made about courses or the institution before enrolment. It also includes complaints about a range of other matters that only became evident after students commence the course, for example, the adequacy of facilities and resources, the academic standard of a course, the provision of suitably qualified and experienced teachers and research supervisors and the handling of disputes within the university.

iii. Complaints about adverse decisions made by universities affecting students: Decisions are made by universities about enrolment, credit for prior study, assessment, academic progression and so on. Whether such decisions are subject to judicial review is a question

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5 Judith O’Reilly, ‘Redress for uni’s ‘poor course’ The Australian, 4 August 1999, p 35.
that has been canvassed elsewhere and it is beyond the scope of this paper to consider how the principles of natural justice may apply in a university setting.\(^6\)

Should any of these complaints not be resolved and result in litigation, the type of legal action that may be brought by the disgruntled student against the university will vary according to the type of complaint and the remedy sought. It will depend also on whether a student’s case is founded in common law or in statute. Historically common law actions against universities were framed in negligence, in misrepresentation and in breach of contract. The trend now is for students to take action under consumer protection legislation. The allegations may be that the university acted in a way that was misleading or deceptive.\(^7\) Alternatively, where the allegations relate to the quality or fitness for the purpose of the educational services provided, they may be based on the statutory guarantees and implied terms in consumer contracts.\(^8\) Some student plaintiffs use a combination of both the common law and consumer protection legislation.\(^9\) This paper concentrates on the latter actions.

**The contractual nature of the student/university relationship**

The principal message of this chapter will be that the status of students has changed irrevocably. The change has been from one of being in a subordinate role in the *stadium generale* to one of a consumer of services.\(^10\)

The existence of a student/university contract is now beyond argument. For some time, commentators have considered that the legal relationship of a university with its students is ‘more suitably governed by the ordinary law of contract and by ordinary contractual remedies.’\(^11\) Indeed, some argue that contract law is ‘perhaps the most promising area of legal claims for academic challenges plaintiffs’.\(^12\) This may have been in the mind of Kirby J of the High Court of Australia when the omission of a litigating student to pursue her action in contract clearly troubled him. He addressed counsel for the university in the following terms:\(^13\)

> Can I just ask a question? It was common ground when we were told of this at the special leave hearing that there is no contractual relationship. I am curious about that. Would not the respondent have paid fees? I accept that this has been common ground and maybe it ought not and cannot be revived

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\(^7\) Pursuant to s 52 *Trade Practices Act* 1974 (Cth) and s 9 *Fair Trading Act* 1986 (NZ).

\(^8\) Pursuant to s 74 *Trade Practices Act* 1974 (Cth) and ss 28 & 29 *Consumer Guarantees Act* 1993 (NZ).


\(^12\) Schweitzer (1992), p 339.

now, but would you just illuminate why that was common ground? I just have
to put it out of my brain even though it will not seem to go away.

Aggrieved students have now moved on from relying simply on breach of contract
and are now basing their actions also on the principles contained in consumer
protection statutes.

Students and consumer protection statutes – the answer to university
accountability?

Recent decades have seen the progressive enhancement and clarification of consumer rights
and supplier responsibilities in Australia and New Zealand, and in the comparative
jurisdictions. Regimes aimed at redressing the imbalance between suppliers and consumers
of goods and services are now firmly embedded. The application of market culture to
education leads logically to the view that this legislation applies to educational services.
Although this application may not have been initially intended by the legislatures, it is hard
to argue against its use in the current climate of higher education.

The particular consumer protection legislation which has potential application is, in
Australia, the Trade Practices Act 1974 (Cth) (TPA) and state Fair Trading Acts,\textsuperscript{14} and in
New Zealand, the Fair Trading Act 1986 (NZ) (FTA) and the Consumer Guarantees Act
1993 (NZ) (CGA).

The quality of the services - implied terms/guarantees

Unfortunately I also endured lecturers with IQs to match Einstein’s, who had written a
series of theses and libraries of books but who could not teach a dog to sit.\textsuperscript{15}

The objective is to protect consumers when they have no real bargaining power to
determine the terms of the contracts they enter into with suppliers of services. This is met
by implying certain non-excludable terms into consumer contracts. The relevant section in
the TPA is section 74, which states that:

\begin{quote}
In every contract for the supply by a corporation in the course of a business of
services to a consumer there is an implied warranty that the service will be
rendered with due care and skill and that any materials supplied in connection with
those services will be reasonably fit for the purpose for which they are supplied.
\end{quote}

The New Zealand equivalent is found in sections 28 and 29 of the CGA which state:

\begin{quote}
Where services are supplied to a consumer there a guarantee that the service will be
carried out with reasonable skill and care.
\end{quote}

\textsuperscript{14} Application of the state Fair Trading Acts does not require the supplier of services to be a
‘corporation’ otherwise the provisions are essentially the same.

\textsuperscript{15} Anna Tobin (1997) “Couldn’t teach a dog to sit”, Times Higher Educational Supplement.
And:

Where services are supplied to a consumer there is a guarantee that the service and any product resulting from the service, will be –
(a) reasonably fit for any particular purpose; and
(b) of such a nature and quality that it can reasonably be expected to achieve any particular result, -
that the consumer makes known to the supplier …

The application of these sections relies on the student being a ‘consumer’.

Are students consumers?

This question has given rise to much debate in both the education and the marketing literature. Although it is by no means universally accepted,16 it is now common to view the student as a customer and, as such, a consumer of educational services. It has been argued that universities that do not treat their students as customers entitled to an efficient and high quality service will lose out to those that do.17 Although the idea of treating students as customers is controversial because of the implied shift in power, it may simply mean that teachers should be more open to student feedback and should measure success by how well students are learning.18 This view is consistent with that prevailing in the higher education literature that states that good teaching is student-focused.19 However, difficulties arise because students participate in the education process and must also take some responsibility for the quality of their learning.20 In the view of a senior participant in the UK higher education sector, it is ‘regrettable’ that ‘students see themselves as consumers rather than participants in a process. Higher Education is not a consumer product, but a participatory product …’21

Students fit clearly within the definition of ‘consumer’ in the legislation. A ‘consumer’ is defined in the CGA as a person who acquires from a supplier goods or services of a kind which are normally acquired for ‘personal, household or domestic use’.22 The TPA defines ‘consumer’ for the purposes of the Act as follows:23

\[
\text{A person shall be taken to have acquired particular services as a consumer if, and only if –}
\]
\[
\begin{align*}
(i) & \text{ The price of the services did not exceed the prescribed amount; or} \\
(ii) & \text{ Where that price exceeded the prescribed amount -the services were of a kind ordinarily acquired for personal, domestic or household use or consumption …}
\end{align*}
\]

16 Baldwin (1994).
21 Baroness Ruth Deech, the Independent Adjudicator for Higher Education in the UK.
22 Consumer Guarantees Act (NZ) section 2.
Thus, it is only when the cost of services exceeds $40,000 that an inquiry is made as to whether the services are of a kind ordinarily acquired for personal domestic or household use or consumption and only then would a court have to decide whether educational services are such services. 24 As annual fees paid by students for particular courses are not likely to exceed $40,000, students are ‘consumers’ for the purposes of the TPA. Even if they were, it would be hard for a university to argue that educational services were not acquired for an individual’s ‘personal’ use. This would be the case even if it is considered that the primary purpose of higher education is vocational as it does not alter the fact that the educational services are of a type acquired by a person for their own personal advancement.

Although crucial for the implication of terms relating to quality and fitness, the definition of ‘consumer’ is irrelevant when considering the sections which aim to keep suppliers of services honest.

**Misleading and Deceptive Conduct – “It’s not what the blurb said”**25

This reality gap is also familiar to Australian students, whether it be the glossy handbook suggesting an outer metropolitan campus is “only” 15 minutes from the CBD – by ambulance with a police escort maybe – to more serious misrepresentations about the availability of academic resources and services.26

The most litigated sections in the Australian and New Zealand consumer protection statutes and the ones with the greatest scope for protection of students and others are those prohibiting misleading or deceptive conduct and false or misleading representations.27 The sections impose strict liability so there is no need to prove an intention to mislead or deceive or to make a false representation in order to prove a contravention of the relevant Act.

In the TPA, section 52 simply states that:

> A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive.

Universities in Australia and New Zealand are incorporated under statute 28 but this in itself is not sufficient for universities to be ‘corporations’ within the meaning of the TPA. That term is defined for the purposes of the TPA to mean certain types of corporations only,

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24 The ‘prescribed amount’ is set at $40,000 by section 4B (2) of the *Trade Practices Act* 1974 (Cth).
26 Natasha Stott Despoja, ‘Students aren’t mere consumers’, *the Australian*, 4 September 2002, p 39 discussing what she calls the ‘growing gulf’ between what British universities claim and what is the students’ experience of courses.
27 Sections 52 and 53 *Trade Practices Act* 1974 (Cth); Sections 9 and 13 *Fair Trading Act* 1986 (NZ).
28 For example, *University of Sydney Act* 1989 (NSW), *Griffith University Act* 1998 (Qld) in Australia; *Victoria University of Wellington Act* 1961 (NZ), *Massey University Act* 1963 (NZ) in New Zealand.
namely, trading and financial corporations and foreign corporations. So, when considering the application of the TPA, the initial inquiry is: is an Australian university a trading corporation? In recent years, universities in Australia have moved exponentially to operating as businesses in the higher education industry. Providers of higher education compete with each other nationally and internationally to provide research and education services. Although the main activities in the industry are teaching and research, other activities such as consultancy work, commercial research in the private sector and offering accommodation or other services are becoming increasingly important sources of revenue. Whenever the activities of universities amount to providing goods or services in exchange for fees, those activities become commercial activities and are subject to the TPA.

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

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

In reality few would argue now that university corporations that provide education should not be required to adhere to the same standards of honesty in promotion and quality in provision of those services as is required of all other service providers. Commentators in the media certainly adhere to the view that there is no justification for university immunity from the TPA.

The question of corporate status does not arise in the context of the FTA (and Australian state Fair Trading Acts), as it is not a requirement. The prohibition is aimed at any person engaged in trade. As a matter of law, whether universities are or are not affected by these prohibitions depends on whether university activities amount to conduct ‘in trade’ (in New Zealand) or ‘in trade or commerce’ (in Australia). In the FTA ‘trade’ is defined as: ‘... any trade, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services’. The phrase ‘in trade or commerce’ has also been interpreted very widely for the purposes of the TPA but still requires the activity

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29 Section 4 Trade Practices Act 1974 (Cth).
31 Bessant (2004); Bhojani (1998); Fels (1998); Griggs (2004); Jackson (2002); McCabe (2000).
33 *Quickenden v O’Connor* (1999) 166 ALR 385, at 392-393.
35 *Fair Trading Act 1986* (NZ) section 9: No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
36 *Fair Trading Act 1986* (NZ) section 2(2)
37 See, for example, *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 22 ALR 621.
complained of to ‘itself bear a trading or commercial character’.\textsuperscript{38} In the higher education context, it is therefore then necessary to distinguish between activities and representations that might induce students to enroll and pay fees and those that do not.\textsuperscript{39}

Could anyone seriously argue that representations made by universities in, for example, promotional material are not made in trade or commerce? Communications with students after they have enrolled are more of a ‘grey’ area.

In this respect, academics and their universities may perhaps take comfort from the decision in \textit{Plimer v Roberts}.\textsuperscript{40} The defendant, a historical researcher, delivered unpaid public lectures on behalf of an association known as the Noah’s Ark Research Foundation. The purpose of the lectures was to encourage interest in a boat shaped geological formation near Mount Ararat. A member of the Australian Skeptics Group alleged the defendant had falsely represented in his lectures that he had personally carried out certain archeological and scientific investigations. The action was taken under the New South Wales equivalent of section 52 of the TPA. The court held that Dr Roberts was not engaged ‘in trade or commerce’ as he was not paid and the subject matter of his lecture was designed to excite interest rather than for pecuniary gain. Weighing against the defendant’s liability there was that the allegations of misrepresentations related to the lecture content rather than to the provision of the service itself. Errors made in class \textsuperscript{41} or comments made in lectures on the subject matter of the lectures are therefore not likely to be ‘in trade or commerce’ and not actionable.\textsuperscript{42}

This above case was clear. But what if the offending representations or conduct occur in some other context during the course of study? Spender J of the Federal Court of Australia had to consider this question in \textit{Mathews v University of Queensland}.\textsuperscript{43} Mathews complained about the grade he had been awarded and alleged that the Registrar and Secretary of the University had wrongly represented to him that the Senate Student Appeals Committee (SSAC) would ‘fairly and expeditiously address all of his concerns regarding alleged improper actions by the University and its staff’\textsuperscript{44} in respect of his grade. The SSAC had held that they did not have jurisdiction and thus failed to consider the matters that were raised in his complaint. Mathews claimed that he had relied on the Registrar’s representations and as a result he had suffered a loss for which he claimed damages. He also claimed that the university had wrongfully represented that it would not ‘countenance plagiarism’ when in fact it did so, and that the subject lecturers would provide a certain material and be available for discussion of assessments with students, and this had not happened. The student claimed compensatory and exemplary damages. The University applied to strike out this claim, as well as a multitude of other causes of action. The judge,

\textsuperscript{38} Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594. See also the discussion on this point in Clarke (2003); Griggs (2004) and Rochford (2001).

\textsuperscript{39} McCabe (1995) p 174.

\textsuperscript{40} (1997) 150 ALR 235.

\textsuperscript{41} McCabe (1995) p 174.

\textsuperscript{42} Rochford (2001) p 139.

\textsuperscript{43} [2002] FCA 414 (8 April 2002).

\textsuperscript{44} Mathews v University of Queensland [2002] FCA 414 (8 April 2002), at para 8.
while taking care to ensure that the plaintiff was not denied access to justice through lacking legal representation, was nonetheless of the view that the plaintiff’s action had no chance of success and granted the university’s application.

The marketing of university services is a relatively new phenomenon. To attract students, information is widely distributed in brochures, prospectuses, calendars, handbooks, education fairs, school visits, radio and television advertising and so on. All statements, claims and representations made to prospective students about courses, resources and facilities being offered and the student’s chance of success and employment opportunities must be neither false nor misleading or deceptive or likely to mislead or deceive. Universities cannot expect to engage in these marketing practices without being answerable for failures to achieve their claims. One of the most significant areas of concern is the recruitment and support of international students. Referring to the hard sell recruiting of overseas students and the 'colourful adjectives' being utilized in the service of university salesmanship, Considine quotes the International Students Officer at Queen Mary College in London who said: ‘In my experience, second-hand car salesmen are models of good practice when contrasted with the representatives of some UK universities and polytechnics’.

In New Zealand there are reports of not insignificant numbers of students who have been prepared to commence proceedings under the FTA. Generally their allegations are that their education provider made certain representations that led them to enroll, that those representations were misleading and that they were subsequently the cause of their loss. In all known cases, the institutes were quick to settle and the students concerned were bound by confidentiality agreements. One case that received much media attention in New Zealand concerned the lack of accreditation of a naturopathy degree course at Aoraki Polytechnic. Fifteen students instigated legal action complaining about the institute’s assurances at the time of their enrolment that accreditation of the course as a degree was a mere formality. The course failed to achieve degree status and the students took action under the FTA. The Polytechnic reached a financial settlement with the students. Similarly, lack of accreditation for a course is a cause of complaint against Waiariki Polytechnic in Rotorua. In August 2005 it was reported that 60 graduates of the Bachelor of Social Sciences ‘kaupapa Maori and adventure therapy classes’ at Waiariki Polytechnic in Rotorua were threatening legal action after discovering they were unable to get registration as social workers due to the lack of accreditation of their courses with the Social Workers’ Registration Board. While the fate of this complaint is unknown it may be assumed to be within those pointed to in Tertiary Update where it states that ‘[E]ight of New Zealand’s nineteen polytechnics have paid nearly $220,000 in compensation or fees refunds to disgruntled students, while several more are dealing with new complaints. They include the Christchurch Polytechnic Institute of Technology, which currently faces claims

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49 The Association of University Staff weekly newsletter, Volume 8 number 36, 6 October 2005, p 3.
of $100,000 from two students’. The report does not give the grounds for the students’ complaints. It does however point to a concern with institutes paying out students who complain as this prevents such information being available to other students, or to prospective students.

Similarly, in Australia, there have been several reports in the media about students claiming damages from Bond University for misleading and deceptive conduct in the promotion of a postgraduate medical program. Essentially the students’ complaint in this matter is that they were given incorrect information that caused them to enroll in a biomedical science degree thinking they could start a postgraduate medical degree in 2004. Their claims include a full refund of course fees and loss of income. It is not known whether these proceedings are continuing or whether they have been settled.

The first Australian student to base a legal action exclusively on section 52 of the TPA was reportedly Steve Jones, a postgraduate student at Deakin University. Jones claimed he had been persuaded to enroll in a two-year master’s degree course in developmental studies after having seeing a glossy booklet produced by the university. He alleged that the promotional material contained in this booklet was misleading and contravened the TPA in the following ways: the study guides used for the course were seriously out of date thus much of the material was ‘obsolete’, and the material and assessments used for undergraduates were in many cases identical with those used in his postgraduate course. Once again, the university acted quickly to reach a settlement with the student.

However, in Fennell v Australian National University the plaintiff, a full-fee paying student at the Australian National University ("ANU") enrolled in the Master of Business Administration (Managing Business in Asia) Program got his day in court, but to no avail. Fennell claimed that the main inducement to him to enter into this program was an advertisement published by the ANU in ‘The Age’ newspaper in Melbourne and later reinforced at an interview with a representative from the University. This stated that the ANU would arrange a work placement in Asia for students enrolled in the course. The Course Handbook did however say that students were primarily responsible for arranging their own work placement in Asia. Fennell’s argument was that he did not receive this until after he had enrolled, had paid his fees and resigned from his job. Ultimately he did arrange his own work placement in Borneo and graduated from the program, but nevertheless he claimed compensation for his losses, which he alleged, resulted from the misleading statement. The losses he claimed were for wages allegedly lost as a result of his ceasing his employment, and for the anxiety and distress he suffered as a result of his

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53 See n 52. The newspaper report states that the student’s latter complaint is supported by postgraduate students’ complaints and surveys of these students undertaken over the previous four years by the Council of Australian Postgraduate Associations, stating that this case is only ‘the tip of the iceberg’.
having to arrange his own work placement and his consequential late graduation. Not only did Sackville J not question the potential for liability of the university under the TPA but he began his judgment by remarking that this case could be said to be a ‘by-product of the relatively new phenomena in Australian tertiary education, namely competition among universities for full fee-paying graduate students’. In his view, the student’s claim gave rise to two issues. The first was whether the student had proved on the facts that the university had engaged in misleading and deceptive conduct. The second was whether the student had suffered a loss for which he could be compensated. Sackville J declined liability, holding that the student had not proved on the facts that as a result of the university’s conduct he had suffered a lesser benefit or a greater detriment than he would have otherwise.

The difficulties faced by the students whose cases do get to court, and their lack of success at the hands of the judiciary, question the usefulness of this litigation to them.

How useful is this consumer protection legislation to students?

The eagerness of higher education institutions to settle legal disputes with their students undoubtedly reinforces the proposition that the threat of consumer litigation acts more in favour of students than does litigation itself. This is perhaps as it should be. The prospect of student litigation may be offensive to some but ‘it is difficult to ignore.’ Some universities have responded positively by developing on-line resources about their responsibilities under the TPA.

The cases above focus on several questions which, while obviously not confined to those actions alone, are made particularly clear by the judges there. The first relates to the obvious imbalance in resources of the litigants. With many students being forced by finance constraints to represent themselves, is it possible for the litigation process to achieve a fair and just outcome? The second issue relates to the losses that a student may rightly claim to have suffered as a result of the offending conduct?

1. The imbalance in financial power

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55 n 54 at [1].
56 For example, in the case initiated by Jones against Deakin University, discussed above, the university ‘acted quickly to defuse a situation that had already damaged its reputation’ and settled confidentially with the student. As reported in Geoffrey Maslen, ‘His master’s angry voice’ The Bulletin, 12 July 1994, p 27.
57 This has also been the case in the UK where there are frequent reports of students instituting actions seeking remedy for poor quality of courses, and these are settled by the institutes concerned. For example: “Law Student wins 30.000 [pounds] payout”, BBC News World Edition, 31 July 2002, http://news.bbc.co.uk/2/hi/uk_news/education/2163300.stm. Interestingly, in the same edition the view was expressed by Jaswinder Gill, Education Lawyer and author, that “Student payout ‘will open floodgates’”. Of even more interest is the fact that this prophecy is yet to be realized.
59 For example, see La Trobe University’s Legal Services webpage at http://www.latrobe.edu.au/legalservices/trade_guide.html.
Problems relating to the cost of litigation to students are highlighted in the majority of cases. In reality, finances will dictate that many students will be self-represented. This imbalance enhances the need for courts to consider carefully before striking out a case – no matter how nebulous it may seem on the pleadings. In *Mathews v The University of Queensland*, Spender J referred to the concerns of (then) Kirby P in the case of *Wentworth v Rogers* (No 5) which he put as:60

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

The potential for a miscarriage of justice where there is such an imbalance in power between the litigating parties seriously concerned the same judge in *Griffith University v Tang*.61

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

There are some aggrieved students of private education providers in Australia who have taken their complaints of contravention of section 52 of the TPA to the ACCC who has pursued the matter on their behalf. One such complaint was made by students enrolled at the Australian Early Childhood College. There it was alleged that the institute had made misleading representations relating to the enrollees’ right to cancel their enrollment and receive a fees refund. Spender J of the Federal Court found that representatives of the institute had engaged in misleading and deceptive conduct and ordered that compensation be paid to those students who had suffered loss as a result.62 In a similar case, the Federal Court found that an internet educational provider, The Australasian Institute Pty Ltd, had breached section 52 of the TPA in the claims it had made to students regarding its internet courses. It was ordered to offer refunds of fees to students and to ‘display corrective advertising on its website’.63 It is perhaps significant that in these instances the students’ claims and the subsequent redress allowed by the courts were confined to refund of course fees and not consequential damages.

60 (1986) 6 NSWLR 534, 536.
2. Can students get the losses that they claim?

Establishment of loss is a further problem highlighted by the cases. This undoubtedly flows in part from a student’s lack of representation also. The plaintiff Mathews (above) clearly encountered a difficulty in establishing a basis for the damages claimed and a link of causation between his losses and the misleading conduct in which the university allegedly engaged. He claimed a considerable sum in compensatory and exemplary damages which was way beyond any amount which could be reasonably contemplated by a court (the former were calculated on what he may have earned as a mathematics professor until his retirement). The judge concluded that in fact the plaintiff was claiming an expectation loss which did not satisfy the requirement of section 82 of the TPA that it is a loss sustained as a result of a ‘prejudice or disadvantage as a result of altering [his] position in reliance upon the misleading conduct.’

Fennell was legally represented in his action against the ANU, yet had he been successful in persuading the court of liability on the facts, he would still have encountered this equally problematic hurdle. Sackville J, having held against him on the facts on the primary issue, did not directly address the question of damages. He did however indicate strongly that Fennell would, in the circumstances, have had great difficulty in proving that he had suffered a loss that was compensable under the Act.

The identification of compensable losses was of significance also in a case taken by a student to the New South Wales Consumer, Trader and Tenancy Tribunal. In *Kwan v The University of Sydney Foundation Program Pty Ltd & ors* the student had enrolled in a program aimed at introducing international students to undergraduate university study. He alleged that he did not receive what he bargained for in that the course was held in a building that was being renovated and was noisy and dirty. He alleged the respondent Foundation had misrepresented the facilities and services that would be provided for the course. In addition the student argued that the program document ‘implies that students in the Foundation program would have access to all the University [Sydney] facilities and the standard of teaching would be akin to that of a university course’ and that had not been the case. The Tribunal found that there had no breach of contract and the presiding member stated that he did not believe there to have been misleading and deceptive conduct. The Tribunal was guided in its decision by the fact that the student had completed the program and gone on to university studies, he therefore had ‘got what he paid for’ and there was no evidence of loss.

Conclusion

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

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68 Although he believed he was unable to rule on this allegation specifically.
There can be little doubt that the ‘misleading and deceptive’ provisions of the legislation have potential to influence the conduct of higher education institutions in the promotion and marketing of their courses. It is important, and indeed it may be enough, that these particular legislative provisions play their part in promoting honest competition in the higher education marketplace. But the cases emphasize that litigation using consumer protection legislation is not likely to be easier or yield better results for the student than the common law. In addition, the provisions may be of even less use to a student when the conduct complained of took place post their enrolment.

So does the legislation provide any help for students in respect of course quality? Terms may be implied into a student/university contract by legislation. However a student, when faced with the might and pedagogical expertise of a university, will be most likely to encounter problems in persuading a court that there has been a breach. There may be difficulties also in ascertaining what, of the university documentation, is part of the contract with the student and what is not, unless clear student/university contracts have clearly been formed on enrolment.

The conundrum is that, while litigation initiated by aggrieved students does demonstrate a clear acceptance that consumer law applies in today’s higher education environment, very seldom does it appear to help students in the courts. Rhetoric aside, and adopting a cynical view, it may be that the courts simply have difficulty in determining in each particular case whether the aggrieved student is frivolous and vexatious or whether he or she is rightly wronged. Undoubtedly the ability of students to initiate action focuses attention on the responsibilities of universities and all higher education providers. The courts however may not be the appropriate fora for these actions to be resolved. Indeed disputes between students and universities should be able to be resolved without recourse to the courts. In the absence of clear and inexpensive avenues of complaint for students outside of their universities, the protection afforded by the legislation will not be enough in the long run. There is clearly a need for an alternative forum for such complaints to be resolved, preferably in a body especially dedicated to such a purpose. The demonstrated readiness of universities and other education providers to settle student claims and thus avoid publicity indicates that they too would welcome any positive innovation in this area.

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69 As in Lamb v Massey University (High Court of New Zealand, Palmerston North Registry, unreported, Wild J, CIV 2003 454 336 & 337, 19 October 2004).
70 Kos and McVeagh (1999); Stuhmcke (2001).
71 Astor (2005); Jackson (2004); Ogawa (2003); Reddy (2004). However, it is of interest to note a recent article headed ‘Students urged to sue institutions’, The Dominion Post, 26 April 2006. This states that students in the UK are being urged to sue institutions for breach of contract if their degree courses are disrupted by striking academics. This indicates the part the threat of litigation may play in encouraging institutions to settle pay disputes with their employees, and interestingly has no reference to the Office of the Independent Adjudicator for Higher Education.
REFERENCE LIST


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