The Application of the Consumer Protection Provisions of the *Trade Practices Act* 1974 (Cth) to Universities

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An increasing perception that the activities of a university should be considered as products suggests that the legal protection afforded to consumers by the *Trade Practices Act* 1974 (Cth) may be extended to protect students of universities. However, the application of the Act is affected by a number of factors. The author considers that the university will not be protected by the shield of the Crown, and could be considered to be a trading corporation for the purposes of the Act, but a significant number of activities of a university could not be considered to be in trade or commerce, and so do not invite the application of the provisions relating to unfair practices. The provisions implying terms and conditions into consumer contracts may not apply because of the absence of a contract between the student and the university.

1. Introduction

The Vice-Chancellor of La Trobe University, Professor Michael Osborne, has referred to the new context within which the provision of Higher Education is now operating. He calls it 'the transformation of Higher Education into an "industry"'[1] and talks about the 'inevitable ramification' of that transformation: the 'preoccupation of government with efficiency, accountability and most recently management in universities'.[2]

The increasing degree to which universities have been commercialised is likely to create a corresponding demand for answerability for claims made in marketing. The marketing of university degrees is a relatively new phenomenon. The pre-

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1 MJ Osborne 'University Management' *Message from the Vice-Chancellor* (internal newsletter, La Trobe University) 15th June 1995.

2 *Ibid.*

Dawkins university relied less on promotional activities than on their status and prestige.

> What promotional mechanisms there were tended to be informal, and were reliant on the institutional aura emanating from a particular university, as its reputation seeped into public consciousness. Anything more forceful than this, was seen as crass and wanton commercialism, as having a "sleazy ring to it" (O'Brien 1987), which was at loggerheads with the image of a university as a place of privileged and assured standing in a nation's culture, where the disinterested pursuit of scholarship was protected, lest the spirit of free enterprise compromise academic freedom.[3]

As that image falls away, and universities are seen to engage in aggressive marketing of a university degree as a commodity, the protection afforded by the old institutional aura will fail; universities cannot expect to engage in the practices of marketing without being answerable for failure to achieve the claims. Tertiary institutions need to be very clear about potential liability in these areas, and need to make employees aware of the potential liability. Damien Considine considers this neglected area: "If universities are increasingly seen as businesses, and if students are increasingly seen as the consumers of services provided by universities, then the legal consequences of the business/consumer relationships need to be addressed."[4]

Tertiary institutions have already had to respond to potential action in relation to claims made in marketing,[5] and with an increasingly demanding and critical client population, this is not likely to remain an isolated phenomenon. It remains to be seen, however, whether the current legislative framework will support such a claim.

The *Trade Practices Act* 1974 (Cth) ("the Act") provides two basic types of action which may be useful to a disgruntled student. Firstly, provisions exist in the Act to prohibit misleading and deceptive conduct, particularly in relation to advertising. Sections 52 and 53 of the Act cover a wide range of activities and may be employed regardless of the existence of a contract if the conduct could be said to be by a "corporation" "in trade or commerce". Virtually equivalent provisions exist in State *Fair Trading Acts*, but do not employ the problematic reference to a "corporation".

Secondly, provisions exist in the Act for the implication of consumer protection terms into contracts for the supply of goods and services. These provisions have no direct equivalents in State *Fair Trading* legislation but some are replicated in *Sale of Goods* legislation.

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3 Colin Symes and Susan Hopkins 'Universities Inc.: *caveat emptor*' (1994) 37 *The Australian Universities' Review* 47.

4 D Considine 'The Loose Cannon Syndrome: University as Business and Students as Consumers' (1994) 37 *The Australian Universities' Review* 36.

5 One university came to an undisclosed settlement with overseas students who complained that the advertised course content did not match the course provided.

Attempts to apply these provisions to the University context, however, raise a number of problems. The first relates to the possibility that the Universities are not bound by the terms of the legislation, if they could be said to be manifestations of the Crown. This may affect an action on the basis of the Act itself, or it could conceivably affect an action based on the implication of terms into a contract. Although the situation is clearer in some cases than in others, it is generally the case that universities are not entitled to immunity from suit.

The second difficulty relates to the coverage of the Act itself, which is, in general, confined to foreign, trading or financial corporations. These limitations will not preserve universities from liability under the Act, given the broad interpretation given to the constitutional requirement that the corporation be a 'trading corporation'.

Thirdly, the provisions relating to misleading and deceptive conduct are limited to corporations "in trade or commerce". Although many of the core functions of the university could not be said to be in trade or commerce, the Act will still apply to a significant number of the activities of the university.

Lastly, the provisions implying terms and conditions into consumer transactions require that there be a contract for the supply of goods or services to a consumer in the course of business. Although a contract will be identifiable in a number of cases, in the core business of the university the requirement that there be a contract is still problematic.

2. Crown Immunity

Most universities are funded by state and federal governments. They are incorporated by special legislation and are subject to a degree of governmental control. A university is a public authority which exercises public duties.[6] In these circumstances it is at least an arguable proposition that some universities will be emanations of the crown in right of the Commonwealth or of one of the States, and accordingly may attract crown immunity to some degree and in some form. I will consider the question of crown immunity from statute, but will defer consideration of crown immunity from contract.

The general rule is that the Crown is subject to the common law[7] and similarly that the Crown is subject to statute law, in the sense that it is bound by any statute that applies to the Crown.[8]

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6 *Ex Parte King; Re University of Sydney* (1943) 44 SR (NSW) 19; *Ex Parte Forster; Re University of Sydney* [1963] SR (NSW) 723, *Clark v. University of Melbourne* [1978] VR 457; *Clark v. University of Melbourne (No 2)* [1979] VR 66; *White v. University of Sydney* (1992) E.O.C. 92-473; See generally *Halsbury's Laws of Australia* Volume 10 Butterworths Sydney 1992 para 160-915.

7 PW Hogg *Liability of the Crown* 2nd edn The Law Book Company North Ryde 1989 at 200. The common law of property and contract applies to the Crown in much the same way as it applies to the private person. The liability of the Crown in tort had been subject to exceptions, but immunity has been abolished.

8 *Ibid.*

> However, the Crown does enjoy a measure of immunity by virtue of a common law rule of statutory construction ... The rule is that the Crown is not bound by statute except by express words or necessary implication. What this means is that general language in a statute, such as "person" or "owner" or "landlord", will be interpreted as not including the Crown, unless the statute expressly states that it applies to the Crown or unless the context of the statute makes it clear beyond doubt that the Crown must be bound.[9]

In the case of Commonwealth organisations, the *Trade Practices Amendment Act* 1977 (Cth) inserted s.2A which expressly includes those carrying on a business. Section 2A says that the Act binds the Crown in right of the Commonwealth where the Crown in right of the Commonwealth or an authority of the Commonwealth carries on a business. The term 'authority of the Commonwealth' is defined in s.4(1) to mean

(a) a body corporate established for a purpose of the Commonwealth by or under a law of the Commonwealth or law of a Territory; or
(b) an incorporated company in which the Commonwealth, or a body corporate referred to in paragraph (a), has a controlling interest;

It appears that the term 'body corporate' in the definition is not restricted to the definition of 'corporation' under the Act.[10] Accordingly, to obtain coverage under the Act, it is not necessary to establish that a Commonwealth authority is a foreign, trading or financial corporation. It may still be necessary to establish that the corporation is engaged in trade or commerce under the individual provisions of the Act.

In any case, many Commonwealth authorities are not entitled to crown immunity pursuant to the terms of the legislation which created them.

Thus, universities incorporated by Commonwealth legislation, specifically the *Australian National University Act* 1991 (Cth) and the *University of Canberra Act* 1989 (Cth) may be, by s.2A, unable to assert that they are entitled to any degree of crown immunity. Similarly, the Northern Territory University, incorporated pursuant to the *Northern Territory University Act 1988* (NT) would be within the range of s.2A.

The position of State government authorities is less clear. Since most tertiary institutions are created pursuant to State legislation but are Federally funded, the position of State government bodies must be considered closely.[11] The Act is silent

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9 *Ibid* at 201. See also *Province of Bombay v. Municipal Corp of the City of Bombay* [1947] AC 58; Report by the Senate Standing Committee on Legal and Constitutional Affairs *The Doctrine of the Shield of the Crown* (Senate Printing Unit Canberra 1992) Ch 6; SG Corones *Restrictive Trade Practices Law* The Law Book Company Ltd Sydney 1994 at 64.

10 *R v. Australian Industrial Court; Ex parte CLM Holdings Pty Ltd* (1977) 136 CLR 235 at 241; RV Miller, *Annotated Trade Practices Act* 16th edn The Law Book Company Limited Sydney 1995 at 26.

11 Constitutionally the provision and control of universities are among the residual powers of the States. The Commonwealth exerts influence through legislation and funding relating to the education sector: see in particular *Higher Education Funding Act* 1988 (Cth); *Overseas Students Charge*

on the application of the Part V provisions to the Crown in right of a state or territory.[12]

Of the relatively few cases which have had to consider the application of the Act to the Crown in right of a State or Territory the most relevant to this case is *"E" v. Australian Red Cross Society.*[13] This case deals with the liability of the Royal Prince Alfred Hospital and its successors, and the Australian Red Cross Society and the Australian Red Cross Society New South Wales Division for injury due to the transfusion of contaminated blood collected by the Society which caused injury to the patient in the form of the HIV virus. The case was based primarily upon ss.52, 55A, 71 and 74 of the Act.

The Royal Prince Alfred Hospital was incorporated by an Act of the New South Wales Parliament but was also listed in the Third Schedule of the *Public Hospitals Act* 1929 (NSW), and was therefore subject to that Act. The Australian Red Cross Society was incorporated by Royal Charter, with the objects of furnishing aid to the sick and wounded. The New South Wales Division was incorporated by an act of the New South Wales Parliament, with the object, *inter alia* of promoting the improvement of health, the prevention of disease and the mitigation of suffering. In the judgment of Wilcox J in the Federal Court he considered whether the hospital was an emanation of the Crown in right of the State of New South Wales. Counsel for the hospital argued that the provision of medical and surgical services was, at the time, regarded as an ordinary and usual function of State governments. The conduct of The Royal Prince Alfred Hospital through a corporation was the means by which the Government discharged its responsibility.[14] Similarly, many people would regard the provision of tertiary education as a function of State Governments. However, although his Honour saw the force of the submission, he thought it inconclusive, on the grounds that successive governments had seen fit to provide these services by a number of means, and, in particular, through the private sector. In a particularly relevant passage his Honour said:

Act 1979 (Cth); *Employment Education and Training Act* 1988 (Cth) The list of legislation creating universities is too long to include here. Most are public and created by state legislation; however there are some universities which are established by non-government interests but are also incorporated by legislation, and some also receive government funding. See generally *Halsbury's Laws of Australia* Volume 10 *supra* n.6 para 160-1 and 160-905 *et seq.*

12 It is important, however, to remember that there is comparable state legislation which is specifically stated to bind the Crown. The State equivalent to some of the provisions of Part V of the Act, the *Fair Trading Act* 1985 (Vic), states at s.3(1): 'Except where otherwise expressly provided by this Act, this Act binds the Crown not only in right of Victoria but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.' The Fair Trading Act contains, in general, provisions comparable to the Act Part V Division 1 — Unfair practices. The *Goods Act* 1958 (Vic) does not have such an application clause. It contains provisions comparable to those in the Act Part V Division 2 — Conditions and Warranties in Consumer Transactions.

13 (1991) 27 FCR 310; (Federal Court of Australia); (1991) 31 FCR 299 (Full Court of the Federal Court). Other cases which have addressed the question include *Bradken Consolidated Ltd v. Broken Hill Proprietary Company Ltd* (1979) 145 CLR 107; *State Government Insurance Corporation v. Government Insurance Office of New South Wales* (1991) FCR 511 and *State Superannuation Board v. Trade Practices Commission* (1982) 150 CLR 282.

14 *Supra* n.13 at 346.

> In 1984 The Royal Prince Alfred Hospital fell between the two extremes ... [of private and indisputably public institutions]. On the one hand, it was not privately owned. It was a public institution, established by a special Act of Parliament for public purposes and subjected to a deal of Ministerial control. On the other hand, it was not a mere component of a government department. It was a statutory corporation with its own objectives and a degree of autonomy in the manner of their attainment. It held property in its own name and managed its own funds, although subject to some control by government. I think that the critical factor in determining whether the corporation was, at that time, "the Crown" is the extent of Ministerial and State bureaucratic control. Contrary to the submission of counsel, I put little weight upon the circumstance that the ultimate source of most of its income was the government; the same might be said of numerous private hospitals, medical practitioners, drug manufacturers and, perhaps, even pharmacists.[15]

The degree of autonomy vested in the governing body of the university may be determined, in part, by an analysis of the Act incorporating each university. Matters which may be relevant would include the power of the governing body of the university to make by-laws, rules and regulations, the power of the body corporate to hold land, the ability of the governing body to make decisions with regard to the construction, use and management of buildings, and the carrying out of additions, alterations and repairs to those buildings, the provision and maintenance of accommodation and the provision and use of plant, appliances and equipment.

In favour of the submission that the university was an emanation of the Crown would be the rights conferred on the government, the duties residing in the executive as to the maintenance of standards and the provision of efficient and economic operation of universities consistent with those standards, the power of the government to direct the university to adopt a particular procedure, the power to direct staff of the university or to determine their level of remuneration, or the power to determine the role, functions and activities of the university. The number of places on the governing board which lay in the gift of the Crown would be relevant, as would the power of the government to remove the governing board or to interfere in management generally.

The provision of funding would also be relevant, along with any conditions attached to that funding. The governance of the relationship between the university and the student would be relevant, as would any constraint upon the university's ability to seek funding elsewhere.

Through consideration of matters of this type, Wilcox J determined that the hospital was not an emanation of the Crown, and was therefore subject to the provisions of the Act. The decision was based largely upon the provisions of the Act which established the hospital as an incorporated body and determined the composition and functioning of its governing board, and on the provisions of the legislation which affected the governance of the hospital generally. The decision was the subject

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15 *Ibid.*

of an appeal to the Full Court,[16] however it was not necessary to consider whether the hospital was an emanation of the Crown in that appeal.

To determine whether a particular university was to be afforded crown immunity, it would be necessary to consider the legislation incorporating the university. If a university enjoys a high degree of autonomy it is less likely that it will be immune from suit. I will consider more closely the degree of autonomy residing in the typical university against the degree of governmental control exerted over the university sector generally and public sector universities in particular.

It should be borne in mind, however, that courts indicate a preference to start from the point that all bodies are equal before the law, and thus, "according to the sentiment expressed by Gibbs CJ in the *Townsville Hospital Board* case,[17] special privileges should generally be denied to statutory bodies, particularly ones engaged in commercial or trading activities."[18]

(a) Control by general legislation

In South Australia and Victoria there are statutes providing for general control of universities in those states.[19] In both states there are restrictions on operation as a university or award of a higher education degree without approval.[20] In South Australia there are provisions for an advisory council and for advisory committees;[21] in Victoria the Minister must ensure that a Register of Higher Education is established and maintained.[22]

(b) Control by specific legislation

The legislation which establishes the universities is, however, the main source of governmental power and influence over the university. Many of the acts set out the objects or functions of the university: "to provide facilities for teaching and research in such branches of learning as the statute may determine, to confer degrees and generally to promote university education and the advancement of knowledge".[23] Statute will also provide for the constitution of the council, or senate, of the university, the terms of office of its members and for the vacation of office.[24] The council or senate is responsible for the management of the university and will have the power to make statutes or by-laws for that purpose. It will also be vested

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16 *Supra* n.13.
17 Ie *Townsville Hospitals Board v. Council of City of Townsville* (1982) 149 CLR 282.
18 N Seddon, *Government Contracts — Federal, State and Local* The Federation Press Sydney 1995 at 113.
19 *Tertiary Education Act* 1986 (SA); *Tertiary Education Act* 1993 (Vic).
20 *Tertiary Education Act* 1986 (SA) ss.4, 5; *Tertiary Education Act* 1993 (Vic) ss.9, 10, 11.
21 *Tertiary Education Act* 1986 (SA) ss.8, 9, 10.
22 *Tertiary Education Act* 1993 (Vic) s.11.
23 See generally *Halsbury's Laws of Australia supra* n.6 para. 160-920 and references cited therein under note 1.
24 *Ibid.* Refer to references cited therein under notes 1, 2, 3.

with financial powers and may have the power to acquire and dispose of real property, perhaps to form companies, partnerships or joint ventures.[25] The body may also have powers specific to the provision of instruction, the granting of degrees, and so on.[26] Other persons or bodies may have statutorily defined powers; the vice-chancellor, academic board or convocation.

However, there is also a degree of strong governmental influence, at both a state and a federal level. Bearing in mind that the control which is significant is control at law, rather than de-facto control, it is probably more relevant to consider the state rather than the federal influence, since the federal influence is exerted primarily through the provision of funding and is over and above the degree of governmental control exerted as a result of legislation. However, the funding arrangements, largely in the form of tied grants, are significant, and should be considered. In addition, consultation and negotiation takes place between ministers and public servants in the development of policy. This, however, is unlikely to result in the view that an individual institution is an emanation of the crown, although it will reinforce the presumption that education is a government matter.

At present national policy initiatives in relation to education are developed by the National Board of Employment, Education and Training. This Board receives advice from four councils, one of which relates to higher education. The Board inquires into, and provides information and advice to the Minister with respect to, *inter alia*, general development of programs, priorities, objectives, and so on, but follows directions or guidelines of the Minister on social, economic and budgetary priorities.[27] All of these matters, however, reside at a general policy level, and the degree of control exerted at their implementation is the relevant question. This control is exerted through financial assistance provided to universities in the form of recurrent grants for operating purposes, recurrent grants for certain other purposes, and capital grants. The amount and timing of grants is a matter for the Minister.

These grants are provided on condition. The conditions may be as to the level of expenditure or for the achievement of certain social objectives, such as the balance of male and female students undertaking higher education. Recurrent grants for operating purposes are provided, subject to statutory formulae, for certain purposes only. Grants are provided according to an educational profile, and must be spent only in accordance with that profile.[28]

Recurrent grants for other purposes may also be provided according to statutory formulae, for certain specific purposes such as the promotion of equality of opportunity or for enhancing the quality of higher education.

However strong the real influence of these funding constraints may be on the management of the university, and however strongly they may place higher education within the range of governmental functions, the fact that they are constraints

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25 *Ibid* at para. 160-925 — 160-930 and references cited therein under notes 1-6.
26 *Ibid* at para. 160-930 and references cited therein under notes 11-15.
27 *Ibid* at para. 160-20 and references cited therein under notes 1-7.
28 *Ibid* at paras. 160-130 to 160-135 and references cited therein.

of the federal government when the university is typically created by state legislation, makes it unlikely that it would be found to be an emanation of the crown in right of the Commonwealth. There will be a degree of influence exerted by the crown in right of the state, however, the high degree of autonomy given to the institution for day to day management purposes is likely to remove the body from the protection of crown immunity.

3. The coverage of the Trade Practices Act

Although Part IV of the Act has been affected by recent amendments which will extend its operation to the States through a co-operative agreement between the States and the Commonwealth, Part V will not apply to those bodies which do not fall within the constitutional powers of the Federal Parliament. The provisions of the Act are largely based upon s.51 (xx) of the Constitution, the 'corporations power'. Section 51 gives the Federal Government power concurrently with the states over 'foreign, trading and financial corporations formed within the limits of the Commonwealth'.[29]

In partial satisfaction of this requirement, a university is typically a corporation formed pursuant to statute. There appears to be no reason why the definition of corporation under the Act should be restricted to corporations formed pursuant to the *Corporations Law*.[30] It is necessary, subsequently, to show that the institution is within one of the categories of foreign, trading or financial corporation. The definitions in s.4 of the Act are framed to provide this constitutional nexus. It is possible but unlikely that a university could be categorised as a financial corporation,[31] and there are very limited possibilities for foreign corporations to operate as universities. However, the category of 'trading corporation' has been widely interpreted. It is defined in s.4(1) to mean 'a trading corporation within the meaning of paragraph 51(xx) of the Constitution.' Is a university a trading corporation?

In *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* the court referred to it as a 'composite term', which 'refers to a corporation which can appropriately be categorised by reference to activity whether actual or intended'.[32] 'Trading' is

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29 Other relevant constitutional powers can extend Commonwealth powers to persons other than corporations. These are the interstate and overseas trade and commerce power (s.51 (i)), the Territories power (s.122), the executive power of the Commonwealth (s.61) and the incidental power (s.51 (xxxix)), the postal and telegraph power (s.51(v)), and the external affairs power (s.51(xxix)). See generally D Healey & A Terry *Misleading and Deceptive Conduct* CCH Australia Limited North Ryde 1991 at 8.

30 See *State Government Insurance Corporation v. Government Insurance Office of New South Wales* (1991) 28 FCR 511, in which the Government Insurance Office of New South Wales was held to be both a trading and a financial corporation.

31 In *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* (1978) 36 FLR 134 Deane J said at 158 'dealings in finance (whether actual or intended) will be decisive of characterisation only where the overall circumstances are such that the corporation can appropriately be categorised by reference to such activity.'

32 *Supra* n.31 at 158.

the activity of providing, for reward, goods or services.[33] Regardless of the outcome of the vexed question of whether the provision of courses on a HECS basis to students is a trading activity, a university certainly does engage in trade. It provides consultancies, leases premises, sells food, books, provides short courses, and so on. Does this make a university a 'trading corporation'?

Judicial analyses of the term 'trading' were summarised in *Hughes v. Western Australian Cricket Association (Inc)*.[34] The mere fact that a corporation trades does not mean that it is a trading corporation.[35] To determine whether a corporation is a trading corporation the court will consider the current activities of the corporation[36] and the constitution of the corporation.[37] The most difficult aspect of determining whether a corporation falls within the definition of trading corporation is the question of the *extent* of the trading activity which must be undertaken. For instance, it has been described as a 'substantial corporate activity'.[38] In the same case, Mason J (with Jacobs J concurring) said that the trading activities must form a 'sufficiently significant proportion of the corporation's overall activities'. Murphy J required that the trading activities should not be insubstantial. In *State Superannuation Board v. Trade Practices Commission* the corporation was required to carry on trading activities on a significant scale.[39]

The range of judicial opinion in *R v. Federal Court of Australia; Ex parte Western Australian National Football League* included the judgement of Murphy J, who considered that the term included a body which does in fact did trade, even if it was incorporated under legislation which bans trading.

Bearing these fairly loose definitions in mind, which activities of a university could be said to be 'trading' activities, and are they substantial enough to result in the categorisation of a university as a trading corporation?

The major trading activities are likely to be:

- international marketing of fee paying courses;
- marketing and teaching fee paying post-graduate courses;
- consultancy work carried out by university employees or departments;
- commercial research in the private sector;

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33 *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd supra* n.32; *St George County Council* (1974) 130 CLR 533 at 569-570; *Bevanere Pty Ltd v. Lubidineuse* (1985) 7 FCR 325 at 330-331.

34 (1986) 69 ALR 660.

35 *R v. Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533 at 543, 562; *R v. Federal Court of Australia; Ex parte Western Australian National Football League* (1979) 143 CLR 190.

36 *R v. Federal Court of Australia; Ex parte Western Australian National Football League ibid*; *State Superannuation Board v. Trade Practices Commission supra* n.13.

37 *Fencott v. Muller* (1983) 152 CLR 570 at 602.

38 Per Barwick CJ in *R v. Federal Court of Australia; Ex parte Western Australian National Football League supra* n.35 at 208.

39 Per Mason, Murphy and Deane JJ; also Deane J in *Commonwealth v. Tasmania* (1983) 57 ALJR 450 at 560.

- advertising in the media.
- offering accommodation or other services for cost.

If assessed on the basis of the funds brought into the institution from these sources, these trading activities would have to be said to be substantial, and growing. The movement away from the government as the primary source of funding for a university is pronounced, and in future the proportion of income achieved through non-government sources is likely to rise.

It is extremely likely, therefore, that the typical university is capable of categorisation as a trading corporation.

4. Provisions of the Act

Part V of the Act contains provisions relating to unfair practices. I will confine this survey to provisions relating to misleading and deceptive conduct (s.52), false representations (s.53), unconscionable conduct (ss.51AA and 51AB), and misleading conduct in relation to services (s.55A). I will also consider the provisions implying terms and conditions into contracts for the supply of goods and services.

(a) Misleading and Deceptive Conduct

Section 52 says that a 'corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'. This is a 'comprehensive provision of wide impact, which does not adopt the language of any common law cause of action. It does not purport to create liability at all; rather, it establishes a norm of conduct, failure to observe which has consequences provided for elsewhere in the same statute, or under general law'.[40] In particular, unlike the tort of negligence, it is unnecessary to show that the party complaining was owed a duty of care, or that the corporation fell below a standard of care, or that the party complaining suffered any damage. It is unnecessary to show that any person was misled.[41]

The term 'corporation' is defined in s.4, as considered above, to mean a trading, foreign or financial corporation. As argued above, it is possible that a tertiary institution is capable of being described as a trading corporation. It is necessary, however, to determine that the activity was 'in trade or commerce'. This is a key term. It was defined in *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* in the following terms:

> the terms 'trade' and 'commerce' are ordinary terms which describe all the mutual communings, the negotiations verbal and by correspondence, the bargain, the transport, and the delivery which comprised commercial arrangements ... the word 'trade' is

40 *Brown v. Jam Factory Pty Ltd* (1981) 53 FLR 340 at 348.

41 Of course, if damages are sought there will have to be some proof of reliance and detriment.

> used with its accepted English meaning: traffic by way of sale or exchange or commercial dealing.[42]

However, it need not be limited to transactions which are conducted on the open market. In the same case, Deane J said:

> [the terms 'trade' and 'commerce'] are not restricted to dealings or communications which can properly be described as being at arms length in the sense that they are within open markets or between strangers or have a dominant objective of profit making. They are apt to include commercial or business dealings in finance between a company and its members which are not within the mainstream of ordinary commercial activities and which, while being commercial in character, are marked by a degree of altruism which is not compatible with a dominant objective of profit making.

The decision in *Concrete Constructions (NSW) Pty Ltd v. Nelson*[43] considered the requirement that the conduct be 'in trade or commerce' in some detail. The case involved an allegation that an incorrect statement by a foreman to an employee constituted conduct in trade or commerce for the purposes of the section. A majority in the High Court — Mason CJ, Deane, Dawson and Gaudron JJ — concluded that the section was not limited by the heading of Part V — Consumer Protection — to limit recovery to those qualifying as consumers. That would "impose an unnaturally constricted meaning upon the words".[44] However, the term does not take in all conduct carried out in the course of, or for the purposes of, a corporation's trading or commercial business. The reference to "*in* trade or commerce" referred "only to conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character".[45]

Negotiations with staff

In *Concrete Constructions*, the representations of the foreman did not constitute conduct in trade or commerce. They were characterised as internal communications between employees. However, it is possible that conduct by an employer to an employee could be characterised as conduct in trade or commerce if it bears a trading or commercial character.[46]

So, for instance, suppose that the Head of a Department of a university indicates to an employee on a limited term (tenurable) level A contract that it is assured

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42 *Supra* n.31 at 139 per Bowen CJ.
43 (1990) 169 CLR 594.
44 *Ibid* at 601 per Mason CJ, Deane, Dawson and Gaudron JJ.
45 *Ibid* at 603 per Mason CJ, Deane, Dawson and Gaudron JJ.
46 *Patrick v. Steel Mains Pty Ltd* [1987] ATPR 40-794, compared with *Wright v. TNT Australia Pty Ltd* (1988) 80 ALR 221, both decided prior to the decision in *Concrete Constructions*; and *Barto v. GPR Management Services Pty Ltd* [1992] ATPR 41-162. See generally B McCabe 'Revisiting Concrete Constructions' (1995) 3 *TPLJ* 161.

that she will obtain tenure at the end of three years. At the end of that period the position is externally advertised and another applicant is given the position, again on a limited term contract. It is possible that a statement by a Head of School to an employee could constitute conduct in trade and commerce, depending on the context. Where the context is the negotiation or renegotiation of an employee's contract, or a statement by an employer or its delegate about the terms and conditions of an employee's employment contract, the conduct is more likely to be considered to be bearing a trading or commercial character. Accordingly, conduct by a corporation in the form of communication between the organisation and its employees, or potential employees, could possibly bear a trading or commercial character, but it is not clear that it will do so. It will depend on the stage of the negotiations.

Promotional Activity

Promotional activity may take on a number of forms. Regardless of the form, however, it is likely that this activity will be in trade or commerce. Promotional activity is also extremely susceptible to the type of conduct prohibited by the Act. For instance, suppose that promotional material about an institution carries an insignia which is extremely similar to a highly regarded university, and the two institutions have strikingly similar names; however there is no specific statement that the institutions are in any way related. This activity is far more likely to be caught by the Act than the provision of course materials which carry the same insignia to students of the institution. Alternatively, suppose a university promotes a course stating that satisfactory completion of the course will entitle the graduate to membership of a professional body and enable the graduate to practise in an area. In fact, the subjects in the course have not been professionally accredited and are not sufficient to enable the graduate to be able to practise in the area. The promotional material is disseminated through television, radio and newspaper advertisement. The distribution of this material is more likely to be caught than the same statement made by a lecturer to a class of students incidentally to the lecture. These activities are perhaps the most straightforward examples of conduct in trade or commerce. They are clearly designed to attract custom, however high-minded the institution attempts to be about the nature of its product.

Information given to students

The activities of the university which relate to the student body may take on a number of forms. For instance, perhaps a lecturer lectures in a subject in which the subject outline, lecture content and examination are substantially different from the subject outline in the institution's handbook. Alternatively, a course co-ordinator give a student incorrect advice about the subjects needed to complete a degree within a certain time. In those cases, it is intuitively difficult to represent the conduct as bearing a trading or commercial character. This may be because of a reluctance to ascribe to the outcome of education the definition of "product" and the process of

education as a "business" bearing a trading or commercial character. These situations bear some resemblence to a communication between a corporation and its shareholders *after* they have become shareholders. It is not clear that it is in trade or commerce. However, this situation is more likely to attract liability than the case of an academic delivering a subject providing incorrect information in a lecture. That conduct does not clearly bear a trading or commercial character. The Federal Court in *Fraser v. NRMA Holdings Ltd*[47] found that a corporation could be liable for incorrect information in a prospectus which was intended to induce people to become members. Similarly, attempts to raise capital from existing members would be likely to bear a trading or commercial character. However, representations made within the relationship, which are not designed to raise capital, may not be considered to be in trade or commerce using the reasoning applied in *Concrete Constructions*. According to McCabe:

> [r]epresentations designed to attract investment are analogous to representations made about the terms of a contract of employment. *Concrete Constructions* makes it clear that conduct that actually takes place *within* the relationship (as opposed to conduct directed towards inducing the other party to establish the relationship in the first place) will not be caught.[48]

However, although the communications of a corporation to its shareholders *as shareholders* during the course of the relationship may not be caught by the Act, communications in some other capacity may be; as, for instance, where a corporation provides services to its members.[49] These authorities support the view that certain promotional activities designed to attract 'custom' may be considered to be in trade and commerce; however, communications with students once they are in the relationship are not to be considered in that light.

In relation to conduct within the university which is clearly in the course of an academic's duty, such as the giving of information in lectures or the setting and marking of assessment, other complications arise from the view that professional persons do not profess a trade, but a calling.[50] Whereas the possibility of resolution of this question has arisen in a number of cases, many of them have involved promotional activities which do not have the character of a typical professional-client relationship. Where some indications may be drawn from the cases, however, they could be interpreted to suggest a distinction between representations made in the course of promotion of professional skills, and representations made as part of the actual provision of advice. McCabe makes this distinction, and illustrates it with an analogy with the situation in a private educational institution:

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47 (1994) 124 ALR 548
48 B McCabe *supra* n.46 at 166
49 *Trade Practices Commission v. Legion Cabs (Trading) Co-operative Society Ltd* (1978) 35 FLR 372
50 B McCabe *supra* n.46 at 170-5

> Where representations are made about the experience or expertise of the teacher or class sizes or some other matter that might induce students to enrol and pay fees, the representations will be conduct in trade or commerce because they are directly relevant to the terms of the commercial relationship between the student and the institution. The relationships bear a trading or commercial character. But where the teacher in the course of teaching the class makes a mistake of fact that misleads the students, the error is not, without more, actionable under s.52. It does not relate to the terms of the pre-existing teacher-student relationship, which is the commercial transaction in question.[51]

Acceptance of students into a course

In the case of conduct in the form of acceptance of a student into a course, it may be that the outcome of such a query will differ with the category of student: for instance, a university which accepts overseas, full-fee paying students accepts a student into an undergraduate course in business when the student has very poor skills in written and spoken English, or alternatively, an institution accepts a student as a Masters student on a full-fee paying or HECS basis, but no supervisor is available with expertise in the area. A supervisor is appointed with no knowledge of the area. Does the section apply in relation to full-fee paying students, but not apply to students enrolled on a HECS basis? Regardless of the category of student, the acceptance of a student into a course is likely to be in trade or commerce; it is not necessary that there be a contract involved.

Commercial Activities

The clearest case of a university engaging in conduct bearing a trading or commercial character occurs where the university is engaged in external contracting; where, for instance, an academic engaged in consultancy work under the auspices of the institution provides incorrect advice to the client. The academic has the permission of the employer to carry out the work, uses the employer's premises, word-processing facilities, administrative staff, library facilities, uses the university stationery in all correspondence, and pays a percentage of the consultancy fee to the university. There is no difficulty about this situation; it is clearly in trade or commerce.

Political Statements

Another situation which will give rise to the problematic reference to trade or commerce may occur where, prior to an election, a political party makes certain promises in relation to funding of the higher education sector. After the election, in which this party is elected, the new government fails to comply with that promise.

This situation is informed by clear authority; in *Union Holdings Pty Ltd v. Kerin*[52]

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51 *Ibid* at 174

52 [1992] ATPR 41-169.

the statement by a minister to the annual conference of the International Wool Textile Organisation that the Australian government would not contemplate a drop in the wool floor price was

> not an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character... It does not form part of the *central conception* of trade or commerce ... and is not made so merely because the speech concerns matters of trade or commerce. The giving of the speech is a matter that can be said to be *in relation to* trade or commerce, but not conduct which is actually *in* trade or commerce.[53]

The situation described here is even less vulnerable to attack than Kerin's statements,[54] since in *Union Holdings* it was argued that the minister was seeking to promote the commercial interests of the Australian Wool Corporation; whereas in this case the statements of the political party were not intended to promote any cause but that of the political party, which could not be said to be even *in relation to* trade or commerce. This is not to say that a statement by a politician can never be in trade or commerce,[55] however there appear to be few circumstances where a politician could be considered to be supporting the interests of a commercial organisation when discussing the tertiary education sector.

The next requirement of s.52 is that the corporation 'engage in conduct'. This term is defined in s.4(2) to include doing or omitting to do any act, giving effect to a provision of a contract or agreement, or arriving at or giving effect to an understanding. This wide definition would take in any of the conduct referred to above.

The conduct must then be shown to be 'misleading or deceptive' or 'likely to mislead or deceive'. The two phrases use the same wording; the inclusion of the second phrase indicates that it is not necessary to establish that any person was *in fact* deceived. Conduct could be said to be 'likely to mislead or deceive' if 'that is a real or not remote chance or possibility, regardless of whether it is less or more than 50 per cent'.[56]

Section 51A may be relevant in some circumstances; s.51A(1) deals with representations with respect to future matters, and says that where a corporation makes such a representation, and it does not have reasonable grounds for making the representation, the representation shall be taken as misleading.

To determine whether conduct will be misleading or deceptive, the approach of the court will depend on the circumstances. If a misrepresentation has been made,

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53 *Ibid* at 40,324.

54 See B McCabe *supra* n.46 at 168-9.

55 See *Australian Federation of Consumer Organisations Inc v. Tobacco Institute of Australia Ltd* (1992) 111 ALR 61; *Meadow Gem Pty Ltd v. ANZ Executors & Trustee Co Ltd* [1994] ATPR (Digest) 46-130; *Lauren v. Jolly* (Unreported) Supreme Court, Victoria, Beach J, 28 April 1992; see generally B McCabe *supra* n.46 at 168-9.

56 *Global Sportsman Pty Ltd v. Mirror Newspapers Ltd* (1984) 2 FCR 82 at 87, referred to in RV Miller *supra* n.10 at 221.

as in some of the situations above, it will be considered to be conduct which will 'lead into error'.[57] So, for instance, where a course co-ordinator give a student incorrect advice about the subjects needed to complete a degree within a certain time, there is a clear misrepresentation and there is no need for further analysis. If there has been no express misrepresentation, for instance, where the similar insignia may mislead but is not positively stating a link between the two institutions, the conduct will be considered according to the test in *Taco Co of Australia v. Taco Bell Pty Ltd*:[58]

- The relevant section of the public must be identified.
- The matter must be considered by reference to all people who come within that section of the public including the astute and the gullible, the intelligent and the not so intelligent, the well educated and the poorly educated.
- Evidence that some person has in fact formed an erroneous conclusion, while not conclusive of the fact that the conduct is misleading or deceptive, may be persuasive. Such evidence is not essential.
- It is necessary to inquire why the misconception has arisen. This is because it is only by such an inquiry that the evidence of those shown to have been led into error can be evaluated to determine whether they were confused by misleading conduct of the respondent.[59]

So, for instance, in an analysis of the situation involving similar insignia above, the relevant audience would be prospective students and their parents, and possibly employers and institutions interested in providing sponsorship. It will also include other universities, corporate bodies, stakeholders, employees of the University, and so on. Whereas other universities would be likely to know the difference between the two institutions, prospective students may be misled by the similarity, having a degree of ignorance about the tertiary system and the institutions in that system. Whether the promotion would be misleading or deceptive to that audience would depend upon the degree of similarity between the representations in the promotional material and the material of the other institution.

The acceptance of a student into a course will give rise to a number of implied representations: that the student has the language skills to give the student a chance to complete the course, and that institution will provide support services to the student, and that staff will be sufficiently trained to deal with the particular problems of the student. Section 51A of the Act will give interpretive aid where a student is advised that assistance will be available when it is not. According to Considine, '[t]he universities are marketing and promoting a product. It is their responsibility to not only advise potential students, and the general public if appropriate, but more

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57 *Parkdale Custom Built Furniture Pty Ltd v. Puxu Pty Ltd* (1982) 149 CLR 191 at 198 per Gibbs CJ.
58 (1982) 42 ALR 177.
59 RV Miller *supra* n.10 at 220.

importantly, to implement and maintain a system of compliance with these principles.'[60] Considine also refers to a general perception that this is an area in which problems are likely to occur. Referring to the 'hard-sell recruiting' of overseas students, he quotes a participant as indicating that *'In my experience, second-hand car salesman are models of good practice when contrasted with the representatives of some UK universities and polytechnics'*.[61]

Acceptance of students where there are no resources to service them gives rise to the same considerations. If an institution accepts a student into a Masters course, there is an implied promise that adequate resources in the form of staff expertise will be available to support that student. A similar situation may occur where a tertiary institution offers a subject to a class with very high student numbers when there are insufficient library facilities to satisfactorily support the students. There is an implied promise upon recruiting the student that there will be sufficient library facilities. There is no requirement that the student relied upon the representation, or that the representation caused damage to the student. The conduct — recruiting or accepting the student — in circumstances where the facilities were manifestly inadequate, may be considered misleading.

Section 52 does not, of itself, create liability; the consequences of breach of the section are contained elsewhere in the Act.[62] In particular, s.82 provides the basis for civil liability under the section. This section provides that a person who has suffered loss or damage by conduct of a corporation which is in breach of a Part V provision may recover the amount of the loss or damage. Although s.52 provides for wide-ranging liability, then, s.82 limits the amount for which the corporation can be liable to the loss actually suffered. The applicant must also prove that the loss or damage was "by" the conduct of the corporation; this "clearly expresses the notion of causation without defining or elucidating it".[63] Thus, it is necessary to show some reliance by the applicant on the conduct of the corporation if the applicant is to recover damages.

This may be relatively easily proved where the statement of a course co-ordinator has resulted in a student having to be enrolled for another semester or another year and thus incuring additional fees. It may also be relatively easy to prove where a student has enrolled in the course on the basis that its completion will fulfil the requirements of a professional body. In that case the measure of damages might be the cost of completion of further subjects in order to satisfy the requirements of the body. It would also, arguably, be a sustainable argument that a student with insufficient skills who has been enrolled in a course might be able to recover the fees paid. Similarly, a student who enrolled in a course on the basis that it would contain the

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60 D Considine *supra* n.4 at 38.

61 J Belcher, International Students Officer at Queen Mary College, London; quoted in D Walker, 'Hard-sell Recruiting by British Universities Assailed' (1985) 30 *Chronicle of Higher Education* 39; quoted in Considine *supra* n.4 at 38.

62 See generally *Brown v. Jam Factory Pty Ltd* (1981) 53 FLR 340 at 348.

63 *Wardley Australia Ltd v. Western Australia* (1992) 175 CLR 514 at 525 per Mason CJ.

advertised subject-matter may recover the cost of the course. In all of these cases it may be argued that the student has also incurred costs relating to texts, living expenses, and so on which are attributable to the conduct of the defendant.

It is less simply proved where a student is enrolled in a course where there are inadequate library facilities, or inadequate supervision. A student's results are affected by such a range of factors that the causal link between the conduct of the defendant and the damage to the student is tenuous. Perhaps if the student could show that he or she would have accepted an offer at another institution if the truth of the matter was known the amount of damages would be measurable as the expenses incurred by continuation of the course and, perhaps, for lost opportunity;[64] however, it is difficult to translate the principles relating to commercial transactions to the market for university places.

The Act also provides for injunctive relief, corrective advertising, and other orders as the court thinks appropriate. From the point of view of the university, the more effective security against non-compliance is the publicity which would attach to a successful claim.

(b) False and Misleading Representations

Section 53 is a less general provision than s.52, and can attract criminal as well as civil liability. It will cover conduct which is also caught by s.52. It contains eleven subsections, most of which are inappropriate to consider here. However, there are some which are particularly relevant.

Section 53 says that:

> A corporation shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services or in connexion with the promotion by any means of the supply or use of goods or services –
>
> ...
>
> (aa) falsely represent that services are of a particular standard, quality, value or grade.
>
> ...
>
> (c) represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;
>
> ...
>
> (d) represent that the corporation has a sponsorship, approval or affiliation it does not have;
>
> ...
>
> (f) make a false or misleading representation concerning the need for any goods or services;

The term false has been interpreted to mean 'contrary to fact'.[65] 'Supply' is defined inclusively; in relation to goods it includes supply by way of sale, exchange,

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64 *Sellars v. Adelaide Petroleum NL* (1994) 179 CLR 332.

65 *Given v. CV Holland (Holdings) Pty Ltd* (1977) 29 FLR 212 at 217.

lease, hire or hire-purchase. In relation to services it includes supply by provision, grant or conferral.[66] It is not necessary that the goods or services have actually been supplied, since the section covers the possible supply of goods or services. 'Services' is defined widely and inclusively in s.4 to cover 'the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under — (a) a contract for or in relation to — ... (ii) the provision of, or the use or enjoyment of facilities for, ... instruction'. A representation may be active or passive, and may arise from statements made or by implication from conduct.[67]

Under s.53(aa) or (f), for instance, promotional material which contained an assertion that a course would give a student qualifications essential to entry into a professional organisation or the right to practise could be an assertion as to 'quality'. The court has accepted the dictionary definition of 'quality' as an 'attribute, property, special feature, the nature, kind or character (of something)'.[68] Section 53(c) and (d) could be breached by an assertion that a course offered by an institution was accredited by a professional organisation.

Section 53 will attract criminal as well as civil consequences. Further, s.53 is a strict liability provision; it is not necessary to prove intention. So if, for instance, accreditation had lapsed and the promotional material was released without the knowledge of the lapse, the liability would still attach.

(c) Section 55A

Section 55A says that 'A corporation shall not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any services.' There is significant overlap between this provision and ss.52 and 53. The major distinction is that s.55A applies to conduct liable to mislead the public. It would generally apply to promotional material or public statements. This may be relevant where, for instance a lecturer lectures in a subject in which the subject outline, lecture content and examination are substantially different from the subject outline in the institution's handbook. The representations contained in the handbook (rather than the conduct of the lecturer, which would not be in trade or commerce) would be caught by the section. The section may also apply to the statements in promotional material relating to the professional accreditation of the course.

(d) Section 51AA

Section 51AA of the Act says that 'a corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories'. This section applies the concepts

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66 Section 4 of the Act.
67 *Gwen v. Pryor* (1979) 39 FLR 437 at 441.
68 *Supra* n.65 at 216.

of unconscionable conduct from the common law and from equitable principles recognised by the Courts. The types of principles involved would include those given expression in *Blomley v. Ryan*[69] and *Commercial Bank of Australia Ltd v. Amadio*[70].

(e) Section 51AB

Section 51AB says that 'a corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable'. The section goes on to list the matters to which the Court may have regard in determining whether the conduct of the corporation contravenes the section. The matters to be considered include the relative bargaining strengths of the parties, whether the conditions with which the consumer was obliged to comply were reasonably necessary for the protection of the corporation, whether the consumer was able to understand any documents relating to the supply, whether undue influence or pressure was exerted on the consumer or whether unfair tactics were employed, and the amount for which and the circumstances under which the consumer could have acquired identical or equivalent goods or services from another person. Given the highly regulated environment in which higher education is conducted in Australia, it is difficult to see how ss.51 AA or 51AB could apply to universities, although the marketing of universities to overseas students is a possible difficulty. It is possible that the provision of accommodation services to students may fall within these sections, and the licence agreements between the students and the university should, perhaps, be scrutinised.

(f) Implied terms and conditions

Further liability may arise under provisions which imply terms and conditions into consumer transactions. The sections in Division 2 of the Act impose "by force of statute and regardless of the wishes of the parties, additional contractual terms".[71] Accordingly, the operation of the section requires the prior existence of a contract, and an applicant wishing to enforce the terms of the Act will do so on the basis of the contract.

In particular, s.74 (1) says:

> 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.

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69 (1956) 99 CLR 362.
70 (1983) 151 CLR 447.
71 *E v. Australian Red Cross Society supra* n.13 at 352 (Federal Court) per Wilcox J.

Section 74(2) extends the protection of the section to consumers who expressly or impliedly make known that the services are required for a particular purpose, or that there is a particular result that the services are required to achieve. In those circumstances there is an implied warranty that the services supplied under the contract will be reasonably fit for that purpose or are of such a nature and quality that they might reasonably be expected to achieve that result.

There is some difficulty in the determination of the question of whether the educational services provided by a university are provided pursuant to a contract. Some circumstances are clearer than others; full-fee paying students appear to be a clearer case of contract than those students paying on a HECS basis, where consideration is not clear. *E v. Australian Red Cross Society* does not really assist in this case, since in *E* the applicant entered the hospital as a private, fee-paying patient, and a contract was thus said to exist. Cases do not clearly indicate whether the arrangement between the student and the university is contractual, or whether the students are corporators; some cases appear to suggest that the university owes a statutory duty to students.Some commentators consider that "[t]he legal relationship of a University with its members is much more suitably governed by the ordinary law of contract and by ordinary contractual remedies".[72] Similarly, DC Holland considers that the relationship is governed by contract.[73] It is certainly clear that some universities' relationship with their students may be contractual as a consequence of the foundation instrument. However, most universities appear to be founded on the basis that the students will become corporators, with the consequence that they bring themselves within the range of by-laws enacted by the corporation in the exercise of powers given to them by the foundation statute. In the absence of clear judicial authority, it would appear that in the case of students enrolled on a HECS basis there is no clear contract for the provision of educational services. In relation to other services provided by a university, for instance, consultancy services, there will have been a contract. Problems will arise in this context, however, because the other party to the contract may not be a consumer. Accommodation and other services provided by the university will clearly be provided on a contractual basis and will attract the operation of the Act.

"Supply", used in relation to services, is defined in s.4 to include "to provide, grant and confer", and when used as a noun is to have a corresponding meaning. Section 4C elaborates this definition and makes it clear that a reference to supply of services includes an agreement to supply services. *Castlemaine Tooheys Ltd v. Williams and Hodgson Transport Pty Ltd*[74] said that "supply" is a word of wide import and neither s.4C nor the definition in s.4 require any restrictive interpretation

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72 H.W.R. Wade 'Judicial Control of Universities' (1969) 85 *LQR* 468, 471.

73 DC Holland, 'The Student and the Law' (1969) 22 *Current Legal Problems*, at 70, quoted in JW Bridge 'Keeping Peace in the Universities: the Role of the Visitor' (1970) 86 *LQR* 531, 548.

74 (1985) 7 FCR 509 at 532 per Lockhart J.

of the term. "Corporation" is to be considered as it is under s.52; that is, as a foreign, trading or financial corporation. As indicated above, the definition of 'services' under s.4 includes the provision of or the use or enjoyment of facilities for instruction.

The requirement that the services be supplied "in the course of business" is also likely to lead to some disquiet in this context. Section 4 of the Act defines "business" to include a business not carried on for profit. *E v. Australian Red Cross Society* may provide an analogy. In that case Wilcox J said:

> Then it is said that the nursing services were not supplied "in the course of a business". The argument is that these words, like "in trade and commerce", do not extend to all activities in which a trading corporation may be engaged. ... The present issue concerns an "external" dealing, between a corporation and its customer. In *Nelson*, Mason CJ, Deane, Dawson and Gaudron JJ said (at 602-604) that s.52 of the *Trade Practices Act* is concerned with "the conduct of a corporation towards persons, be they consumers or not, with whom it ... has or may have dealings in the course of those activities or transactions which, or their nature, bear a trading or commercial character". The "trade" of a hospital is the provision of services to patients. That is its business. I see no reason to doubt that its contract with the applicant was made "in the course of business".[75]

In a similar manner it may be argued that the "trade" of an educational institution is the provision of educational services, and that these services are being provided to a customer in an "external" dealing. It could be said that they are provided in the course of a business. No difficulty arises in the case of consultancy work.

Moreover, some question will arise as to whether a student is a consumer under the definition of the Act. Under s.4B(1)(b) of the Act:

> a person shall be taken to have acquired particular services as a consumer if, and only if—
> (i) the price of the services did not exceed the prescribed amount; or
> (ii) where that price exceeded the prescribed amount — the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

Section 4B(2) sets the prescribed amount at $40,000 and the price is to be taken as the amount paid or payable by the person for the services.

In *E v. Australian Red Cross Society*[76] Wilcox J said that he could see no reason why a hospital patient who receives nursing services in return for the payment of fees should not be regarded as a consumer.

There is a remaining question; that is, whether a university, if it is an emanation of the crown, is entitled to immunity from contract. Hogg suggests that because the statutes do not apply by their own force, but rather by virtue of the contract, the Crown can be bound, and moreover, in the context of contracts with emanations of

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75 *Supra* n.13 at 355.
76 *Supra* n.13.

the Crown in right of a State, no constitutional issue is presented.[77] However, he says that:

> [a]s a rather recent device for applying statute law to the Crown, the doctrine of the implied term is still highly uncertain. But it has the potential to expose the Crown to a considerable body of statute law. If it became established that the Crown as contractor always implicitly agrees to be bound by all statutes that would bind a private contractor in the same circumstances, this would come close to removing the commercial activities of the Crown from the presumption of immunity.[78]

The traditional position may have limited the liability of the Crown in contract, however, previous immunities have been eroded to the extent that the ability of the Crown to avoid a suit in contract is questionable in some jurisdictions and out of the question in others. Accordingly, even if the universities could successfully claim that they were manifestations of the crown, an attempt to resist liability through crown immunity would be unsuccessful. Seddon says that, "[g]enerally speaking, Australia has pursued a more egalitarian path than have comparable countries ... As a consequence many of the immunities and privileges which exist in those countries have disappeared in Australia".[79] In particular, Australian jurisdictions have statutorily abolished crown immunity from suit on the contract.[80]

Aside from the remaining question — whether students enrolled on a HECS basis have a contract with the university for educational services — there seems to be no reason why services provided by a university to a student should not be affected by the implied term that the services are fit for the purpose for which they are acquired.

5. Conclusion

It is clear that there is a wide range of potential liability under the *Trade Practices Act* 1974 (Cth) and the *Fair Trading Act* 1985 (Vic). The level of appreciation of potential liability is possibly a little low. Considine says:

> Every employee of the university is a delegate for the university for some purposes, whether advising, enrolling, teaching or supervising students, or buying chalk. In doing these things, employees are acting for, and therefore binding, their university (subject

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77 PW Hogg *supra* n.7. Hogg cites Canadian authorities in support of this possibility: *Bank of Montreal v. Attorney General of Quebec* [1979] 1 SCR 565; *The Queen v. RL Belleau* [1986] 1 FC 393 (TD).

78 PW Hogg *supra* n.7 at 220.

79 N Seddon *supra* n.18 at 114.

80 *Judiciary Act* 1903 (Cth) s.64, *Crown Proceedings Act* 1992 (ACT), *Crown Proceedings Act* 1988 (NSW), *Crown Proceedings Act* 1993 (NT), *Crown Proceedings Act* 1980 (Qld), *Crown Proceedings Act* 1992 (SA), *Supreme Court Civil Procedure Act* 1932 (Tas) Pt VI, *Crown Proceedings Act* 1958 (Vic), *Crown Suits Act* 1947 (WA); See generally N Seddon *ibid.*

to some legal qualifications). Legally, then, every employee is a potential 'loose cannon on the deck'.[81]

There has been a flurry of activity on this point since the Part IV provisions of the Act were clearly applied to state instrumentalities, and the possibility of Part V application was discovered. However, the situation in relation to Part V has not really changed.

The appropriateness of this type of potential liability is another question; the general movement away from a collegiate approach to learning, where the student was not regarded as a consumer of a product, seems counter-productive, and liability under consumer protection legislation does not appear to have been intended. That, however, is outside the scope of this paper.

As a general comment, however, it is clear that it is not possible to make a general comment about the liability of educational institutions under the Act. The range of possible transactions will lead to different conclusions because a university's business does not have a commercial or trading character, but the activities of a university include a number of commercial or trading activities.

81 D Considine *supra* n.4 at 36.