Liability of the University in Negligence

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Abstract

The liability of a university for the negligent instruction of students has traditionally been limited by the reluctance of the courts to intervene in internal matters, and particularly in purely academic matters, and the availability of other mechanisms for dispute resolution, notably the jurisdiction of the visitor. This thesis considers these traditional constraints and argues that the changing environment in which the university functions requires a change in approach to the analysis of the liability of universities for negligent instruction. It considers the university systems in Australia and the United Kingdom and, to a lesser extent, the United States, and argues that increasing governmental involvement in the university system could give the university the status of a quasi-governmental organisation. The level of governmental control invites a negligence analysis appropriate to a public body, but that analysis is not likely to lead to significant differences in the outcome. This thesis details the approaches in Australia and the United Kingdom in the analysis of liability of governmental organisations. It then undertakes an analysis of potential liability in negligence. Considerations peculiar to the university context arise at each stage of a negligence analysis, and this thesis analyses the effect of these matters. However, the number of alternative dispute resolution procedures available to the student are likely to divert actions in negligence to other types of proceeding. There is a significant impact on the negligence analysis through administrative remedies, the jurisdiction of the visitor, and statutory protections afforded to the consumer.
Declaration

This is to certify that

(i) the thesis comprises only my original work except where indicated in the preface,
(ii) due acknowledgement has been made in the text to all other material used,
(iii) the thesis is less than 100,000 words in length, exclusive of tables, maps, bibliographies, appendices and footnotes.

Signed: ..................................................................................................................................................
Preface

This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration. It includes no work submitted for other qualifications and no work carried out prior to candidature. The information contained herein is derived from reported and unreported judgments, primarily of the Australian, English, American courts, from published law reviews, law texts and government reports, and from some unpublished theses. The analysis in chapter six of the application of common law public remedies to universities was inspired by the work of Michael Sinclair (M D Sinclair, Common Law Constraints in Public and Private Law over the Exercise of Privatised Functions (PhD thesis, University of Cambridge, 1994)).

The law is as stated in October 2000.
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1. Introduction

In *Fennell v Australian National University*, a student who had undertaken a course in the University claimed that he had been induced by false representations to undertake the course. He instituted proceedings under the *Trade Practices Act 1974* (Cth). In his decision, Sackville J prefaced his remarks by saying '[t]his case might be said to be a by-product of a relatively new phenomenon in Australian tertiary education, namely competition among Universities for full fee-paying graduate students'.

The competitive environment of the university sector evidences a number of other pressures on the individual university - changes in government policy, an increase in the number of universities, successive funding cuts, increasing numbers of students, and rationalisation of courses and teaching programs to reduce costs. These pressures have been reflected in university systems in Australia, the United Kingdom and the United States - the policies which have induced them are, in fact, evident in university systems throughout the world. It is generally thought that such pressures, and the expedients which follow, must result in an increasingly litigious environment.

The aim of this project is to determine the rules applicable to the liability of the university in negligence, emphasising the legal impact of shifts in the external and internal environments of the university upon liability of the university for negligence resulting in a failure of the student to learn. These shifts are dictated by trends in government policy dealing with the university sector, and the motivation for those trends will also be analysed.

The means by which it is proposed to reach this aim are to examine the external regulatory environment in which the university functions, and to identify the way in which that environment has shifted significantly to a position which both allows greater intervention by the government and requires greater responsiveness to certain market mechanisms. The result of this shift is the movement of the university to the ambiguous

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[2] Ibid.
position of a quasi-public body, with potential implications for its common law liability. The external regulatory environment differs from country to country, although there is a common direction to policy change in the university sector across several countries. Accordingly, assessment of the impact of the peculiarities of the university environment will require a comparative analysis of the conditions subsisting in various jurisdictions. It is proposed to consider the public universities in Australia, the United Kingdom and the United States. This analysis will concentrate on these countries, but the issues addressed are common to many of the Western industrialised countries - a movement towards what Slaughter and Leslie term ‘academic capitalism’. The commonality of the issues is indicative of the global environment in which the universities now operate; they are ‘pushed and pulled by the same global forces at work’.4

Something should be said about what is new about the focus of this dissertation. Academic writing about ‘the university and the university sector is copious, and the restructuring of the university sector has been the subject of considerable analysis, particularly by political scientists and economists. Although litigation involving universities is not rare, it has not reached the scale anticipated by those concerned with the litigiousness of consumers. Nevertheless, a great deal has been written about the liability of providers of education in all sectors. A particularly hardy jurisprudence has arisen in the United Kingdom, reflecting a trend which has existed in the United States for some time. The focus on negligence, too, is not new, although this analysis carries the argument rather further. However, this analysis attempts to provide more depth to the universities’ ‘changing environment’ to which reference is frequently made, and to trace the origins of many of the presumptions upon which predictions of increasing litigation are based. It attempts to provide some definition of the university as it now operates, a definition which has not been adequately provided in case law, and draws parallels with the relatively recent dominance of the quasi-public corporation. It also attempts some analysis of the interaction of the various remedies available to aggrieved

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4 Ibid. See also Simon Marginson and Mark Considine, The Enterprise University (2000) 45.
students. Further, although this dissertation considers the law in the United Kingdom and the United States, it concentrates particularly on the position in Australia. A comprehensive study on liability of universities for negligence causing harm to students has not occurred in the Australian jurisdictions.

Although reference will be made to private universities, this analysis will concentrate on public universities for two reasons: firstly, in Australia and the United Kingdom there is little in the way of an independent private sector. Whereas the United States has a developed private sector, 'it serves only 20 percent of all students and only a relatively small number of private universities are heavily involved in the research enterprise.' Secondly, the liability of private universities in negligence is relatively straightforward. The interesting issues arise in relation to the changes in the environment of public sector universities.

There is a substantial amount of interesting material which could not be considered in this dissertation. In particular, the universities’ liability for the negligent acts of third parties, particularly student organisations or residences, alcohol liability, non-delegable duties and the liability of the university for injuries occurring on campus could have been considered as part of a general exposition of the universities’ liability in negligence. Only an attenuated account of the liability of the university arising as a result of governance activities relating to corporate bodies could be considered. The dissertation was unable, also, to do justice to the administrative remedies available to students against universities. However, the scope of this analysis necessitated confinement of the issues to those involving liability for negligence resulting in failure to learn. This is justifiable insofar as it raises the most insistent questions and policy reservations, and insofar as it concerns the core business of the university.

Chapter two of this analysis contains an account of the legislative environment in which Australian universities function, and a comparison of that environment with those subsisting in other relevant common law jurisdictions. The legislation affecting the

\[\text{Slaughter and Leslie, above n 3, 12.}\]
modern university includes specific legislation establishing each university, and more general legislation affecting the governance of universities, including legislation creating the external bodies administering the university sector and dealing with the funding of the university sector. The legislation creates an administrative environment which has also been considered in this part. This part of the analysis addresses the way in which the legislative and administrative environments of the universities have altered in response to an annexure by the state of the universities to the economic interests of the state. These movements have been illustrated or orchestrated by a succession of government enquiries into the university sector in various countries.

Chapter three seeks to establish the characteristics of the university in terms of the internal structure of the university, and to assess the way in which the internal structure is altering in response to the demands imposed by the external environment. The way in which the university thinks of itself demonstrates an increasing tendency to attach the concepts governing relationships in private industry. The internal environment of the university differs from university to university. Accordingly, assessment of the impact of the internal environment will require some analysis of the different means by which universities are created and administered. This chapter contains a detailed account of the internal structure of Australian universities, and an account of the growing trend towards 'managerialism' and its effects. It also contains an analysis of the relationship between the university and its students, and the way in which this relationship is increasingly characterised as one based on contract. These internal structures and relationships are affected by the change in the external environment of the university, as the organisation takes to itself the goals imposed by the state and upon which funding is premised.

Chapter four considers the statutory origin of the modern university, and the argument that the involvement of the state in the creation and management of the university suggests the application of sovereign immunity to the university. It then considers the impact of the statutory origin of the university in determining whether a university owes a duty of care to a student, particularly in relation to a novel claim.
Chapter five assesses the role and operation of the law of negligence in the university sector, in the light of the external and internal structures governing the operation of the modern university. This account of the potential liability of the university will commence with a short explication of the judicial approach to cases involving educational negligence in Australia, the United Kingdom and the United States. Commentary and cases, particularly in the United States jurisdictions, demonstrate difficulties attaching to attributing liability to the university under each of the three constituent factors in an action in negligence - establishing that a duty of care exists, establishing the standard of care and identifying a breach, and establishing that some compensable damage has occurred and has been caused by the breach. Each of these factors will be considered, with particular emphasis on the public policy considerations attaching to the extension of liability into the area of educational negligence.

This part of this analysis assesses the role and operation of the law of negligence in a structure such as the modern university, with strong external influences limiting the range of internal decisions, and with a structure based upon ancient principles and in which internal dispute resolution is typical. It addresses the potential impact of the statutory context of the university, and the state-sanctioned commercialism of the modern environment, on the common law liability of the university.

Chapter six continues the assessment of the role and operation of the law of negligence by comparing the other remedies available to the student against the institution in the type of case which could attract a negligence action. In particular, it considers the possibility of contractual remedies, and the interaction between the contract and the action in tort. It also considers remedies available in administrative law and those arising as a result of the application of consumer protection statutes to universities. It addresses the traditional insulation of the university from judicial scrutiny in many of its decisions through the institution of the visitor and the reluctance of the court to adjudicate in decisions involving academic expertise.

It will not be possible in this study to add a great deal to the copious writing on the nature of the university. This is not because it is a barren study, nor even because it is
not relevant. The idea of the university addresses different concerns depending on the context of the enquiry. This study addresses almost exclusively the legal idea of the university. Happily, it is the case in Australia, England and the United States that a university is generally definable by reference to the attributes specified by regulatory bodies. This provides some definition to an otherwise indefinable reference group. It is proposed, however, to provide some context to the characteristics imposed by regulatory bodies in this introductory passage.

The purpose of this introductory caveat is a recognition of the myriad ideas of the university, and the value of these ideas to any critical reflection on the functions of the modern university. Since it is proposed to evaluate some of the effects of the changes to the environment of the modern university, it is necessary to check the natural tendency towards nostalgia by recognising that there are multiple understandings of the university, and that none has the normative force of exclusivity in the concept.

It is also necessary to recognise the degree to which the law responds to the social and political realities which create the modern university. There is an interesting relationship between these two social institutions; the law hardly knows the university. Subject to internal governance and dispute resolution in many cases, and in any event hardly participating in the indiscriminate litigation of recent times, the university has not been recreated in law with the same speed with which it has been recreated politically. The past is very important for the law, and for that reason some historical context must be provided to this study. Thus, the preoccupation - particularly in chapter two - with historical, social and political considerations is natural.

The central theme of this dissertation is an account of the applicability of principles relating to government bodies to the university. Chapter 2 echoes familiar arguments that the university sector is increasingly regulated by government, even though this regulation may take the form of compulsory private enterprise. This trend towards simultaneous loss of autonomy to the state and to the market is evident in a number of university systems. It is generally conceded that this trend is the result of forces external to the university, but it is also apparent that universities have collaborated in the shift to
a certain extent by the adoption of economic goals and the language of the market to describe those goals, and by the means employed to pursue those goals. It is also frequently asserted that these changes in the functions of the university somehow argue with the definitive nature of the university. However, as chapter two suggests, there is no one meaning of the university, historically or in law, and the single accepted aspect of the institution - that it is subject to constraints upon its operation by the regulatory structure within which it operates and the funding constraints of the state – suggests that to render unto the state that which belongs to it is not an unjustifiable position. The constraints of that position upon the modern university leaves it subject to the modern trends in higher education: the massification of the sector, the creation of a university system, the ‘user pays’ principle, the acknowledged economic role of higher education in the economy, and the impact of globalisation.

Nevertheless, the new pressures are being exerted on extant structures, and the adaptation of those structures to their new tasks gives rise to many of the ambiguities in their legal position. The restructuring of significant relationships within the university is the first premise upon which this thesis is based. Firstly, the creation of a new management paradigm to enable the university to respond to the market has been effected without alteration of other significant structures within the university. The foundation instrument and the form of the older universities have not been entirely changed. Rather, they have been re-employed to other ends. Secondly, the relationship between the university and its students has not been remodelled in the older universities.

Rather, analyses of the relationship which are more convenient to the commercial premise have been employed. It is my thesis that both of these expedients have an impact on potential litigation. The use of commercial management structures to pursue commercial ends invites the strategic commercial use of litigation. The university, involving itself in commercial enterprises, is not entirely adapted to the commercial enterprise, and the awkwardness of collegiate decision-making and committee-based accountability may translate into the liability of members of those committees where tortious actions or breaches of contract occur. The use of the contractual designation to describe the student-university relationship ignores the lack of definition of contractual terms and the difficulty in effectively controlling the university’s exposure to liability by
control of the contractual process. Both sets of relationships lead to the issue of concurrent liability in contract and tort. The state-mandated shift towards commercialism is responsible for both trends.

The relationship between the university and the state is also the foundation of the issues arising in chapter four. The question of sovereign immunity would not arise in the absence of such a link, and the question of the application of the principles of negligence to a statutory authority in a novel claim arise because of the statutory foundation of the modern university. This discussion requires some differentiation between the position in the Australian, United Kingdom and United States jurisdictions. The origin and justifications of the policy/operational distinction, and their application to the university, suggest that in the cases in which a negligence analysis could be used to impugn the decisions of a university the distinction could be applied. However, the existence of more appropriate mechanisms for review of those decisions and the reluctance of the court to review purely academic decisions have made the cases in this area rare. Nevertheless, where the threshold test of justiciability has been satisfied, the principles applicable to the university are basically the same as those applied to private individuals. Some question arises in relation to the duty to exercise discretionary powers, but this analysis concludes that the principles derived from *Council of the Shire of Sutherland v Heyman* and *Crimmins v Stevedoring Industry Finance Committee* apply to such decisions of a university.

Chapter five pursues this theme in relation to the elements of an action in negligence, concentrating in particular on the public policy considerations which may apply to finding that a duty of care is owed by a university to a student to ensure that there is no failure to learn. In particular, the policy constraints which have been employed in the United States to limit the liability of educational institutions for 'educational malpractice' are considered in the context of modern English decisions involving

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educational authorities, particularly *X (Minors) v Bedfordshire County Council*\(^8\) and *Phelps v Hillingdon London Borough Council*\(^9\) and in the context of the factors relevant to the existence of a duty of care in Australia discussed, in particular, in *Perre v Apand Pty Ltd.*\(^10\) Many of the policy considerations applied by the courts in the United States are peculiar to the statutory context of the school or university, but are given a lukewarm reception in the United Kingdom and, probably, in Australia. However, the reluctance of the courts to adjudicate in issues of academic or pastoral judgment has been reiterated in recent cases.\(^11\)

The place of the university in the state is also significant for much of chapter six, which considers the application of public law remedies to the university and the justifiability thereof. The predominance of public law mechanisms over private law procedures in cases in the United Kingdom and, to an extent, Australia, bears explanation in its own right in view of the increasingly private legal forms employed by the university. It is also significant in an account of the liability of the university in negligence, since public law provides an alternative procedure which has an impact on an action in negligence by providing a more appropriate remedy and, perhaps, as a countervailing factor in determining that a duty of care should be owed. The remainder of chapter six contains an analysis of other potential remedies, particularly statute based consumer remedies.

The concluding chapter, chapter seven, draws together the threads of the various chapters to consider whether it is realistic to expect the action in negligence to develop as a dominant mechanism for providing relief or recovery to the university student for failure to learn.

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\(^8\) [1995] 2 AC 633.


\(^11\) See *Clark v University of Lincolnshire and Humberside* [2000] 3 All ER 752.
2. The External Environment of the University

With universities developing from religious roots in the 11th century, the question of state control did not arise. Truth was of God - control and management were processes that were subjugated to Truth, not part of its determination.¹

The fundamental shifts which have changed the way in which the university is viewed by society and the way in which the university considers and talks about itself are motivated partly by a state interest in the university sector, rather than by a spontaneous, untaught conversion by the universities themselves. The justifications for the shift from a state-centred to a (state-sanctioned) market-driven system of university education have three common themes: the application of new institutional economics and new public management theory to the universities,² resulting in the privatization of the concept of tertiary education; the necessity to broaden the traditional model of the university to meet contemporary economic and social needs;³ and the need for fiscal restraint.⁴

The impact on the university has been to effect two simultaneous but apparently conflicting shifts: the university has had to become more market-oriented and responsive to a ‘clientele’, and has also had to concede a loss of autonomy to the state.

Kelsey identifies the ‘remarkable congruity’⁵ in changes to tertiary education policies across many countries. She says that this ‘reflects a coherent policy agenda which is


³ Ibid 52.

⁴ Ibid.

promoted through interlocking networks of international actors and agencies, which cross-fertilize with the officials, politicians, entrepreneurs and commentators who influence policy at the national level.'\(^6\) She attributes this congruity to the influence of the World Bank, and its assertion of 'self-evident truths', all tending to user-charges and student loans, private provision of education and redistribution of savings to more socially profitable education at junior levels.\(^7\)

The convergence of policy directions across different university systems has been assisted by the failure of universities effectively to contribute to the policy debate. The way in which the state has steered these shifts in the university self-concept and has legitimated the shift by processes of consultation and negotiation - often occurring after the relevant decisions have been made - has resulted in a confusion significant enough to be referred to as a 'crisis of confidence' within universities.\(^8\) The impotence of the university academic to frame a response to this crisis is part of the problem. The lost ability to articulate the sense of value for the university as many academics conceive it has meant that the argument could not be effectively framed in the public sphere: the university was unable to respond to the government arguments.

This is a cultural phenomenon, a quite general conceptual loss, and has little to do with individual failings of character or intelligence. The concepts we need are beyond our reach in the way that we capture when we say that a form of speaking has gone dead on us. Thus, for example, the spread of managerial Newspeak was facilitated by the replacement of the idea of academic life as a vocation with the idea of it as a profession. At a certain point the concept of a vocation became as anachronistic as the concept of virtue.\(^9\)

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\(^6\) Kelsey, above n 2, 53.

\(^7\) Ibid 54.

\(^8\) Stewart Sutherland, 'Universities: Crisis of Confidence or Identity' Robert Menzies Oration, University of Melbourne, August 1996.

This point parallels one made at length in relation to the internal influences on the nature of the university; just as the language of accountancy has remodeled the significant relationships within the university, the language of management has altered the public face of the university.

The confusion also attaches to attempts to remodel significant relationships within the university, which have been preserved in their original language and designation in university statutes, in much of the university documentation, and in the institutional memory, but which now appear to be inappropriate usages in the context of new ways of talking about the university. The idea of the university as an autonomous organisation with a membership frequently (although more recently) including undergraduate students has become more and more inappropriate in the face of reiterated demands that the student be considered and dealt with as a client. Other relationships within the organisation have been affected by this shift. The desire to conceptualise the complex student university relationship as an economic transaction has reduced the student residence arrangements to lease or licence arrangements which are more conceptually manageable, but which leave traditional obligations of pastoral care with ambiguous status. The relationship between the university and the student unions on campus, not being transmutable to an economic transaction, has in many cases been legislatively circumscribed to one of supervision and control on the part of the university to ensure that the relationship between the student union and the student is definable in terms of an economic transaction and regulated by the language of accountancy.

The other change bound up with this process of steering towards almost exclusively economic goals has been an alteration in the way in which the university interacts with the state. The autonomous university has been replaced by a university 'system' with the consequence that co-operative planning of higher education is possible. The demise of the self-governing university has been prompted by the exertion of financial

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pressure on the university sector which has, by a process of compliance with guidelines upon which funding is contingent, resulted in a closer attachment of the university to the state in all but structure. The university has, in public consciousness, moved from the position of autonomous institution to one more analogous to a privatised utility. Some newer universities in the United Kingdom, indeed, were never free from a high level of government involvement and scrutiny.

To a certain extent the university sector is resistant to change. Not on its face, for it does appear to have absorbed an enormous shift in policy over the last fifty years. However, the deeper traditions and self-knowledge of the university sector have not kept pace.

The study of higher education policy is taken up with explaining and understanding what is, and with analysing the impact that policy-driven change and adjustment in selected dimensions of the enterprise have upon others closely related to them: access, finance, structural change, management, etc. ...[Yet] higher education remains an institution one of whose outstanding features is an immense and omnipresent organisational memory - a feature shared by few other social institutions, with the obvious exception of the churches, the law courts and the legislature.11

How much more pervasive the effect of this organisational memory when considered by reference to another of the institutions of immense organisational memory - the courts? The effect of modern change on the university's liability for common law negligence must be critically affected by the mismatch between historical structure and modern developments. Neave and Van Vught suggest that there are a number of consequences of this 'institutional memory':

- present practices are shaped by previous rationalities;

• the power of institutional memory forms the bedrock on which concepts of academic autonomy rest;
• any institution whose identity and whose structures - whose legitimacy - is historically defined will tend to judge change according to whether it is sympathetic or antipathetic to ensuring continuity in the institution's mission, its responsibilities and its place in society.¹²

However, claims resting on these foundations are inarticulate in the face of new arguments based on 'the gods of technological development', of international competition, of market forces and to the final arrival upon this earth of that New Electronic Jerusalem - the information society, the learning society, or the communication society.'¹³ Privatization will be accompanied by internationalization, ushered in by the neo-liberalism reflected in the policies dominant in the World Bank. 'As with many developments for which human experience provides little precedent, this latter-day technical millennialism brings with it massive hopes, claims, panaceas, in short, visions so vast and all-embracing that one can be sure of one thing - namely their guaranteed disappointment.'¹⁴

Nevertheless, the underlying realities of the university - the relationship between the university and its students, the role taken on by the academic - do not readily change.¹⁵ If the university is no longer what it was, neither is it (yet?) what the state intends it to be. It is submitted that this fundamental shift in the reality of state involvement in the university requires a remodeling of the concept of the university, and a reconsideration of its common law liability in the light of that remodeling. In the course of the

¹² Ibid x.
¹³ Ibid x-xi.
¹⁴ Ibid xi.
¹⁵ The impetus for change in academic work, and the mechanisms by which that change is to be brought about in the light of a 'culture of individualism and academic personal autonomy' were considered by Peter Coaldrake and Lawrence Stedman, Academic Work in the Twenty-first Century (1999) 1.
privatization of the university, the common law of negligence was rarely called upon in the context of the complex of student/university relationships, and the major indication of the impact of the change in that set of relationships in the set of private law remedies available to students was the increasing use of the language of contract to describe the rights and obligations of the relationships.

This thesis is interested in the relevance of the premises of the law of torts to this set of relationships, and the degree to which the presumptions underlying the negligence action are appropriate to this complex - for instance, whether the system of private law rules, including negligence, had been 'infused with the individualistic premises of a self-executing market economy composed of small, competitive units'\textsuperscript{16} and whether its transformation to 'accommodate an increasingly interdependent and organizational society'\textsuperscript{17} could effectively accommodate the new realities of the university, or act in the public interest if it did. It is also interested in the operation of the law of negligence where the tortfeasor is a quasi-governmental corporation, and the public policy arguments which apply to attempts to extend university liability in this context.

An account of the significant shifts in the external environment of the university will involve, firstly, an account of the characteristics which have been judicially accepted as adding to the definition of the university, secondly, the foundations of the university, and thirdly, the legislative, policy and administrative environments of the university. It will show, through this analysis, that there is a significant mismatch between the traditional legal (and social) idea of the university and the modern institution which has grown out of the reforms of successive governments. It is submitted that the modern university is a quasi-governmental authority, sharing many of the features of a privatised utility. It has become commonplace to describe a university as a public body, as a natural consequence of the premise that education is a matter for the state. The state exerts significant regulation over the university sector, so that the functions of the


\textsuperscript{17} Ibid.
university are usually a reflection of the economic and social priorities of the government of the day. The existence of external audit and review bodies which scrutinise the policies and procedures of individual institutions to determine whether funding will be forthcoming, virtual control over the profile and funding of students and strong influence over the profile of staff, the ability to steer research into areas considered to be significant by the state - all indicate an even stronger degree of de-facto than formal control.

The result is an institution with an autonomous corporate structure but a strong dependence upon the state. The apparent autonomy provided by the formal structure of the university makes it deceptively simple to advocate the applicability of rules adapted to individualistic transactions, and to discount public policy arguments which apply to governmental or quasi-governmental bodies. However, the interrelationships between the university and the state suggest that this is a simplistic view.

2.1 The Nature of the University - Definitions and Context

2.1.1 ‘Definitive’ Characteristics of the University

Just as a school has been described as an ‘improvised assemblage’ designed to meet historical contingencies, so that there can be ‘no ruling “idea” of education’,18 there is no ‘idea of the university’ free of historical contingency. There is no real consistency even in one period. ‘Universities have always been like the curate’s egg, different from one faculty to another in ethos, types of subject matter and ways of teaching it, research output, and so on.’19 The ‘debate on the University is made up of divergent and non-contemporaneous discourses, even if one discourse dominates over the others at certain moments.’20 Professor Alan Gilbert, as Vice-Chancellor of The University of


Melbourne, suggests that 'to think there had been a single immutable idea of a
university was poor history and dangerous ideology.' This is as true for definitions in
law as it is for history or philosophy: there is judicial acceptance of the view that the
university is to be defined by reference to the standards of the day. In *St David's
College, Lampeter v Ministry of Education*, a case arising as a result of the refusal of
the Minister of Education to treat the College as a university for the purposes of the
Regulations for State Scholarships and University Supplemental Awards, Vaisey J made
an attempt to define the nature of a university. He said that the word 'university' is
not a word of art; whereas one can usually identify a university when one sees it, it is
not easy to define in precise and accurate language. He conceded that the ancient
universities of Oxford and Cambridge, were undeniably by common consent
universities, and accorded the same status to several others. 'There is no question that
such institutions as the universities of London, Durham, Manchester and so forth, are
universities in the fullest and most proper sense.'

His Lordship appeared to accept the submissions of counsel for the plaintiff that a
university possesses certain essential qualities; firstly, that it must be incorporated by the

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21 Jane Richardson, 'Universities face up to private funds’ revolution’, *The
Australian (Melbourne)*, 23 February 2000, 37.

22 [1951] 1 All ER 559.

23 As Newman says, in Roman Law 'universitas' means a corporation: John
Henry Cardinal Newman, *The Idea of a University* (1925) 20; Adolf
43, part 2, 750: 'A union of persons or a complex of things, treated as a
unit (a whole). As far as a universitas of persons is concerned, the term
is applied by the jurists in the field of both public (persons associated in a
community, civitas, municipia, collegia of a public character), and
private law (private collegia, societates).’ Collegia are defined at 395 as
'[a]ssociations of both private and public character, unions of different
kinds and for different purposes (professional, cultural, charitable,
religious). There were collegia of priests, ... of tradesmen, craftsmen and
workmen, or public officials, clubs for social gatherings, etc. ...they were
permitted to issue statutes concerning their organization, activity, and the
rights and duties of their members’.

24 [1951] 1 All ER 559, 560.
highest authority. This, he considered, was 'the sovereign power, succeeding, no doubt, to the Papal privilege which was exercised in Christendom in the middle ages by the proper, and, indeed, only, body which could incorporate and give authority to a great teaching institution.'

Secondly, 'to be a university, an institution must be open to receive students from any part of the world.' There must be a 'plurality of masters', and it must be an 'institution in which at least one of the higher faculties is taught'. It cannot be a university 'without residents either in its own building or near at hand', and 'it must have power to grant its own degrees'.

One aspect of this case which has not been strongly challenged is the idea that the university is created by the exercise of some sovereign power. It is not sufficient that a body has the attributes of a university, or carries out the functions normally carried out by a university: 'the mere possession of other attributes such as the teaching of at least one of the higher faculties including theology, law, philosophy or medicine, or the right to confer degrees, would not entitle an institution to become a university.' Moreover, merely because the body is created by statute and has the commonly accepted attributes of a university does not necessarily mean that it is a university. This becomes a significant reservation when an attempt is made to identify a university by reference to commonly held perceptions of a university; perceptions of the fundamental

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25 Ibid.
26 Ibid 560-1.
27 It is not clear in which context his Lordship spoke of the 'higher faculties'. They may correspond with the medieval concepts of trivium - grammar, rhetoric and logic - and quadrivium, a course consisting of arithmetic, geometry, astronomy and music. However, different periods may have different understandings; Ramsay and Shorten (below, n 29) speak of it: the 'higher faculties' as including theology, law, philosophy and medicine.
28 [1951] 1 All ER 559, 561.
characteristics of a university are misleading in an era of changing perceptions of the university. In *St David’s College, Lampeter v Ministry of Education*\(^\text{30}\) this reservation was admitted.

I think it is very difficult, when you are dealing with a word of general import like this, to lay down the precise criteria, but I ask myself what the ordinary man would say if he were asked whether this college was a university. I am not referring to the man in the street - a man who, perhaps, has had no university education or no experience of what a university is - but to the ordinary man who does know what a university is or who has received his education at a university.\(^{31}\)

However, this approach is not particularly helpful, and the appropriateness of the distinctions his Lordship draws may be challenged in the modern context, although the case has never been expressly overruled. Many institutions which are permitted to call themselves universities today cannot show that they satisfy the set of criteria required in *St David’s College, Lampeter v Ministry of Education*.\(^{32}\) Many universities, particularly the newer ones, cannot and do not teach the ‘higher faculties’. The residential requirement is no longer as strongly appreciated. Indeed, one of the ‘forces for change’ in higher education in Australia, identified in the discussion paper for the West review, is the digital revolution, which enables students to study at a university without attending the university. It says that the traditional view, that higher education services are best provided on a campus to students residing nearby, will come under increasing

\(^{30}\) [1951] 1 All ER 559.

\(^{31}\) Ibid 561.

\(^{32}\) Farrington says that it is *because* the decision was never expressly overruled that the government decided to put the issue of the post-1992 decision beyond doubt in s.77(4) of the *Further and Higher Education Act* 1992 (UK): ‘... a form of insurance against the remote possibility of legal challenge...’ Lord Strathclyde House of Lords *Official Report* col 1466 12 March 1992. D J Farrington, *The Law of Higher Education* (1998) 13. Section 77 of the Act provides a mechanism by which a higher education institution can acquire the word ‘university’ in its title. This entitles the institution to be treated as a university ‘for all purposes’. 30
scrutiny. New technologies will expand the possibilities for interaction independent of location.33

The symbolic language which communicates the idea of a university as an *alma mater*, ‘as a kind of womb in which the embryo of the social being is brought to fruition before being expelled - that is, born(e) [sic] - into “the world”’34 is not really appropriate where the student is no longer confined to the physical site of the university.

Another way of defining the university is through its functions, or perceived functions. This may be represented by an academic viewpoint, which might assert that universities have essentially three functions: to act as ‘living repositories of accumulated knowledge’, to pass on accumulated knowledge to the younger generation, and to at to human knowledge through research.35 Readings suggests that, having been assigned the dual tasks of research and teaching, ‘respectively the production and inculcation of national self-knowledge’,36 the university ‘becomes the institution charged with watching over the spiritual life of the people of the rational state, reconciling ethnic tradition and statist rationality.’37

This breakdown of functions does not appear to be represented in the funding arrangements for higher education. The confusion in or difficulty of definition may result in more fundamental alterations to ways of thinking and operating; and these changes will have a radical and unwelcome effect on the notion of the university. Sir Stewart Sutherland, for instance, suggests that ‘the most critical task is to recreate a


36 Readings, above n 20, 15.

37 Ibid.
sense of our own worth by refashioning our understanding of our identity - our understanding of what the word "university" means'. 38 He suggests that 'we lack a clear sense of common purpose and coherence in what we do.' 39 The discussion paper to the West Committee of review of higher education made the same suggestion.

There is a feeling of unease in the universities. Many believe that traditional intellectual values and sound scholarship associated with higher education - and in particular, the pursuit of knowledge for its own sake - are under threat. ... Higher education, they say, has lost its way and is rudderless in a sea of change. The morale of academics is low. 40

More appropriate, however, than the expression that higher education is 'rudderless' is the suggestion that higher education is being steered in an unpopular direction. It is likely that the guide has been provided - is being provided by the government - but that many universities and academics are unwilling to accept the direction provided. Indications of government policy demonstrate that higher education has more to do with markets than it had in the past and that there is an increasing emphasis on learning with a view to acquiring qualifications. As a consequence of this, attempts to define the 'university' are more commonly directed to excluding usages which would reduce the marketability of the term, or to determine whether the organisation is subject to regulation. In Australia this preoccupation has been seen in several recent disputes. In one case a US-based distance education provider, Greenwich, established itself on Norfolk Island. Senator Kim Carr said that a direction had been given to the administrator of Norfolk Island to give assent to a Bill establishing the university. His comments demonstrated the concern that the value of the education product would be diminished: '[w]e have a university claiming to be part of the great Australian quality

38 Sutherland, above n 8. Professor Sutherland was speaking in the context of determining the nature of academic autonomy as an idea capable of resisting the imposition of government policies destructive of that concept.

39 Ibid.

40 The West discussion paper above n 33.
education system which is appropriating the names of other great institutions throughout the world ... such as the University of Greenwich in the UK.\textsuperscript{41} Professor John Niland supported the sentiment, referring to the danger of 'reputational asset stripping' and advocating a combination of government regulation and self-association or self-accreditation.\textsuperscript{42} The University of Greenwich, and the Victoria University of Technology which administers courses for the British university, have distanced themselves from the Norfolk Island institution in an attempt to preserve their goodwill.\textsuperscript{43} In a second case the Federal Court ordered the Australasian Institute to stop advertising or posting on its Web site claims that its global master of business administration was approved or sponsored by the University of Ballarat. The Institute claimed affiliation with a number of Australian universities.\textsuperscript{44}

At the same time, Deakin University, through its private offshoot Deakin Australia, has formed an alliance with a private retailer to create the Coles Institute. Deakin will manage all Coles' vocational and higher education needs. The move invited comparisons with McDonalds, Sears and Motorola, which have established their own internal institutions for the training of staff. The University made it clear that the incorporation of the Coles Institute did not create a new university: Deakin vice-chancellor Professor Geoff Wilson said McDonalds, Sears and Motorola 'were not universities in the Australian or international sense and nor was the Coles institute'.\textsuperscript{45} Certainly, it is not anticipated that the Institute will award degrees. Still, the cross-sectoral approach represented by this type of arrangement is likely to obscure the 'nature of the university' arguments brought in contradiction to the prevailing mindset.

\textsuperscript{41} Dorothy Illing, Jane Richardson, 'Greenwich Forum Call', \textit{The Australian} (Melbourne) 10 March 1999, 39.

\textsuperscript{42} Ibid.

\textsuperscript{43} Dorothy Illing, 'Tale of Two Greenwiches', \textit{The Australian} (Melbourne), 23 June 1999, 35.

\textsuperscript{44} 'Order on Web College Claims', \textit{The Australian} (Melbourne), 2 June 1999, 35.

\textsuperscript{45} Geoff Maslen, 'Coles sets up shop with Deakin', \textit{Campus Review} 21-7 April 1999 1, 5.
Attacks on the standing of Australian institutions have prompted government intervention. The federal, state and territory governments have sought to agree on national protocols for approving higher education institutions ‘to set up a national accreditation and quality standard consistent across the two levels of government.’\textsuperscript{46} The proposals set down processes for admitting entrants into the market, and a quality assurance scheme for ongoing monitoring. The title ‘university’ would be protected through business names and associations legislation and through the corporations law, and ‘through legislation with consistent criteria and procedures. ... There would be a common definition of an Australian university, common criteria for assessment of applications for university status and core elements for evaluating claims.’\textsuperscript{47}

Discussion of the appropriate functions of the university has been largely directed by the state, and the shift in the way the state regards the university’s functions has motivated the shift in the public perception and in the universities’ own perception. In other words, the debate about the ‘essence’ of the university has become a debate asking ‘[w]hat do we want from an institution and how can we get it?’\textsuperscript{48} Weber comments that this seems to involve a fundamental and political redefinition of universities and education, and that this is part of a redefinition of public services in general. The economic value of producing profit and operating efficiently are subordinated to social

\textsuperscript{46} Dorothy Illing, ‘Rules mean unis must measure up’, \textit{The Australian} (Melbourne), 29 March 2000, 35.

\textsuperscript{47} Ibid. In the United Kingdom the title ‘university’ may be lawfully acquired through the grant of a Royal Charter or an amendment to an existing charter, through a private Act of Parliament, or through the mechanisms for change of name set out in the \textit{Further and Higher Education Acts} 1992, where the discretion of the Privy Council is limited to having regard to the need to avoid names which are or may be confusing (s.77 \textit{Further and Higher Education Act} 1992 (UK), s.49 \textit{Further and Higher Education (Scotland) Act} 1992 (UK)). It may also be possible to apply for registration of a name containing the word ‘university’ through the \textit{Business Names Act} 1985 (UK). See Farrington above n 32, 53.

\textsuperscript{48} Gaita, above n 9, 13.
and political values, and ideas of accountability, responsibility and transparency are assuming a direct, fiduciary significance. He suggests that it is becoming anachronistic to speak of an 'idea' governing a university: rather, the prevailing tendency is to talk of the 'mission' of the university. Further, the term 'mission' no longer has a religious or transcendent connotation, and 'instead is employed to suggest the dependence of the university on the prevailing economic system. The 'mission' of the university is thus increasingly understood as that of being 'accountable' to those who pay for it, whether these are understood to be large corporations, individual taxpayers or even students.  

This sentiment has led to calls for the 'philosophical separation of the notions of accountability and accounting.' Readings argues that 'it is imperative that the University respond to the demand for accountability, while at the same time refusing to conduct the debate over the nature of its responsibility solely in terms of the language of accounting (whose currency is excellence). Kelsey refers to the 'consensus-mongering' of global neo-liberalism as directly antipathetical to the traditional university, which is a source of critique and a breeding ground for radical ideas. The successful subjugation of the university in that form to the precepts of neo-liberal economics results in an intellectual closure, an absence of questioning.  

There are a number of trends which result from the increase in government intervention and have resulted in a greater potential for intervention. In particular:

- the substantial costs associated with mass higher education which have led to a concern by government to realise more value per dollar committed in this sector;
- a clear expectation by government that the higher education sector is more closely tied to the national economy - both in terms of meeting national labour market needs and also through the commercialisation of its research and teaching activities;

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49 Weber, above n 34, 53 - 4.
50 Readings, above n 20, 18.
51 Ibid 19.
52 Kelsey, above n 2, 60.
• as a larger proportion of the population expresses an interest in participating in higher education, inevitably, higher education also becomes more of a political issue;
• due to an ageing population, the social service burden on the national treasury is rising dramatically, which is coupled with pressures to cut government expenditure and to demand greater efficiencies from public sector institutions; and
• as with other industrialised countries, traditional manufacturing industries are being replaced by the so-called ‘knowledge processing sector’ of which higher education is an integral component.53

Many of these trends arise from the challenges presented by globalization, and not all countries respond to these challenges in the same ways. However divergent the responses to these forces are, ‘the system effects are so powerful that higher education policies in some areas - access, curricula, research, autonomy for faculty and institutions - converge.’54

This account will consider more particularly several of these factors: these are the massification55 of the higher education systems throughout the world, the introduction of the user-pays principle in higher education, and the increasing tendency of the higher education system to be used as a mechanism for economic development. Another factor inherent in the potential of state-steered policy in higher education, the creation of the university system, will be considered, and the effects of globalisation in the higher education sector will be touched upon.


55 This unspeakable word is now in frequent use, and has been purified by reference by, for instance, Jane Kelsey, (Jane Kelsey ‘Privatizing the Universities’ (1998) 25 Journal of Law and Society 51, 52); Glenys Patterson, (Glenys Patterson, The University (1997)); and in Catherine Bargh, Peter Scott and David Smith, Governing Universities - Changing the Culture? (1996), where it rates a mention in the index.
The 'massification' of higher education

The post-war years were years of redefinition for the university sector in Australia. In common with all industrialised countries, there has been a shift from elite to mass higher education. In 1939 the number of universities in Australia was as few as seven; in 1995 there were forty-three Commonwealth funded higher education institutions, and three unfunded private institutions. In 1998 there were 58 universities and other institutions offering undergraduate courses - including the Australian International Hotel School and the KvB College of Visual Communication.

The expansion in the number of universities has been one of the causes of what is considered a mass participatory approach to higher education - fifty out of every thousand Australians in the 17 - 64 age group now participate in higher education, compared with thirty-six a decade ago. The greatest expansion has been quite recent: between 1988 and 1992 full time attendance at tertiary institutions grew by 52%. Figures in 1996 show 603,000 people out of Australia's population of 18 million are university students. To a certain extent the sector was unprepared for the expansion. The West Discussion Paper noted that few anticipated the 'sheer weight' of numbers 'clamouring for further education'. Whereas Minister Dawkins had set an indicative target for numbers of students, in 1995 his indicative target had been exceeded by

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56 Meek and Wood, above n 53, xv.
58 Marginson, above n 18, 4.
61 Ibid 7.
16,000 six years earlier than anticipated.\textsuperscript{63}

Mass participation in higher education has had its own effects. 'Their dramatic expansion required equally dramatic increases in government funding. It is not surprising then that they are now facing much closer scrutiny by bureaucrats and politicians of their activities.'\textsuperscript{64} The West discussion paper makes this pressure explicit: 'The public support provided to institutions and students undertaking higher education is often not identified in an explicit manner and is delivered in a number of ways ... There are several areas in which action could be taken to get greater value from Australia's public investment in university research.'\textsuperscript{65}

This intensified scrutiny comes at a time when the place of the university in society is being challenged: 'Australian universities are also facing increased scepticism about the value of what they do and the quality of their ever-expanding, much more heterogeneous graduates.'\textsuperscript{66}

The United Kingdom experienced a similar set of pressures. After the second world war there was a great increase in the number of universities and the number of students and graduates. A changing demand for graduates led to a change in employment opportunities away from administration, teaching, the church, the law and medicine and towards business and industry. The rapidity of the expansion led to speculation that academic standards were being compromised, both in terms of academics and of students, and early questions were raised as to the financial dependence necessitated by the expansion, and the questions of accountability which inevitably followed.\textsuperscript{67} The social revolution represented by the participation of middle and working class students

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\textsuperscript{63} The West Discussion Paper, above n 33, vii.

\textsuperscript{64} Clark, above n 60, 6.

\textsuperscript{65} The West Discussion Paper, above n 33, 25.

\textsuperscript{66} Clark, above n 60, 6.

\textsuperscript{67} V H H Green, The Universities (1969) 316.
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in the university 'made integration into the university environment, designed for another era, something of a problem'.

The direction of change in the United States has been broadly similar to that being experienced in Australia and the United Kingdom. However, the pace of change during the post-war period was rather greater. "While Britain was expanding higher education, at what it believed to be an appropriate rate, the American university scene was being transformed by a much more rapid growth which Trow was later to define as the entry to "mass higher education" - a development which did not occur in Australia and the United Kingdom until much later. However, the universities in the United States were also characterised by more diversity than was apparent in the British universities: a fact attributable to the decentralisation of the American university system as compared to the British system.

The growth in the university sector did not, in itself, greatly alter the relationship between the university and the state. It did, however, lay the groundwork for the interest of the state in the control of the sector, and the means by which it was to do so. Neave and Van Vught suggest that the period of massive growth in higher education participation ushered in a 'facilitatory' relationship between university and state, in which the university, by and large, maintained existing internal forms and structures, but the government underwrote higher education as an opportunity for those duly qualified to have access to higher learning. However, this evolved into an interventionary state, in which the state intervened to restore stability into higher education's 'private life' - 'patterns of participation, internal governance and authority'. Whereas it is doubtful

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68 Ibid 318.
69 Shattock, above n 10, 6.
70 Ibid 7.
71 Neave and Van Vught, above n 11, xi. Although written primarily in the context of Western Europe, this account includes a chapter on the Australian higher education sector.
72 Ibid xii.
that such intervention was justified in Australia, it is argued that continued talk of ‘crisis’ in academe is used as justification for each progression of government intervention.

**The creation of the university system**

In Australia, the post-war period has been characterised by an increase in the involvement of the Commonwealth government in the university sector. Although, at federation, education was a power which remained with the states, the outbreak of World War II altered this situation. The Commonwealth Minister for Labour and National Service, E J Ward, introduced a Universities Commission in 1942 and placed controls on university enrolments. Although these regulations were effectively challenged, the Commonwealth influence continued. The system of shared grants between the states and the Commonwealth was introduced in the 1950s. This was followed in 1974 by the federal government adopting complete responsibility for the funding of universities and colleges of advanced education. More recently, this influence has effected the amalgamation of the colleges of advanced education with the university sector, which introduced significant change in the profile of universities, as well as in their approach to students, their attitude to research and their adherence to tradition. Former diploma and certificate courses became degree courses, and technical colleges became institutes of technology and sought to have their courses credited towards a degree in a university.

The United States was more resistant to the creation of a university system than was the case in Australia. However, the same influences were instrumental in effecting a shift in that direction. As in Australia, the control of the higher education sector was a State

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73 In *R v University of Sydney; Ex parte Drummond* (1943) 67 CLR 95.
74 Shorten, above n 57, 19.
76 Clark, above n 60, 7.
matter. However, also as in Australia, the influence of the federal government was felt through the use of financial leverage. Federal grant moneys had an impact on both research and, to an extent, on curricula.\(^{77}\) So, for instance, the equivalent of quality assessments were instituted by several states in the form of rising junior examinations, junior writing exams, value-added assessments, more standardized teaching evaluations, and performance-based budgeting. All of these tended to regulate the university's teaching work. There was no consistency in these changes across the United States, and it certainly wasn't administered by the national government; nevertheless the policy directions mirrored those occurring in the United Kingdom.\(^{78}\)

It would be an overstatement, therefore, to suggest that the United States went through the process of creation of a university system; however, standardization occurred nevertheless.

\textit{The 'user pays' principle}

The dramatic increase in participation in higher education, along with the increasing social service burden consequent upon an ageing population, have given rise to pressures to cut government expenditure and to demand greater efficiencies from public sector institutions and greater accountability for the application of public funds to governmental objectives. As the Australian federal government began to monitor institutions through quality assurance schemes, reducing, at the same time, the availability of funds for higher education, non-government forms of funding were not only encouraged, but mandated by the circumstances. Thus, marketing of courses for full-fee paying overseas (and now local) students, development of partnerships with industry for research and training, and the creation of products and processes for the market became a necessary complement to government funding sources.\(^{79}\)

\footnotesize{\(^{77}\) Slaughter and Leslie, above n 54, 48.}
\footnotesize{\(^{78}\) Ibid.}
\footnotesize{\(^{79}\) Ibid 17.}
One of the consequences of these pressures has, in Australia, been the re-introduction of fees. For some time prior to the mid-1980s higher education was largely publicly funded. As tertiary education was increasingly redefined as a private good, the burden of funding tuition shifted progressively from the state to the student, and perhaps the employer, as beneficiary. The introduction of the compulsory student services levy, then the Higher Education Contribution Scheme in 1989, spelled the end of free tertiary education. With the election of the coalition government and a subsequent increasing pressure on funding came an increase in the basic cost of tuition. This was expected to result in a drop in demand among undergraduate students, particularly those from poorer income groups, but it was also considered likely to increase pressure on the university to deliver ‘value for money’ and to respond to ‘consumer’ demand more effectively. Whilst studies have not confirmed the negative impact of HECS on the social composition of higher education students, the increasing pressure on universities to respond to students’ demands has become a mantra self-pronounced by the universities, although perhaps at the instigation of government.

This trend would have been exacerbated by implementation of the recommendations suggested in the West Report, which showed a focus on the university as a business, and a stronger emphasis on teaching. According to one commentator, the discussion paper to the report demonstrated that ‘[u]niversities will need to become obsessive about client service in the new competitive environment and position themselves for

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80 Kelsey, above n 2, 52.
81 Marginson, above n18, 2.
82 Les Andrews, Does HECS Deter? Factors affecting university participation by low SES groups (1999) 21. International studies, however, have shown that fees or cost increases diminish demand for higher education. HECS payments are distinguishable, since they are deferrable and contingent on reaching a certain income threshold: Andrews, 10.
long-term future change'.\textsuperscript{84} It is a particular type of client service - increasing dependence on private financing and competition are expected to 'stimulate efficiency, innovation, and responsiveness. Education is reduced to training and information transfer, and measured through accreditation of standardized outputs.'\textsuperscript{85} What will not be measured in the user-pays lexicon will be the traditional responsibilities of universities:

the creation and expansion of knowledge, research and publication; repositories and transmitters of historical, cultural, and social knowledge; critic and conscience of society; and advising and servicing the state, professions and communities - are reconceived as 'spillovers'. They are left under- or unfunded and marginalized.\textsuperscript{86}

The trend towards user-pays in Australia shows no sign of slowing. Federal funding to universities suffered a downward trend from 1996, and the estimate for 2000 - 2002 was a little more than $4 billion. In the 1990s, conversely, student numbers grew by 200,000. The Coalition government increased student contributions through the Higher Education Contribution Scheme and that has mainly substituted for the decline in student funding. The strongest revenue growth has come from full-fee paying overseas students and other private sources.

Students in the United Kingdom have also faced a contribution to the cost of their education. The introduction of student fees will reinforce the 'consumer' emphasis;

\textsuperscript{84} Dorothy Illing, ‘In Future, the Customer Will Always be Right: Phillips’, \textit{The Australian} (Melbourne), 19 November 1997, 38. However, many of the West proposals are not likely to be implemented, at least in this term. See, for instance, reaction to the proposed voucher system: Jane Nicholls, ‘Government Runs Scared on West’ \textit{NTEU Advocate} November 1997 4. A more recent analysis of the market forces which will have an effect on universities can be found in Steven Schwartz, ‘Uni Monopoly Inc lies on the brink’ \textit{The Australian} (Melbourne), 16 February 2000, 38.

\textsuperscript{85} Kelsey, above n 2, 52.

\textsuperscript{86} Ibid.
comment in the United Kingdom prior to the release of the Report of the Dearing Committee, which recommended the introduction of fees, suggested that students may appreciate the education they are receiving if they know they (or their families) are paying for it, and they may be more likely to demand more from the universities, thus assisting in the general aim of improving standards.\(^{87}\)

This answerability extends beyond general openness to student demands and formal procedures for quality assurance. The extreme form of accountability is accountability through the courts: ‘[i]n light of the increased personal cost to students of their higher education and the detrimental effect of lower grades on future employment prospects, it would be surprising if students unhappy about their grading did not look to the possibility of seeking legal redress.’\(^{88}\)

However, in Australia the link between the increase in fees and the rise of consumerism is projected rather than real, and asserted as a natural consequence of having to pay, rather than supported by government policy. Simon Marginson criticises this aspect of the discussion paper preliminary to the West report: he says that the discussion paper’s emphasis on student-centredness fails to address issues such as the type of protection offered to student consumers, including the provision of detailed information about courses, and rights in relation to false advertising and poor educational performance.

The final report located student-centredness firmly in the market mechanisms which would, presumably, result in universities’ responsiveness to student demand: ‘[u]niversities must be more responsive to students’ choices and preferences. The only effective way to achieve this is by building a direct financial relationship between providers of higher education and students.’\(^{89}\)


\(^{89}\) The West Report above n 83, 24.
The significance of government policy on the shift towards conceptualisation of the university function as the delivery of a commodity cannot be understated; the origins of many universities, and their continued reliance on public funding, provide for the government sufficiently effective steering mechanisms by means of which the prevailing ideology can be imposed upon the university sector. However, there is some mismatch between the commoditification of the university degree and the governmental steering mechanisms; since traditionally fees have been paid to government, rather than to the institutions themselves, universities are currently not financially accountable to students.

According to the West discussion paper, 'it is only natural that institutions respond primarily to the central funding agency rather than to students. In effect, the current arrangements assume that central administrators know more about the capacities of institutions and the needs of students, than students themselves.' 90 The West Report suggested that a direct financial relationship be created between the university and the student, and the shift to deliver more full-fee paying courses suggests that this line is being followed. The Federal Government's Green Paper on research and research training moves some way in that direction in the context of postgraduate research, by postulating portable scholarships, transferable between universities. 91

It has also been suggested that, in spite of the rhetoric about 'student-centredness' or 'client orientation', the measures adopted by governments to date act contrary to these goals. Slaughter and Leslie say that their key motivation in writing Academic Capitalism was the desire that the state and the electorate would become aware that a decline in undergraduate education is a natural and unavoidable consequence of a decline in funding. 92 Governments providing block grant funding and students providing only a small share of instructional costs lack the power to effect university

90 The West Discussion Paper, above n 33, 18.


92 Slaughter and Leslie, above n 54, 22.
responsiveness, particularly since ‘universities are prestige maximisers’, and will pursue research activities to distinguish themselves in the market. ‘Since most faculty teach, and many faculty perform public service, but fewer win competitive research funds from government or industry, research is the activity that differentiates among and within universities.’ Thus, the environment of reduced funding may have the effect of diminishing teaching effort and resources at a time when students are encouraged to consider themselves consumers and to demand consumer-type remedies.

The changes in the United States have had a different genesis and progression, largely as a result of the ‘dissimilar state structures, political economies and academic cultures.’ The changes began in the early 1970s, when market forces were introduced into higher education through the development of a high tuition-high aid policy, through which government gave aid to students rather than institutions - making students the consumers in the tertiary education marketplace. The aid policies, however, did not cover the full costs of most students as the price of higher education rose, so the proportion of the cost borne by the students increased. The effect of these changes was to increase the consumer-orientation of the student.

*The economic role of education*

The higher education system, like education generally, is regarded as a significant focus for social control and the formation of the citizen. The inclination to use education as a tool for social reform has been evident in recent years; for instance, ‘[f]or the Howard government in 1996, like all of its predecessors, the stakes in education policy are high. Education shapes people as citizens. There are also other institutions that do this - for example the family, work, the churches and consumption, but none of these sites are as open to governmental intervention and social change.’

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93 Ibid 17.
94 Ibid.
95 Ibid 44.
96 Marginson, above n 18, 5.
However, increasingly ‘education is less part of social policy but is increasingly viewed as a subsector of economic policy’.97 ‘Recent policies have emphasised the role of education in the economy, and its functions of preparing and selecting people for employment, and have tilted the balance towards these functions’.98 The discussion paper of the West committee’s review of higher education pointed to the economic significance of the higher education system. Amongst the tenets propounded as the philosophical foundation of the review was a commitment to enabling graduates to play a ‘productive, wealth-creating role in a modern, outwardly oriented economy’, ‘providing industry, governments and the wider community with access to advanced knowledge and skills’, and ‘developing a wealth-generating, world competitive higher education industry as part of a broader post-secondary education industry.’99 The demands of the post-industrial economy increase the importance of the higher education to provide training and research and development.100 As a result of the widely-held view of the importance of higher education in the economy, the use of public funds has been linked to national priorities, and this trend has also affected research funding policies which, in the late 1980s, changed so that faculty had to compete for government research funds. These research funds were targeted increasingly on national priorities, and the priorities were often concerned with Australian economic development.101

In the United Kingdom policy has moved in the same direction in the relatively short time since the Robbins Committee102 suggested predominantly social objectives in

98 Marginson, above n 18, 5.
100 Slaughter and Leslie, above n 54, 25.
101 Ibid 17.
102 United Kingdom, Report of the Committee on Higher Education (Cmd 2154, 1963) (Robbins Committee).
higher education. In a 1987 white paper a call was made for major changes, saying that 'higher education should serve the economy more effectively' and 'have closer links with industry and commerce, and promote enterprise,' and expand access 'to take account of the country's need for highly qualified manpower.' This would include study oriented to determining the needs of the economy so as to achieve 'the right number and balance of graduates.'

These intentions were brought into effect in the 1988 Education Act, which diminished the differences between universities and polytechnics, abolishing the University Grants Commission, which had acted as a buffer between universities and government, and the polytechnic board, and replacing them with smaller boards, dominated by business leaders. The government directed that block grants to institutions should be replaced by payments for services. Competition in the higher education sector was increased by the abolition of the binary divide, allowing the polytechnics to compete with the universities, whilst decreasing funding to the old universities. The sector would thus provide for its own expansion by levelling down, not up.

The universities were increasingly exposed to a form of the market, and had to respond to the market signals appropriately. These signals were mediated by the government. In 1993 the Minister responsible for higher education at the Department for Education in the United Kingdom said that the evidence suggested that although students were looking for a social as well as an academic experience, in the main they sought real

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103 (i) instruction in skills suitable to play a part in the general division of labour; (ii) promoting the general powers of the mind; (iii) the advancement of learning; (iv) the transmission of a common culture and common standards of citizenship: [22]- [29].

104 United Kingdom, Higher Education: Meeting the Challenge (Cmnd 114, 1987) iv.

105 Slaughter and Leslie, above n 54, 42.


107 Slaughter and Leslie, above n 54, 43.
learning, through interesting, challenging and knowledgeable teachers. Students expected that higher education would 'give them good qualifications, widely respected, which will open doors to employment, self-employment or further study or research as well as to a fuller and richer life.'

His comment emphasised the message transmitted by The Charter for Higher Education, which described the functions of the university in terms of delivery of a commodity: 'universities and colleges are more and more aware of the need to deliver high-quality services, responding to the needs and demands of customers.'

Thus, it was clear that the government considered higher education to have much more of a market orientation than before. Further, the change in emphasis provoked 'a new concentration on the rights of the 'consumer' or 'client' (student) to a quality education provided by bodies in a contractual relationship with the state.'

The Report of the National Committee of Inquiry into Higher Education (Dearing Committee Report) (1997) in the United Kingdom provided a new definition of the purposes of higher education, and the need to respond to the economic goals of the society in which the university functioned. That students should be well-equipped for work, that their acquisition of knowledge should be for the benefit of the economy and society, and that higher education should serve the needs of the economy were clearly identified in three of the four main purposes of higher education.

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108 T Boswell MP, Under-Secretary of State, at the Department for Education, Quality and the Consumer, Sainsbury Seminar, 16 March 1993.


110 Farrington, above n 32, 4-5. The Citizens' Charter was introduced by the Conservative Government to ensure that the level of public services was increased and that the taxpayer received a high level of public service. Charters for Higher Education were published under the Citizen's Charter Initiative. A number of individual universities have established their own charters.
Globalisation

The 'globalisation' of the higher education market was identified as a feature giving rise to the transformation of the market by the Australian Industry Task Force on Leadership and Management Skills (the Karpin Report) in 1995.\textsuperscript{111} It is difficult to assess the effects of globalisation, since the term is capable of carrying a number of different meanings, typically simultaneously. Bostock says that globalisation 'describes many aspects of the modern world where standardisation and homogenisation among countries and regions can be seen ... [it refers] to the relatively unimpeded movement of capital and goods and services on a global scale'.\textsuperscript{112} The interesting aspect of globalisation from the perspective of this argument is the degree to which universities will be subject to competition from overseas education providers. To an extent, this development would suggest the likelihood of the breakdown or fundamental reform of the existing university system, and a redefinition of the manner in which the social obligations of the university sector are to be determined and funded. This development parallels the introduction of competition in other, previously governmental, bodies.\textsuperscript{113}


\textsuperscript{112} William Bostock, 'The Techno-Corporate University: a Global Paradigm' (Unpublished paper delivered at the Social Justice/Social Judgement conference at the University of Western Sydney (Hawkesbury), Blacktown campus, on April 25-25 1998; extracted as 'McAdemia: is it nuts to standardise uni?' Campus Review 6-12 May 1998, 10).

The pressures applied to the university do not appear in the sharp focus of those bodies that have specific statutory obligations to reach social objectives which may conflict with duties to shareholders. Because this clear opposition does not arise, the mutability of the social obligations has not been punctuated by the markers provided by case law. Rather, they are the subject of newspaper commentary, political and academic discussion, all tending towards a lack of resolution. A global marketplace in the current climate which demonstrates a broad privatization agenda creates, according to Kelsey, the conditions for a deregulated international education market 'which, once established, will be extremely difficult to re-regulate or contain'.

Whereas the academic community has long demonstrated a commitment to internationalisation through study, research and teaching overseas, they have also demonstrated an obligation to apply their knowledge to their local conditions. If the balance between these two engagements is disrupted by the application of the free trade paradigm, education 'stops being a means to convey unique identities and cultural values, an arena of much-needed contest and critique, and an activity valued for itself. It is transformed into a tradeable commodity to be bought and sold on world markets like any other good or service.' Globalisation in a free-trade paradigm means that there is no boundary at which internationalization ends so that the local can be protected. In this way, the 'public good', cautiously whispered in these days of economic rationality, may not be served.

The universities have joined the newly privatized utilities in becoming a surrogate international business whose product is sold in the international market place at the competitive market price. The relationship between the university and the state is one of purchaser/provider or shareholder/manager. The academy is no longer 'a collective whose value depends upon intellectual reputations, integration of its activities, and the maintenance of a vibrant intellectual community.' Academics are removed from the

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114 Kelsey, above n 2, 55.
115 Ibid 56.
116 Ibid.
117 Ibid 58.
118 Ibid 61.
decision-making process and relegated to the position of wage labourers.

**Conclusion - state steering towards market principles**

There has, of course, always been a regard for the interests of the state in the creation and regulation of the university. *St David's College, Lampeter v Ministry of Education*[^119^] made it clear that the university must be incorporated by the sovereign.[^120^] Even if the university was so created, that and the possession of the attributes of a university would not have the effect of creating a university unless that was the express intention of the sovereign power.[^121^] In Australia, all universities are created by individual statutes - either by the Commonwealth or by one of the States or Territories - even those few private universities; and the requisite express intention must therefore be said to exist. It is vain to argue that universities are not closely bound, from their inception, to the state. Moreover, it has been suggested that, in international terms, Australian public universities have a greater degree of autonomy in both the management of resources and in academic matters than overseas public institutions[^122^].

Nevertheless, over the past few decades the effectiveness of government steering mechanisms has been ensured by restrictions on the universities' operation. The West discussion paper identifies key hindrances to the ability (or likelihood) of a university to behave in a business-like manner. Firstly, there have been government controls over student numbers, which prevent institutions making a trade off between price and volume. New entrants to the university market are faced with major barriers to entry - particularly a restriction on the use of the 'university' title, and lack of access to public funding. Thirdly, Australian universities have been restricted in their ability to borrow funds. They are also subject to controls over the disposal of assets.

[^119^]: [1951] 1 All ER 559


[^121^]: Ibid 131-2.

[^122^]: The West Discussion Paper, above n 33, 17.
The new policy direction is to begin to remove the anti-competitive features of this regulation - to subject the university sector to market forces. This gives rise to the second-hand regulation of the market. Australian universities are subjected to government control in the direction of the purported freedom they are expected to exert. The new phase in higher education planning and policy development is 'characterised by reductions in public expenditure, increased emphasis on efficiency of resource utilisation and management and a strengthening of the policy and planning role of individual institutions' in the market context. This is reflected in institutions in the OECD, where there has been a degree of deregulation of higher education and a transfer from state to consumer control. Governments are 'increasingly insisting that the higher education sector “be steered by market forces, that is, by competitive, “for profit”, exchange relationships between producers and consumers or buyers and sellers”'.

This phenomenon must be put into context; it is not an entirely new policy direction. Australian universities have always competed, to an extent, for students, resources and prestige. What is a new development is the way in which the market has helped regulate the relationship between universities and the government and universities and the community. Government has not divested itself of a regulatory function, but the concept of the market has become ‘central to a number of discourses which constitute the current policy agendas of governments ... and educational institutions. Education is currently being thought of in market terms and markets of various sorts are guiding priorities and funding’.

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123 Meek and Wood, above n 53, 4.
Just as the Australian universities are bound by their origin to the states, so the universities in the United Kingdom are beholden in that respect. In the United Kingdom universities are created either by charter, by individual statute, or as a consequence of the Further and Higher Education Act 1992 (UK). That act authorised a number of institutions to carry that title where they had previously clearly not been universities.  

Aside from that obvious connection to government, the potential for control by the sovereign power is increased by the funding arrangements in the university sector. The Dearing Report underlined the degree to which the Universities are attached to the state. The Report called for a new compact between state, the institutions and their students. ‘Our recommendations add up to a coherent package for the future of higher education. We do not intend those to whom they are addressed should choose to implement only some of them. The new compact requires commitment from all sides’. This expectation is coupled with the sentiment that ‘[i]nstitutions are intended to retain their independence and gain increased security, in return for clearer accountability (especially on standards) and greater responsiveness to a wide range of legitimate stakeholders’. 

The same tension present in the direction of Australian higher education policy - between university autonomy and government policy - is present in British trends.

Interestingly, it is this policy which is pronounced to be the ‘freeing’ of universities from the shackles of government control, to place it in the control of university leadership. Clearly, however, the university leadership is to respond in the circumstances created by past government policy. Whereas Neave and Van Vught suggest that the university, ‘like that other institution whose identity is based on historic

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127 The changes effected by that Act included the conversion of a number of polytechnics and colleges into universities and thus the removal of the previous binary divide.

128 The Dearing Report, above n 87, [24.1].

129 David Watson, ‘The Main Messages of the Dearing Report’ (Video presentation at the Griffith Institute for Higher Education Symposium After West: The Future for Australian Higher Education (Brisbane), 24 November 1997. David Watson was one of the 17 members of the National Committee of Inquiry into Higher Education in the United Kingdom chaired by Sir Ron Dearing.
memory, the church, can be in the world, but not necessarily of it', the effect of
government policy seems to have been to drag the university, kicking and screaming,
into the world it intends it to inhabit. Domination by government policy is exchanged
by mediated domination by the market and by industry.

And here it is that the university joins the classic Greek myth of Prometheus.
Prometheus, so legend has it, stole fire from the gods to improve the lot of his
fellow men. For his temerity, he was chained to a rock. Each day, an eagle tore
at his liver just as each night, his liver was renewed. Amidst the insistence of
governments that universities free themselves from the hands of the state, that
they place themselves at the disposal of industry, it is surely not irrelevant to ask
whether in reality the change in relationship between higher education and
government may be interpreted as ‘Prometheus unchained’ or, on the contrary,
as ‘Prometheus bound’.131

2.1.2 Eleemosynary and civil corporations

As already indicated, the university is tied to the state not only by its reliance on public
funding, but also by reason of the founding instrument, which is typically the product of
the sovereign power. A modern university may have its foundation by statute or by
royal charter. It may take on one of three forms: one of the two types of lay corporation
- that is, an eleemosynary corporation or a civil corporation - or a trust.132 The corporate

130 Neave and Van Vught, above n 11, xiv.

131 Ibid.

132 Halsbury notes that ‘Colleges in the [ancient] universities ... were
certainly considered ... as ecclesiastical, or at least as clerical,
corporations’. However, ‘it is now established common law, that
colleges are lay corporations’. William Blackstone, Commentaries on
the Laws of England (first published 1765-69, 1982 ed) 482-3. All
Australian universities are created by statute: Australian National
University Act 1991 (Cth); University of Canberra Act 1989 (Cth);
Northern Territory University Act 1988 (NT); Charles Sturt University
Act 1989 (NSW); Higher Education (Amalgamation) Act 1989 (NSW);
University of Sydney Act 1989 (NSW); University of New England Act
form is a vehicle designed for independence; however, the changes in the university sector which have resulted in the increase in the number of organisations with the designation of 'university' have tended also to create a new relationship between the government and the corporations, so that it is no longer possible to treat the university corporation as unreservedly independent. In the United Kingdom, in particular, this trend is evident; institutions which had previously been maintained by local authorities

1989 (NSW); University of New South Wales Act 1989 (NSW); University of Newcastle Act 1989 (NSW); University of Wollongong Act 1989 (NSW); University of Western Sydney Act 1988 (NSW); Macquarie University Act 1989 (NSW); University of Technology, Sydney, Act 1989 (NSW); University of Queensland Act 1965 (Qld); University of Queensland and Queensland Agricultural College Amalgamation Act 1989 (Qld); James Cook University of North Queensland Act 1970 (Qld); James Cook University of North Queensland and Townsville College of Advanced Education Amalgamation Act 1981 (Qld); Griffith University Act 1971 (Qld); Griffith University and Brisbane College of Advanced Education (Mount Gravatt Campus) Amalgamation Act 1989 (Qld); Griffith University and Gold Coast College of Advanced Education Amalgamation Act 1990 (Qld); Queensland University of Technology Act 1988 (Qld); Queensland University of Technology and Brisbane College of Advanced Education Amalgamation Act 1990 (Qld); University of Central Queensland Act 1989 (Qld); University of Southern Queensland Act 1989 (Qld); University of Adelaide Act 1971 (SA); Flinders University of South Australia Act 1966 (SA); Statutes Amendment and Repeal (Merger of Tertiary Institutions) Act 1990 (SA); University of South Australia Act 1990 (SA); University of Tasmania Act 1992 (Tas); Melbourne University Act 1958 (Vic); Melbourne College of Advanced Education (Amalgamation) Act 1988 (Vic); Melbourne University (Hawthorn) Act 1991 (Vic); Monash University Act 1958 (Vic); Monash University (Chisom and Gippsland) Act 1990 (Vic); Monash University (Pharmacy College) Act 1992; La Trobe University Act 1964 (Vic); La Trobe University (Bendigo and Wodonga) Act 1990 (Vic); Deakin University Act 1974 (Vic); Deakin University (Warrnambool) Act 1990 (Vic); Deakin University (Victoria College) Act 1991 (Vic); Victoria University of Technology Act 1990 (Vic); Royal Melbourne Institute of Technology Act 1992 (Vic); Swinburne University of Technology Act 1992 (Vic); Melbourne University (VCAH) Act 1992 (Vic); University of Western Australia Act 1911 (WA); Curtin University of Technology Act 1966 (WA); Murdoch University Act 1973 (WA); Edith Cowan University Act 1984 (WA); Australian William E Simon University Act 1988 (NSW); Australian Catholic University Act 1990 (NSW); Bond University Act 1987 (Qld); Australian Catholic University (Victoria) Act 1991 (Vic); University of Notre Dame Australia Act 1989 (WA).
were transferred to a new species of higher education corporation, which ‘is one of a growing number of what has been described as “fringe organisations” or “non-governmental bodies” and constitutes one of a multifarious range of independent bodies which are now surrounding government in ever-increasing numbers.’\textsuperscript{133} Whilst the form of the United Kingdom’s higher education corporation has not been adopted in Australia, governmental control has been exerted by other means. It is not appropriate to describe the structure of the university as a ‘corporation’ without considering the interaction between the government and the corporation. Whilst the corporation might, nominally, be independent, it is sufficiently affected by government policy to give rise to questions of status as a public body. The analogy of the ‘fringe organisations’ may be a useful one in an analysis of the universities. The level of common law control of these bodies has received some scrutiny, both in terms of the level of common law intervention and the appropriate rules to follow, and in terms of the appropriateness of the common law as a mechanism of control of these organisations.

This analysis will begin with an outline of the traditional types of formal structure of the university. These are characterised by a high theoretical level of independence; however, the analysis which follows, by detailing the degree of governmental control of the university sector, demonstrates the mismatch between the traditional structure of the university and the reality, which places the university amongst the growing breed of non-governmental bodies attached to government.

2.1.2.1 The Eleemosynary Corporation

An eleemosynary corporation is defined as one ‘founded for the perpetual distribution of

charity and alms-giving',¹³⁴ and in the context of educational establishments, they are 'that type of lay corporation set up for the purpose "ad studendum et ad orandum"',¹³⁵ created for the 'promotion of learning and the support of persons engaged in literary pursuits.'¹³⁶ As they are traditionally 'private and particular corporations, for charity, founded and endowed by private persons'¹³⁷ the corporation and its members are 'subject to the private government of those who erect them'¹³⁸ - governance of the corporation is entirely intra-mural. The founder of an eleemosynary corporation is defined as 'that person or institution who provided the funds for its establishment'.¹³⁹ The office of the visitor 'attaches as a necessary incident to all eleemosynary corporations'¹⁴⁰ and stands at the 'apex of the judicial arm'¹⁴¹ of the university. The corporation will usually be constituted by the master, fellows and scholars,¹⁴² although the foundation instrument may prescribe otherwise.

Notwithstanding that the above definition considers that the eleemosynary corporation was established privately, early cases recognised that the eleemosynary corporation could be founded by either crown or subject: 'if either the crown or the subject creates


¹³⁷ Philips v Bury (1692) 2 TR 346, 352; 100 ER 186, 189-90.

¹³⁸ Ibid 190.

¹³⁹ Sadler, above n 134, 4; Green v Rutherforth (1750) 1 Ves Sen 462, 472; 27 ER 1144, 1149.

¹⁴⁰ Sadler, above n 134, 3.

¹⁴¹ Ibid.

¹⁴² Ex parte Macfadyen (1945) 45 SR (NSW) 200, 204.
an eleemosynary foundation, and vests the charity in the persons who are to receive the benefit of it, since a contest might arise about the government of it, the law allows the founder or his heirs, or the person specially appointed by him to be visitor, to determine concerning his own creature.\textsuperscript{143}

Although most modern Australian universities are not established privately for charitable purposes, but are rather established by statute, most modern universities are said to be eleemosynary corporations.\textsuperscript{144} 'In these modern foundations it is the university itself which is established for the promotion of learning and the support of persons engaged in literary pursuits, which is hallmark of the eleemosynary corporation.'\textsuperscript{145} Both in Australia and in the United Kingdom the creation of a number of universities by statute as a consequence of government reform of the higher education sector tends to undermine the sense in which the eleemosynary corporation was originally understood. In the United Kingdom, in particular, many of the universities created pursuant to the 1992 reforms were not incorporated; rather, the bodies conducting the new universities were incorporated.

2.1.2.2 The Civil Corporation

In contrast to the structure of many universities, Oxford and Cambridge are civil corporations, although their individual colleges are eleemosynary.\textsuperscript{146} A civil corporation is a type of lay corporation, erected for a variety of temporal purposes, characterised by

\textsuperscript{143} Green v Rutherforth (1750) 1 Ves Sen 462; 27 ER 1144.

\textsuperscript{144} Sadler says 'there is no doubt that all Australian universities are eleemosynary corporations': Sadler, above n 134, 3; but cf Bridge, above n 136; Ricquier, above n 135, 650-1.

\textsuperscript{145} Bridge, above n 136, 533-4.

\textsuperscript{146} The status of the colleges of the University of Cambridge, particularly in the light of the Education Reform Act 1988 (UK), was considered in detail in P R Glazebrook, 'The Colleges in the University of Cambridge' [1993] Cambridge Law Journal 501.
the municipal and commercial corporation. They are 'bodies of temporal purpose, and therefore subject to control by the courts of law'. In the case of Oxford and Cambridge, Bridge says that the individual colleges are eleemosynary corporations, whereas 'the universities themselves are civil corporations not sharing the eleemosynary character of the colleges of which they are composed but being created for temporal purposes with temporal rights.'

Sadler, citing Blackstone, says that 'the [ancient] universities were ecclesiastical and therefore subject to episcopal visitation'; however Blackstone clearly indicates that they can not be spiritual, as they are composed of more laymen than clergy, and nor can they be eleemosynary; Blackstone asserts them to be civil corporations.

Further, as to the ancient universities, there is a distinction between colleges and halls: '[c]olleges are corporations, with power to hold property, and with endowed fellowships belonging to them. Halls are not corporations, have not power to hold property, and have no endowed fellowships belonging to them.'

In the case of both eleemosynary and civil corporations, the traditional definitions, and those upon which much theoretical analysis of the university is based, emphasises the independence of the university. The eleemosynary corporations are characterised by the existence of a visitor. There are significant organisational differences between the two structures, but the absence of the visitor in the civil corporations, and the primacy of the

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147 Blackstone lists the king (or queen), organisations for the advancement of manufactures and commerce, the college of physicians and company of surgeons, the royal society and the society of antiquaries: Blackstone, above n 132, 471.

148 Sadler, above n 134, 3.

149 Bridge, above n 136, 533. Blackstone is also inclined to consider them civil corporations: Blackstone, above n 132, 471.


151 R v Hertford College, Oxford (1878) 3 QBD 693, 694
colleges in the instruction of students, are the most important for the purposes of this account.

2.1.3 Foundation of the University

It is also possible to distinguish universities on the basis of the instrument by which they are created, and as this creates some distinctions in the analysis following, which considers the relationships within the university, it is necessary to make some explanation at this point of the typical founding instruments. The most common of these are the charter and the individual or general statute.

2.1.3.1 The charter

Universities in the United Kingdom have been traditionally formed by incorporation by Royal Charter. Their internal structure is determinable by reference to statutes annexed to the Charter. This manner of creation is not common in Australia. At the

152 Although the oldest Australian universities were formed by Royal Charter, this tradition was not followed in the newer universities, which were established by statute. With the universities established by charter, the statute was superimposed on the charter. See the founding statutes listed above at n 132 and below at 2.1.3.3.

153 The University of Sydney was originally formed by charter. In the United Kingdom the chartered universities include many created after the Robbins Report of 1963: East Anglia, Essex, Kent at Canterbury, Lancaster, Sussex, Warwick and York were created on 'greenfield sites', and nine colleges were given university status: Aston in Birmingham, Bath, Bradford, Brunel, City, Loughborough University of Technology, Salford and Surrey. The last university to be created by charter in the 1960s was the Open University, created in 1969. The privately funded University of Buckingham received its Royal Charter in 1983. In the United Kingdom the procedure is as follows: 'A petition is presented to the Crown, through the office of the Lord President, praying for the grant of a charter. In the case of a university or college, the College Charter Act 1871 provides that “a copy of any application for a Charter for the foundation of any college or university which is referred by the Queen in Council for the report of a Committee of the Privy Council must be laid before Parliament, together with a copy of the draft charter, not less than thirty days before the Committee reports on it.” When a Charter is
end of 1993 there were thirty chartered universities in England and Wales which were
eleemosynary corporations (along with the civil corporations Oxford and Cambridge).
In Scotland there were four chartered corporations,\(^ {154}\) and in Northern Ireland both
universities were chartered corporations.\(^ {155}\) However, in 1992 when the 'new'
universities were created, the procedure of petitioning for a Royal Charter was
dispensed with.\(^ {156}\)

The chartered corporations were traditionally afforded institutional autonomy, which
was strongly guarded as a necessity for the proper conduct of the university. In the
United Kingdom this was endorsed by the Report of the Robbins Committee, which
described a system aiming at the maximum of independence compatible with public
control as 'good in itself', and as a reflection of the 'ultimate values of a free society'.
'We do not regard such freedom as a privilege but rather as a necessary condition for the
proper discharge of the higher education functions as we conceive them.'\(^ {157}\)

The charter was considered to be one way of preserving that autonomy; it was the means

\(^ {154}\) Stirling, Heriot-Watt and Strathclyde, all created or converted into
universities pursuant to the recommendations of the Robbins Committee
(above, n 102), and Dundee, which separated from St Andrews in 1967
but was granted its own charter. Another four are governed by 19th
century Acts of Parliament dealing with the questions of vesting of property and other
assets of any institution it is replacing.' Bastin, above n 133, chapter 1
footnote 31.

\(^ {155}\) Queens University of Belfast and the University of Ulster. Farrington,
above n 32, 9.

\(^ {156}\) Farrington, above n 32, 36.

\(^ {157}\) Robbins Committee, above n 102, [709].
by which the university pronounced its principles - which underpinned the untrammelled pursuit of knowledge - and by which it would test its actions. ‘[U]niversities must be protected from having to endorse the dominant party political lines, traditional ways of thinking, or fashionable modes of thought ... there must be a clear degree of independence from the wider society.’

Partly for that reason the position of the chartered corporation must be considered with some care; originally formed with less attachment to the state than some of the newer universities, with a long tradition of independence, it could be said that the arguments applying to public or semi-public authorities do not apply with the same force to these chartered universities. The chartered universities have been reluctant ‘to accept that the provision of higher education, as opposed to the funding for it, is a matter for the state.’ The independence is not merely an internal tradition: it is protected in a number of ways by the externally imposed structure of the university. For instance, in the United Kingdom changes to the statutes annexed to the charter may only be made with the approval of the Privy Council. Furthermore, incorporation by Royal Charter affords the chartered corporation all of the powers of a natural person. Thus, the chartered corporation ‘can, generally speaking, do anything that an ordinary individual can do’. It is not constrained by the terms set out in its charter. Contracts and transactions entered into by the university which are outside the terms of the charter will be valid at common law and thus enforceable.

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159 Bastin, above n 133, 5.


161 Although if a university were to exceed its objects or disobey any prohibition in the charter the Attorney-General could apply for the issue of a writ of scire facias to have the charter revoked. Scire Facias is a prerogative writ, but the power of the crown itself to alter or to recall a charter is said to be restricted to the following:

‘(i) where it has in the original charter (or in a subsequent charter made valid by acceptance) expressly reserved power to alter the charter;
(ii) where the corporation is wholly or partially moribund;
(iii) where the corporation consents to the alteration.’ Farrington,
The courts do not have the power to revoke a charter by ordinary process;¹⁶² a charitable corporation founded by Royal Charter cannot be re-founded or re-established by the court, but can be regulated and controlled by the court, especially on financial grounds, and in that case the court is entitled to have regard to altered circumstances.¹⁶³

However a member of the university or the Attorney General may apply to the court for an injunction to restrain it from doing an act which could expose it to proceedings for the revocation of the charter or seek a declaration that it was acting outside the charter.¹⁶⁴

Lastly, the internal affairs of most chartered corporations are subject to supervision by a visitor.¹⁶⁵ Whilst this is the case with some universities formed by statute alone, it is not the case with many of the new universities in England.

However, it must be conceded that the chartered universities are subject to the financial pressures of other universities, and although the older and richer of them can resist those pressures to a certain extent, the power of the government to restrict funding is a powerful controlling measure.

The autonomy afforded by the chartered structure has not necessarily always been afforded to institutions created through different means. For instance, the universities created out of polytechnics and colleges in the United Kingdom, whose structure was

¹⁶² Re Whitworth Art Gallery Trusts, Manchester Whitworth Institute v Victoria University of Manchester [1958] 1 Ch 461; Farrington, above n 32, 27.

¹⁶³ Re Whitworth Art Gallery Trusts, Manchester Whitworth Institute v Victoria University of Manchester [1958] Ch 461, 467.

¹⁶⁴ Bastin, above n 133, 6, fn 34.

¹⁶⁵ The exceptions are the civil corporations: Oxford and Cambridge.
reformed by the *Education Reform Act 1988* (UK) to free them from the inhibiting control of local councils, were still constrained by the requirement that the Secretary of State approve articles of government and amendments thereto, to issue directives to amend articles of government, or to prevent unreasonable exercise of functions by governing bodies. Whilst the *Further and Higher Education Act 1992* removed all the powers of the Secretary of State, as part of a policy to end the distinction between the different types of higher education institution, the chartered university still retains greater autonomy in the United Kingdom, since it is not subject to the ultra vires doctrine and because of the role of the visitor.

**2.1.3.2 Formation by statute**

In Australia, the tradition of collegiate teaching was not followed. When the University of Sydney was founded in 1850 the professorial board successfully resisted its adoption and the University of Melbourne, founded in 1853, adopted the same approach. As these two 'are the parent tertiary teaching institutions in Australia,' all universities founded subsequently followed that approach. Although some of the older universities were established by charter, the terms of the charter were incorporated into founding legislation. In those cases, the status of the charter is a little unclear, but it is reasonable to suppose that the terms of the charter retain their authority except insofar as they have been superseded by the terms of the statute. Most other Australian universities were created directly by statute.

The legislation that establishes the universities is one 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.' Statute will also provide for the

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166 Sadler, above n 134, 4.
167 Ibid.
168 See generally *Halsbury's Laws of Australia* n.7 para 160-920 and
constitution of the council, or senate, of the university, the terms of office of its members and for the vacation of office.\textsuperscript{169} 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 with financial powers and may have the power to acquire and dispose of real property, perhaps to form companies, partnerships or joint ventures.\textsuperscript{170} The body may also have powers specific to the provision of instruction, the granting of degrees, and so on.\textsuperscript{171} Other persons or bodies may have statutorily defined powers: the vice-chancellor, academic board or convocation.

In the United States the legal status of institutions depends firstly on whether they are State public or private institutions, or federal public or private institutions. If they are institutions in the public post-secondary system the legal status of the institution varies from state to state as well as from institution to institution within a state. In particular, a species of state institution is established directly by the state constitution, and has more autonomy from the state governing board and the state legislature. So, for instance, public institutions created by a state constitution, such as the universities of California or Michigan, can be dissolved only by an amendment to the state constitution and are insulated from legislative control. These institutions are characterised, for legal purposes, as a ‘public trust’, an ‘autonomous university’, a ‘constitutional university’ or a ‘constitutional body corporate’. They are not generally subject to state administrative law, and may not be able to assert the defences available to statutory institutions.\textsuperscript{172} However, they enjoy greater autonomy; in \textit{Regents of the University of Michigan v State of Michigan}\textsuperscript{173} a number of constitutional universities challenged the constitutionality of provisions in legislative appropriation acts that allegedly infringed on their autonomy.

\textsuperscript{169} Ibid. Refer to references cited therein under notes 1, 2, 3.
\textsuperscript{170} Ibid [160-925]-[160-930] and references cited therein under notes 1-6.
\textsuperscript{171} Ibid [160-930] and references cited therein under notes 11 - 15.
\textsuperscript{173} 235 NW 2d 1 (Mich, 1975).
The court agreed that the legislature could not impose conditions on its appropriations to the universities in a way that would ‘interfere with the management and control of those institutions.’

Alternatively, a state constitution may create the statewide governing board of public colleges and universities (for example, the board of regents) but create the state colleges themselves by statute.

A university in the United States established by state statute is regarded there as a ‘state agency’, ‘public corporation’ or state ‘political subdivision’. These institutions are subject to legislation applicable to state-created entities - for instance, the state administrative procedure act and other requirements of state administrative law. They may also be able to claim sovereign immunity.\textsuperscript{174}

The states also have some regulatory control over private post-secondary education, although it is not as broad as the authority exerted over their own public institutions. Authority is exerted in two ways; firstly, through incorporation or chartering laws, either as charitable or educational non-profit corporations, or as general business corporation laws where the universities are profit-making. Secondly, states regulate private post-secondary institutions through licensure, which is imposed as a condition to offering education in the state or to granting degrees or using a collegiate name.\textsuperscript{175}

Under the expansive reforms in the higher education sector in recent years, governments have occasionally committed themselves to a wholesale creation of a species of university. The most dramatic instance of this occurred in the United Kingdom in 1988, when the polytechnics and colleges were taken out of local authority control and established as higher education corporations pursuant to the \textit{Education Reform Act} 1988

\textsuperscript{174} See, for instance, \textit{Board of Trustees of Howard Community College v John K Ruff Inc}, 366 A 2d 360 (Md, 1976), in which the board of a regional community college was a state agency and able to assert sovereign immunity as a defence against a suit for breach of contract.

\textsuperscript{175} Kaplin and Lee, above n 172, 683-4.
The governance of these institutions was set out in the Act. In 1992 all polytechnics and the largest of the colleges of higher education were converted into universities.  

The Australian approach to the same issue was handled differently. The Dawkins reforms to the higher education system in 1988, which abolished the binary system and established the Unified National System of higher education occurred by means of a number of amalgamations of colleges of advanced education with universities and conversion of some colleges into universities. This was effectuated by a number of pieces of legislation, relating to individual universities.

2.2 General Legislation Affecting Universities

Regardless of the structure adopted by the university, the government is in a position to control universities, within constitutional limits, by the enactment of general legislation which affects universities as a whole. In Australia the more straightforward exertion of power originates with the state governments, since the states retain sovereign power over education. Aside from the control exerted as a result of the enactment of the founding statutes, in South Australia and Victoria there are statutes providing for general control of universities in those states. In both states there are restrictions on operation as a university or award of a higher education degree without approval. In South Australia there are provisions for an advisory council and for advisory committees; in Victoria the Minister must ensure that a Register of Higher Education is established and maintained. More broad ranging controls exist at the federal level,

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176 Further and Higher Education Act 1992; Further and Higher Education (Scotland) Act 1992

177 Tertiary Education Act 1986 (SA); Tertiary Education Act 1993 (Vic).

178 Tertiary Education Act 1986 (SA) ss 4, 5; Tertiary Education Act 1993 (Vic) ss 9, 10, 11.

179 Tertiary Education Act 1986 (SA) ss 8, 9, 10.

180 Tertiary Education Act 1993 (Vic) s. 11
and will be considered below.

In the United Kingdom a number of statutes have had an impact on the administration of universities. This was not the case prior to 1988; until that time control was exercised primarily through the founding instruments and through the ability to control funding.\(^{181}\) In 1988 the *Education Reform Act 1988* (UK) had the effect of placing much of the relationship between the institution and the Crown on a statutory basis. Amongst the effects of that Act were the appointment of University Commissioners with the power to amend university statutes so as to bring academic staff within the operation of the general law relating to employment, with some continued protection for academic freedom, and the exclusion of the visitorial jurisdiction, where it still existed, in some disputes relating to a member of the academic staff.\(^{182}\) The *Further and Higher Education Act 1992* (UK) and *Further and Higher Education (Scotland) Act 1992* introduced extensive changes, including the removal of the binary divide which had previously existed between universities and polytechnics. The Acts also gave certain powers to the Secretaries of State and created new Funding Councils.

In the United States, state governments have general, rather than limited powers. As in the Australian case, state governments can claim all power not denied them by the federal Constitutions or their own state constitution, or which has not been preempted by federal law.\(^{183}\) Thus, in those states which do assert substantial authority over universities, the functions assumed by the relevant state could include regulating, funding, planning and coordinating through state agencies. In addition, states exert authority over post-secondary institutions' borrowing and financing activities. The federal involvement in education stems primarily from Congress' power to spend its funds for the 'general welfare of the United States'.\(^{184}\) This forms the basis of the federal aid to education and civil rights requirements and student records requirements

\(^{181}\) Farrington, above n 32, 153.

\(^{182}\) Ibid 90.

\(^{183}\) Kaplin and Lee, above n 172, 671.

\(^{184}\) Article I, Section 8, Clause 1. See Kaplin and Lee, above n 172, 712.
which affect state institutions. In addition, the taxing power under Article I, Section 8, Clause 1 allows some regulatory access, particularly over private institutions, and the commerce power under Article I, Section 8, Clause 3 allows broad-ranging powers. This power has been interpreted to permit the regulation of activities that are in or that 'affect' interstate or foreign commerce, and even intrastate activities may be subject to this power where the activity affects commerce among the states or with foreign nations. Finally, the civil rights enforcement powers, deriving from various constitutional amendments, form the basis for discrimination laws applicable to public institutions, and to some extent to private institutions.

2.3 The Policy and Administrative Infrastructure of the University Sector

Universities are now closely attached to the state; whereas it is questionable whether they are public authorities, at least in Australia and the United Kingdom, most are in receipt of public funding or are subject to direction as to the manner of expenditure of that funding, and possibly to limitation on the way in which alternative funding options are permitted. The goals of higher education institutions generally are the provision of education for the benefit of society as a whole, not for the benefit of the educational institution.

This section will compare the administrative and financial arrangements relating to universities in Australia, the United Kingdom and the United States. By this means it is proposed to provide a context within which to place further discussion of the management of universities, and to demonstrate the degree to which the government can exert real control over universities. This is a matter which is repeated across a number of jurisdictions. The economic pressures and the theories and principles used in response to these pressures are not confined to one country, nor are they transient. The

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186 This matter will be considered in detail in chapter 4.
political economic changes ... are global and structural. They are not likely to disappear, allowing us to return to business as usual. 187

2.3.1 The Australian position

In Australia the responsibility for the provision of education, including higher education, is vested in States rather than in the Commonwealth Government. Most of the statutes by which the universities are created and under which they operate are prescribed by the States. However, the Commonwealth government has a major influence on the operation and management of the university sector because it is a major source of finance. Given this influence, the government’s perception of the role of the university and the means by which the government seeks to achieve this role are critical.

The Higher Education Council for Australia in 1992 defined the principal purposes of Australian universities as the education of appropriately qualified Australians to enable them to take a leadership role in the intellectual, cultural, economic and social development of the nation and all its regions, and the creation and advancement of knowledge; and the application of knowledge and discoveries to the betterment of communities in Australia and overseas.

It went on to say that Australian universities must enable their graduates to operate anywhere and in any sphere at a level of professionalism consistent with best international practice, and in ways that embody the highest ethical standards. It went on to define the goals of the Australian higher education system in terms of retaining and nourishing diversity, providing opportunities for access by members of disadvantaged groups, ensuring quality teaching and supervision, and a range of other goals focussing on encouraging student achievement, providing a climate of intellectual inquiry, achieving scholarly depth, advancing knowledge and application of research and scholarship, collaboration with other sectors and engagement with professions, and engagement with the community.

187 Slaughter and Leslie, above n 54, 6.
The way in which the Commonwealth seeks to achieve those goals will determine the degree to which the government operates at 'arm's length' from the institutions which provide higher education. Whereas the Commonwealth lacks the direct constitutional authority to legislate for these goals, the funding arrangements between the Commonwealth and the State provide significant reason for compliance with Commonwealth policy.

Although, as outlined, the level of government-sourced funding has dropped over the past decade, and has been replaced by an increased level of reliance on private funding, government funding results in the potential to exert a significant level of influence over the higher education sector - although its influence is more marked in the newer and less prestigious universities, which are unable to attract significant private funding. The impact of this sector-wide control on the individual university is felt in the mechanisms for attracting funding and through other compulsory mechanisms for accounting for that funding and ensuring that it is being used in a manner conforming with government policy.

2.3.2 The position in the United Kingdom

The Dearing Committee suggested that the four main purposes of higher education are:

- to inspire and enable individuals to develop their capabilities to the highest potential levels throughout life, so that they grow intellectually, are well-equipped for work, can contribute effectively to society and achieve personal fulfilment;
- to increase knowledge and understanding for their own sake and to foster their application to the benefit of the economy and society;
- to serve the needs of an adaptable, sustainable, knowledge-based economy at local, regional and national levels;
All universities in the United Kingdom, except the privately funded University of Buckingham, receive a proportion of their public funding for teaching and research from the relevant funding agency. These funding councils were established under the provisions of the Further and Higher Education Act 1992 and the Further and Higher Education (Scotland) Act 1992. They were intended to fund the provision of research and education by higher education institutions and the provision of higher education courses by other bodies or persons.

2.3.3 The position in the United States

In the United States, as in Australia, education is a matter for individual states. However, the external legal environment in higher education in the United States has been historically benign; ‘[a]cademia ... was like a Victorian gentlemen's club whose sacred precincts were not to be profaned by the involvement of outside forces in its internal governance.’ The law did not intervene in this environment, which was considered to be unique, and capable of regulating itself through reliance on tradition and consensual agreement. Rather, it reflected and reinforced those attitudes. ‘Legislatures and administrative agencies imposed few legal obligations on institutions and provided few official channels through which their activities could be legally challenged. What legal oversight existed was generally centred in the courts.’

The judiciary, too, reinforced this view, and for a long time the application of the notion that universities stood in loco parentis to their students removed them from the scrutiny of the courts. College authorities were, in the view of the courts, in a position to make any rule or regulation for the government or betterment of their pupils, just as could a

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188 The Dearing Report, above n 87, [5.11].
189 Kaplin and Lee, above n 172, 5.
190 Ibid.
191 Ibid.
parent. The wisdom or worth of those rules or regulations was a matter left to the discretion of the authorities, and in the exercise of that discretion 'the courts are not disposed to interfere, unless the rules and aims are unlawful or against public policy'.

Non-intervention by the judiciary was further justified in the constitutional area by the 'private' nature of the relationships created in the private universities, and in the public universities by the fact that student attendance and employment were privileges, rather than rights and thus not subject to constitutional rights arguments. In the area of torts, public institutions were immune on the basis of the governmental immunity doctrine, and private institutions on the basis of the charitable immunity doctrine.

However, the freedom of universities from legal scrutiny was eroded as a consequence of a number of social and legal movements. Increased involvement by governments in higher education institutions opened avenues for suit. Pressure for increased involvements arose as a consequence of the increase in the number, size and diversity of higher education institutions, and a change in the character of the academic population. In the 1940s student numbers swelled as a consequence of the GI Bill, and in the 1950s another expansion came as a result of the 'baby-boomer' generation. A consequential increase in the staff population brought into the universities a body of academics with less sympathy for academic tradition. Many students also displayed less traditional views. The lowering of the age of majority, and the large number of older students as a result of the GI Bills, made the idea of in loco parentis inappropriate, and the increasing demand for credentials in the workforce made the argument that higher education is a privilege irrelevant.

The increasing numbers of students made the sector more critical to government, and government funding tied institutions more closely to the government agenda. Increasing consumerism, the development of the buyers' market, and government consumer

192 Gott v Berea College, 161 S W 204, 206 (Ky, 1913).
193 Hamilton v Regents of the University of California, 293 US 245 (1934).
194 Kaplin and Lee, above n 172, 6-7.
protection regulations, have introduced a series of responses from institutions, including policies for self-regulation, and introduced a whole new set of rights and responsibilities.\textsuperscript{195}

The role of the federal government is considered to be in the 'provision of financial support and leadership on issues of broad national concern.'\textsuperscript{196} The comparatively 'private' nature of universities in the United States arises from the fact that funding is obtained from both public and private sources and from tuition fees. Whereas private institutions receive some government funding they are generally financially autonomous. Higher education institutions in the United States have a wide range of funding source upon which to draw. For instance, Florida has compensated for cuts in government funding by contributions from the state lottery, and Virginia has funded education and capital building programmes through state bond issues.\textsuperscript{197}

However, the scarcity of funds has drawn the higher education institutions more closely into the political process, and 'issues arise concerning equitable allocation of funds among and within institutions and among various categories of needy students.'\textsuperscript{198} Further, the reliance of the universities on private funding has created a new set of alliances with the corporate world. Both trends undermine the idea of institutional autonomy and academic freedom.

This general picture of the increasing integration of universities in the United States with political, social and economic realities parallels the experience in Australia and the United Kingdom. In the legal context, the result has been an increase in regulation from a number of sources. The increasing level of financial support by the federal government in particular has led to the blurring of the public/private dichotomy, previously supportable in view of the different origins of the universities. The

\textsuperscript{195} Ibid 7-8.
\textsuperscript{196} The Dearing Report, above n 87, Appendix 5, [7.4].
\textsuperscript{197} Ibid [7.5] - [7.7].
\textsuperscript{198} Kaplin and Lee, above n 172, 9.
movement in Australia and in the United Kingdom back to a fee-paying model may, in turn, have brought universities in those countries closer to the United States' model.

2.4 The new class of quasi-government corporation

The bureaucratic infrastructure supporting the provision of higher education, particularly in Australia and the United Kingdom, is illustrative of the significance attached to higher education by the state. The financial and administrative support provided by the state are not exacted without cost. Whereas, as indicated, university structures tend to vary, from the fiercely autonomous chartered institutions to the heavily regulated universities created pursuant to the Further and Higher Education Acts of 1992 in the United Kingdom, the significance of the closely guarded autonomy can be overstated. The autonomy is to be exercised within the circumscribed range permitted by government, and although the previous high level of regulation has recently been replaced by a conscious policy of deregulation, it is mediated deregulation of the type experienced by the quasi-government corporations created by policies of corporatisation and privatisation. Many universities have attempted to bypass the regulatory quandary and governance issues limiting access to industry by incorporating commercial arms. Melbourne University Private, Deakin Australia, and Monash College, for instance, provide practical access to non-government income. The alliance between Coles and Deakin Australia was described by the Australian Federal Education Minister as 'the way of the future'. 199

The increasing privatization of universities is a conscious government policy, and part of a trend current in most higher education systems. However, the structures and governance models in most universities are not appropriate to the commercial organisation - hence the creation of 'corporate' or 'commercial' arms as subsidiaries or offshoots of universities to co-ordinate universities' commercial or offshore operations. The universities were created to do different things, and new duties rest uneasily on the old foundations. The universities retain the structure and models of governance

199 Reported by Geoff Maslen, 'Coles sets up shop with Deakin', Campus Review, 21-27 April 1999, 1.
appropriate to a different environment. The failure to consciously create a coherent structure compatible with the new set of policy truths is not surprising; the universities are uneasily straddling a divide between the public and the private sector. Although the corporate form has been adopted by most universities, the private sector model of the corporation is inappropriate, as it hides the level of government direction and control over the universities and the imposition of public goals upon the universities. A more fruitful analogy may be the set of privatised utilities which present a new set of questions for those considering the links between the state and the private sector. These fringe organisations also present a new set of questions on the relationship between private law and the state. These corporations are said to exist in a 'bifurcated provenance' between company law and administrative law. They operate in the 'new public sector policy environment of self-regulation and market competition'. They take the corporate form, but are subject to a high level of governmental involvement in their functioning, so that the form is not an adequate guide to the question of whether the body is public or private. More particularly, these bodies retain public sector goals, which, like those of universities, are often difficult to accommodate.

[M]any of the formal objectives adopted or imposed on the public sector are problematic and difficult to combine. Some objectives are not easy to reconcile, others are competing. Some may be mutually exclusive or even contradictory in intent. Public sector goals are inherently complex and many are formidable and even unquantifiable.

Like these quasi-government organisations, universities now resist categorisation as

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201 Meek and Wood, above n 53, 5, quoting Neave and Van Vught, above n 11.


public or private; indeed, the inability to describe the status of the university in these terms reveals 'the inadequacy of extant language to address changes that blur the customary boundaries between private and public sectors. The same kinds of language limitations make problematic descriptions of the increasing numbers of hybrid organizations emerging in a period of privatization and deregulation.'

Chapter 3 will consider the internal manifestation of this revolution in the academic sector. It will show how the 'encroachment of the profit motive into the academy' has prompted changes in the internal relationships, governance and organisation of the universities. The redefinition of these aspects of the academy will prompt unforeseen consequences in the liability of the university. Chapter 4 will consider the public-private dichotomy more closely, and analyse the consequences of assigning a university to one side or the other of the public-private divide in the context of an action in negligence.

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204 Slaughter and Leslie, above n 54, 9.
205 Ibid.
3. The Internal Environment of the University

Just as the external environment of the university has altered to require the university to accommodate the obligations of compliance with increased government scrutiny and control and in response to the market, the internal structure of the university has altered. Whilst the older universities, on the whole, retain the same formal structure, in many cases they have adapted to the new external realities by the creation of business units which take on a corporate form. The governance of the university is required to comply with enforced standards of transparency and accountability, in an acknowledgment of the use of public-funding and in order to pursue private funding, and is expected to correspond with levels of efficiency and effectiveness in decision-making. Many of the newer universities, particularly in the United Kingdom, have had a management structure imposed upon them, although some of the newer universities are 'private' and obtain little or no funding from the government.

In Australia, the management of higher education was given specific attention in the report of the Hoare Review, the recommendations in which addressed university governance, strategic management, workplace reform, financial and asset management and methods by which management could facilitate change. Although the Hoare Report recommendations have largely gone unnoticed as a result of the ousting of the Labour Party and the subsequent wide ranging reforms instituted by the Liberal government, the process of review and projected reform of university governance has continued.

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1 The recent creation of Melbourne University Private is an example of this strategy. Deakin Australia, and Monash College are others. See above under 2.4.


3 I am indebted to Linda Hort for this analysis, which is contained in chapter 3 of her draft PhD thesis: 'Our Journey: Changes in the Higher Education Sector', with a draft of which she has kindly provided me.

4 An enquiry into the internal management of Universities was reported in V Lynn Meek and Fiona Q Wood, Higher Education Governance and Management: An Australian Study (1997).
West discussion paper has recommended particular attention to the issue of university governance which, it says, is an area which needs to be reviewed if its recommendations are adopted. It says that 'the governance structures of many universities are likely to be inappropriate in a more competitive environment.' The executive summary of the Final Report of the West Committee makes the link between the external environment of the university and its internal form clear. It suggests an 'essential incompatibility' between a view of the world based on collegiate decision making, and one based on executive decision making. It conceives that the internal decision making processes of universities can be changed only by the universities themselves, but suggests that a failure to do so will result in a failure to operate effectively in an environment of increasing competition and increasing student choice.

These attempts to force efficiency in the management of universities are part of the government policy direction, but their aim, to an extent, is to emulate the operation of organisations controlled by the market. In this way the universities again bear a resemblance to the hybrid organisations created by government policies of privatisation of government utilities and functions - both have been subjected to a change in the definition of organisational reality which has been translated from a different culture and applied without or with minimal conceptual modification.

The forced changes to the culture of the university organisation have often been referred to as an increasingly 'managerial' approach - an approach compared unfavourably with a 'collegiate' style of management. However, there is no inherent incompatibility between academia and managerialism; rather, there are 'soft' and 'hard' managerialist approaches, and it is the incidents of 'hard' managerialism which attract criticism. The

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'soft' approaches to management 'see higher education as an autonomous activity, governed by its own norms and traditions, with a more effective and rationalised management still serving functions defined by the academic community itself.' However, this is not the form adopted in Australia or in the United Kingdom. Hard managerialists 'are resolved to reshape and redirect the activities of [the academic] community through funding formulas and other mechanisms of accountability imposed from outside the academic community, management mechanisms created and largely shaped for application to large commercial enterprises.' The idea is to make universities sufficiently similar to commercial firms to enable assessment and management in roughly similar ways.

Thus, one consequence of this approach is that the university is remodelled to emulate other types of business organisation. This results in a transference of power from the academic, who had a voice in the collegiate decision making structure, to a new management class, which speaks of the organisation as an entity in its own right, which is mediated through 'new languages built around 'objective' social scientific research, concepts of economic efficiency, and accounts of organizational success in terms of profit and loss.' The scientists, 'technocrats', economists and accountants who speak those languages become powerful in the process.

The anomaly, however, is that the model which had previously governed the internal structure of the universities has suffered forcible replacement, but that many of the structures and activities which were appropriate under that model remain. These residual features are not easily reconcilable with a market-based model, nor are they entirely consistent with a model based upon a public organisation. The university is an ancient institution, and some of its incidents are medieval in origin. The incompatibility

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8 Ibid 12.
between the ancient characteristics of the university and the modern form gives rise to issues common to the experience of the 'hybrid' organisations which have arisen as a result of privatisation of public sector organisations, and some of the consequences attaching to the form adopted by these organisations might be useful in the analysis of the new model of the university.

This chapter will consider the internal structure of a university - the governance of the institution and the relationship between the university and the student. It will show that the governance of the institution is influenced by an ambivalence in approach which marks the external influences on the university - a commitment to neither the corporate nor the public sector - and that this is the result of an alteration in the external environment which has directed or steered the change. This forced alteration has not been reflected in all of the internal structures or relationships of the university and the residual confusion in the perceived consequences of the shift towards a market-based model is attributable partly to the residue of historical structures in the university.

The first part of this chapter will consider the changing styles of university governance in Australia and the United Kingdom, and will consider the models adopted in the United States. Without making a thorough analysis of the governance of a university, which has been provided elsewhere, it will identify trends in management styles and suggest some potential consequences for the liability of the university as a result of those trends. The pattern of judgments involving universities in the United States, and involving privatised government bodies in Australia and the United Kingdom, will provide some insight into the potential for litigation involving universities as a result of these trends.

The second part of this chapter will analyse the relationship between the university and its students, and will determine whether the external factors motivating change, and the change in management styles, will affect the definition of the relationship. It is

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submitted that the definition of the relationship between the university and its students will materially affect the liability of the university in negligence for actions involving those students. If the relationship is defined as a contractual one, as it is increasingly characterised by commentators, the action in tort in the context of a contractual relationship will have to be analysed. If the relationship is, in part, defined by public law premises, the interaction between the administrative and the tortious remedies, and the tort liability of public bodies, will have to be considered. A fiduciary analysis of the relationship between the university and its students will lead to additional potential liability. If the likelihood of this is considered to be a significant, the interaction of that relationship with an action in negligence must be determined. Finally, the possibility that the university stands in loco parentis with those of its students who were minors would lead to altered liability in tort.\textsuperscript{11}

It is not intended to consider the relationship between the university and its staff, partly because it is tangential to the central issue of liability to students in negligence, but also because it is an area affected by statutory and award provisions, and much of the ambivalence created by the influence of the modern environment on historical features is resolved through that means.

What will become evident by an analysis of the governance of the university and an analysis of the relationship between the university and its students is the inconsistency between the historical structures of the university and the new directions of the university, and the lack of clarity in the vision of the new university built upon the old. What will also become evident is the exposure of the university to a range of actions because of a failure to adequately determine the status of the university as a private or a public body, the failure to identify the role of a governing body as one characterised by public or private duties, and the failure to clearly characterise the relationship between the university and its students.

\textsuperscript{11} This would not necessarily mean increased liability; a parent is subject to a duty of care of less scope than, say, an employer.
3.1 University governance and management

Issues of university governance have characterised the conversation about higher education in Australia, the United States and the United Kingdom. The changing demands of higher education, the shift ‘from a small number of “elite”, largely autonomous institutions which were essentially peripheral to national concerns that existed up until the mid-1940s’ to ‘the mass systems of higher education that exist today’ raise concerns about the ability of the university governance structure to manage effectively. Successive government reviews have identified the need for change; in particular, in calls for transparency, for governance structures which would command public confidence, and for ethics in public life. The Hoare Report said that ‘effective governance is a matter which needs to be reconsidered in the light of the current and developing environment for higher education. Universities can probably no longer rely on their traditional governance forms if they are to operate fully effectively.’ These challenges were not confined to universities; indeed, universities tended to be swept along in the wake of challenges arising during the privatisation of

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13 Meek and Wood, Higher Education Governance and Management, above n 4, executive summary.

14 Hoare Committee Report above n 2, 45.
public utilities. The Hoare Committee Report suggested that the issue of governance gained prominence as a result of poor business practice and performance in the corporate sector and in the commercialisation of public sector enterprises. It said that neither type of enterprise had effectively resolved issues relating to structure, membership, roles and responsibilities of governing bodies.

One of the difficulties experienced by both the government and the higher levels of management intent upon change is the mismatch in expectation between the various stakeholders, overlaying management structures often built upon quite ancient models. Whereas all Australian universities have a governing body, whether that is a council, a senate or a board of governors, and that governing body is the 'ultimate locus of authority and responsibility for academic financial and property matters within the university', the role of the body is not always easily definable. There are a number of reasons for this: the range of expectations within and outside the academic community, the substantial differences in the size and composition of governing bodies, and the frequent lack of a document defining their role beyond the founding charter or statute, which is not over-detailed. Much of the detailed knowledge about the function of university boards is provided by the collective memory of the organisation, and partly to this can be attributed the universities' poor experience of change. A change to the management structure of the university can result in a critical loss of institutional memory. This can be experienced as the confusion of an academic who can no longer find the source authority for directives which would once have been the subject of open, collegiate discussion in a recognised forum.

One of the most commonly cited constraints to university management is the 'collegial'

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16 Hoare Committee Report above n 2, 44.

17 Meek and Wood, Higher Education Governance and Management, above n 4, chapter 3.
structure and decision-making pattern. The most recent of the Government reviews, the West Report, made particular reference to the incompatibility of collegial decision-making with the need for timely responses in a financing framework that gives greater choice to students. The Report endorsed the recommendations of the Hoare Report, to which the Government did not provide a formal response, and did not provide additional recommendations.

Of course, the dichotomy between the managerial and collegiate styles of governance is a massive oversimplification of the reality. The style of governance of a university varied between the ancient civic universities, the English red-brick and 'new' universities, the Australian sandstone universities and those which were previously colleges of advanced education. Further, the oft-asserted existence of a 'collegial' decision-making structure can be questioned. It has been described as a 'well-perpetuated myth', although one with significant persuasive force. Rather, 'in an analytical sense, corporate managerialism and collegiality should be viewed as ideal types; the complex real life of higher education institutions allows the ultimate fulfilment of neither approach.' That is not to say that those who have identified a loss of collegiality in decision making are delusional or sentimental; rather, they are identifying a trend away from this structure - a movement between extremes rather than

18 The university decision-making structures have also been described as 'organised anarchies' (Michael D Cohen and James G Marsh, *Leadership and Ambiguity: The American College President* (1974)) and as 'political collectives' (J Victor Balridge, *Power and Conflict in the University* (1971)).

19 The West Report above n 6, 111.

20 See Marginson and Considine, above n 12, 106-8.

21 For an account of the historical and policy context of the governance of higher education in the United Kingdom, for example, see Catherine Bargh, Peter Scott and David Smith, *Governing Universities - Changing the Culture?* (1996) 4ff.

a realisation of a particular management type. 'In one sense, the oscillation between
managerialism and collegiality is a source of a good deal of conflict within higher
education. But in another sense, it is only another aspect of the overall higher education
dynamic - the workings of higher education “in an unstable organisational universe”.'

That conflict, whatever its motivation, is often cited, and the ‘new managerialism’ of
higher education is often compared with the ‘collegial’ approach. Many universities
have in place decision making structures which have replaced the “’gentleman amateur
administrator” of a past era’ with ‘the professional/managerial university executive
officer.” This corporate ethos has been linked to the general change in the culture of
the public sector, particularly that of the Commonwealth Public Service, and the
commitment of the Hawke Labor government to public sector reform through the
introduction of private sector management practices. The impact of this on
universities could be experienced as a ‘loss of collegiality’, or at least as a loss of
effectual voice, as an executive branch replaces the decision making functions of a
collegiate structure. The executive presents a decision as unanimous and obliges
acceptance and support of that decision. This ‘formidable and remote authority’
according to Bessant, preempts the collegial authority of academic/professorial boards:
‘It takes a brave academic to stand up and oppose a united gaggle of mega-Deans,
Deputy Vice-Chancellors and a Vice-Chancellor at a board meeting’.

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23 G Neave, ‘Homogenization, integration and convergence: The Chesire
cats of higher education analysis’, in V Lynn Meek, Leo Goedegebuure,
Osmo Kivinen and Risto Rinne (eds), The Mockers and Mocked:
Comparative Perspectives on Diversity, Differentiation and Convergence
Education Governance and Management, above n 4, chapter 3.

24 B Bessant, ‘Corporate Management and its Penetration of University
Administration and Government’ (1995) 38 The Australian Universities’
Review 59-62.

25 Meek and Wood, Higher Education Governance and Management,
above n 4, chapter 3.

26 Ibid, quoting Bessant, above n 24, 60. See also Marginson and
Considine, above n 12, 68-70.
This phenomenon cannot be solely attributable to government policy, because it is not restricted to Australia. Rather, this is further indication of the convergence of policy directions in a globalised higher education context. Writing of Canadian universities, Buchbinder and Newson suggest that departments, faculty boards and university boards 'are becoming less important in setting the university's real academic priorities', a function which has been assumed by an expanding management. 'Systems of management have been applied to aspects of decision making and judgment that once belonged within the realm of "the collegium"'.

In the United Kingdom, the past two decades identified trends of 'massification' and 'marketization' which created a new policy and management environment. This new environment contributed to the re-emergence of governance issues for two reasons. Firstly, university councils and governing bodies have had to 'reinterpret their responsibilities in more active terms at the very time when - and partly because of this activism - their legitimacy has been questioned.' Secondly, a more active, outward-looking position has been forced on universities by the new competitive environment. 'These are issues which university councils, however reluctantly, are obliged to engage.'

Bargh et al draw a parallel between the demands for reform in the governance of higher

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28 See the reference to the use of this word under 2.1.1 above and see Jane Kelsey 'Privatizing the Universities' (1998) 25 Journal of Law and Society 51, 52; Glenys Patterson, The University (1997); Catherine Bargh, Peter Scott and David Smith, Governing Universities - Changing the Culture? (1996).

29 This word has become almost common enough to dispense with the inverted commas.

30 Bargh, Scott and Smith, above n 28, 2-3.
education institutions, and the overall policy environment which saw the privatization of government utilities and a general assumption of corporate sector values by the public sector. According to their analysis, efforts to privatize governance and management 'have been pursued more intermittently.' Nevertheless, the 'new' public management culture has a reflection in the management of higher education institutions in the United Kingdom - particularly in the new universities. Without altering the public goals of the institution, the management styles and techniques have changed. The new public manager plays a disputed role in this reconfiguration. One account suggests that he or she 'merely employs leading-edge management styles and techniques to pursue largely unchanged public goals.' But a second, more ideological account vests him or her with the attributes and values of the private sector entrepreneur. 'The cult of the entrepreneur, in turn, is linked to the process of managerialization [sic], which, despite all the slipperiness of both its definition and its associated symbolism, has transformed old power relationships and patterns of control and accountability in the public sector.'

For the New Right advocate of reform in government bodies, reforms to public governance required 'stripping away the symbolic facades and old organizational structures that, allegedly, marginalized governing bodies' role. In their place, 'efficient' responsibilities are substituted that embed within the public sector the imperatives of the 'market' culture.' It is important to bear in mind the existence of the public goals of the university - at length the question to be addressed will be - is the new governance structure well-adapted to the pursuit of public goals such as those pursued by the university, and if the governance structure has altered the goals of the university, has this caused a shift in the university's exposure to common law liability, particularly in negligence?

Bargh et al do suggest that there has been a recent backlash to the imposition of new

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31 Ibid 21.
32 Ibid.
33 Ibid 21-2.
models of governance, particularly in the 'new' universities, characterised by a more abrasive and adversarial style of governance. They attribute this development to a number of factors, but chiefly to a 'shift in the political climate, and public doctrine and policy, against what is seen as excessive marketization ... and in particular, the decline in probity that is seen as a consequence of abandoning public service and professional values.'

The experience in the United States has been rather different. The comparatively high number of purely private universities has produced a more entrepreneurial university sector, but the size and complexity of the American university tended to produce an early preference for the business model. Between 1900 and World War 1, Patterson notes, 'the modern American university had taken on the mantle more of a large business corporation than a universitas-type “community of masters and scholars.”'

'The board of trustees were the directors, the administratrors the executives, and the teachers the employees. Along with this, the role of the president had grown away from that of a “first among equals” into a much more managerial role.' The period after the second World War was marked by an increasing involvement by the federal government in the university sector, following the tendency in Australia and the United Kingdom. However, the early experience with an entrepreneurial university sector may provide insights into the litigation patterns against a newly managerialist university sector in those countries.

Thus, the trend towards corporate styles of management is not confined to Australia, 'nor can it be divorced from broader socio-economic forces that are re-shaping higher education globally.' Similarities between the changes in Australia and the United

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34 Ibid 10.
35 Patterson, above n 28, 215.
36 Ibid.
37 Meek and Wood *Higher Education Governance and Management*, above n 4, chapter 3.
Kingdom indicate 'elements which would seem to relate to deep structures of economy, polity and language which affect both countries' and extend to many countries which labour under similar external influences. The underlying influences arise not only from characteristics of each individual state and region, but from 'a much broader set of external movements which in its cultural aspect are becoming increasingly similar so that the language of management is familiar to academics across continents and is regarded by many with similar suspicion.'

Identified as a trend, the changes in university governance and decision-making structure are significant to the liability of the university for several reasons. Firstly, and anecdotally, the diminution of collectivity in decision-taking creates an adversary in management. Management is, appropriately or not, considered to be 'the other' and identified as 'the university'. The Hoare Committee criticised the culture of the sector, in which 'there still seems to be a culture of mutual blame and dependence ... whereby university managements and the relevant unions blame each other, or even federal or State governments, for their inability or unwillingness to tackle major workplace and work practice issues.' This creates the environment in which litigation flourishes. It results in the removal of a sense that the academic (or the student, for that matter) 'belongs' to the university, rather than merely working for or obtaining a service from the university. The creation of a 'client' mentality affects the student's approach to the university, as well as the university's approach to the student. This trend is characterised in the growing tendency to treat the student as having an exclusively contractual relationship with the university.

This situation is exacerbated by a commitment to the introduction of a private sector management style, and the desire of a private sector-style manager, to control all aspects

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39 Ibid.

40 Hoare Committee Report, above n 2, 13.
of the organisation being managed. A management which identifies and quantifies every aspect of its service and its organisation makes it easier for a litigant to identify failures to comply. For instance, a lecturer who retained the god-professor right to amend subject details as he or she thought appropriate - or not to provide subject details at all - is far less likely to be sued under, for instance, the misleading and deceptive conduct provisions of the Trade Practices Act 1974 (Clth), or its consumer protection equivalents elsewhere, than a lecturer who scrupulously enumerated the contents of a subject in the university handbook, then found him- or herself unable to deliver those contents. A university which requires staff to allow students access to examination papers is far more likely to be sued than one which maintains an air of elaborate mystery over the whole of the examination process. These changes, which are in themselves laudable perhaps, and are instituted in order to be responsive to student needs in the new quasi-market environment, leave the university vulnerable.

The private sector management style and the competitive environment which requires its adoption, trickles across to the promotion of the university, and this provides a fertile ground for potential litigants. Course handbooks and promotional documents can be construed as representations or contractual terms in certain conditions. Excessive claims, or even moderate claims to which adherence is impossible, invite litigation from which the university may not be preserved by disclaimers buried in long documents or on web-pages. These sources of information have been made more elaborate and attractive by university managers, but the trend is at the behest of government. The West Report made the necessity for information for prospective students clear in the odd free-market/government requirement manner it adopts. Recommendation 9 requires 'that, as a condition of receiving government funding, institutions should be required to make publicly available information about themselves and the services that they offer, in a form that enables students to make informed choices among competing institutions and courses.\textsuperscript{41} Thus, the combined efforts of government-prescribed free market characteristics and managerialist control will invite the student to be litigious.

\textsuperscript{41} The West Report, above n 6, 110.
In addition to the form of accountability provided by the potential for litigation, the Report suggests that, where institutions are able to charge fees, students should be able to effectively assert their rights. These rights are obviously intended to be accompanied by appropriate redress. As a response to the new set of complaints, the West Report also advocates the establishment of a new complaints procedure. Recommendation 10 says "[t]hat the Government should establish an independent complaints procedure, possibly in the form of a Higher Education Ombudsman, [sic] to support students, before a student centred funding framework is implemented."\textsuperscript{42} In a double-jeopardy approach which sits oddly with the operations of a full market economy, the students should, under the proposed approach, be able to gain redress should providers not satisfactorily deliver studies or services, and the Commonwealth should be able to withdraw access to public funds if consistent failure to deliver is demonstrated. However, the Report does not address the relationship between the proposed complaints procedure and common law actions, or the role of the university visitor in this scheme. The role of the visitor, indeed, is one area in which the archaic uses of the university appear to be incompatible with the tenor of calls for transparency and accountability. In jurisdictions in which the visitor is still an option for aggrieved students, the interrelation between the various forms of relief is a critical question.\textsuperscript{43}

The second way in which the managerialist approach may affect liability is that the corporatist approach, along with other alterations to the structure of the university, removes it more and more from the 'public' designation, even though the changes are, to some extent, motivated by government policy and changes to the public sector as a whole.\textsuperscript{44} As government policy abandons direct implementation in favour of a 'steering' approach, the potential to characterise the university as a public body is lessened. This diminishes the likelihood that administrative law measures will be taken against the university, and reduces the possibility that a claim in negligence will be affected by the claim that the university is a state instrumentality. In the context of universities in the

\textsuperscript{42} Ibid.

\textsuperscript{43} A consideration of the role of the university visitor appears in chapter 6.

\textsuperscript{44} See Marginson and Considine, above n 12, 71.
United States, Kaplin et al say that 'the law often does treat public and private institutions differently. These differences ... are critically important in assessing the law’s impact on the roles of particular institutions and the duties of their administrators.'

The third way in which a more managerial approach will affect the liability of the university is through the concomitant duty - and raison d’etre of a private sector model - to follow private funds. This activity takes the university into inherently litigious territory. For instance, in *First Equity Corp. of Florida v Utah State University*, the plaintiff, which was a stock brokerage company, sued the university for failure to pay for common stocks ordered by the university's assistant president of finance. Whilst the university claimed its board of trustees did not have the power to authorize investments, and the Court held that a general power to control and supervise appropriations by the state for the support of the school and a power to handle its own financial affairs would not give the university unlimited authority to encumber public funds, the restriction of authority in that case is less likely to exist today. In the context of private universities, and public universities with private arms, limitations on the apparent authority of the executive officer of a university could not be assumed. Consulting activities are expected of staff members, and universities are clearly aware of the potential for litigation, as is apparent from the disclaimers accompanying consultancy agreements. However, the consulting activities of staff increase the apparent authority of university officers and employees by extending the range of activities in which a university traditionally operates.

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46 544 P2d 887 (Utah, 1975)

47 An audit of New South Wales universities indicated that those universities demonstrated a lack of effective control over the consulting activities of their staff. All 10 public universities have had to clamp down on 'academic moonlighting' after the state's audit office found inadequate and outdated policies left universities vulnerable to exploitation: Patrick Lawnham, ‘Unis told to police outside contracts’, *The Australian* (Melbourne), 9th February 2000 35.
Kaplin and Lee, in the context of United States' universities, note that the increasing frequency and vigour with which universities have expanded the scope of 'auxiliary' enterprises or operations will increase the potential for litigation. Where the auxiliary activities of the university extend beyond educational purposes potential issues arise in unfair competition, as the university could be said to be exploiting its tax-exempt status and funding sources, or in claims that the institution's activities are inconsistent with its academic mission, or in criticism that the activities involve the institution in potential risk through contract or tort claims, among other things.\(^{48}\) Whilst it is not clear that the management model necessarily preceded the increasingly entrepreneurial activities of the university, the participation of a private sector management model hastens the demise of the traditional 'social contract' between the professionals in a faculty and the society in which they operated. Whereas professionals were able to shield themselves from the harsh operation of the market by negotiating 'a social contract with the community at large in which they received monopolies of practice in return for disinterestedly serving the public good',\(^{49}\) by eschewing the ideals of service and altruism and becoming involved with the market university academics, like other professionals, forfeited the protection of the social contract. 'Participation in the market began to undercut the tacit contract between professors and society because the market put as much emphasis on the bottom line as on client welfare.'\(^{50}\) The reason for the historical treatment of universities was undermined, and this increased the likelihood that universities will begin to be treated like other organisations.

The response of a managerialist university may be to tighten control on staff involved with contracts with outside organisations, to promulgate codes of conduct to regulate the public comments of staff,\(^{51}\) and to create new administrative positions for the

\(^{48}\) Kaplin and Lee, above n 45, 930-1.


\(^{50}\) Ibid 5.

\(^{51}\) See, for instance, reports of a La Trobe code of conduct in Guy Healy,
negotiation of the marketplace. The university may also create a corporate arm through which it carries out some external activities.

The range of activities which may be carried on through these auxiliary arms may extend some way beyond the provision of educational services. Kaplin uses examples such as the sale of personal computers and software, computing, graphics, printing and copying services, child-care services, hairstyling services; travel services; credit card services; the sale of snack food, greeting cards, musical recordings, or trade paperbacks by campus bookstores or convenience stores; the sale of hearing aids at campus speech and hearing clinics; the sale of books; the sale of prescription drugs at university medical centres; training programs for business and industry; entertainment and athletic events open to the public for an admission charge and summer sports camps on the campus; athletic facilities; hotel or dining facilities open to university guests or the public; rental or dormitory rooms to travellers or outside groups; rental of campus auditoriums and conference facilities; leasing of campus space to private businesses that operate on campus; conference management services; entrepreneurial uses of radio or television stations and related telecommunication facilities; and the sale of advertising space on athletic scoreboards or in university publications.52 In Australia and the United Kingdom many of these activities are carried on by student organisations on campus, but this does not necessarily relieve the university of liability for loss if injury results on campus or if the university maintains a level of control over the activities of the organisation.

However, it is dangerous to generalise in the assertion that a managerialist governance

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52 Kaplin and Lee, above n 45, 930.
structure will give rise to liability. The governance issues which arose in universities in the United Kingdom and which featured in the Second Nolan Report involved allegations of ‘mismanagement and maladministration’ against universities which had adopted a corporate managerialist style.53

In seeking to explain those cases it has been suggested that the constitutional structure of the statutory universities, with its stress on corporate managerialism, a mainly ‘lay’ board, and optional staff and student board members, make those institutions particularly susceptible to misgovernance. There has been a pejorative reaction on the part of some critics of the statutory university management style.54

Hall and Hyams suggest that this response is probably unwarranted, and detracts from an argument that the governance systems of all universities need to be reviewed.

Thus, the fourth way in which the changing governance style of a university may lead to potential litigation is the ad hoc way in which the structures of the university have been adapted to approach the new conditions. It may be the case that universities which were created as managerialist bodies ‘resemble giant tower blocks with design faults caused by the speed of their construction’,55 but it is also the case that some of the older universities ‘give the appearance of labyrinthine mansions, built to a specification of another age and now requiring comprehensive replumbing and rewiring.’56 These latter institutions may not have the legal structures to support a managerialist government, but their governance and management is often conducted by ‘a small cadre of senior

53 Problems arose in 1994 at two statutory universities, Huddersfield and Portsmouth, and in 1994 and 1995 at two Further Education Colleges, Derby Tertiary College Wilmorton and St Phillip’s Rorman Catholic Sixth Form College.

54 Hall and Hyams, above n 15, 30.

55 Ibid.

56 Ibid.
university officers in a manner which is not provided for by charter, statutes or regulations.\textsuperscript{57} The mismatch between the official structure of the organisation and the manner in which business is actually carried out is an interesting counterpoint to the degree of control exerted over other members of staff in a managerialist culture.

3.2 Governance issues giving rise to liability

The failure of the governance structure of a university to provide the checks and balances which would protect the university, the governing body or the individuals constituting the governing body from liability in negligence has received less attention than the failures of the governing body to provide accountability and transparency. It should be noted that a wide range of potential liability exists under statute - for instance, health and safety legislation, data protection and environmental protection. Criminal liability may also arise where fraudulent activity is identified. Potential liability may arise under various common law or equitable doctrines which impose a duty on board members to act with reasonable skill, care and diligence, or to avoid conflicts of interest. However, these sources of liability will not be considered in this study.

One of the factors identified by the Hoare Review was the lack of appropriate skills and knowledge of the higher education sector among members of governing bodies in Australia. The Review Committee suggested that this may be attributable partly to the appointment process, partly to a lack of training, and in some circumstances to the difficulty in getting appropriate people to serve on committees requiring specialist skills, particularly in finance and legal matters. This observation should be considered in the context of a further observation, made by the committee, that the university is a large, complex organisation, and may be faced with management and administrative tasks which would test the best managers in the private sector.\textsuperscript{58} It should also be considered in the light of the proposal by the Hoare Review Committee that members of governing bodies take increased responsibility for the accountability, management, and

\textsuperscript{57} Ibid.

\textsuperscript{58} Hoare Committee Report, above n 2, 53.
administration of the institution.

Conversely, the Committee acknowledged that the enhanced responsibilities would be likely to lead to increased public scrutiny of the individual members' probity. It identified four 'elements of probity' that would require clarification: 'disclosure of interests; fiduciary responsibility; liability; and indemnity.' Not unreasonably, the Committee considered that, were the universities to follow the reforms in both the public and private sector to require directors and board members to pay compensation or damages under certain circumstances, members would be 'motivated' 'to become more closely involved in the work of the governing body [which would] increase the effectiveness of the governing body.' The Committee did not note that this would hardly lead to a great number of suitable candidates for specialist committees, particularly where internal committee membership does not result in financial compensation. One of the possible consequences of increasing the potential personal liability of those on governing committees is the desire of the individual committee members to regulate and control the activities of the university as a whole by the codification of conditions, rules, and expectations. The enunciation of specific rules provides a focus for a potential litigant, who can point to a particular breach.

This combination of a poor set of skills, a complex organisation and increasing responsibilities is likely to lead to increased liability for both the individual member and the university.

3.2.1 Liability of governing boards

Given the range of operations over which the governing body of a university must exert its duties, the potential liability of a person on the governing board must have increased over the past few decades. This potential liability includes the risk of prosecution, but this account will be confined to liability in tort. In a recent tort case in the United Kingdom an injured student unsuccessfully sued a university, and two governors were

59 Ibid 57.
sued in their personal capacity as well as in their capacity as governors, alongside all the other governors.  

The university now operates in territory not substantially different from that inhabited by the corporation formed for profit. The university corporation is not really analogous to that of a commercial corporation. The origins of the chartered corporation lie in ecclesiastical and local government law, and from the earliest times universities in Europe and, later, in Britain, were assimilated to local authorities. Thus, ‘[t]he similarities between the old forms of local government in Britain and the constitutions of universities are important, since they allow us to use case law and other precedents to determine the powers of university ... officers and bodies.’

For the chartered universities, analogous case law might lie in disputes involving municipal government. More generally, the duties of members of corporate boards have origins in trust law. Much of the law reflects a Victorian perception of the company, with a director acting as trustee or agent for the constituents - the company, or collective corporate membership. ‘It is they who have chosen him, warts and all; they who can remove him; they who can ratify his acts in excess of authority and forgive his sins’. On that rationale, the duties of care and skill of a director could be subjectively adjudged, as he or she was elected for individual qualities. Further, his or her duties to the company had to be assessed by reference to the memorandum and articles, as the members’ social contract.

Although both the conceptualisation of the corporation and the perceived role and


obligations of the director have undergone material change, the trust origins of the corporation have resulted in a different perspective on directors’ duties. The set of general law duties of a director owes more to equitable principles than to common law negligence. The general law has imposed duties on directors on the basis that directors are fiduciaries - the directors are in a relationship of trust and confidence with the company. The consequence of being a fiduciary is that the fiduciary’s powers must be exercised on behalf of those who are in a position of dependence: the director’s powers must be exercised on behalf of the company. The duties imposed by the courts are the duty to act bona fide in the best interests of the company as a whole; the duty to exercise one’s powers for proper purposes; the duty not to fetter one’s discretion; the duty to avoid actual or potential conflicts of interest; and the duty of care and diligence.

In more recent times, these general law fiduciary duties have been mirrored and extended by statutory duties under the Corporations Law. These largely (but not completely) overlap but do not replace the general law duties. They may both be pleaded, since they co-exist. Which is pleaded depends on who is bringing the action.

In England, the trust origins of the corporation receives modern affirmation by the fact that almost all universities are exempt charities, and the duties apply not only to chartered universities, but to statutory universities and Higher Education Institutions (the 1992 ‘new’ universities). The fiduciary duties of the members of the governing board will include the duty to act solely in the best interests of the institutions and not to create a conflict of interest. According to Palfreyman, the member must also ‘act prudently with skill and care, probably (the law is not entirely clear!) to a level deemed that of the reasonably competent member - this is similar to the law’s (high) objective

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expectations of a charity trustee and to the (increasingly high) expectations of a company director. Palfreyman notes that the board members are not strictly charity trustees, nor are they company directors. He cites a Scottish case which refers to the term 'quasi-trustees', and adopts it as providing a sufficiently exacting standard of care.

In the United States, the trend is for the fiduciary duty of the ‘trustees’ (the governors) of the university to be analysed in terms of corporate law, rather than trust law, reflecting the wide range of activities undertaken by the modern university. This demands a lower standard of care, acknowledging the calculated risk-taking and the general business skills required of the modern governor or board member. A higher charity standard may apply to activities involving the investment of the university’s capital.

However, these standards of care relate to the trust (or quasi-trust) duties of the board member. Personal liability of the member in negligence to an outsider is another matter. The member’s duty to the company is the higher standard; the board member’s liability to an outsider must be as a result of a decision implemented by the entire board, causing injury to another, otherwise the university would be the proper plaintiff. In the case of a decision causing injury to an outsider, the corporation will be negligent. According to Palfreyman, it is unclear whether a member can be pursued in relation to the corporation’s negligence. He concludes that the ‘view on balance’ is that the individual member will not be personally liable against the corporation unless he or she has been

66 Howden v Incorporation of Goldsmiths (1840) 2 Dunlop 996.
67 Kaplin and Lee, above n 45, 85 citing Corporation of Mercer University v Smith, 371 SE 2d 858 (Ga, 1988).
wilful and malicious - and hence acted in bad faith - and/or he or she acted ultra vires. In any event, the university, as the richest and as the insured party, will be the more attractive defendant.\(^69\)

Trustees, in the event of a breach, may be excused in the discretion of the court if they have acted honestly and reasonably and ought fairly to be excused; however, as the discretion to do this arises from the relevant legislation, Palfreyman suggests that board members of universities will probably not be entitled to this discretion despite the ‘quasi-trustee’ standard of care.\(^70\) Nor will the board member necessarily be protected by legislation intended to cover company directors. Palfreyman calls for legislation to extend the discretion of the court to these ‘quasi-trustees’.

The terms of the founding statute may have some effect on the liability of members of the governing bodies. A founding statute may, for instance, exclude liability of board members. The *Macquarie University Act 1989* (NSW) schedule 1\(^71\) provides that

No matter or thing done by:

(a) the University, the Council or a member of the Council, or

(b) any person acting under the direction of the University or the Council,

if the matter or thing was done in good faith for the purpose of executing this or any other Act, subjects a member of the Council or a person so acting personally to any action, liability, claim or demand.

In Australia, the Hoare Committee proposed that any such provision should be amended to require that, in order to be protected from suit, the member of the governing body both acted in good faith, and exercised the same degree of care and diligence that a reasonable person in a like position would exercise. This proposal would bring the

\(^69\) Palfreyman, above n 65, 248.

\(^70\) Ibid 249.

\(^71\) Which has effect by virtue of s.9 of the Act.
liability of members of a governing board of a university into line with that of members of Commonwealth Authorities and Companies, as specified in s.22 of the Commonwealth Authorities and Companies Act 1997 (Clth), and that is the section referred to in the Report. However, s.22 is a civil penalty provision, and it is not clear from the reference whether such a disclaimer would be intended to extend to civil liability for negligence. The exclusion of persons acting without due skill, care and diligence certainly restricts the operation of a clause such as that in the Macquarie University Act, and would leave a member of a governing board more vulnerable to an action in negligence.

The statutory exclusion of liability in negligence would be out of step with the provisions of the Corporations Law; section 199A of the Corporations Law in Australia would not permit this type of provision in the constitution of a trading corporation. Further, the High Court in Puntoriero v Water Administration Ministerial Corporation (Kirby J dissenting) upheld an appeal from the New South Wales Court of Appeal, and held that a protective clause in s.19 of the Water Administration Act 1986 (NSW) did not extend to the commercial activities of a statutory authority. The Corporation was constituted by s.7 of the Water Administration Act 1986 (NSW) and was a statutory body representing the Crown under s.7(2)(e). The immunity conferred by s.19, according to Gleeson CJ and Gummow J, did not extend beyond the ‘discharging [of] public duties or [the exercise of] authorities or powers of a public nature.’ This case will be considered in more depth in the context of the legal liability of the university originating with the corporate arm of the university under 3.2.2 below.

72 Section 199A is contained in Part 2D.2 of the Corporations Law. These amendments were made pursuant to the Corporate Law Economic Reform Program Act 1999 (Act No 156 of 1999). The previous corresponding section was s.241.

73 (1999) 165 ALR 337.

It seems likely that the policy direction which calls for accountability in public bodies, and is sensitive to claims of incompetence and impropriety in governing bodies, is unlikely to countenance a set of exclusions for negligence in the founding statutes of universities.

In the United Kingdom, it is not common to provide members with the benefit of clauses excluding liability to the corporation, and the use of indemnities is also uncommon. However, the use of 'errors and omissions' insurance is increasingly the norm, and this would cover liability in negligence.

3.2.2 Liability originating with the corporate arms of universities

There are various reasons for creating a trading company through which a university might carry on its commercial operations - taxation, commercial, or legal considerations - and some universities have used this strategy for many years. However, it is not clear that this device will always protect the university from suit in the event of a claim. Further, employees who are required to be directors of this company may be exposed to personal liability themselves, and might expose the university to vicarious liability. It is intended to consider only the potential tortious liability arising as a result of this type of arrangement; issues such as the capacity of the university to create such a body, potential conflicts of interest, and the statutory liability of directors for wrongful trading will not be considered.

Theoretically, the legal exposure of a university entering into such an arrangement will be reduced, since the newly formed corporation will have a set of powers wider than that of a university - for instance, it will be in a position to speculate, whereas a university may be limited by its statutory powers or by rules relating to charities. In the United Kingdom, in particular, Higher Education Institutions are charities and must

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75 Palfreyman, above n 65, 249.

76 John Boardman, 'Trading Companies' in Palfreyman and Warner above n 15, 175.
apply property and income only for their defined charitable purpose. Further, since the new corporation will be a separate legal entity from the university, the university will not be liable for its wrongs. However, the university may be liable for negligence through two doctrines: through the operation of the principles of vicarious liability, or through the lifting of the corporate veil. Only the latter will be considered, as the current focus is on the primary liability of the university.

3.2.2.1 Personal liability of directors of corporate arms to the corporation

Negligence has been underused in the context of the law of corporations, possibly because of the trust origins of corporations law, so that it is more common to apply equitable remedies for failure to comply with duties of skill, care and diligence. However, the majority in the Court of Appeal in Daniels v Anderson, accepted the principle that directors could be liable for common law negligence. The possibility of common law negligence adds to the perception of growing potential liability created by recent decisions, for instance the possibility of liability of honorary directors under the corporations law, or under sexual harassment legislation. Aside from the set of statutory duties owed by a director to the corporation, a typical textbook on corporations law will mention liability in negligence only in passing. The corresponding duty of skill, care and diligence, arising from equitable principles, will dominate the discussion. This duty does not typically adopt the standard required to prove a case in negligence, but that of a person involved in the management of a commercial enterprise which is risky and uncertain. The traditional position sees the standard of care of a director as

77 Ibid 182.
78 (1995) 37 NSWLR 438 (the AWA case). See also State of South Australia v Marcus Clarke (1996) 14 ACLC 1019 and Permanent Building Society v Wheeler (1994) 12 ACLC 674, which also considered breaches of the director’s common law duty of care.
that which an ordinary person would take in conducting their own affairs.\(^{80}\) In the course of his judgment in *Re City Equitable*, Romer J enunciated a subjective test, saying that a director need not exhibit a greater degree of skill than may reasonably be expected from someone of his or her knowledge and experience. He also suggested that directors were *not* obliged to give continuous attention to the company by attendance at meetings, and that directors can trust other officers to act honestly.

The last decade has seen a change in directors' attitudes about the duty of skill, care and diligence. A series of insolvent trading cases, for instance, *Metal Manufacturers v Lewis\(^ {81}\)* and *Morely v Statewide Tobacco Services Ltd\(^ {82}\)* have suggested that the courts may be coming to require more of directors. In *Daniels v Anderson\(^ {83}\)*, the insolvent trading cases were considered to be relevant to the standard of care required of directors.\(^ {84}\) Whilst there were few cases based on the common law or statutory duty of care prior to this case, standards of conduct were being enforced through the insolvent trading provisions. ‘Clarke and Sheller JJ A have signalled that there is little jurisprudential distinction between cases decided under the duty of care and the statutory duty to prevent insolvent trading’\(^ {85}\). These cases suggest that the duty of care has become more onerous. Directors are now expected to take a diligent and intelligent interest in information provided to them, ask for information which they think is necessary or which, in the circumstances of each case, should be provided, keep up to date with the company's financial position and, where necessary, seek independent, expert advice. Subjective considerations are still relevant, but will not overcome this

\(^{80}\) *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407.

\(^{81}\) (1988) 6 ACLC 725.

\(^{82}\) (1992) 10 ACLC 1233.


general need to be informed.

The court will, under both general law and statute, consider such factors as the difference between large and small companies, and the nature of the business, any particular expertise claimed by the person, the number of meetings attended and the degree of diligence applied, if management has been fraudulent, whether there were any grounds for suspicion and what checks or balances were in place. The Court of Appeal did not endorse the approach at first instance, which had drawn a distinction between the duties of executive and non-executive directors.

3.2.2.2 Lifting the corporate veil

The traditional position is that, since the university is a separate entity from the trading corporation, the university will not typically be liable for the actions of that corporation.86 This is the case even though the university may own 100 per cent of the trading company.87 The directors of the trading corporation are obliged to act in the interests of that company, and not of the university.88 However, in certain circumstances, it is possible to argue in favour of lifting the corporate veil to expose the university to suit. In Briggs v James Hardie89 the possibility of lifting the veil to make a parent company liable for torts of a controlled subsidiary was raised, but not decided. In that case, Briggs suffered from asbestosis which he said he contracted whilst being employed by a subsidiary of James Hardie & Co Pty Ltd. He brought a negligence action against both the employer and the holding company. The NSW Court of Appeal held that lifting the corporate veil was a possibility, given the uncertainties governing this point, and ordered that the issue be determined at trial. Rogers AJA suggested that

87 Pioneer Concrete Services Ltd v Yeinah Pty Ltd (1986) 5 NSWLR 254
89 (1989) 16 NSWLR 549.
the rules applying in tort cases should be different from those applying in actions in contract, taxation or compensation. The corporate arrangements are completely irrelevant to the victim of a tort. Meagher JA spoke of the distinction between ‘lifting the corporate veil’ and finding that one corporation is ‘a mere cypher’ for another. His Honour was prepared to assume that there was scope for the operation of a doctrine to that effect in the law of torts, and specifically in the law of employer’s negligence. He referred to American cases in which it had been held that where an employee is in the employ of a subsidiary company so dominated by its parent that it can be said to be a mere conduit and to have no separate existence, and to cases in which the subsidiary was incorporated by its parent for the purpose of fraud. In those cases the court will lift the corporate veil to allow the employee to sue the parent company. However, this has not occurred to allow the parent company to be sued when the subsidiary was formed for the purpose of evading tortious liability.\(^90\)

*Briggs* was considered in *Wren v CSR Ltd.*\(^91\) At first instance in that case, O’Meally J in the New South Wales Dust Diseases Tribunal accepted that CSR had appointed the persons conducting the business in which the injured employee had worked - Asbestos Products Pty Ltd - and effectively governed the enterprise. CSR determined what capital should go into the operations of Asbestos Products and profits of the business effectively belonged to CSR. Asbestos Products ceased business because of a decision of the board of CSR. These facts indicated that CSR’s influence over Asbestos Products was dominant, pervasive, constant and controlling. O’Meally J suggested that the control exercised by CSR over Asbestos Products was sufficient to render CSR liable for the tortious acts of Asbestos Products.

On appeal the New South Wales Court of Appeal\(^92\) held that CSR owed a duty of care to

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90 Ibid 556, citing *Craig v Lake Asbestos of Quebec Ltd*, 843 F 2d 145 (3rd Cir, 1988).


Wren. Beazley JA and Stein JA, in a joint judgment, noted that senior counsel for Wren accepted that no case was made at trial that the circumstances were such that the corporate veil be lifted or that Asbestos Products Pty Ltd was CSR’s agent. The court analysed the relationship between CSR and Wren in terms of duty of care only, noting that it is possible to owe a duty of care to persons who are not, strictly speaking, employees. CSR had a duty directly to Wren, and that duty was co-extensive with that owed by an employer to an employee. Powell JA, in a separate judgment, said that it was not Asbestos Products, but CSR which, through its employees, controlled and supervised the factory, manufacturing processes and activities of employees, and that CSR had ‘assumed pro hac vice the mantle of employer of those employees of Asbestos Products’. It thus became subject to a duty to those employees.

Thus, it was not necessary to find any theory justifying piercing the corporate veil. This case emphasises the possibility that a duty of care arises according to the circumstances of the relationship, and will not necessarily be restricted by the existence of two separate legal entities. The case also demonstrates an unwillingness to ‘emasculate’ corporate law doctrines and to do no ‘violence’ to the principles in Salomon. ‘Tort law is being very careful not to stand on the toes of Salomon and company. In return, there has been acknowledgment in corporate law that, when lifting the veil in tort cases, considerations different from those in contract or revenue cases should be applied.’

3.2.3 Conclusion - issues of corporate governance

The changes in the environment of higher education, the evolution to a management

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93 Ibid 485 (Beazley JA and Stein JA), citing Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16.

94 Ibid 465 (Powell JA).


style intended to cope more effectively with those changes, and the grafting of commercial business principles onto the structures of the university, have resulted in an unusual mix of duties originating in municipal law, trust and corporations law, as well as in common law negligence. Whilst the board member of a university committee or a director of a company created as a commercial arm of the university could effectively ascertain their duty of care by identifying the most rigorous of the two likely contenders - adopting the 'quasi-trust' standard of care - this is not consistent with the wide range of entrepreneurial activities being carried out by universities; particularly by those commercial arms. From the universities' perspective, the individual directors' liability for breach of duty speaks mainly as a motivation for clarification of indemnity or insurance arrangements.

3.3 The relationship between the university and its students

The aim of this section is to explore the various representations of the relationship between the university and its students, and the way in which the changing internal and external environment of the university has altered the way in which the university/student relationship is viewed. The increasing commoditification of the relationship - the conceptualisation of a student in terms of a client or customer of a higher education industry, has rendered the contractual representation more attractive, and it has gained increasing ascendancy in both Australia and the United Kingdom. It has long had some attraction in the United States. This raises questions about the interaction of contractual and tortious remedies for the student in an action against the university. The tendency to consider the contractual analysis as an appropriate spur to accountability for poor education raises further questions about the position of the visitor in the university - the degree to which the visitor should remain as a shield against the scrutiny of the courts.

The viable representations of the relationship between the student and the university at which he or she is in attendance can be considered by reference to the level of judicial scrutiny each allows. The university may stand in relation to its students as a corporation
stands in relation to its members, and the students are together a body of corporators. In that case, a body of opinion asserts that the state should interfere as little as possible in the internal organisation, and, similarly, that judicial interference should be minimised.97

However, judicial interference has been justified in some cases on the basis of one of the alternative models; for instance, on the basis that the relationship is governed by statute, or the university for some other reason is in the nature of a public authority, so that the duties owed by the university to the student are statutory duties. Alternatively, interference has been justified on the basis that the students stand in a contractual relationship with the university, and so, in consequence, the relationship is governed by the terms and conditions which may be found to be in that contract.98 Some cases suggest the possibility that the student could stand as a beneficiary of a trustee university, or that intervention is otherwise justifiable on the basis that the university is a fiduciary.99 Finally, and most convincingly, the relationship may be a hybrid of two or more of these possibilities.

97 This idea is expressed in many cases in which courts deny that they have the jurisdiction to adjudicate on disputes arising between a university and its members. On a doctrinal level, it has been justified by the idea that '[t]he state was ... but one of the many groups to which individuals might owe allegiance; private associations were thus viewed as clusters of sovereignties, each competing with the state and other groups for individual loyalties, and each therefore entitled to immunity from interference in its affairs by the state.' See Note, 'Judicial Control of Actions of Private Associations' (1963) 76 Harvard Law Review 983, 986.

98 Possibly supplemented, as already mentioned, by statutorily implied terms.

Authorities in the United States have relied on a set of constitutionally guaranteed rights, in particular, the fourteenth amendment which requires due notice and fair hearing, and have also, in the past, relied on the theory of *in loco parentis*. Reliance on constitutionally guaranteed rights is still very common in cases in the United States, and colours modern judgments. This analysis will not consider either of these two theories in detail, since they have little relevance in the context of modern Australian higher education. They are worth mentioning here, however, as adherence to these theories in the United States has resulted in a different line of authority from that experienced in Australia and the United Kingdom. The theory that schools stand *in loco parentis* suggested that the university stood in place of a parent, and owed the duty of a parent to the student with regard to the supervision of the students' conduct and welfare. The *in loco parentis* doctrine 'permitted the institution to exercise virtually unlimited legal authority over, as well as responsibility for, the students in their care.' The doctrine was increasingly attacked as the university environment changed, creating a system of mass education, including a large number of students of mature age, and a series of cases in the 1960s considered the doctrine outdated and inoperative. More recent cases confirm this view. There is no judicial precedent in Australia or the

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101 E.g. Stetson University v Hunt, 88 Fla 510, 102 So 637 (1924); Gott v Berea College, 156 Ky 376, 161 S W 204 (1913).


104 Furek v University of Delaware, 594 A 2d 506, 522 (1991); Beach v University of Utah, 726 P2d 413, 418-9 (1986); American Future Systems v SUNI College, 565 F Supp 754, 764-5 (1983); Hartman v
United Kingdom to support the view that the university stands *in loco parentis* to its students, and an Australian court is unlikely to apply the doctrine in the Australian context. Most Australian university students are adults who enter into a relationship with the university without parental involvement, and although the university provides a range of services to students, such as counselling, health and housing, and has wide disciplinary powers over those students, this does not justify the imposition of a doctrine which is inappropriate in the circumstances, even to protect the interests of students.

In Australia, the relationship between the student and the university is most commonly considered to be either a corporate relationship or a contractual relationship. The relationship cannot be identified in abstract one way or another; the representation which is to be preferred in any particular case will depend on the nature of the dispute, the origin of the institution, the rules of the institution and, to some extent, policy.

Amongst these factors, the characteristics of the university itself must be of pre-eminent importance. A correct characterisation of the relationship between the parties will depend on how the university is constituted, in particular the question of whether it is a private or a public institution, the internal organisation of the university, its foundation instrument (whether that be a deed of trust, charter or Act of Parliament), and any other instrument which may indicate the 'membership' of the university. Even if the constitution and the membership of the university are properly identified, there is no clear consensus on whether the relationship should be shielded from judicial scrutiny,

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It is possible that an individual lecturer may occupy this position. See the decision of Mr Terry Mangan, an officer of the New South Wales TAFE Commission concerning the dismissal of a TAFE teacher for sexually inappropriate behaviour, referred to by Kirby P in *Matkevich v NSW TAFE Commission [No 3]* (Unreported, NSW Court of Appeal, Kirby P, 1995) 5. See Monotti, above n 104, 169.
some regard being given to policy in determining the question. Since policy will have
some impact on the characterisation of the relationship, the changing character of the
higher education system will force a change in the way the relationship is viewed.

The circumstances in which the question of the relationship between the student and the
university are likely to arise will in themselves give rise to distinguishing
considerations; clear differences in approach arise depending on whether the dispute
involves a question of academic judgment or an incident arising through non-academic
conduct. The courts have shown themselves less willing to become involved where they
are asked to review substantive scholastic decisions. Whereas this provides some
weight to the policy arguments supporting a particular representation of the relationship,
however, it will not be a conclusive argument; since, for instance, a corporate
representation for the academic aspect of the relationship is compatible with a
contractual or other representation of the non-academic aspect of the relationship.

This analysis will start with a representation of the relationship as a set of mutual
obligations between corporators. It will spend some time considering the various
possible alternative characterisations of the relationship which have been used to justify
judicial interference in the corporate relationship. It will then consider the matters
which may make one characterisation more attractive than another in a policy sense. It
is not possible to determine which conceptualisation of the relationship will prevail,
since the arrangements in each university will determine that result; however, it is
possible to make some comment about the trend to justify judicial intervention on the
basis of theories which may be an awkward characterisation of a complex relationship.

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107 Sally M Furay, 'Legal Relationship between the Student and the Private College or University' (1970) 7 San Diego Law Review 244, 245 and the discussion below.
3.3.2 Students as corporators

A view strongly supported by the authorities is that in most Australian universities at least part of the relationship is one of status, that the students stand as corporators in relation to the university, and that that relationship is governed by the by-laws of the corporation. To go one step further, the interpretation of those by-laws is, to some extent, within the jurisdiction of the visitor, rather than the courts. There are circumstances, of course, where the founding instrument will limit the definition of corporators, and in those cases non-corporators may be in a contractual relationship;

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108 I make cautious use of this term; MacCormack reminds us that Maine's famous description of law in terms of an evolution from status to contract made use of a limited concept of status applying only to the family. However, Graveson defines status as 'a special condition of a continuous and institutional nature, differing from the legal position of the normal person, which is conferred by law and not purely by the acts of the parties, whenever a person occupies a position of which the creation, continuance or relinquishment and the incidents are a matter of sufficient social or public concern'. It is in terms of a continuing, institutional conferral of status, as an incident of a relationship rather than as a consequence of agreement, that I use the term. See Geoffrey MacCormack, 'Status: Problems of Definition and Use' (1984) 43 Cambridge Law Journal 361, 362. Goldman suggests that the use of the theory of in loco parentis in the United States 'suggests acknowledgment by the bench that these disputes involve the law of status, not the law of contract.' Goldman, above n 99, 651, note 36.

109 This position is changing; many of the newest universities in England, the non-chartered universities, do not have a visitor. Scottish universities have never had a visitor. In Australia the visitorial jurisdiction has been attenuated in New South Wales to limit the visitor to ceremonial duties only (University Legislation (Amendment) Act 1994 (NSW) s.3, Sch. 1), and the jurisdiction has been made concurrent with the jurisdiction of the courts in Victoria (Administrative Law (University Visitor) Act 1986 (Vic)). There has been substantial discussion about the abolition of the jurisdiction altogether: see Rick Snell (ed), The Role of the University Visitor: A Symposium University of Tasmania Law School Occasional Paper Number 5 (1997).

110 In many of the 'new universities' in the United Kingdom the student is not a corporator; in fact, the university itself is not incorporated. Rather, the governing body is a body corporate. In Ex parte Davison (1772) 1 Cowp 319 Davison was a commoner of University College; that is, an
the typical foundation instrument, however, will list undergraduate students and postgraduate students as corporators.¹¹¹

Under this characterisation, the university becomes a sort of 'little republic', with rules which are the equivalent to municipal laws. When consolidated into a corporation they become one person at law, with one will identified by the vote of the majority. This will may establish rules for the regulation of the entire body, and these constitute 'a sort of municipal law of this little republic; or rules and statutes may be prescribed to it at its creation, which are then in the place of natural laws.'¹¹²

These rules are within the exclusive jurisdiction of the visitor. The result of this has been described as an 'Alsatia in England' - a place where the common law does not run and where the ordinary courts have no jurisdiction.¹¹³

Where the student is identified as a corporator, the student and the university are bound by the rules of the corporation. The authorities for this principle are ancient; in King v

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¹¹¹ See, for instance, University of Sydney Act 1989 (NSW) s.4; University of Technology, Sydney, Act 1989 (NSW) s.4; University of Western Sydney Act 1988 (NSW) s.4; University of Wollongong Act 1989 (NSW) s.4; University of New South Wales Act 1989 (NSW) s.4; La Trobe University Act 1964 (Vic) s.3; Royal Melbourne Institute of Technology Act 1992 (Vic) s.4 The Melbourne University Act 1958 (Vic) s.4 states, in part, that 'the University shall be a body politic and corporate ...which shall now and hereafter consist of - ... (g) the undergraduate students'. The University had previously consisted of the council and senate only.


¹¹³ 'There must be no Alsatia in England where the King's writ does not run' Czarnikow v Roth, Schmidt and Co [1992] 2 KB 478, 488 (Scrutton LJ), cited in Farrington, above n 61, 216.
Chancellor of the University of Cambridge\textsuperscript{114} the matter at issue was the suspension without hearing of a student due to a failure to pay a debt to a member of the faculty. Lord Chief Justice Pratt found for the student, holding that the relationship between the student and the institution was the same as that applying to corporations, and thus the institution was required to follow the rules of natural justice. Under the rules for the removal of members of a corporation the party must be summoned, and given an opportunity to be heard. 'The cases determined upon that head are so numerous, and the rule so well settled and known, that it cannot now be disputed; for want of doing which, this suspension or degradation cannot be supported. And therefore a peremptory mandamus was granted.'\textsuperscript{115}

More recently, in the same sort of dispute, something like the same conclusion was reached in University of Ceylon \textit{v} Fernando,\textsuperscript{116} where the Privy Council was required to determine whether the University of Ceylon had contravened the principles of natural justice applying its procedures and suspending a student for breach of examination regulations. Although little was said of the status of the student, the court said that 'he must be taken to have agreed, when he became a member of the university, to be bound by the statutes of the university'.\textsuperscript{117} The Privy Council found that no particular procedure was required to be adopted, as long as the procedure complied with elementary and essential principles of fairness.

These views have been followed in some American authorities. In \textit{Commonwealth ex rel Hill v McCauley}\textsuperscript{118} a Pennsylvania county court defined the relationship between the student and a private Presbyterian institution chartered by the State of Pennsylvania to be the same as that which applied to corporations. The court noted that the principles of

\textsuperscript{114} (1724) 2 Ld Raymond 1334; 92 Eng Rep 370 KB.
\textsuperscript{115} (1724) 2 Ld Raymond 1334; 1347.
\textsuperscript{116} [1960] 1 WLR 223.
\textsuperscript{117} University of Ceylon \textit{v} Fernando [1960] 1 WLR 223, 233.
\textsuperscript{118} 3 Pa C 77 (1877).
natural justice applied to the removal of a student, and in the circumstances 'the case fell under the rule for removing a member of a corporation'.

The conceptualisation of the student as a corporator is more consistent with the traditional exclusive jurisdiction of the visitor. One interpretation of the traditionally wide powers of the visitor is the claim that, unless the position has been altered by statute, the jurisdiction of the visitor is exclusive, and the jurisdiction of the courts excluded. However, this must be accepted only with reservations; in King v Chancellor of the University of Cambridge it was argued that 'the court could not issue a writ of mandamus because the clause, "nullus justiciarius seu judex se intromittat, &c," contained in the school's charter from Queen Elizabeth, excluded the court from inquiring into the proceedings of the case.' This argument was rejected on the basis that 'several temporal advantages annexed to the student's degree by acts of Parliament, and although the court might not interfere with the educational matters of the school, it could act to secure these temporal rights.'

It has certainly been the case that the court does find itself capable of intervening in a number of species of dispute; particularly where it can be shown that the corporator is simultaneously in a contractual relationship with the university. Most cases in which this difficulty has arisen have involved contracts of employment, rather than the relationship between the university and the student; however, they are instructive, not only as an indication of the extent of the jurisdiction of the visitor, but also because they provide insight into the relationship between the rights of the member as corporator and his or her rights as contractor.

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120 (1724) 2 Ld Raymond 1334.

121 Fowler, above n 119, 402; (1724) 2 Ld Raymond 1334, 1339.

122 Fowler, above n 119, 402.
The more recent of these cases have involved persons wrongfully dismissed from office. That person may be a corporator by the terms of the founding instrument. However, he or she will also typically be in a contractual relationship with the university. Clearly the traditionally exclusive jurisdiction of the visitor will not in this case exclude the jurisdiction of the courts. Similarly, a student may be, clearly a corporator by the terms of the founding instrument; that does not necessarily mean he or she is not in a contractual relationship with the university for some aspect of the relationship.

If one first looks at the contractual relationship, it may be observed that the conflict between the jurisdictions is between contract and status. As a member of the foundation, a party has a *locus standi* before the visitor, and the visitor possesses an exclusive jurisdiction to try all matters relating to his membership, for by the common law the visitor provides the proper forum to which all grievances concerning the foundation must be submitted. Yet the terms of a contract are a matter for the courts of common law and equity.  

However, a line of authority asserts that the visitor’s jurisdiction extends to actions for breach of contract, at least to the extent that the University’s rules are terms of the contract: in *Murdoch University v Bloom and Kyle* 124 Burt J, on the assumption that a breach of contract fell within the visitorial jurisdiction, said ‘[i]f it were then I can see no reason why an action for damages if brought upon the breach of such a contract would not equally be a matter within the exclusive jurisdiction of the visitor...’. This view was adopted by Lord Griffiths in *Thomas v University of Bradford*, 125 and Lord Ackner said, in the same case, that ‘Miss Thomas is not relying upon a contractual obligation other than an obligation by the university to comply with its own domestic laws. Accordingly, in my judgment, her claim falls within the exclusive jurisdiction of

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the visitor. In Bayley-Jones v University of Newcastle (which concerned the termination of the enrolment of a PhD student by the university), after considering these authorities, Allen J concluded that there was no difficulty in construing that it was possible that there was a contract which incorporated the terms arising from the rules of the university:

One can have contractual rights which are a reflection of rules of the University. Where in such a case what constitutes a breach of the contract is breach of the rules of the University the Visitor’s jurisdiction, which is exclusive, is attracted. In my opinion it is clear that in the present case the plaintiff is entitled to rely upon any breach of contract between her and the University which was involved in the ultra vires purported termination of her candidacy.

This interesting set of statements illustrates the tension between two tendencies; it is becoming more common to characterise the relationship as contractual, but the jurisdiction of the visitor has swelled to take in that aspect of the relationship. Whereas it could be said that the reason for characterising the relationship as contractual is a justification of the intervention of the court, it has not necessarily worked that way.

The easy acceptance of a relationship governed concurrently by contract and corporate rules can be compared with earlier cases, in which the members of the foundations were not in any contractual relationship with the corporation, ‘but enjoyed their membership of the foundation as a result of having been admitted to office therein. It was thus simply as the holder of an office in the foundation appointed for the purpose of performing duties imposed by the statutes of the foundation that a person obtained a status within the foundation.’ In the case of Thomson v University of London Sir

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126 Ibid 828.

127 (1990) 22 NSWLR 424.

128 Smith, above n 123, 639. It is interesting to note that Blackstone considered this to be one of the characteristics of a eleemosynary corporation which distinguished it from a civil corporation: ‘And among these [civil corporations] I am inclined to think the general corporate
Richard Kindersley V-C provided useful dicta, but nothing more, because even though the student alleged the existence of a contract between himself and the registrar, there was held to be no contract. Kindersley V-C said

whatever relates to the internal arrangements and dealings with regard to the government and management of the house, of the domus, of the institution, is properly within the jurisdiction of the Visitor, and only under the jurisdiction of the Visitor, and this Court will not interfere in those matters; but when it comes to a question of ... any contracts by the corporation, not being matters relating to the mere management and arrangement and details of their domus, then, indeed, this Court will interfere.¹³⁰

Since most of the cases which touch on this issue are cases involving the jurisdiction of the university visitor, it is difficult not to conclude in a way which features the jurisdictional question more prominently than the question of substance. However, it is clear from the comparison of modern with more ancient cases that the court is becoming more comfortable with analysing at least part of the relationship as contractual.

It is possible to attempt a reconciliation of the authorities by considering the nexus of contracts theory of the corporation. The memorandum of association or articles of association of a company create a contract between the company and each shareholder, and between each of the shareholders.¹³¹ However, this contract is limited insofar as it

¹²⁹ (1864) 33 LJCh 625

¹³⁰ Thomson v University of London (1864) 33 LJCh 625, 634

¹³¹ For authority in the United Kingdom see T Crowther, 'The Nature of the
is a statutory contract which is of contractual effect only insofar as it deals with the rights and duties of members as members. Thus, if the memorandum and articles of association deal with other matters, not related to membership, these do not form part of the contract between the parties. 132

Such a construction of the relationship between the parties may have an effect on the justiciability of some decisions in public law; the existence of a contract may preclude success in an application for judicial review. If the contract is based on the membership of the corporation, it may not affect justiciability if the decision referred to goes beyond the rights of the member as member, since these are not contained in the contract. However, if, as suggested below, the contract goes further than the rights conferred by the statute, difficulties may arise for justiciability in public law.

In the case of a corporate relationship, the obligations and rights of the student and of the institution are contained in the foundation instrument, and the rules and regulations made pursuant to that instrument. The student is taken to be bound by those rules when he or she becomes a member of the institution upon matriculation. This includes provisions relating to dismissal, discipline, any manner of procedure for determination of disputes between the parties, regulations relating to examinations, re-reading of examination papers and so on. 133

In policy - as opposed to legal - terms, the benefits of a corporate model are, firstly, that the presumptions of opposing interests attaching to a contractual analysis are avoided. Secondly, the limited interference of the judiciary in the functioning of the institution is

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133 See, for example, University of Ceylon v Fernando [1960] 1 WLR 223, 231.
explained. Even if the role of the visitor is eventually abolished in all jurisdictions, a corporate model invites a more private settlement of disputes according to the rules of the organisation. This limitation on judicial intervention has several advantages:

(a) Strict judicial supervision of the internal affairs of the university interferes with the autonomy of the university. This could deprive the university of the ability to promote specific goals which it considers desirable, and which are in the interests of the corporators.\(^\text{134}\) For instance, if the power of the university to discipline students for plagiarism, cheating in an examination or purchasing essays was to be strictly construed by a court, it would seriously impair the ability of the university to carry out a program of assessment recognised as credible by employers and other institutions.

Against this concern, however, is the traditional reluctance of a court to subject academic matters to scrutiny on their merits. Administrative review procedures opening the process to external scrutiny do not threaten the integrity of assessment procedures.

Moreover, internal dispute resolution procedures are not necessarily free from this concern. Whalley and Price report the concerns arising from the exercise of the 'ceremonial' functions of the visitor in Nigeria, when the Visitor, purporting to exercise his powers, 'instituted a series of "visitations" into the management of the universities, with frightening consequences to the hitherto cherished concept of academic freedom and the related issue of professorial tenure.'\(^\text{135}\) The visitations took the form of sending armed forces onto campuses.

(b) Judicial enquiry has limitations when placed in the context of a set of commonly

\(^{134}\) See a related discussion in Note, ‘Judicial Control of Actions of Private Associations’ above n 97, 991.

\(^{135}\) Peregrine WF Whalley and David M Price, ‘The University Visitor in Tasmania: Retention, Repeal or Reform?’ in Snell (ed), above n 109, 14.
accepted rules and regulations.

In a case involving the internal affairs of an association, a court may find it proper to refer to the association's practices, rules, or purpose as standards for determining the legitimacy of rival claims. ... If a court undertakes to examine the group's rules or past usages, its inquiry may lead it into ... the 'dismal swamp,' the area of its activity concerning which only the group can speak with competence. Rules and usages which have taken on a peculiar meaning over a period of time, when interpreted by a court which is unfamiliar with the group or unsympathetic to its practices, may be construed in a way which does not reflect the understanding of the members prior to the dispute.\textsuperscript{136}

Moreover, judicial attempts to substitute a legal interpretation for the understanding of members may interfere with the functioning of the group.\textsuperscript{137} This is unlikely to present a problem of massive proportions when the institutional goals are, to some extent, defined by statute, as they are in the case of a university. However, in cases where the court has been called upon to interfere with an academic judgment, it has been very reluctant to impose its view on the university. This is precisely the reason for the traditional jurisdiction of the visitor, who is supposed to be familiar with academic matters.

Against these advantages, in the university context, is the great power of a university, by whose means a person may have an education or may be denied one. In a case where the power of the organisation is great, the necessity for some external control, such as judicial intervention, may be felt. Since the provision of education is a virtual necessity, and individuals are more or less compelled to join, the argument for the preservation of

\textsuperscript{136} Note, 'Judicial Control of Actions of Private Associations', above n 97, 991.

\textsuperscript{137} Ibid 992.
autonomy as a reflection of freedom of association is less persuasive.\textsuperscript{138}

Another factor telling against the omission of the judiciary from overseeing the actions of an association again arises due to the nature of the compulsion to join the university; the power of the university can be felt both by the individual and by the society to which the university supplies or withholds its services. This argument is applied to any group of strength. The actions of a group may have an impact on the interests of an individual's 'mental or physical well-being, social relations, reputation, intellectual development, religious activities, access to forums for the expression of his beliefs, property interests, ability to earn a living, and political effectiveness.'\textsuperscript{139} The impact of a group on the public interest could also be marked, by, for instance, controlling the disposition or discharge of a public office, or by prohibiting testimony in the interests of the public but against the interests of the group.\textsuperscript{140}

However, these disadvantages are alleviated, in the case of the university, by the degree of external control exerted by Parliament, which restricts the formulation of socially harmful goals and practices, and the existence of other forms of external oversight, where a visitor exists. Theoretically the visitor provides cheap, speedy, flexible and final adjudication in disputes, characteristics favourable to the student and potentially more favourable than a judicial dispute resolution procedure. However, Whalley and Price suggest that the system of visitorial jurisdiction as it currently operates is not necessarily in possession of those characteristics. Although, in visitorial enquiries, the student may represent him- or herself they may be disadvantaged when opposed by universities, who will have sought legal advice and who will usually be strongly represented. This is aside from the costs of the university and of the visitor him- or herself. Nor is the system necessarily speedy; in one case fourteen months elapsed between the petition and the delivery of the judgment of the visitor declining

\textsuperscript{138} Ibid 994.

\textsuperscript{139} Ibid 992-3.

\textsuperscript{140} Ibid.
jurisdiction.\textsuperscript{141}

A more intangible set of protections against this type of group tyranny applies to universities. The tradition of academic freedom is still accepted in universities, and although the tradition may be thought to be under threat from the ‘corporate university’ culture, there are signs that academic freedom is still relatively robust. Nevertheless, the tendency towards ‘academic capitalism’, which makes a corporate enterprise out of the university, locks many aspects of the university’s functioning into the ‘commercial in confidence’ bracket, and protects commercial goodwill against the scarification of criticism.\textsuperscript{142}

The group power of the individual university is also diminished by the level of competition introduced by successive reforms of the higher education industry. The same phenomenon which diminishes the ability of academic freedom to protect public debate diminishes the power of the university to have a real impact on the future of individuals or the function of public institutions.

Other concerns have prompted calls for the abolition or attenuation of the visitorial jurisdiction. Whalley and Price report, since 1979, a revival of interest in the visitor as an independent arbiter of university disputes and a consequent growing concern that the increased visitorial activity jeopardises the integrity of vice-regal office by involving State Governors in matters of public controversy, involves the Governor in non-ceremonial duties consuming time and expense, and demands qualifications and

\textsuperscript{141}‘The RMIT case’, in which judgment of the visitor was dated 1 February 1995. The account is based on the report of the Senate Select Committee on Public Interest Whistleblowing (\textit{In the Public Interest}, Canberra, 1994) and the report of the committee on unresolved whistleblower cases: \textit{The Public Interest Revisited} (Canberra, 1995), cited in Whalley and Price, above n 135, 18.

experience not necessarily held by the visitor. Paradoxically, given the revival of popularity of the office for petitioners, these concerns have resulted in a tendency to adopt a 'narrow approach to, and interpretation of, their role and function', particularly where the issue is potentially controversial and public. This vice-regal reluctance to intervene has reduced the effectiveness of the office.

As an alternative to the current methods of oversight, it is possible to argue a place for the redevelopment of the law of public utilities, suggested by commentators in the light of the corporatisation and privatisation phase in the United Kingdom, Australia and New Zealand. Professor Michael Taggart, in particular, suggests that important regulatory issues arising as a result of this phenomenon may be addressed by reference to common law doctrines 'which control persons and corporations enjoying a legal or de facto monopoly in the provision of essential services to the public'. This body of law was well recognised in the United States from the early 19th century, and although applicable to a fairly limited range of bodies, amongst which the universities are not likely to be counted, this body of law does provide insights into the type of protection considered appropriate in that context.

### 3.3.3 Students as contractors

The contractual analysis emphasises the consensual nature of the relationship between

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143 Whalley and Price above n 135, 16.
144 Ibid.
145 These expressions of vice-regal concern are considered in Peregrine Whalley and David Price, 'The University Visitor in Western Australia' (1995) 25 University of Western Australia Law Review 146; F Burt, University Visitor (unpublished paper delivered to the University of Western Australia Convocation on 18 March 1994) 10; K Mason, University Visitors in Snell (ed), above n 109, 30.
147 There is insufficient space to consider this question in detail.
the corporators, and suggests that the rules of the corporation are enforceable in accordance with ordinary contract doctrine. There is a body of opinion which considers that the contract is the most appropriate way of governing the relationship: ‘[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.’\(^{148}\) By this argument, the rules and regulations of the university become the terms of a contract between the university and the student, supplemented by other documents. The rationale for such a preference could be closely linked to the changing values of the society which gives the university its identity. As the university sector is increasingly challenged by a modern ethos committed to accountability, the consequences of failure to provide satisfaction in the terms of that account may include liability for compensation through contractual suit.

The contractual theory, if applicable at all, is more frequently applied to a private institution. The reasoning is that attendance is a privilege governed by conditions, normally expressed or implied in official publications. These serve as notice of academic standards and general conduct. By enrolment at the institution the student warrants that he or she knows the rules and undertakes to abide by them. Failure to do so is a breach of contract.\(^{149}\)

This rationalisation of the relationship has certainly occurred in cases in the United States. In *Anthony v Syracuse University*\(^ {150}\) the registration agreement stated that the school reserved a ‘right to require withdrawal of any student at any time for any reason deemed sufficient to it and no reason for requiring such withdrawal need be given’. A student was dismissed on the grounds that she was not ‘a typical Syracuse girl’. The


\(^{149}\) Furay, above n 107, 263.


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court ruled that the student was bound by the registration agreement, and this rationale has been adopted in a number of cases in the United States.\textsuperscript{151} A corresponding argument, in the hands of a student, may be made to support a view that the institution has made certain promises to an enrolling student, by virtue of statements made in course handbooks and other official publications, and that those promises are supported by consideration, in the form of fees, or in the form of a promise to obey the regulations of the university. In \textit{Andre v Pace University}\textsuperscript{152} two students brought a claim against a university asserting, inter alia, breach of contract, for failure to deliver a basic computer programming course as promised. The students were successful in their claim that the failure to deliver the course was so complete that rescission of the full contract was justified.

However, writing in the context of United States’ law, Goldman suggests that the courts’ use of contract law is a ‘rationalization’ of decisions in suits involving conflicts between the student and the university,\textsuperscript{153} and the constitution of the contract is more often assumed than established.

Although it is possible, by reference to the admissions application, the registration forms and the rules and regulations of the university, to assert that the contract requires that a particular procedure will be followed, or that particular subjects will be offered, this reduces the ‘product’ of a university to a limited range of promises. What has the university agreed to provide the student? Chancellor of The University of Melbourne,

\textsuperscript{151} \textit{Eg Deehan v Brandeis University}, 150 F Supp. 626 (D Mass 1957) (school refused to renew the registration of a student who had protested against the inadequacy of scholarship assistance); \textit{Robinson v University of Miami}, 100 So.2d 442 (Fla 1958) (student dismissed from a teacher training program because he was an atheist); \textit{Carr v St. John’s University}, 12 N Y 2d 802, 236 N Y S 2d 834, 187 N E 2d 18 (1962) (students expelled for participating in a civil marriage ceremony). See Goldman, above n 99.

\textsuperscript{152} 618 N Y S 2d 975 (1994).

\textsuperscript{153} Goldman, above n 99, 652.
Sir Edward Woodward, suggests that a graduating student should be taking away an ‘enquiring mind’, a ‘well-developed capacity to reason’, a ‘capacity for problem solving’, the ‘ability to communicate’, ‘interests beyond work’, ‘tolerance’ and ‘a number of friendships’. The Dearing Committee Report in the United Kingdom, introduces itself with the premise that ‘[t]he purpose of education is life-enhancing: it contributes to the whole quality of life. This recognition of the purpose of higher education in the development of our people, our society, and our economy is central to our vision’. It goes on to say that UK higher education must encourage students to achieve beyond expectations, to be at the ‘leading edge of world practice in effective learning and teaching’, and to sustain a culture ‘which demands disciplined thinking, encourages curiosity, challenges existing ideas and generates new ones’. Which part of the contract enforces the objective to ‘be part of the conscience of a democratic society’? These high ideals were tested as contractual terms in Trustees of Columbia University v Jacobsen, in which a student sued by a university for tuition fees filed a counterclaim seeking damages of $7,016. He alleged that the university had represented that it would teach the defendant wisdom, truth, character, enlightenment, understanding, justice, liberty, honesty, courage, beauty and similar virtues and qualities, that it would develop the whole man, maturity, well-roundedness, objective thinking and the like; and that because it failed to do so it was guilty of misrepresentation to defendant’s pecuniary damage.

Unfortunately the matter was dealt with summarily, with the trial judge granting the

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155 Dearing Committee Report, above n 12, [1.1].

156 Ibid [1.4].


158 53 NJ Super 574, 576; 148 A 2d 63, 64.
university’s motion for summary judgment. This was sustained on appeal.\textsuperscript{159}

Even if, through the implication of terms by common law or statute, there was an implied promise to educate, problems of proof arise. The contract theory is a limited basis upon which to assert substantive student rights beyond the right, for instance, to the benefit of a promise to run a course into which a student has been accepted,\textsuperscript{160} to provide adequate tuition,\textsuperscript{161} to be provided with adequate library facilities,\textsuperscript{162} or to have the relevant regulations followed in a disciplinary hearing. It is likely that the courts will imply a term to exercise reasonable skill and care in the provision of tuition, although it may be difficult for a student to establish a failure to reach the contractual level of skill.\textsuperscript{163} A student attempting to enforce a right to ‘an education’ or ‘employability’ would have to look further than the contract. The incompatibility of, on the one hand, reducing ‘public goals’ or objectives to a set of priorities and, on the other hand, requiring their implementation according to the precepts of the private market is again demonstrated.

Even in the absence of wider issues of public policy, authorities suggest that the courts are reluctant to interfere with some aspects of the university/student relationship; a reluctance inconsistent with the view that the relationship in its entirety can be characterised in terms of a traditional contractual analysis. The courts have not

\textsuperscript{159} Ibid. See Note, ‘Educational Malpractice’ (1976) 124 University of Pennsylvania Law Review 755.

\textsuperscript{160} See Casson v University of Aston in Birmingham [1983] 1 All ER 88, and in a slightly different context, Moran v University College Salford (No 2) [1994] ELR 187, in which a student was offered an unconditional place in error, and was then refused entry into the course.

\textsuperscript{161} Sammy v Birbeck College The Times 3 November 1964.

\textsuperscript{162} Even then, how is ‘adequacy’ defined?

traditionally, for instance, interfered with an academic decision of a university.\footnote{164}

Certainly, if the law of voluntary associations is considered, the courts have generally taken the view that relations between members are, while consensual, not contractual.\footnote{165}

Courts have generally declined jurisdiction except in limited cases: where property rights are involved, where the right to work is involved, to require that decisions relating to membership are resolved according to the rules of natural justice, or where the association is subject to legislation creating rights and obligations on members within the association.\footnote{166}

In addition to the difficulties in establishing the subject-matter of the contract, there are difficulties in the process of formulating the contract. The input of the student into the process of negotiating the contents of the contract is small. The university/student contract is closer to a \textit{contrat d’adhésion} than to one based on \textit{consensus ad idem}.\footnote{167} As one commentator put it, 'the registration contract is not the result of bargaining. It is unlikely that a student wishing to re-negotiate its terms would be able to find someone during the registration period who had the authority to vary the provisions of the

\footnote{164} 'Internal matters' have traditionally been within the exclusive jurisdiction of the visitor: \textit{Patel v Bradford University Senate} [1978] 1 WLR 1488; \textit{Thomas v University of Bradford} [1987] AC 795; \textit{R v Lord President of the Privy Council, ex parte Page} [1993] AC 682. This is a tradition now being widely challenged: 'The essential issue for consideration here relates to the nature of the academic process and the assumption that the courts are not suited or equipped to resolve university disputes: whether, in fact, there is something so unique, or precious, about academe that it should merit a special form of review.' David M Price and Peregrine W F Whalley, 'The University Visitor and University Governance' (1996) 18 \textit{Journal of Higher Education Policy and Management} 45, 48. Where there is no visitor, the courts are nevertheless reluctant to intervene in purely academic decisions: \textit{Clark v University of Lincolnshire and Humberside} [2000] 3 All ER 752.

\footnote{165} \textit{Cameron v Hogan} (1934) 51 CLR 358, 376 (Rich, Dixon, Evatt and McTiernan JJ).


\footnote{167} See Bridge, above n 148.

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Indeed, in many cases it would be difficult for the student to find someone who had knowledge of the provisions of the contract, let alone sufficient knowledge of the rules of agency to know whether they were in a position to renegotiate any existing contract. In the case of universities formed pursuant to legislation, amongst which all Australian universities are numbered, many of the rules of the institution will not be capable of renegotiation by an individual, having been enacted by the governing body of the university pursuant to the enabling act and existing in the form of by-laws. That would leave some documentation: perhaps the course handbook, publicity materials, the fairly unexceptional statements contained on enrolment forms; and some comments of course co-ordinators or advisors, which would be recognised as negotiable terms.

The existence of essential elements of the contract is also problematic. Although it is not difficult to postulate a point of offer and acceptance, it may be problematic to assert that the parties had an intention to be bound. Again, in the context of voluntary associations, Cameron v Hogan suggests that the court would be unwilling to postulate a contract unless there were 'some clear positive indication that the members contemplated the creation of legal relations inter se'.

The existence of consideration may be problematic in some categories of institution and of student. Obviously, if the student is paying fees directly to the institution there is no difficulty. Some difficulty does arise where the student is a HECS based student, or is studying on a full scholarship. In the case of a HECS based student, it could be simply submitted that the student’s payment or promise to pay the HECS payment, albeit to a third party, would constitute consideration, as consideration need not flow to the promisor. Alternatively, the student, by agreeing to submit to the rules of the institution, could be held to have provided consideration for the promise. A student studying on a full scholarship could also be said to have provided consideration in the

168 Goldman, above n 99, 653.
170 Bolton v Madden (1873) LR 9 QB 55.
form of submission to the rules of the institution, which constitutes a detriment.

For many, the differences between the normal commercial setting, in which the contract is such an attractive device, and the situation of a student enrolling in a university, are so pronounced as to make it, in practicality and in policy, a poor rationalisation of the relationship.171

The view that the relationship between student and university was clearly not contractual was expressed by Kindersley V.C. in Thomson v University of London.172 The University of London had originally been incorporated by Royal Charter in 1836. Since then it had been regulated by different charters from time to time, but at the relevant time the University was governed by Royal Charter granted by letters-patent. Although the judgment related to a rather limited relationship between Thomson and the University, that is, Thomson had paid a sum to sit a number of examinations for a gold medal, Kindersley VC considered the situation of a person who had paid the fee for admission to one of the colleges, paid tutors' fees, and had become a member of the College by matriculation, and paid more fees. His Lordship considered that a representation of that relationship as contractual was, 'although perhaps in one sense .. not quite absolutely and metaphysically a misnomer, but in a legal point of view it is a misnomer - it is not a legal contract'.173

[I]t is this: that the Crown having established, for public purposes, this University for the public benefit, for the promotion of learning, with its privileges and with its Visitor, the purpose is, that persons may come and submit themselves to examination. It is a misnomer to say that by that, and because they have paid the regulation fees, therefore they have entered into a contract,

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171 See, for instance, Goldman, above n 99, 653; Furay, above n 107, 264.
172 (1864) 33 LJCh 625.
173 Thomson v University of London (1864) 33 LJCh 625, 638.
and a contract which this Court would enforce.\textsuperscript{174}

\textit{Thomson} is, on its facts, restricted to the holding of examinations, and 'the holding of examinations and the conferring of degrees being one, if not the main or only object of this University',\textsuperscript{175} the regulations therefore and their construction were considered to be a matter for the members of the University, internal matters and matters within the exclusive jurisdiction of the Visitor. It is not clear from the language of the case whether different aspects of the university's function, say, provision of tutorials, would be considered differently. It appears that, in a matter involving examinations, policy considerations would arise which would not arise in other aspects of the university's function. Further, it seems that the changing environment of the university would be material enough to alter the outcome in a like case in contemporary Australia.

A more recent decision accepting a contractual analysis of some part of the relationship occurred in the United Kingdom in \textit{Moran v University College, Salford}\textsuperscript{176}, in which the plaintiff, Moran, claimed that the respondent, University College, Salford (UCS), had entered into a written agreement with him to accept him for the degree course in physiotherapy, and that in breach of that agreement UCS has refused to accept him on the course.

The University College, Salford is one of the new universities established by the \textit{Further and Higher Education Act 1992} (UK). Moran applied for entry into the physiotherapy course through an admissions body. He was given an unconditional offer as a result of a clerical error, and he immediately made a firm acceptance of that offer. He thereby forewent any opportunity of going into clearing, which is the process by which applicants who had not received offers, or who had not satisfied the conditions of a conditional offer, applied to be considered for remaining vacancies. Moran sought

\textsuperscript{174} Ibid.

\textsuperscript{175} Ibid 634.

\textsuperscript{176} [1994] ELR 187.
specific performance of the agreement, a mandatory injunction compelling the defendant to admit the plaintiff to the course, and further or alternatively, damages for breach of contract.

The original proceedings were an interlocutory application for a mandatory order. The court noted, following *Leisure Data v Bell*\(^{177}\) that the case would have to be an unusually strong and clear one before a mandatory injunction would be granted - the court would have to feel a high degree of assurance that at the trial it would appear that the injunction was rightly granted. Further, the court would consider whether such an order should be made on an interlocutory injunction in the interests of justice.

The Court of Appeal allowed an application for leave to appeal against the decision of a Deputy High Court judge not to grant a mandatory injunction on an interlocutory application to compel the college to admit the applicant. However, it dismissed the appeal in its discretion, leaving the applicant to pursue damages for breach of contract. To effectively require University College Salford to admit Moran would create an injustice, given that a number of other people with better qualifications were refused admission.

On the issue of whether there was a contract, and what the substance of that contract was, Glidewell LJ considered that the unconditional offer made to Moran was, on the face of it, intended to create a legal relationship between the parties, and appeared to be an offer capable of acceptance. Moran accepted it by notification to UCS, thus presenting a 'strong case' for saying there was an agreement to offer him a place if he sought to enrol on the due date. He was not bound to enrol or to pay fees at this point, but if he had enrolled, he would have been bound by a further contract to pay fees. Glidewell LJ concluded that there was a strong case for saying that there was a binding agreement under which University College Salford committed itself to accept Moran for the course. The consideration for this contract was in the fact that Mr Moran lost the chance of going into clearing. Moran had also given notice to vacate his flat and to

\(^{177}\) [1988] FSR 367.
leave his employment.

This case has been widely cited as an authority for the existence of a contract between the student and the university; however, there are some reservations on its applicability to every case. Firstly, the contract was not a contract to educate; it was a contract to enrol. It is feasible to regard certain aspects of the student-university relationship as contractual, without reducing the entire relationship to contract. Secondly, the University College, Salford is one of the universities created pursuant to the *Further and Higher Education Act 1992* (UK). In those universities, as has already been noted, the body corporate is made up only of the governing body of the institution. Students, whether undergraduate or post-graduate, are not members of the university. It is impossible, therefore, to argue that any other status would attach to the student. The effect of the second reservation is diminished by the first - since a student in a chartered or statutory university would not become a member until matriculation, it is still possible to argue that the contract to enrol exists for those institutions.

A New Zealand university has already experienced the effect of the reasoning in *Moran*. A 1998 application to strike out a claim by four former students dissatisfied with the standard of an MA applied degree in environmental studies failed, and the matter was allowed to proceed to trial. The judge said that it was ‘beyond argument’ that universities who enrolled students entered some form of contractual relationship.178 English universities have been challenged by claims in a number of contexts. Students have claimed that the appointment of a particular examiner for a thesis was a breach of an implied term to take reasonable care, as the examiner was not competent to examine the topic. Students who have been allowed to re-sit examinations after failing have claimed an implied promise to offer tuition for the supplementary exam. Claims have arisen as a result of statements in a prospectus that counselling or pastoral care was

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178 *Grant, Woolley, Staines and Grant v Victoria University of Wellington* [1997] (Unreported, Wellington Registry, High Court, 13 November 1997).
available to students. A number of claims of this type are currently before the courts.\textsuperscript{179}

A more recent English case replicating the circumstances in Moran arose in Clark v University of Lincolnshire and Humberside.\textsuperscript{180} Again, the university was a 'new' university, in which the students were not corporators, and the court conceded that the relationship between the university and the student was partially contractual, although not all matters pertaining to the relationship were justiciable by the courts.\textsuperscript{181}

As a result of the generally accepted view that a contractual relationship exists, the Committee of Vice-Chancellors and Principals of the Universities of the United Kingdom promulgated a Note to Vice-Chancellors and Principals on 6 December 1996. It concluded: 'the university-student relationship is a contractual one; the contract is formed once the student accepts either a conditional or an unconditional offer to study at an institution. The terms of the contract must therefore be established at that time.'\textsuperscript{182} The Committee urged the adoption of a number of terms, such as a reference to 'top-up' fees or additional expenses such as fees for field trips, which the university may wish to have the ability to impose, limitation or exclusion terms, and terms giving the right to vary, modify or discontinue courses.

More recently, the introduction of the Teaching and Higher Education Act 1998 (UK) requires undergraduates, subject to means-testing, to contribute directly to fees. According to commentators, this has confirmed the move to a contract between the

\textsuperscript{179} Clive Lewis, 'Litigation and the university student' in J Richard McManus (ed), above n 163 169, 179. Lewis does not give details of the cases.

\textsuperscript{180} [2000] 3 All ER 752.

\textsuperscript{181} See chapter 6 for a full analysis of this case.

\textsuperscript{182} Eversheds Solicitors 'The terms of the university-student contract' for the Committee of Vice Chancellors and Principals (CVCP) and Universities and Colleges Admissions Service (UCAS) 6 December 1996 16.
3.3.4 A relationship based on enforceable statutory duties

A modern university in Australia or the United Kingdom may have its foundation by statute or by royal charter. It may take one of three forms: one of the two types of lay corporation, that is, an eleemosynary corporation or a civil corporation; or, in limited circumstances, a trust. In the United States the situation is appreciably different, with consequences for the legal position; American higher education began as a private, usually church-related enterprise, and federal and state colleges followed.\(^{184}\)

All Australian universities are now defined by statute, whatever the manner of their original creation. In the case of Australian, United States and United Kingdom institutions created by statute, the relationship between the student and the university is going to be affected to some extent by the terms of that statute. It does not follow that the statute gives rise to statutory duties enforceable at the suit of the individual student.

However, that seemed to be implied by the judgment of Halse Rogers J in *Ex Parte King; Re University of Sydney*.\(^{185}\) In that case Halse Rogers J considered the University of Sydney, by reference to the terms of its establishing Act,\(^{186}\) to have a statutory duty to establish certain tutorial classes and those classes were to be open to students whether or not they had matriculated within the University. Further, a 'leaving certificate or higher leaving certificate which certifies that a student has passed the required examination in


\(^{184}\) Furay, above n 107, 247.

\(^{185}\) (1943) 44 SR (NSW) 19.

\(^{186}\) The university was created by Royal Charter of 1858. It was granted corporate status by s. 6 of the *University and University Colleges Act 1902-1959* (NSW).
the subjects and at the standard which the Senate determines are necessary for matriculation shall entitle the holder of such certificate to matriculate at the University.\textsuperscript{187} His honour said that the terms of the statute were definite: the applicant had a legal right to be admitted to the university regardless of the fact that the student had not become a member of the general student body. However, the case itself was decided on the basis that the Constitutional powers of the Commonwealth were the subject of debate, and as a result the case was removed to the High Court.\textsuperscript{188}

The Senate of the university had made regulations and by-laws, which it had the power to do under the terms of the establishing Act, to set the relevant standards. Further, in this case the statutes prescribed that the corporation consisted only of the twenty-six fellows of the Senate. The founding statute did not include as corporators members of the general student body. The terms of the establishing Act were more prescriptive and restrictive in their terms than many equivalent Acts, and this consideration may distinguish this case from applicability to other universities. The suggestion that the relationship between the university and the student could be in the nature of the relationship between a public authority and citizen raises interesting possibilities. However, it may be explained by considering another case involving the University of Sydney, Ex Parte Forster; Re University of Sydney.\textsuperscript{189}

Although in that case the Court came to the same conclusion about the University of Sydney - that the University was a public authority and owed statutory duties to students - the language tended to suggest that by ‘public duty’ it meant a duty owed only to a restricted class of persons, not otherwise giving rise to a right of action in the hands of a specific person.

The Senate’s function of providing instruction, conferring degrees, and so on,
may be regarded as public functions...But, except in so far as express provision is made for duties to individuals, such duties as these functions import must be regarded as public duties imposed in the public interest, without discrimination on improper grounds between individuals but not so as otherwise to confer upon individuals specific legal rights.\textsuperscript{190}

It could be said that, in this case, instead of conferring individual legal rights as a consequence of a 'statutory duty', the arrangements made by the university could be classed as by-laws without the intention to confer a civil remedy for breach of statutory duty. This is not inconsistent with the relationship between the university and the student giving rise to a contractual relationship, but it does give rise to a different source of obligations by the university. The Court identified regulations made by a corporate body which are intended to bind both the corporation itself, and members of the public who came within the sphere of their operation, as by-laws.\textsuperscript{191} This analysis is also consistent with the view that the student is a corporator for part of the relationship. Thus, the decision does not refute the possibility of alternative formulations of the relationship, but it gives rise to the possibility that a student could, in certain cases, have a right to a civil remedy for breach of statutory duty.

Other cases have not considered the University to be a public authority. In \textit{Clark v University of Melbourne (No 2)}\textsuperscript{192} the Full Court of the Victorian Supreme Court rejected the proposition that the University of Melbourne was a public authority. Reversing in part the decision of Kaye J at first instance,\textsuperscript{193} the Full Court drew a distinction between a public authority and a university, and regarded the relationship

\begin{itemize}
\item \textsuperscript{190} \textit{Ex Parte Forster; Re University of Sydney} [1963] SR (NSW) 723, 729.
\item \textsuperscript{191} Per Lindley LJ in \textit{London Association of Shipowners and Brokers v London and Indian Docks Joint Committee} [1892] 3 Ch 242, 252, applied in \textit{Ex Parte Forster; Re University of Sydney} [1963] SR (NSW) 723, 731.
\item \textsuperscript{192} [1979] VR 66.
\item \textsuperscript{193} \textit{Clark v University of Melbourne} [1978] VR 457.
\end{itemize}
between the students and the university in that case as more accurately described as resembling the relationship between corporation and members. The Court said that the public authorities which may attract the operation of administrative law are those which exercise some form of governmental function. The university’s powers, by contrast, are powers of self-government which only affect those who choose to become members of the university by enrolment or by acceptance of employment or office. Although the university’s origin in an Act of Parliament distinguishes them somewhat from the powers of a Committee of a voluntary association or of some other type of corporation, ‘they have this in common with the latter powers that they cannot touch anyone who does not voluntarily bring himself within their reach.’

Whereas, in many cases, disputes involving matters internal to the University are within the exclusive jurisdiction of the visitor, if, by reference to the founding statute, the duties are held to be public duties they are within the jurisdiction of the courts. Where the duty is owed to a class of persons, rather than to the public generally, it is more likely to give rise to a civil remedy. However, whether there exists a private right of action for breach of a statutory duty is a question of construction of the relevant statute.

The difficulties arising in the construction of statutes to determine whether a provision gives rise to a private right of action were considered in the Victorian Court of Appeal


195 See also Peter Willis, Patel v University of Bradford Senate (Case Note) (1979) 12 Melbourne University Law Review 291, 293: ‘Matters involving ... public duties of the corporation ... remain subject to intervention by the courts’. Cases which have considered that the founding statute gave rise to public duties include R v University of Saskatchewan, Ex parte King (1969) 1 DLR (3d) 721, 723 (enforcement of public duties contained in the statute establishing the university are outside the jurisdiction of the visitor).

196 Phillips v Britannia Hygienic Laundry Co [1923] 1 KB 539.

197 O’Connor v S P Bray Ltd (1937) 56 CLR 464; Sovar v Henry Lane Pty Ltd (1967) 116 CLR 397.
in *Gardiner v State of Victoria*.

In that case, Phillips JA described the question of an individual’s right to sue for breach of a statutory duty imposed generally on another as a ‘troublesome’ one. He said

The remedy is born of a statute which, while prescribing certain conduct, most commonly creates non-compliance an offence, attaching a penalty. It is generally accepted that a right to sue arises in an individual who is injured by the non-compliance only if there can be discerned in the statute an intention on the part of the Parliament that such should be so, and of course that creates the difficulty because usually Parliament has not turned its mind to the problem at all.

He noted that the proper starting point for the enquiry was to determine legislative intention - whether it was intended that the statute confer a private right of action.

The legitimate endeavour of the courts is to determine what inference really arises, on a balance of considerations, from the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed, the pre-existing state of the law, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation. It is not a question of the actual intention of the legislators, but of the proper inference to be perceived upon a consideration of the document in the

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199 Ibid 467. He said that it was troublesome to the extent ‘that one learned writer has called upon the High Court to abolish the cause of action altogether - which if I may say so seems rather extreme.’ He was referring to Professor J L R Davis, ‘Farewell to the Action for Breach of Statutory Duty?’ published as chapter 5 of N J Mullany and A M Linden, *Torts Tomorrow: A Tribute to John Fleming* (1998) 69.


201 *O'Connor v S P Bray Ltd.* (1937) 56 CLR 464, 477-8 (Dixon J); *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397, 405 (Kitto J).
light of all its surrounding circumstances.²⁰²

Where the Act containing the obligation was one passed for the general good, rather than for the benefit of some only within the wider community, 'that is nowadays regarded as pointing strongly against a Parliamentary intention that an individual should be able to sue for non-compliance with some particular provision'.²⁰³ If there is no other remedy available to the aggrieved party, this may point to the existence of an individual's right to sue for breach.²⁰⁴ If a mechanism to enforce the statutory obligation, or alternative enforcement procedures are available, these will suggest that there is no legislative intention to allow a personal right of action.²⁰⁵

The existence of a private right of suit available to the individual student against the university is dependent upon the relevant statute, which cannot be considered in the abstract. However, a contractual interpretation of the relationship, and the existence of the visitorial jurisdiction and the alternative mechanisms established by that institution may affect the question and make it less likely that the statute is intended to give rise to a private right of action.

Another consequence which may arise from the public status of the institution and the existence of statutory duties is a right of relief in administrative law. This possibility

²⁰² Sover v Henry Lane Pty Ltd (1967) 116 CLR 397, 405 (Kitto J) quoted with approval in Sutherland Shire Council v Heyman (1985) 157 CLR 424, 482 (Brennan J) and in Byrne v Australian Airlines Ltd (1995) 185 CLR 410, 460-1 (McHugh and Gummow JJ)


also distinguishes the interpretation of the student-university relationship as one of contract. In the past few years the question of public status has been separated more clearly from the private rights said to arise from contract. This is as a result of a coincidental set of developments in relation to judicial review, which have given rise to a 'sharper division between public law claims enforceable by way of judicial review and private law claims enforceable by ordinary court action for breach of contract or negligence.' The developments, arising out of the Datafin case, do not exactly create a set of statutory rights enforceable by the individual. They do give rise to a more acute focus on whether a claim is amenable to judicial review. The two step approach to this question asks, firstly, whether the body is a public law body, and secondly, whether the subject matter really involved questions of public law. Contractual claims, however, fall outside the ambit of public law. Recent cases have been decided on one basis or another, but the courts have 'never fully analysed whether the fact that a student has a contract with a university necessarily means that the dispute can only be a private law dispute and cannot be amenable to judicial review.' The cases cited above are not likely to reoccur. Rather, the courts will grant an application for judicial review, without analysing the possible contractual argument, according to the Datafin analysis, or apply the contractual analysis. There is insufficient space to consider the consequences of the Datafin analysis in detail, but the question of administrative law alternatives will be considered in chapter six.

### 3.3.5 A fiduciary theory

Writing in the 1960s and asserting an alternative to the contractual analysis of the student-university relationship, Goldman sought to argue that the relationship should be

206 Lewis, above n 163, 171.

207 *R v Panel on Takeovers and Mergers, ex parte Datafin* [1987] QB 815.

208 Lewis, above n 163, 172.

209 *R v Board of Governors of Sheffield Hallam University, ex parte R* [1995] ELR 267; *R v Manchester Metropolitan University, ex parte Nolan* [1994] ELR 380.
reinterpreted as one of status, where the status arises from some fiduciary obligation owed by the university to the student. He pointed out that the relationship, if viewed in its entirety, was clearly more than a contractual arrangement. It is 'a status relationship with accompanying unique juristic attributes.' The terms of the relationship are not negotiated. Universities never attempt to define the consideration they intend to bring to the bargain. Rather, 'the parties entering into the student-university relationship understand their arrangement by reference to the history and tradition of the university's societal role.' Goldman suggests that there are commonly understood, intrinsic characteristics of the relationship which should survive the wording of documents considered to make up the university/student 'contract'. 'It is an arrangement in which the incidents of the relationship overshadow the contractual verbiage imposed upon the students.'210

So far, the argument could be used in favour of a corporate model. Goldman, however, uses it to develop a fiduciary analysis of the relationship. He defines a fiduciary in terms of the Restatement of Agency, Second as 'a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking.'211 This implies confidence in each party. Alternatively, a fiduciary relationship could arise when one party is in a position to dominate the other. Whereas in a contractual relationship it is appropriate to assume that each party is acting in his or her own interests, that assumption does not apply when one party has placed his or her trust and confidence in the other party or, alternatively, there is a great imbalance of bargaining power to the extent that one party is at the mercy of the other.

In support of his exposition of the view that a university is in the position of a fiduciary, Goldman says that the 'value of an educational experience is directly affected by the school’s conscientious, faithful performance of its duties - duties which are directed

210 Goldman, above n 99, 667.

211 Restatement (Second) Agency 13 comment a (1959), Haluka v Baker, 60 Ohio App. 308, 34 NE 2d 68, 70 (1941) (quoting with approval the equivalent comment in Restatement, Agency); See Goldman, above n 99, 668, note 114.
toward the student's benefit.' The educator establishes tasks for the benefit of the student, and the student performs the tasks 'in reliance upon the educator's good faith performance of his duties as a teacher'.

The parallels continue, asserting that the student must repose trust in the institution, by virtue of the disclosure of confidential information, the espousing of opinion, the confidence in the school's skill and objectivity in 'evaluating, scoring and reporting these manifestations of learning, ability and potential.'

The difficulty in this analysis is betrayed in a comment attributed to another commentator but reported with approval by Goldman: '[a] fiduciary is one whose function it is to act for the benefit of another as to matters relevant to the relation between them. Since schools exist primarily for the education of their students, it is obvious that professors and administrators act in a fiduciary capacity with reference to the students.' The theory is accompanied by the same parental attitude as that displayed by the discarded theory of in loco parentis. It posits, firstly, that the primary function of the university (here referred to as a school) is to educate its students. That presumption should be characterised as such and, if it is correct in some cases, is hardly generalisable. It is not always accepted that a university must include teaching as one of its essential functions. It has always been an idea that the university consists of a community of scholars whose aim is to get a qualification to teach and to carry on academic pursuits. 'One might well argue that teaching is required for the attainment of such an aim, but provided that a scholar can be put in the way of acquiring what is necessary for learning, it is not clear that positive teaching is also a necessity, however much it may be desirable in most cases.'

212 Goldman, above n 99, 671.
213 Ibid 672.
Secondly, the descriptions used to support the fiduciary theory would have students as passive receptors of the education handed down by the institution, rather than participants in the educational process. This is not surprising, given that Goldman is using the theory to provide a basis for student rights, and is emphasising the obligations of the institution to acknowledge those rights; but it is possible to assert an alternative view of education: that of students and tutors jointly working towards the same educational goals. Interestingly, Goldman's view of the set of rights which should arise as a consequence of the fiduciary relationship is limited to the set of procedures surrounding disciplinary action by the university. He does not suggest that the university is bound to provide any particular product to the student, despite describing at length the peculiar confidence arising as a result of the subjection of the student to the better knowledge of the university, and the correlative undertaking of the university to 'select those who are competent to teach and to establish for its students' benefit an atmosphere conducive to intellectual development and to present a program of studies and activities designed to expand and develop its students' mental horizons.'

Goldman's theory has not reflected court opinions in the United States. Nor, in Australia, has a fiduciary theory been adopted by the courts in the context of a student/university relationship. In *Hospital Products Ltd v United States Surgical Corporation* the High Court adopted the terms 'fundamental' and 'inflexible' to describe the principles applying to fiduciaries. A person who occupies a fiduciary position may not use that position to gain a profit or advantage for him- or herself, nor may he or she obtain a benefit by entering into a transaction in conflict with the fiduciary duty without the informed consent of the person to whom the duty is owed. The circumstances in which the fiduciary duty is owed are less easily stated, and Gibbs CJ doubted if it were fruitful to make a general statement of the circumstances in which

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216 Goldman, above n 99, 672.
218 Ibid 67 (Gibbs CJ).
it will arise. He said 'Fiduciary relations are of different types, carrying different obligations ... and a test which might seem appropriate to determine whether a fiduciary relationship existed for one purpose might be quite inappropriate for another purpose.'

In *Breen v Williams* Brennan CJ said that fiduciary relations arise from either of two sources: agency, and a relationship of ascendancy or influence by one party over another, or dependence on or trust of one party by another. In the university/student relationship there is, in general, no question of agency. There is an argument to suggest that the university is in a position of ascendancy over the student; even if a contract is in existence, a fiduciary relationship is not inconsistent with the contract. However, if the arrangement between the parties was a purely commercial one, and the parties were at arm's length and on an equal footing the courts are unlikely to consider that a fiduciary relationship exists. It can be argued that the student is not on an equal footing with the university - that the contract between the university and the student is more in the nature of a contract d'adhesion. That, in itself, does not give a fiduciary aspect to every feature of the relationship. The set of rights argued to exist as a result of the fiduciary relationship by Goldman are limited to the procedures to be observed in a disciplinary action against a student. However, if the disciplinary procedures are established pursuant to the university statutes, the contractual theory has them contained in the university/student contract. Where the rights of the student are established in the contract, there is 'no need, or even room, for the imposition of fiduciary obligations.'

The exercise of disciplinary authority does not place the university in a position of conflict with its duties to the student - the university does not profit from this activity.

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219 Ibid 69.


221 Ibid 82.

222 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 70 (Gibbs CJ).

Usually, in fact, it rather suffers from it.

According to the Australian authorities, a fiduciary analysis would not add appreciable weight to a students’ rights campaign. The Australian and United Kingdom analysis of fiduciaries differs markedly from the United States’ (and, to some extent, Canadian) tendency to view a fiduciary relationship as imposing obligations which go beyond the exaction of loyalty and as displacing the role hitherto played by the law of contract and tort by becoming an independent source of positive obligations and creating new forms of civil wrong. Since there is no marked tendency to apply the fiduciary theory to university/student relationships in the United States, either, Goldman’s view has value, at this stage, only as a critique.

Looking at this argument from a different perspective, the structure of some universities creates a fiduciary relationship in another direction - a duty owed to the corporation and possibly to funding councils. As an instance of this, higher education corporations established pursuant to the Further and Higher Education Act 1992 (UK) have charitable status, so the members of the board of such a university will be deemed to be charity trustees and thus fiduciaries, owing duties to the corporation and to the funding councils. It is necessary to consider also the large public expenditure in higher education: using the language of modern management theory, the public is also a stakeholder in the product of the university. The fiduciary theory should, perhaps, be extended to take in all of those with an interest in the continued and effective functioning of higher education institutions.

How do these comments coalesce with the identity of students as corporators? It is quite clear that directors of a company occupy a fiduciary position and so have fiduciary obligations to the company. These duties include a duty not to make improper use of

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224 Ibid 95 (Toohey and Dawson JJ).

inside information or position.\textsuperscript{226} However, they have not generally included a duty owed to shareholders themselves. Writing in the context of corporation directors, Finn says: 'It has long been asserted with almost uncritical certainty that company directors do not, by virtue of their position, owe any fiduciary duty to the individual shareholders of the company. If this proposition must at the moment be accepted as the law, it is nonetheless a remarkable one in the writer's opinion.'\textsuperscript{227}

He goes on to say that courts have imposed some equitable duties on directors when taking decisions which affect the rights of shareholders inter se. Without going much further with the analogy, it is possible to comment that the university management does owe fiduciary duties to the university as a whole, on a number of bases, but that this would not necessarily extend to a right of action by the student him- or herself.

### 3.3.6 Preferable view

Authorities support the view that the relationship between the university and the student is (depending on the founding instrument) concurrently statutory, contractual and corporate. Where the student is a member of the university as a consequence of the statute, as is often the case, membership may create a contractual relationship between the university and the student, and between students, for certain purposes. This relationship is within the exclusive jurisdiction of the visitor in some cases. Students may have personal rights based on a statutory duty owed by the university in some limited cases. Where the student is not mentioned in the founding instrument, the student may yet have remedies based on statutory duty, or may have rights based on a contract consisting of terms which are a combination of the prospectus enrolment documents and the statutes of the university. However, pressure resulting from the changing external environment of the university creates a growing tendency to describe the relationship as simply contractual, and universities are responding to the perception that it is contractual by altering their course documentation and registration procedures.

\textsuperscript{226} Fiduciary duties supplemented by statutory duties.

\textsuperscript{227} P D Finn, \textit{Fiduciary Obligations} (1977) 11.
to protect themselves from the implications of that conceptualisation.

The 'hybrid' analysis is attractive to many commentators. For instance, Alex Samuels in the early 1970s opined that:

[t]here is a contract between the student and his institution and the prospectus forms part of that contract and the university must adhere to it. ... Although he becomes a student by contract the student also has a status. The university is a public body set up by prerogative and in disciplinary matters fills a judicial or quasi judicial role in a dispute involving the student, and thus the prerogative order of certiorari probably lies.228

In 1998 in the United Kingdom Lewis expressed a similar view - that there is 'no reason in principle why the relationship between student and university cannot properly be described as a hybrid, involving partly questions of public law and partly questions of private law.'229 The courts have not clearly delineated the point at which the public and private law questions separate.

The pressures which have resulted in this redefinition of the relationship originate from the increasingly pressing requirement that universities be called to account for the use of public funds, and for that accounting to be in terms of commercial principles. It is arguable that the relationship will be affected by the perceived function of the university, as those functions are an expression of contemporary values; if the student is considered to be a merely passive consumer of a commodity, it may be more easily accepted that the relationship is contractual, whereas if the student is considered to be an active participant in a community of scholars, the relationship looks more like a corporate model. The contractual model produces a more measurable outcome, and a more easily definable set of rights and responsibilities than is consonant with the

229 Lewis, above n 163, 172.
corporate model. This construction is suggestive of the attempt to prescribe objective values, the pressure to do which is a motivating factor in scientific research: ‘[t]he obvious appeal of the scientific approach is that it appears to offer an external or absolute standard of truth. The depersonalized approach avoids the problem of having to adjudicate among competing versions of the truth that might otherwise occur.’

The ascription of a monetary value to students to assist the accounting for the use of public funds also requires that a monetary value be set to the facilities and services provided to students, so that the unfunded pastoral and familial obligations which were a feature of the old-style universities are no longer a valued part of the university, or are otherwise given a contractual value. The ends of the university then have their values ascribed to them on the basis of that set of standards.

Thus, the alteration in the way in which the student is considered follows the alteration in the way in which the university is considered, to the degree that there may be a relationship of cause and effect. It has been suggested that the shift in the relationship of higher education to the society in which it exists has resulted in a change in the perception of the relationship between the university and the student, so that

\[\text{In the light of these changes, it is evident that a rational theory of the legal relationship between the student and the university can only develop within the context of the university as an instrument of society. In this concept, student-university relationships cease to be the private affairs the university has long considered them. The university's responsibility to its students is a responsibility to society.}\]

Determining what is meant when describing the university as an 'instrument of society', and what that means for the relationship between the university and its students, are difficult proceedings in the prevailing climate of change in the university sector. It


\[\text{Furay, above n 107, 245; footnotes omitted.}\]
appears likely that the responsibility to society to educate its students is to be mediated and measured by the concepts of the market, which requires the mechanism of contract law to facilitate its transactions.

So, today, it is commonplace to assert that, where the university has certain rights which it would not have if it did not perform certain roles, it must accept certain corresponding duties and responsibilities. According to Hamlyn, '[h]ow that works out is a complex matter and it is equally a complex matter what duties and rights the individual members of a university have in consequence.' Generally, however, the public nature of most universities in Australia is likely to warrant more interference by the state than would necessarily be acceptable in a private institution, particularly with a view to enforcing the responsibilities which the government may attach to the provision of funding.

The reason for a prevailing tendency to identify the student as having a contractual relationship with the university lies in the preoccupation with accountability (in its various forms) which construes the student as an external stakeholder, both in accounting, administrative and legal terms. The implications of this construction now inform much of current public discussion on the nature of the institution. Habermasian analyses of this trend have identified the influence of both accounting and law (they refer to this as a 'colonizing influence') which have resulted in the reinterpretation of social relations in this way. So, for instance, Power and Laughlin suggest that '[t]he colonizing potential of accounting consists not only in the instrumental reach of its information systems technology but also in its capacity to capture organizational self-understandings and reframe them in accounting terms'. Accounting colonizes areas of social life (that is, the university and its relationship with the student), 'by creating newly internalized facts and vocabularies which potentially undermine the capability of actors to question its self-evident mission'. This has the potential to result in the

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232 Hamlyn, above n 215, 217.


234 Ibid.
‘crisis of confidence’ identified by, for instance, Stewart Sutherland, who says, ‘we often seem to dance to tunes wholly composed by others - and as I have suggested these tunes enervate because their power over us plays not simply on our evident lack of self-confidence, but also on our current failure to redefine our identity in a new diverse world of higher education.’

Power and Laughlin extend this idea:

There is a much wider subscription to the view that practices like accounting increasingly control the language and categories within which social management can be conceived. In this way expertise generates new forms of conformity, normality, indifference and cynicism. For example, the categorical shift from citizens to clients, from persons to calculable individuals.

It is submitted that it is this influence which lies behind the current acceptance of the definition of students as clients, stakeholders, entities easily quantifiable in current accounting terms. Once this is achieved, it is a small matter to redefine the legal relationship. This in itself is indicative of what Habermas refers to as the ‘juridification’ of the relationship; the law, which previously mediated between the Habermasian concepts of the system and the lifeworld, begins to impose its own normative values on the relationship, ushering in its own complexity of definition of the relationship. Administrators make enhanced claims to expertise in the newly defined categories, and produce an ‘insidiously expanding domain of dependency. This domain comes to include the way we define and norm areas of life such as family relations, education, old age as well as physical and mental health and well-being.

The reconceptualisation of the student as consumer, client, stakeholder; as in a contractual relationship with the university, allows the imposition of all of the legal

235 Stewart Sutherland, ‘Universities: Crisis of Confidence or Identity’, 1996 Robert Menzies Oration, University of Melbourne, August 1996.

236 Power and Laughlin, above n 233, 447.

consequences of the relationship; ousts the jurisdiction of the visitor, removes the possibility of purely domestic governance. Habermasian analyses would assert that the juridification would lead to dysfunctional consequences as a result of the loss of substantive justification: in order to subsume the relationship under the law and to deal with it administratively the relationship is transformed, but the legal and administrative rationales do not create their own normative justification.

The tendency to consider the student university relationship as one based upon contract has significant grounding in the tendency to view the university in market terms. 'The development of contract law has been important in the economic world because of its capacity to support complex market exchanges.'\textsuperscript{238} However, "contracts are a device, sometimes useful, sometimes not", in promoting mutually beneficial relations'.\textsuperscript{239} The tendency of contemporary government policy to co-opt the idea of the contract is largely attributable to new management discourses. Thus, the increasing resort to contractualism is a consequence of the appearance of new social, political and economic conditions and new government problems.

[A]uthors in this tradition emphasise the importance of agency theory, the 'new institutional economics' and management discourses in the development of contemporary contractualism. The widespread use of the language and practice of contract in the 1990s is seen to be an extension of the new management discourses which dominated bureaucratic reform in the OECD group of countries from the late 1970s onwards.\textsuperscript{240}

The features which characterised the development of this New Public Management\textsuperscript{241} -

\textsuperscript{238} Glyn Davis, Barbara Sullivan and Anna Yeatman (eds), The New Contractualism? (1997) 2.

\textsuperscript{239} Geoffrey Brennan, 'The Economic Concept of a Contract' in Davis, Sullivan and Yeatman (eds), above n 238, 27.

\textsuperscript{240} Davis, Sullivan and Yeatman (eds), above n 238, 3.

\textsuperscript{241} C Hood, 'A Public Management for all Seasons?' (1991) 69 Public 157
freedom to manage, the setting of explicit standards and measures of performance, greater emphasis on outputs than procedures, the disaggregation of units in the public sector, a shift to greater competition in the public sector, a stress on private sector management styles, a stress on greater discipline and parsimony in resource use— are features which any academic would recognise amongst the reforms which have shaped the last few years of university management. Managerialism in Australia did not necessarily imply a move to contracting, but it did lay the foundations for contracting.

It should be noted that not all commentators adopt the 'colonising' metaphor to describe the recent corporatist swings in the higher education sector. Meek and Wood suggest that the linear approach, which has the managerial push and the economic rationalist ideology "'colonising' all in its sway", overstates the case. Although it is a period of adjustment, 'there is little evidence to suggest that academe is being totally colonised by the corporate ideologues. ... Executive officers probably have less real power than what their critics attribute to them, and what they would like to have themselves.'

Nevertheless, these trends have involved the adoption of several corporatist approaches which may have unlooked-for effects.

Alford and O'Neill have described a contract state as 'one in which activity previously subject to some form of organisational hierarchy is governed by contracts (or quasi-contracts) between buyers and sellers, either inside or outside the public sector.'

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242 Davis, Sullivan and Yeatman (eds), above n 238, 3.
244 Meek and Wood, *Higher Education Governance and Management* above n 4, chapter 3.
Contractualist principles have come to characterise not only the way in which the government approaches the administration of the higher education sector, but also the way in which the government is insiting the universities approach their relationship with their students. Just as the ‘cascade of contracts’ approach to governance affects the wider body politic, it also has an effect on the community of the university. Yeatman says that the effect on the body politic can lead to the abandonment of the idea of the body politic: ‘[n]o longer are citizens presumed to be members of a political community which it is the business of a particular system of governance to express. Theirs becomes a radically disaggregated and individualised relationship to governance.’

In the case of the university and the student, the individualised relationship is developing into a relationship with clearly defined legal consequences: it is regarded as a legal contract. However, ‘liberals tend to assume that contract and status are mutually exclusive, and to overlook the non-contractual foundations of contractual relations.’ The natural consequence of this mutual exclusivity is a tendency to sink the status relationship; since classical liberals prefer the view that government should be based on free agreement, rather than oppressive inherited bonds, the focus stays on the contractual analysis, and status components are reworked to fit contractual models. ‘This means that contract “does not so much free the individual from society but reshape the status of the persons in society so as to become an individualised one.” Thus, “a contractual social order has its own distinctive status component”.’

[T]he individual with contractual capacity is a social individual produced and continually enmeshed in ongoing processes whereby both personhood and contractual capacity are formed. As Yeatman argues ... ‘contractual personhood

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246 Davis, Sullivan and Yeatman (eds), above n 238.


248 Davis, Sullivan and Yeatman (eds), above n 238, 7.
is socially, politically juridically and culturally constituted'. This means the individuals in contractual relations are not the isolated, autonomous individuals of classical liberalism. 249

This means also that the idea of free agency must be questioned. The new contractualism suggests a more limited conception of the agency of contracting parties and a non-voluntary theory of contract. The participation of the contracting parties is through consent, and negotiation of the conditions of their governance.

Whereas the contractual analysis is becoming the predominant conceptualisation of the university/student relationship, it is not clear whether the status aspect of the relationship will be entirely ousted. The possibilities arising from the public aspect of the university give rise to considerations enumerated in chapter 4.

3.4 Conclusion

Cases which assert a contractual relationship between the university and its students are based on quite specific aspects of the relationship - typically enrolment. However, the number of cases which apply a different analysis to the university/student relationship cannot be discounted, and in some cases they specifically deny the contractual analysis. The existence of statutory duties enforceable by individual students also suggests that it is erroneous to base the university/student relationship entirely on contract. There will be circumstances in which an exclusively contractual relationship will be more convincingly argued - where the student is not a member of the university, for instance; or where the university has specifically stated that the arrangement is a contractual one, and the condition, and term, of the contract can be ascertained, or where there is no visitor. In a majority of cases in Australia, in all but the newest universities in the United Kingdom, and in the public universities in the United States, a more satisfactory argument suggests that the arrangement is based partly on contract and partly on status. The contractual aspects of the relationship once a student is enrolled would take in the

249 Ibid.
specific promises to re-enrol on an annual basis and to provide and to continue the course. The incidents of membership of the institution, the disciplinary power of the institution over the students, and the role of the visitor are aspects of the status relationship.

The idea that the university's relationship with its students is partly based on contract may have an effect on the potential liability of the university in negligence. This effect will be considered in chapter 6, which will deal with the theories which analyse concurrent liability. Chapter 6 will also consider the administrative remedies available to the student and whether these remedies are consistent with tort remedies. On the other hand, if the student's relationship with the university is based upon contract alone, and disciplinary remedies are founded upon the student's submission to the discipline of the university in contract, common law administrative remedies have no place. This matter will be considered at length in chapters 4 and 6. The role of the visitor, and the unsatisfactory status of the visitor in a contract-based relationship, will also be considered in chapter 6.

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4. The public nature of the university

4.1 Introduction

Flanagan said 'the world is undergoing momentous change the like of which has not been witnessed for a century and a half. All borders, be they geographical, political, economic, or social, are in flux.' One of the borders which has been eroded is the distinction between the public and the private. More specifically, the upheaval in the university sector has resulted in real questions as to whether education generally should be located in either the public or the private sphere. The corporatisation of universities has encouraged the development of a "dual [public/private] education system", leading to greater "structural responsiveness to extramural and industry defined need".

In chapter 2 it was argued that the university sits uneasily along the public/private divide. The difficulty of definition is as apparent in legal as in lay discussion. Despite a relatively high level of autonomy reposed in an individual university, it is constrained to a great extent by government policy enforced by funding mechanisms. Whereas in the public mind, and possibly in its own eyes, the university is unlikely to be classified as a public authority, a large number of decisions have suggested the applicability of administrative law remedies to some classes of decision; and conversely, cases in


3 Oddly enough, the Australian Higher Education Industry Association has suggested that the universities are an arm of government; in a case running in the Industrial Relations Commission the AHEIA wrote to the Commission to say that it had no legal power to make an award which affected universities in relation to redundancies or notices of termination.
private law have been comparatively rare. In some cases the application of administrative remedies has been subjected to criticism; however, the application of public law remedies to the activities of the university suggests that the legal characterisation of the university as a public body is an arguable proposition.

The division between public and private law 'causes difficulties for the common law'. This is, perhaps, due to the arbitrary nature of the divide in policy. Horwitz says that the primary concern of late nineteenth century legal thinkers in the creation of the public/private divide in law was the movement to 'sharply separate law from politics. By creating a neutral and apolitical system of legal doctrine and legal reasoning free from what was thought to be the dangerous and unstable redistributive tendencies of democratic politics, legal thinkers hoped to temper the problem of "tyranny of the majority". Political economy elevated the market to the position of ascendancy in the distribution of rewards, and private law was understood to be the 'neutral system for facilitating voluntary market transactions and vindicating injuries to private rights.'

The public/private distinction, then, at least in America, had a 'conservative ideological foundation', founded on the 'invisible hand premise that private law could be neutral because the universities are agencies of the State Governments: Ken McAlpine, 'Amazing scenes at AIRC' NTEU Advocate November 1997 4.


For an analysis of the application of administrative law mechanisms to the university see chapter six.


Ibid 1426.
and apolitical. Legal thinkers of the 1940s took the sophisticated view that the division between public and private was an arbitrary one. In the United States the idea of the public realm found it difficult to survive the dominance of private self-interest as a legitimate basis for political reality.

However, the tendencies of late-century capitalism towards large-scale corporate concentration in the United States justified a renewed attack on the arbitrary public/private divide. Private institutions exerting power were indistinguishable from public institutions exerting power, and '[t]he attack on the public/private distinction was the result of a widespread perception that so-called private institutions were acquiring coercive power that had formerly been reserved to governments.' The 'contemporary erosion of the public/private distinction ... is but another symptom of the passing of that world of nineteenth-century decentralized competitive capitalism that once made that distinction a rough approximation of reality'.

How does that historical comment inform the Australian position? Certainly the political contingencies have resulted in, firstly, the existence of a public/private distinction, and secondly, the content of the public 'sphere' in any particular political context. Just as, at the conclusion of the nineteenth century, the proliferation of large non-governmental bodies holding concentrated power led to disquiet at the tendencies of the distinction to remove entire areas of policy from public scrutiny, the late twentieth century tendencies towards privatization of traditionally government functions give rise to the same concerns. Academic comment asserting the propriety of public law concepts as part of corporate law evidence the same problems with the late twentieth century capitalism as occurred in the late nineteenth century. These assert that company law should take account of wider constituencies - that a 'public' element should be read into the obligations owed by company directors under company law. For instance, it is

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9 Ibid.
10 Ibid.
11 Ibid 1428.
asserted that directors should be required to take account of wider considerations, such as the claims of the workforce, customers and clientele, suppliers and creditors; and, more broadly, community and national interest, welfare and the environment.\textsuperscript{12} Alongside this development, private sector law is showing signs of change; for instance, the emerging requirement that parties to a contract show good faith in the performance of contractual obligations 'reflects a public law value quite antagonistic to traditional notions of freedom of contract'.\textsuperscript{13}

Nonetheless, the political conception of the public/private spheres tends to have an influence on the capacity for judicial regulation of that sector. Law is, of course, commonly divided into private and public law. Institutions subject to public law are governed - largely - by administrative law, whereas institutions said to be subject to private law are regulated by areas such as trust, company and partnership law.\textsuperscript{14} Assumptions about the public and private spheres have an effect on the content and the theory of the applicable sets of laws.\textsuperscript{15}

That is not to say that judicial reasoning adopts the analysis which locates institutions in the private or public 'sphere'. The futility of attempting to reason in this way could be illustrated by the judgment of Litton VP in the Court of Appeal in Hong Kong in \textit{Hong Kong Polytechnic University v Next Magazine Publishing Ltd}.\textsuperscript{16} In an appeal from the judgment of Keith J that the University had no right to sue for defamation either under


\textsuperscript{13} David Mullan, 'Administrative Law at the Margins' in Michael Taggart (ed), \textit{The Province of Administrative Law} (1997) 144.


\textsuperscript{15} Ibid.

\textsuperscript{16} (1997) 7 HKPLR 286.
the common law or the Hong Kong Bill of Rights, being a public authority, he said 'I regret to say that I have difficulty in following the judge’s reasoning. He says ... the essential feature of the University is that it operates in the public sphere. ...I do not know what the expression “operating in the public sphere” means.'

The judiciary requires the specificity of the ‘operating level’ language, the ‘language that courts and agencies employ in the law’s routine operating level: the language of rules and regulations, statutes and opinions.’ The academic distinction drawn between the public and private spheres is part of the ‘meta-language’ employed by academics and policy makers, and this is often the source of confusion. The terms public and private have currency at both operating level and meta-language level, and it is in relation to the operating language that reservations about the distinction between public and private are strongest. There are generally more severe objections to vagueness and ambiguity when the terms are significant to rules upon which society relies for stability.

However, prevailing conceptions about what is (or should be) ‘public’ and what is (or should be) ‘private’ will have an (eventual) effect on the outcome of a case in the following ways:

1. By shifting the ground beneath the body or institution so that it becomes more acceptable to subject it to the sort of controls to which the public body is traditionally subject, or to remove controls incompatible with a public element.

2. By changing government policy so that bodies or institutions are shifted from one sphere to another to take advantage of the perceived benefit to the public. The clearest example of this type of operation is the ongoing rash of privatization of

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17 Article 16 of the Hong Kong Bill of Rights Ordinance (Cap 383).
19 Ibid.
hitherto public bodies to take advantage of the perceived benefits of operating within the market or according to market precepts and the perceived disadvantages of operating according to public sector principles.

3. By altering the substance of arguments brought before the court in the first place; for instance, counsel in the Hong Kong Polytechnic case would not have attempted the argument that the university could not take advantage of defamation laws if the university had been clearly located in the 'private' sphere. This makes it possible for the court to rule one way or another.

Thus, the increasing perception that the university has the features of a public body in fact may lead to the result that in law they attract the principles attaching to public bodies.

The position in the United Kingdom and in Australia in relation to universities is broadly similar in terms of the level of public ownership and public funding. In the United States, the position is complicated by the set of constraints imposed by the federal Constitution and a greater participation in the university sector by private bodies. If the institution is public, it is subject to federal Constitutional constraints, whilst if it is a private institution it is not. Thus, 'insofar as the federal Constitution is concerned, a private university can engage in private acts of discrimination, prohibit student protests, or expel a student without affording the procedural safeguards that a public university is constitutionally required to provide.'

If the university is a public body of a certain type, it will attract administrative remedies. Three questions arise: is a public body of this type entitled to sovereign immunity from an action in tort? If it is not such a body, the next question is, is it the type of body to

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attract the operation of administrative remedies? Thirdly, how does the fact that a body is considered to be public affect the issue of duty of care in a novel situation?

In relation to the question of sovereign immunity, it is unlikely that a university would be considered to be an instrumentality of the state. In Australia, the general rule, as a result of statute, is that the Crown is subject to the common law. Governmental bodies other than the Crown were never immune from liability in tort. The common law applies to the body by reason of the relationship between the body and members of the public where that relationship gives rise to a duty to take steps to avoid a foreseeable

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21 The application of administrative remedies is considered, to an extent, in chapter 6.

22 See below, n 30 for examples of relevant statutes. See further Peter Hogg, Liability of the Crown (2nd ed, 1989) 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. It is reasonably clear that the university could not be regarded as the Crown; see the discussion in relation to public hospitals in E v Australian Red Cross Society (1991) 27 FCR 310.

23 Mersey Docks Trustees v Gibbs (1866) LR 1 HL 93; Geddis v Proprietors of Bann Reservoir (1878) 3 App Cas 430; Peter Cane, An Introduction to Administrative Law (2nd ed, 1992) 241. Cane goes on to say that these cases concerned liability for negligence, ‘but they are applications of a more general principle. They were also actions against non-governmental statutory corporations, but they are now treated as establishing a general rule governing the exercise of statutory functions by governmental as well as non-governmental bodies’ (241, footnote 2). See also Crimmins v Stevedoring Industry Finance Committee (1999) 167 ALR 1, 7, (Gaudron J), citing Caledonian Collieries Ltd v Speirs (1957) 97 CLR 202, 220 (Dixon CJ, McTiernan, Kitto and Taylor JJ); Sutherland Shire Council v Heyman (1985) 157 CLR 424, 436 (Gibbs CJ) (Wilson J agreeing), 458 (Mason J), 484 (Brennan J), 501 (Deane J); Stovin v Wise [1996] AC 923, 943-4 (Lord Hoffmann); Pyrenees Shire Council v Day (1998) 192 CLR 330, 391-2 (Gummow J) [on the exercise of powers and functions] and Sutherland Shire Council v Heyman (1985) 157 CLR 424, 443 (Gibbs CJ) (Wilson J agreeing), 460-1 (Mason J), 479 (Brennan J), 501-2 (Deane J); Parramatta City Council v Lutz (1988) 12 NSWLR 293, 302 (Kirby P), 328 (McHugh J); Pyrenees Shire Council v Day (1998) 192 CLR 330 [on the failure to exercise powers and functions].
risk. In the case of discretionary powers, the statute pursuant to which the body is created operates 'in the milieu of the common law'. The common law applies unless excluded. The act which creates the statutory authority and confers its powers may either expressly or impliedly exclude the operation of the common law in relation to that body's exercise or failure to exercise its powers or functions. Further, where the body is exercising a governmental function of 'an ordinary character involving no invasion of private rights and requiring no special authority' provisions which exclude or limit liability have, on a number of occasions, been held not to apply.

Some statutes creating universities make it clear that the university is not to be regarded as an instrumentality of the Crown. In other cases, despite the silence of the relevant statute on the matter, it unlikely to be seriously contended that the university is an instrumentality of the State.

There are other reasons for considering the statutory context of the university. The 'public nature' of the university may also be relevant if it locates a dispute between a university and its students in either the public or the private realm. If the issue is one

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24 Crimmins v Stevedoring Industry Finance Committee (1999) ALR 1, 8-9, (Gaudron J), citing Western Australia v The Commonwealth (Native Title Act Case) (1995) 183 CLR 373, 487 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ), referring to the statement of Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' (1965) Jesting Pilate 203, 205 that '[w]e act every day on the unexpressed assumption that the one common law surrounds us and applies where it has not been superseded by statute'.


27 Eg s.4 of the University of South Australia Act 1990 (SA). Most Australian statutes, however, are silent on the matter.
relating to liability in negligence, a question arises as to the justiciability of certain decisions of the university. The operation and effect of the policy/operational distinction must be considered. If the relationship between the university and its students is contractual, there may be grounds for considering issues of concurrent liability. If the claim arises in administrative law, the interaction between the administrative and the tortious remedies must be considered.\textsuperscript{28}

This chapter will consider the nature of the university - whether it could be said to be public or private - for the purposes of the law of negligence. It is proposed, firstly, to dispense with the contention that the university is an instrumentality of the State and protected by the shield of the Crown. Secondly, it is intended to investigate the effect of the fact that universities are statutory authorities on the question of liability in tort - in particular, the issue of the existence of a duty of care in a novel situation. It will consider the way in which the law of negligence is applied to public authorities, to determine whether the public policy questions governing the immunity of the public authority for some purposes are convincing in application to universities.

\section{4.2 Sovereign immunity}

At common law the Crown could not be sued because it would be a contradiction for the King to be subject to his own courts.\textsuperscript{29} That position, however, has been altered by statute.\textsuperscript{30} The standard formula applied by the Australian legislation to affect the

\textsuperscript{28} The interaction between administrative, tortious and contractual remedies is the subject of chapter 6.


\textsuperscript{30} For instance, \textit{Crown Proceedings Act} 1947 (UK), which abolished the petition of right procedure for actions in the United Kingdom and introduced Crown liability in tort. In Australia Crown immunity was affected by Act No 6 of 1853 (SA); \textit{Claims Against the Government Act} 1857 (NSW), which did not actually say that the Crown was liable in tort, but did say that the petition of right procedure was of limited operation and insufficient to meet all cases; \textit{Claims Against the Colonial Government Act} 1876 (NSW), which repealed the 1857 Act but refined
liability of the Crown in tort states that in a case involving the Crown 'the rights of the parties therein shall as nearly as possible be the same and judgment and costs shall follow or may be awarded on either side as in an ordinary case between subject and subject'.\(^{31}\) The wording 'as nearly as possible' appears in the Acts of New South Wales, the Commonwealth, Tasmania, Queensland, Victoria and the Northern Territory, suggesting that there is the possibility for a differential application of the law to the Crown in certain circumstances or to some extent. However, Aronson and Whitmore suggest that the statement is designed to serve two functions: to make the necessary changes when applying the law to the Crown, 'that is, it is a statement that what binds the Crown are all the procedural and substantive laws, mutatis mutandis, which bind the subject', and to indicate a legislative awareness that occasionally it is 'it is right and proper to pay regard to the public status of the Crown.'\(^{32}\)

Accordingly, although the common law position of immunity from claims in tort no longer obtains, it is still recognised that there will be circumstances in which the status of the Crown will make a difference.

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\(^{31}\) Adopting the formula of s.3 of the Procedure introduced by that Act. The wording of s.3 of the Act was held in *Farnell v Bowman* (1887) 12 App Cas 643 to be intended to subject the Crown to liability in tort. The legislation which affects the current position in Australia is the *Crown Proceedings Act 1988* (NSW) s.5(2); *Crown Suits Act 1947-1954* (WA) s.5(1); *Crown Proceedings Act 1993* (Tas); *Crown Proceedings Act 1992* (SA); *Crown Proceedings Act 1980* (Qld) s.9(2); *Crown Proceedings Act 1958* (Vic) s.23(1)(b) - the Victorian liability is limited to vicarious liability; *Crown Proceedings Act 1993* (NT); *Crown Proceedings Act 1992* (ACT). The *Judiciary Act 1903* (Cth) s.64, interpreted by *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254, affects the liability of the Commonwealth in tort. The English position is now governed by the *Crown Proceedings Act 1947* (UK). The New Zealand Act is the *Crown Proceedings Act 1950* (NZ).

\(^{32}\) See generally Aronson and Whitmore, above n 29, 4.
The consequence of the typical wording of the Crown Proceedings Acts will be to impose direct liability on the Crown in an action in tort, because it gives the subject the same rights, as nearly as possible, against the Crown, as the subject would have in a suit against another subject. However, the legislation in this respect is not uniform, and some legislation, for instance, the *Crown Proceedings Act* 1958 (Vic) is drafted so narrowly as to exclude Crown liability to provide a safe system of work and an occupier's duty to those entering Crown land. Generally it is possible to say that the Crown will be liable in tort, both directly and as a consequence of the application of principles of vicarious liability. The effect of the Crown Proceedings Acts is to subject the Crown to vicarious liability for the torts of its servants, agents, and independent contractors to the same extent as if the Crown were a private person.

Furthermore, at common law a Crown servant is personally liable for the torts he or she has committed or authorised. The personal liability of servants is not diminished by the imposition of vicarious liability. The personal liability of servants is alleviated to some extent in some jurisdictions by statutory measures requiring insurance or indemnification of the employee.

In the United States public institutions can sometimes escape liability in tort by asserting

33 See generally Aronson and Whitmore, above n 29, 26-7.


35 Aronson and Whitmore, above n 29, 20.

36 See, for instance, the *Workers' Rehabilitation and Compensation Act* 1988 (Tas) s.97, which requires employers to insure each employee against liability to a fellow employee; the *Wrongs Act* 1936 (SA) s.27C which, subject to reservations, makes the employer liable to indemnify an employee where the employer is sued in tort for things done in the course of employment; and the *Employee's Liability Act* 1991 (NSW) s.3, which, subject to some reservations, removes the possibility of the employer claiming an indemnification from an employee for matters for which the employer is vicariously liable.
sovereign or governmental immunity on the basis of common law, which protects the state and its entities from litigation on common law and some statutory claims.\textsuperscript{37} The availability of the defence varies from state to state; although sovereign immunity was generally recognised in early cases, its effect has been abrogated or varied by statute or common law decisions, or a combination of the two, over time.

If the defence of state immunity is raised, the court will determine firstly whether the institution is an arm of the state. If it is, the court must ascertain whether the state has taken some action that would divest the institution of sovereign immunity for the purposes of the suit. For instance, some states have passed tort claims acts which regulate the types of lawsuits which may be brought against the state.\textsuperscript{38} State supreme courts have established other exceptions.\textsuperscript{39}

Sovereign immunity is not available when the state entity is not performing a government function. For instance, in \textit{Brown v Florida State Board of Regents},\textsuperscript{40} a university chose to own and maintain a lake in which a student of the University drowned. Sovereign immunity was denied on the basis that the activity was not a governmental one.

\textsuperscript{37} Immunity of the state and its agencies from claims of violations of federal constitutional rights is also afforded by the Eleventh Amendment to the United States Constitution. Private institutions cannot claim sovereign immunity, although non-profit institutions may assert a limited 'charitable immunity' to some tort actions. This also varies from state to state. Some universities are constitutional universities, which are not generally subject to state administrative law and may not be in a position to assert defences available to other statutory institutions. See above 2.1.3.3.\textsuperscript{38}

\textsuperscript{38} For instance, the Florida \textit{Tort Claims Act}, Fla. Stat 768.28 (1985).

\textsuperscript{39} For instance, \textit{Morash v Commonwealth}, 363 Mass. 612 (1973) in which the Massachusetts Supreme Court ruled that the state could be sued for a limited category of negligence claims.

\textsuperscript{40} 513 Sc 2d 184 (Fla Dist Ct App, 1987).
In the case of Australian universities, however, sovereign immunity is unlikely to be an issue.

4.3 Tortious liability of the university in a novel claim

Given that the university is a statutory authority, but that sovereign immunity does not protect it from tortious claims, how does its statutory origin affect the issue of its liability in tort in the case of a novel claim against it? This question is significant at the point of the analysis of duty of care. Clearly, there are many situations in which the status of a university as a statutory authority is irrelevant; for instance, the liability of a university as an occupier is not going to be affected by its genesis. Similarly, the university’s liability in tort for physical injury caused by positive act is unlikely to be affected by its origin in an Act of Parliament. However, there are several situations which can not be dismissed summarily. In particular, is the origin of the university significant in determining whether a university has a duty to educate properly?

The university’s origin will have an effect on liability in a less straightforward manner in other contexts. If some of a university’s functions could properly be regarded as quasi-legislative, the existence of a duty of care will be excluded in the case of injury caused in the exercise of those functions. This exclusion might operate in situations likely to lead to conflict - the enactment of rules relating to plagiarism or cheating in examinations, or the methods of resolution of disputes.

The following discussion will consider the consequence of the statutory origin of the university for its liability in negligence. It will firstly consider the rationale behind a traditional immunity for government bodies in relation to ‘governmental’ activities. It will then consider the way in which court decisions have resolved questions relating to the tortious liability of governmental authorities in Australia, the United Kingdom and the United States. Finally, it will consider the applicability of the policy reservation to

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41 Crimmins v Stevedoring Industry Finance Committee (1999) 167 ALR 1 suggests this.
universities.

Leaving aside the question of sovereign immunity, which was considered under 4.2 above, government bodies have frequently enjoyed some level of immunity because of the duties they have been called upon to perform. Where a government activity involves business activities, it is difficult to accept the relevance of governmental immunities. Certainly, it is not in issue that a statutory body may come under a common law duty of care.\(^42\) This will apply both to the exercise\(^43\) and the failure to exercise\(^44\) its powers.\(^45\) Cases in which the governmental aspect to the decision has resulted in the consideration of some form of immunity have included cases involving the army,\(^46\) the coast guard,\(^47\) the fire service,\(^48\) the solicitor-general or attorney-general,\(^49\) mental hospitals,\(^50\) prison

\(^{42}\) The position in the United States has been clarified to some extent by statute: the *Federal Tort Claims Act* 1946 provides a general consent to suits in tort against the sovereign, followed by a list of specific exceptions to the consent. See generally Aronson and Whitmore, above n 29, 36. Many of the cases cited in the following passage are concerned with the relevance of the statutory exception.


\(^{45}\) *Crimmins v Stevedoring Industry Finance Committee* (1999) 167 ALR 1, 7 (Gaudron J).


and parole authorities, police, the body administering companies and securities regulations, separately incorporated companies charged with the administration of reservoirs, light house, aircraft inspections, air traffic controls, waterfront authorities and schools. These cases have attracted some consideration of governmental immunity on various grounds: without distinguishing between the matters considered relevant in American, English or Australian jurisdictions the grounds have included fairly indistinct articulations of a number of reasons:


52 Crisp v R (1904) 2 N & S 187.

53 Schmidt v United States, 198 F 2d 32 (1952).

54 Geddis v Proprietors of Bann Reservoir (1878) 3 App Cas 430. Aronson and Whitmore make the comment that in this case, 'strictly speaking, the defendant was a company rather than a government authority; but it functioned as a public utility, and the case is treated as a leading case in the area of negligence of public authorities.' Aronson and Whitmore, above n 29, 60.


i. the 'traditional judicial reluctance to evaluate the wisdom of governmental action as measured by social, political or economic criteria',\textsuperscript{58} thus representing and supporting the doctrine of the separation of powers;\textsuperscript{59}

ii. the lack of competence, or perceived lack of competence, of a court to review decisions based on value judgments, policy judgment and decision.\textsuperscript{60} It is argued that judges are not trained in public administration, and the context of bilateral dispute resolution 'is an awkward vehicle with which to assess public policy with multilateral implications. The cost of an ad hoc transfer of public administration from statutory authorities to courts would be astronomical';\textsuperscript{61}

iii. the 'chill factor' - whether liability to suit will 'chill the ardour of some officials'.\textsuperscript{62}

\textsuperscript{58} Aronson and Whitmore, above n 29, 38; note that this was referred to as an effect of the relevant immunities afforded by the \textit{Federal Tort Claims Act} 1946, which were, in part, said to be a reflection of that reluctance. See \textit{Crimmins v Stevedoring Industry Finance Committee} (1999) 167 ALR 1, 21 (McHugh J), 55-6 (Kirby J).

\textsuperscript{59} Bruce Feldthusen, 'Failure to confer discretionary public benefits: the case for complete negligence immunity' (1997) 5 \textit{Tort Law Review} 17, 19.

\textsuperscript{60} See, for instance, Lord Wilberforce in \textit{Anns v Merton LBC} [1978] AC 728, 754: 'Most, indeed probably all, statutes relating to public authorities or public bodies, contain in them a large area of policy. The courts call this 'discretion' meaning that the decision is one for the authority or body to make, and not for the courts.' See also Feldthusen, above n 59, 19. In \textit{Crimmins v Stevedoring Industry Finance Committee} (1999) 167 ALR 1, 3 Gleson CJ pointed to the same difficulty: 'recognition of the existence of a duty is consistent with the need, when dealing with the question of breach, to take account of complex considerations, perhaps including matters of policy, resources and industrial relations'.

\textsuperscript{61} Feldthusen, above n 59, 19. See also Doyle and Redwood, above n 6, 34.

\textsuperscript{62} L L Jaffe, \textit{Judicial Control of Administrative Action} (1965) 245, referred to in Aronson and Whitmore, above n 29, 42. An instance of judicial reluctance to intervene on this ground was provided in the dissenting judgment in \textit{Dalehite v United States}, 346 US 97 (1953). However, this ground was dismissed, at least by Lord Salmon, in \textit{Anns v Merton LBC} [1978] AC 728, 755 and 762.
The idea here is that liability will distort sound public policy. However, there is little evidence to support this theoretical premise: 'the real problem is that too little is known about the impact of potential liability on public defendants. Liability may not alter public behaviour in the same way that we expect it alters private behaviour.' This factor has been heavily relied on in cases against the police, such as *Hill v Chief Constable of West Yorkshire*. However, it was rejected in the context of prison authorities making decisions at the operational level: *Dorset Yacht Co. Ltd v Home Office*.

iv. the fact that some government functions do not have private sector equivalents. Although this has not been said to lead to immunity, it has been argued that it has that effect;

v. the decision subject to suit involved consideration of matters which, although not policy matters, involve criteria inherently unfit for judicial evaluation; for instance, the gravity of an offence, the impact of a prosecution on the defendant or others, or the reasonableness of allocating or rejecting a contract or tender.

vi. A further rationale, although not judicially articulated, lies in the nature of government decisions:

almost all acts of government hurt someone, and it would be utterly impracticable to assess and order compensation for every injury inflicted by government. Even if one were to limit such compensation to injuries caused by government fault, the impracticability of complete compensation remains. ... [C]omplete liability would inhibit governments from acting. ... [A] complete

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63 Feldthusen, above n 59, 19.

64 Ibid 29.


67 *Indian Towing Co. Inc. v United States*, 350 US 61(1955); Aronson and Whitmore, above n 29, 42.

68 See Aronson and Whitmore, above n 29, 44 for case instances of this.
fault-liability scheme would be an enormous force for conservatism.\textsuperscript{69}

However, this last point gives rise to the question of the point at which an exercise of government power which causes harm should not be attempted: what is a reasonable exercise of government powers?

vii. A final, overriding, argument is the fundamental doctrine of separation of powers. This argument asserts, firstly, that public authorities make decisions in the public interest, a process which involves balancing competing claims about what is best for the collective good. The power under which they perform this function is usually expressed in discretionary terms. The exercise of those powers is an executive function, into which the court should not interfere. Oversight of these functions is appropriately achieved though the accountability inherent in the electoral process.\textsuperscript{70}

It is possible that the considerations informing these cases can be ignored in the context of the university, or any relevant authorities may be distinguished, on the basis that the decisions made by the university in any particular case are no different from the decisions made in the private sector.\textsuperscript{71} However, distinguishing the cases on the basis of inherently 'governmental' or 'non-governmental' functions would lead to 'a meritless inquiry which could well turn upon accidents of history. There are many functions undertaken by government for which one would want special rules of liability, even though private people could undertake the same functions.'\textsuperscript{72} This is particularly the case in the modern environment, in which the activities of the executive government cross into spheres of commerce and industry, and in which an increasing number of previously governmental functions are being contracted out to private bodies.

\textsuperscript{69} Ibid 59, footnotes omitted.

\textsuperscript{70} Doyle and Redwood, above n 6, 34.

\textsuperscript{71} This was the basis upon which Lord Diplock in \textit{Dorset Yacht Co. Ltd v Home Office} [1970] AC 1004 distinguished \textit{Geddis v Proprietors of Bann Reservoir} (1878) 3 App Cas 430.

\textsuperscript{72} Aronson and Whitmore, above n 29, 67.
By way of comparison, similar justifications are provided for dismissing the possibility of judicial oversight by way of administrative law. For instance, considerations which might affect the question of the reviewability of a decision of a public body might include:

- whether the current and projected means of ensuring the ‘accountability’ of a public body should exclude accountability in the courts.\(^73\)
- whether the courts should interfere with the implementation of policy. If a decision of a university was a consequence of government policy, should the university, although an independent body, be shielded from the possible consequence of the implementation of that policy?

The judgment of Kirby J in *Romeo v Conservation Commission of the Northern Territory*\(^74\) pointed to the difficulties encountered by the application of the law in this area in a changing environment. In *Romeo* the Commission submitted that the decision as to whether precautions should be provided was not subject to review, since it involved matters of policy. Accordingly, the matter was non-justiciable. The matter was only considered in detail by Kirby J. He noted that there is ‘comparatively little legal authority’\(^75\) providing insight into this issue in Australia, although he noted the distinction which has developed in Australia between policy making powers of a public body, which are treated as quasi-legislative in character, and the operational or managerial decisions, which are susceptible to judicial evaluation.\(^76\)

\(^73\) I am indebted to the account of Sinclair for this breakdown of policy considerations: M D Sinclair, *Common Law Constraints in Public and Private Law over the Exercise of Privatised Functions* (PhD thesis, University of Cambridge, 1994) 113. Some analysis of public law oversight of the university is provided in chapter 6; otherwise, space constraints prevent a closer analysis of the level of public law oversight of the university.

\(^74\) (1998) 192 CLR 431.

\(^75\) Ibid 484.

\(^76\) Ibid. See also Tina Cockburn, ‘The Liability of Public Authorities in Negligence as Occupier: Romeo v Conservation Commission of the
Reflecting, in a general way, the diminishing functions accepted by modern government and the growing appreciation that government and its authorities cannot ‘make the world safe from all dangers’, judicial decisions in negligence claims against public authorities both in this country and elsewhere have lately come to address more closely the limited resources available for the execution of the functions and responsibilities committed to them by statute.\textsuperscript{77}

The allocation of funds is within the operational functions of the authority, and ‘it is increasingly recognised that courts must “bear in mind as one factor that resources available for the public service are limited and that the allocation of resources is a matter for” bodies accorded that function by law’.\textsuperscript{78}

\section*{4.4 The liability in tort of a government authority}

\subsection*{4.4.1 The Australian Position}

In most parts of Australia there was early recognition of the principle that the Crown should be liable in tort, and a consequent early recognition of the modifications and exclusions to Crown liability. As already discussed, the traditional immunity of the Crown from liability in tort has been removed in Australia by a series of legislative provisions and some case law.\textsuperscript{79} The effect of this legislation is that the liability of the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{77} See above n 30.
\item \textsuperscript{78} (1998) 192 CLR 431, 464 (Kirby J).
\item \textsuperscript{79} Ibid 480 (Kirby J) citing \textit{Knight v Home Office} [1990] 3 All ER 237, 243 (Pill J); cf \textit{Just v British Columbia} (1989) 64 DLR (4th) 689. He goes on to cite \textit{Cekan v Haines} (1990) 21 NSWLR 296, 314 (Mahoney JA), and notes that '[d]emanding the expenditure of resources in one area (such as the fencing of promontories in natural reserves) necessarily diverts resources from other areas of equal or possibly greater priority.'
\end{itemize}
\end{footnotesize}
Commonwealth or the State is the same as that of a private citizen where the circumstances giving rise to the action are analogous. However, early cases gave clear articulation to the need for special principles in the case of negligence actions against the government. The legislative provisions have been interpreted to exclude liability where 'the purposes or functions peculiar to government' gave rise to the potential liability, or where the Crown's prerogative or traditional immunities are involved. Thus,

[the application of the law of negligence, itself in course of evolutionary development, to public authorities has presented special problems. These problems are referable mainly to the character of a public authority as a body entrusted by statute with functions to be performed in the public interest or for public purposes. Some adjustment therefore needs to be made to accommodate the application of the principles and concepts of negligence to the acts and omissions of such a body.

This method, however, as discussed above, does not account for the changing environment in which government authorities carry out their functions; nor does it account for the full range of activities carried out by such a body.

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80 For instance, in Davidson v Walker (1901) 1 SR (NSW) 196, 212 Simpson J in the Full Court in New South Wales, considering the consequences of the Claims Against the Government Act said that 'I do not think it was intended to put the Government in the same position as private person. If it were, this would amount to submitting to the control of the jury the exercise of various important functions of Government ... Practically, this would render the Governments in these important matters helpless.'

81 Maguire v Simpson (1977) 139 CLR 362, 393-395 (Stephen J), 408 (Murphy J); Commonwealth v Evans Deakin Industries Ltd (1986) 161 CLR 254.

82 Sutherland Shire Council v Heyman (1985) 157 CLR 424, 456 (Mason J).
4.4.1.1 The policy/operational distinction

It is at the threshold stage that the character of the defendant as a public authority makes the most difference. Australian authorities have attempted to define the type of government action which would call for the application of those special principles of negligence by reference to the concepts of ‘discretion’ and the ‘policy/operational’ distinction. Some decisions have such a high policy content that it is inappropriate to subject them to judicial scrutiny. The planning/operational terminology which evolved in the United States was adopted in Australia in *L v Commonwealth*, a case in which a prisoner on remand in Fannie Bay gaol in Darwin brought an action in negligence against Commonwealth authorities for injuries resulting from the sexual assaults on him by two convicted prisoners. Whereas certain failings of the Commonwealth which resulted in the injuries, such as gross overcrowding due to failure to build an alternative prison, were clearly planning decisions, other decisions resulting in injury were clearly operational. *Sutherland Shire Council v Heyman* and *Parramatta City Council v Lutz* have been cited as more recent authorities for the proposition that public authorities could not be liable for damage arising out of a policy decision. However, Australian authorities suggest that ‘the scope of policy matters which are properly outside the ambit of negligence liability is narrow and that not all discretions entrusted to government agencies are excluded.’

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83 Doyle and Redwood, above n 6, 43.
84 See 4.4.3 below.
85 (1976) 10 ALR 269, 276.
87 (1988) 12 NSWLR 293.
89 Aronson and Whitmore, above n 29, 77-86.
Although in *Sutherland Shire Council v Heyman* 90 the High Court did not follow the leading English case of *Anns v Merton London Borough Council*, 91 three members of the High Court referred to the policy/operational distinction. Mason J distinguished the concepts of policy and operational decisions. He said 'policy decisions] involve or are dictated by financial, economic, social or political factors or constraints ... [Operational decisions are those which are] merely the product of administrative direction, expert or professional opinion, technical standards, or general standards of reasonableness.' 92 It is possible that a situation will involve the exercise of a power involving both policy and operational decisions. 93 In that case, the authority will not be protected from liability by the policy aspect of the decision. If the decision is one which the court is competent to review, public authorities are to be treated no differently from other defendants.

*Heyman* arose when a municipal council, with a statutory power to make inspections of buildings, gave approval to plans for the erection of a house and inspected the building


92 (1985) 157 CLR 424, 469. The judgment of Mason J in *Heyman* drew on American jurisprudence based on the discretionary function exception in a United States statute, the *Federal Torts Claims Act* 28 USC 2671-80. *Indian Towing Co v United States* 350 US 61 (1955); *Dalehite v United States* 346 US 15 (1953); *United States v Varig Airlines* 467 US 797 (1984). The Supreme Court in *United States v Gaubert*, 499 US 315 (1991) said at 323 that the purpose of the exception is to 'prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort.' The court said that the exception covers only discretionary acts, involving an element of judgment or choice. It is the nature of the conduct, not the nature of the body, which is significant to the question of whether the exception applies, the exception only protects governmental actions and decisions based on considerations of public policy, and an operational decision could be based on policy and thus be within the exception.

93 For example, *Parramatta City Council v Lutz* (1988) 12 NSWLR 293 where a council's decision on whether to order the demolition of a building in a dilapidated condition was unreasonably delayed.
at some stage but failed to inspect the foundations or alternatively to detect thereby that
the house had insufficient foundations. A subsequent purchaser suffered loss when the
house began to exhibit defects arising from the poor foundations. In the Court of
Appeal Division of the Supreme Court of NSW, the defendant was found liable,
applying ordinary principles of negligence. In the High Court it was generally accepted
that the ordinary principles of the law of negligence applied to public authorities
rendering them liable for damage caused by a negligent failure to act when under a duty
to act or by negligent failure to consider whether to exercise a conferred power, or by a
person's relying on the negligent use of such a power.

However, the policy/operational distinction has not been happily applied. To some
extent this is a terminological problem. 'Courts with entirely different views about the
scope of immunity have nevertheless attempted to express their views with precisely the
same judicial language. Inconsistent judicial treatment has now rendered ineffective the
otherwise workable policy-operational distinction.'

Nevertheless, judgments in more recent decisions have used the same terminology
and support exists in this country for the distinction, albeit in relation to 'core areas' of policy-making, or in the exercise of functions and powers which are quasi-legislative or regulatory in nature.

Outside these confined areas, it may be preferable to accommodate the distinction at the breach, rather than the duty stage.

\[94\] Feldthusen, above n 59, 19.

\[95\] For instance, in Romeo v Conservation Commission of the Northern Territory (1998) 192 CLR 431 (Kirby J).


\[97\] Crimmins v Stevedoring Industry Finance Committee (1999) 167 ALR 1, 8 (Gaudron J); 33 (McHugh J).

\[98\] Todd, 'Liability in Tort of Public Bodies', in Mullany and Linden (eds), Torts Tomorrow - A Tribute to John Fleming (1998) 36, 46-7, cited in
statutory authority may be considered in the light of its obligation to carry out certain functions and its inability to desist from their exercise.99

Feldthusen, too, suggests that the point that should be reconsidered is the extent of the immunity, not the meaning of the distinction. The question should be the more fundamental one of whether discretionary decisions should be immune or not. Doyle and Redwood also suggest that 'the troublesome and elusive dichotomy is one the law could do without. Rather than agonising over dubious conceptual classifications the courts would be better served by focusing on whether the decision is of such a nature that ... judicial abstention is required.'100

An underlying rationale, founded in policy, for distinguishing the circumstances in which public authorities will be liable in tort, exists, and the policy/operational distinction is a manifestation of this policy rationale. The Privy Council in Rowling v Takaro Properties Ltd101 suggested that the central issue is one of justiciability and the suitability of certain decisions to judicial resolution.102 The question should not be whether a decision of a university is a policy or an operational distinction, but whether a decision of a university is affected by the underlying policy rationale for excluding certain decisions from the adjudication of the courts. Trindade and Cane say that it 'probably does not matter much whether we adopt something like the policy/operational distinction to limit the application of tort law to public authorities; or whether, on the


100 Doyle and Redwood, above n 6, 44.


102 Doyle and Redwood, above n 6, 45. Kneebone suggests that the court says that it cannot adjudicate in these cases because it ought not, because of the availability of alternative remedies. See Susan Kneebone, Tort Liability of Public Authorities (1998) 33.
other hand, we take relevant policy matters into account in deciding whether a public
authority has acted tortiously.\footnote{103}

If the policy/operational distinction is treated as a convenient short-cut to the policy
matters relevant to determination of a duty of care of a body engaged in public duties,
where can it be applied to the university context? If, for instance, a university statute
provided a policy and a set of procedures to regulate the incidence of plagiarism
amongst students, the enactment of the policy and procedures would constitute a policy
matter. The manner in which those policies and procedures were carried out in a
particular case would constitute an operational matter. However, in a number of cases
which have considered this matter, the applicability of the policy/operational distinction
was not considered. The court refused to accept jurisdiction and reiterated that it would
not act as a court of appeal from the decisions of examiners.\footnote{104} Obiter it was indicated
that administrative review mechanisms would have been more appropriate than private
law proceedings where there was no visitor.

\textit{Harding v University of New South Wales}\footnote{105} was analysed on the basis that the university
attracted some of the principles applicable to a public authority. The student had
commenced a medical degree at the University of New South Wales. She discontinued,
was readmitted, failed to sit exams and refused re-enrolment, was eventually permitted

\footnotetext{103}{Francis Trindade and Peter Cane, \textit{The Law of Torts in Australia} (3\textsuperscript{rd} ed, 1999) 705.}

\footnotetext{104}{Thorne \textit{v} University of London [1966] 2 QB 237; Patel \textit{v} University of Bradford Senate [1978] 1 WLR 1488; Thirunayagam \textit{v} London Guildhall University (Unreported, Court of Appeal - Civil Division, Hirst LJ, 14 March 1997); Madekwe \textit{v} London Guildhall University (Unreported, Court of Appeal - Civil Division, Auld, Pill LJ 5 June 1997). See also Clark \textit{v} University of Lincolnshire and Humberside [2000] 3 All ER 752, in which the case was pleaded in contract, but the Court refused to consider questions of academic judgment. Analyses of different aspects of these cases occur in chapters 5 and 6.}

\footnotetext{105}{(Unreported, New South Wales Supreme Court, Master Greenwood, 3 June 1997). An analysis of this case in a different context appears in chapter 6.}

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to re-enrol, and failed in two of four subjects in her first year. She then sought special permission to re-enrol but permission was denied by the Admissions and Re-enrolment Committee, who also held that she was to be excluded for the years 1989 and 1990. The Appeal Committee, upon appeal, confirmed the decision of the Admission and Re-enrolment Committee.

The student approached the New South Wales Supreme Court in its Administrative Division and raised three issues: that the Appeal Committee was not properly constituted, that medical evidence was not appropriately considered, and that there was actual bias against her. McInerney J found against the plaintiff. The student appealed against that decision and won a 'pyrrhic victory' insofar as the Court of Appeal held that the Committee should have had all members present, but held that there was no utility in making an order for prerogative relief. The student then sought damages against the university on a number of grounds, including negligence. The proceedings before Master Greenwood in the Common Law division of the Supreme Court were a striking out application. In her statement of claim the student alleged, inter alia, that the university was negligent in failing to know its own rules, failure to call upon the student to appear in person at the various hearings, and failure to provide procedural fairness.

The case was considered on the basis that the university was a public authority insofar as the avenues for damage for wrongful administrative action were considered. In relation to the action brought in negligence, the case as far as it goes, demonstrates an application of the policy/operational distinction. The allegation was that the Committee should have been present at the one time when making the decision. However, there was nothing in the charter under which it was exercising its powers to say that a meeting could not occur without all members being present at the one time. Thus, the meeting procedures constituted a matter of policy and were not questioned. As to the operational question - the manner in which the actual meeting was held - the judge at first instance thought that the Committee had held the meeting in an appropriate manner under the auspices of the charter. On that basis a finding of negligence against the university was extremely remote.
4.4.1.2 Duties of positive action

Where the threshold test of justiciability has been satisfied, the principles applicable to public authorities are basically the same as those applied to private individuals. However, specific difficulties have arisen in relation to statutory powers which have not been exercised, leading to loss. These cases seek to assert a duty of positive action which, if breached, give rise to an action in negligence.106

In *Sutherland Shire Council v Heyman*107 Mason J affirmed that, generally speaking, a public authority which did not have a statutory obligation to exercise a power did not have a common law duty to exercise it.

But an authority may by its conduct place itself in such a position that it attracts a duty of care which calls for exercise of the power. ... There are ...situations in which an authority’s occupation of premises ... or its ownership or control of a structure in a highway or of a public place ... attracts to it a duty of care. In these cases the statute facilitates the existence of a common law duty of care.108

This 'general reliance' principle, in his Honour’s view, formed a foundation for a conversion of 'public duty' into 'private right'. In the case of a claim suggesting that the public authority has failed to act when it had a positive duty to act, whether or not it is a statutory duty is not conclusive in a claim in negligence. Rather, the statute is the context in which the action or inaction of the public authority is to be considered. However, it is possible that the power conferred for the purpose of obtaining a particular

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106 There are some cases in which an individual has been held to have a duty to go to the assistance of another, for instance, *Lownes v Woods* (1996) Aust Torts Reports 81-376. Duties of positive action arise in other contexts; see n 111 and discussion below.

107 *(1985) 157 CLR 424.*

object has resulted in a general expectation by the public that the power be exercised.\textsuperscript{109}

And there are situations in which a public authority, not otherwise under a relevant duty, may place itself in such a position that others rely on it to take care for their safety so that the authority comes under a duty of care calling for positive action. Such a relationship has been held to arise where a person, by practice or past conduct upon which other persons come to rely, creates a self-imposed duty to take positive action to protect the safety or interests of another or at least to warn him that he or his interests are at risk.\textsuperscript{110}

This situation can arise in a case where there has been specific representation directed towards the person inducing him or her to rely on the performance of the function by the statutory authority, but it can also arise where the authority has acted in a way which induces general reliance, by supplanting private responsibility for action. So, for instance, if it could be shown that the authority performed a function which was well known to be performed by that authority, and it could be shown that an expectation arose that the authority would perform that function which was so strong that it operated to the exclusion of private performance of the function, general reliance on the authority could arise sufficient to remove the necessity for evidence that there had been specific reliance on the authority's performance. No representation by the authority upon which the plaintiff relied to his or her detriment would be necessary in this case.

This rationale for the imposition of a duty of care on a public authority does not normally apply to an individual. Mason J said '[i]t scarcely needs to be mentioned that the reasons which lie behind the common law's general reluctance to require an individual to take positive action for the benefit of others have no application to a public authority with power to take positive action for the protection of others by avoiding a risk of injury to them.'\textsuperscript{111}

\textsuperscript{109} Ibid 457 (Mason J).

\textsuperscript{110} Ibid 461 (Mason J).

\textsuperscript{111} Ibid 468 (Mason J). There are situations in which an individual does have
As already indicated, the 'general reliance' principle came under recent scrutiny and has been rejected by some members of the High Court in *Pyrenees Shire Council v Day*\(^\text{112}\) although it remains an attractive option. In *Pyrenees*, the Victorian Country Fire Authority was called to a fire in the chimney of a rented fish and chip shop. It noted defects in the chimney and notified the local shire council, which sent a building inspector to the premises. The inspector notified the occupier that no fires should be lit, and a letter was subsequently sent to the occupier and to the owner at the address of the shop to confirm that the fireplace was unsafe and should not be used under any circumstances. The occupier ignored the letter and did not notify the owner. The council took no further action. The lease was assigned to the first plaintiffs, who were not told of the defects in the fireplace and who were told that the fireplace was in frequent use. They continued that use, and as a result a fire damaged both the premises and the adjoining premises. The council was sued for failing to compel the repair of the defect on the grounds of the 'general reliance' concept to which Mason J referred in *Heyman*. The High Court, by a majority of three to two, held that a duty of care was owed by the council to the tenant, and held unanimously that a duty was owed to the adjoining owners to exercise its power to compel repairs to the premises.

The reasoning of the judges varied. Brennan CJ said that a duty was owed to the tenant and to the adjoining owner on the basis of a statutory duty to act. The other majority judges, Gummow and Kirby JJ based their decisions on the ordinary duty of negligence. The 'general reliance' test was not used as the basis of liability. Toohey and McHugh JJ dissented in relation to the duty owed to the tenant.

Brennan CJ followed the views of Lord Hoffmann in *Stovin v Wise*.\(^\text{113}\) If a discretion not


to exercise a statutory power is rational, there can be no duty imposed by the common law to exercise it. The existence of a discretion to exercise a power is not inconsistent with a duty to exercise it, and a statutory duty to exercise a power could arise in particular circumstances and be enforceable at public law by the remedy of mandamus. Thus, there is a statutory duty to exercise the power and the statute determines the persons in favour of whom it should be exercised. A statutory duty is a creature of statute and is conceptually distinct from a common law duty of care, but a failure to exercise a statutory duty may give rise to a right of compensation exercisable by those in favour of whom the statute was intended to operate. His view on this point - that there can be no common law liability for a negligent omission to exercise a statutory duty if there was no public duty to act - is the point of departure from the rest of the court in Pyrenees. However, the view of the High Court in Crimmins v Stevedoring Industry Finance Committee\(^ {114} \) that public law concepts should not be introduced into the negligence analysis, suggests that Brennan CJ’s views are unlikely to be followed.

The rest of the court in Pyrenees used common law principles, and threw the existence of the statute, and the discretion it conferred, into the matters to be considered in an analysis of common law negligence. Gummow J said that where a statutory power is conferred, the authority must exercise that power with reasonable care, and a failure to do so, where injury results, would give rise to common law negligence. Where a statutory authority has taken upon itself a task in relation to a conferred power, it may place itself in a relationship with others which would import a common law duty of care. The continuation or additional exercise of that power would discharge this duty.

Kirby J endorsed the three stage conceptual structure adopted by the House of Lords in Caparo Industries plc v Dickman\(^ {115} \) - was it reasonably foreseeable that particular conduct or omission would be likely to cause harm, was there a relationship of neighbourhood, or proximity, and is it fair, just and reasonable that the law should impose a duty of given scope on the wrongdoer for the benefit of the other party? The

\(^{114}\) (1999) 167 ALR 1, in particular 21-2 (McHugh J), 55-6 (Kirby J).

\(^{115}\) [1990] 2 AC 605.
proximity factors included the existence of the relevant statutory powers to remove any danger, and the council’s actual knowledge of the risk. In *Perre v Apand Pry Ltd*¹¹⁶ Kirby J reiterated his adherence to this approach, although McHugh J rejected it at length.¹¹⁷ Similarly, in *Crimmins v Stevedoring Industry Finance Committee*¹¹⁸ Kirby J advocated the three step approach as the only adequate universal identifier of the existence of a legal duty.

In *Pyrenees*, Toohey and McHugh JJ, in separate dissenting judgments, supported the notion of ‘general reliance’, which arises where there is a general expectation that a power will be exercised, and the authority is aware of this. They said that the duty of care of the council according to that principle would be owed to those members of the community who would generally rely on an authority in circumstances where they are particularly vulnerable. The adjoining owners were in that position, because they were not aware of the defect, and they were not in a position to inspect the fireplace. Further, any effective remedy would be slow and expensive. The tenant, however, could inspect the fireplace, and it was not reasonable to rely on the council to protect it from defects in its own premises.

*Pyrenees* does not alter the position in *Heyman* with regard to the liability of public bodies. In some circumstances, the nature of a public body requires some adjustment to the ordinary principles, but this was not necessary in *Pyrenees*.¹¹⁹ In fact, the majority judgments suggest that, rather than constituting an impediment to the finding of a duty of care, the existence of a discretionary statutory power rather facilitates the finding of a duty of care.

¹¹⁷ See discussion under 5.4.2.3 below.
¹¹⁸ *Crimmins v Stevedoring Industry Finance Committee* (1999) 167 ALR 1, 58 (Kirby J).
¹¹⁹ Doyle and Redwood, above n 6, 40.
In the university context, *Dudzinski v Kellow*\(^{120}\) considered the duty of a statutory authority performing a discretionary power. This case, heard in the Federal Court, considered a striking out application brought by a university against a student alleging, inter alia, negligence. The student claimed that the decision of staff members to refuse to grant him exemptions for subjects completed in a previous Diploma course, and subjects completed to date in a degree course, were negligently made, resulting in economic loss and mental distress. He claimed that the staff member who made the original decision, the Dean of the Faculty who approved the decision, and the staff member who headed the student’s appeal from the decision under the university’s appeal mechanisms, had all been negligent. In relation to the latter two, part of the claim that they were negligent stemmed from the student’s claim that the original staff member lacked the expertise to make the decision and they failed to make enquiries as to his competence.

Drummond J refused to strike out the student’s claim in negligence against the first two employees. The university argued that the student was complaining of a failure to act with reasonable care in exercising the power to grant the exemption sought by the applicant, and said that the law does not ‘ordinarily recognise’ a duty of care in the exercise of a power which it has no obligation to exercise.\(^{121}\) Drummond J noted that *Council of the Shire of Sutherland v Heyman*\(^{122}\) was authority for the proposition that the

\(^{120}\) [1999] FCA 390 (8 April 1999) (Including corrigendum dated 1 June 1999). It is worth noting that there is no provision under the *Griffith University Act* 1971 (Qld) for a Visitor of that University. Drummond J noted that, at common law, the courts do not have jurisdiction to entertain matters relating to the misapplication of internal rules of a university. Whilst the statutes made under that Act provide for processes to resolve internal disputes, neither the Act nor any of the statutes expressly exclude the jurisdiction of the ordinary courts to deal with those disputes. The university did not argue that they effectively excluded the operation of the courts, but purported to reserve the right to argue in those terms in later proceedings. Drummond J was satisfied that the court had jurisdiction. This matter is considered at length in chapter 6.

\(^{121}\) Ibid [10].

\(^{122}\) (1985) 157 CLR 424.
repository of a discretionary power may, by its own conduct, place itself in such a position that it comes under a duty of care if it chooses to exercise that power.\textsuperscript{123}

The university also contended that a duty of care with respect to the exercise of a power could not arise where the power is to confer or withhold a benefit upon the claimant to its exercise. Drummond J said that provided the plaintiff complaining of negligently caused economic loss was in ‘a sufficient relationship of proximity to the defendant, an action can lie even though the claim is in respect of a gratuitous benefit that would have been received but for the defendant’s negligence’.\textsuperscript{124} There was no question, then, that a duty of care could arise when a statutory authority was exercising a power; the question is - what constitutes a relationship of proximity. \textit{Crimmins v Stevedoring Industry Finance Committee}\textsuperscript{125} goes some way towards resolution of that issue.

In \textit{Crimmins v Stevedoring Industry Finance Committee} the High Court was called upon to consider the obligations of a statutory authority to take affirmative action. McHugh J substantially adopted the analysis of Professor Todd to opine that, in a novel case in which a plaintiff alleges that a statutory authority owed a common law duty of care and breached it by failure to exercise a statutory power, the question of duty of care should be answered by reference to the following questions:

1. Was it reasonably foreseeable that an act or omission of the defendant, including a failure to exercise its statutory powers, would result in physical injury to the plaintiff or his or her interests? If no, then there is no duty.
2. By reason of the defendant’s statutory or assumed obligations or control, did the defendant have the power to protect a specific class including the plaintiff (rather than the public at large) from a risk of harm? If no, then there is no duty.

\textsuperscript{123} Ibid 459-61.
\textsuperscript{125} (1999) 167 ALR 1.
3. Was the plaintiff or were the plaintiff’s interests vulnerable in the sense that the plaintiff could not reasonably be expected to adequately safeguard himself or herself or those interests from harm? If no, then there is no duty.

4. Did the defendant know, or ought the defendant to have known, of the risk of harm to the specific class including the plaintiff if it did not exercise its powers? If no, then there is no duty.

5. Would such a duty impose liability with respect to the defendant’s exercise of ‘core policy-making’ or ‘quasi-legislative’ functions? If yes, then there is no duty.

6. Are there any other supervening reasons in policy to deny the existence of a duty of care (e.g., the imposition of a duty is inconsistent with the statutory scheme, or the case is concerned with pure economic loss and the application of principles in that field deny the existence of a duty)? If yes, then there is no duty. 126

McHugh J elaborated on the concepts of vulnerability and knowledge. In relation to vulnerability, he clarified his statements in *Perre v Apand* in relation to general reliance. He said

while the concept of general reliance has been criticised, properly understood, the concept was merely one way of testing for an important requirement in the determination of duty of care - how vulnerable is the plaintiff as the result of the defendant’s acts or omissions. 127 In the context of the common law liability of statutory authorities, general reliance is a combination of the requirements of the existence of powers in the statutory authority to ameliorate harm and the vulnerability of the plaintiff to that harm. 128

Gleeson CJ agreed generally with the orders of McHugh J, but made no comment on the specific argument used in this context. Gaudron J was less specific than McHugh J.

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126 Ibid 24-5 (McHugh J), basing his analysis on Todd, above n 98 55.
128 Ibid 26 (McHugh J).
She noted that an authority may come under a duty of care both in relation to the exercise and the failure to exercise a power or function, and the duty arises by reason of the relationship between the statutory body and some member or members of the public which gives rise to a duty to take positive steps to avoid a foreseeable risk of harm. Her analysis suggests particular agreement with points 5 and 6 of McHugh J’s analysis.  

Gummow and Hayne JJ were in dissent. Gummow J was in general agreement with the reasons for judgment of Hayne J, but said in addition, on this point:

[t]he starting point will commonly lie ... in the terms of the statute and a determination of the scope of its operation. It obscures rather than illuminates the scheme established by the legislature to posit a common law duty of care and then determine whether the existence of that duty has been negatived by the statute, or other factors.  

His Honour suggested that by reasoning thus, the interaction between the statute and the common law would not be clear.

Hayne J said that the fundamental reason for not imposing a duty of care in relation to the quasi-legislative functions of a public body is that the function is one that must have a public rather than a private focus. To impose a private law duty would distort that focus. He suggested that this was reflected in the operation of the policy/operational distinction - quasi-legislative functions must lie at or near the centre of policy functions. His judgment demonstrated an adherence to the separation of powers argument - the court should not interfere in the role given to the authority by Parliament.

Cases in which Australian courts have considered the duty of care of a university, although of limited authority, demonstrate reasoning consistent with an identification of

129 Ibid 7-8 (Gaudron J).
130 Ibid 40 (Gummow J).
the university as a statutory authority exercising, in some parts of its functioning, discretionary powers. *Dudzinski v Kellow* 131 although a striking out application in the Federal Court, had no difficulty in accepting the basic assertion of the university that it was the repository of a discretionary statutory power. Drummond J held that the principles to be applied were consistent with *Council of the Shire of Sutherland v Heyman* 132 and that a duty would arise where sufficient proximity was established. Consistent with the analysis of McHugh J in *Crimmins v Stevedoring Industry Finance Committee* 133 the university had a published policy governing the grant of exemptions from course requirements, and the initial employee was charged with or assumed the duty of determining whether to apply the policy in the student’s favour. The student, seeking to invoke the policy, belonged to a specific class of person. Economic loss, according to Drummond J, is ‘an arguably foreseeable result of a negligent misapplication of the University’s exemption policy in so far as it is likely to lead to delay in completing studies and associated costs’. 134 Conversely, the application of the university’s policy did not amount to a core policy-making function. It constituted an operational decision. Given that the case was an application to strike out the student’s statement of claim, the judgment is indicative only that the statement of claim could not be struck out as disclosing no cause of action, and that the correct approach in a case involving a university’s policies was that appropriate to a statutory authority.

Absent the jurisdictional question which has dogged cases in the United Kingdom, there is no reason to think that this case would not be more widely applicable to academic decisions. The decision to grant a credit for subjects studied is clearly an academic one, involving comparison of syllabus content and standards, and responsibility for the decision is usually that of a reasonably senior academic staff member. As long as the operational, rather than the policy aspect of the power is in question there seems to be

no reluctance to concede that a duty of care may be owed.

4.4.2 The position in the United Kingdom

Similar concerns have characterised recent cases involving statutory authorities - or authorities deriving powers or duties from statute - in the United Kingdom. The elusive 'policy/operational distinction' and the problems peculiar to positive duties have been considered in three decisions in the House of Lords, X v Bedfordshire County Council, Stovin v Wise and Barrett v London Borough of Enfield. In X v Bedfordshire County Council the House of Lords gave its decision on the divided decisions of the Court of Appeal involving the liability of a regulatory body for damage caused in the exercise of a regulatory role, along with a number of other appeals relating to the alleged failure of educational authorities to fulfil statutory functions. All cases were striking out applications and had an impact on the position in the United Kingdom on liability arising from carrying out statutory functions. Aside from a cause of action for breach of statutory duty, an argument was advanced in the conduct of these cases that there had been a negligent fulfilment of statutory functions. The question of justiciability and the existence of a common law duty of care was resolved according to the following set of questions:


[1999] 3 WLR 79.

X (Minors) v Bedfordshire County Council [1995] 2 AC 633.

M (a minor) v Newham London Borough Council; X (minors) v Bedfordshire County Council [1994] 2 WLR 554 (CA).

E (a minor) v Dorset County Council; Christmas v Hampshire County Council; Keating v Bromley London Borough Council [1994] 3 WLR 853 (CA).
1. Did the action of the authority which grounds the claim fall within a discretion conferred by the relevant statute? The authority cannot be liable for actions which fall within their discretionary authority. However, if the discretion is exercised so unreasonably that it falls outside the ambit of the discretion there is no reason in principle for denying common law liability.\(^\text{141}\) In determining this question, the court would assess the factors taken into account by the authority in making the decision. These factors may include public policy matters. However, the court will not assess the policy matters. If the decision is a policy decision, the matter is not justiciable. Significant problems occur in determining whether the matter is a policy matter or not.

2. If the decision fell within the discretion conferred, or if the factors relevant to the exercise of the discretion included matters of policy, the matter is not justiciable.

3. Did the action involve, not the exercise of a discretion, but the implementation of a statutory duty? In that case it is not a question of a decision as to whether to do an act or not, but a question of being careful in the manner in which you do it.

4. If it is a matter of implementation of a statutory duty, the matter will be justiciable.

5. If the matter is justiciable, the ordinary principles of negligence apply (and their Lordships said that the ordinary principles are those out of \textit{Caparo Industries Plc v Dickman}\(^\text{142}\)) - that is, ‘[w]as the damage to the plaintiff reasonably foreseeable? Was the relationship between the plaintiff and the defendant sufficiently proximate? Is it just and reasonable to impose a duty of care?’\(^\text{143}\) However, their Lordships said that the question of whether there is a common law duty of care ‘must be profoundly

\(^{141}\) The determination of this question will require the court to ask whether the exercise of the discretion is \textit{Wednesbury unreasonable} - the decision in exercise of the discretion was so unreasonable that no reasonable authority could have arrived at it. See generally C J Hilson and W V H Rogers \textit{‘X v Bedfordshire County Council: Tort law and statutory functions - probably not end of the story’} (1995) 3 \textit{Torts Law Journal} 221, 225.

\(^{142}\) \textit{[1990] 2 AC 605}.

\(^{143}\) \textit{X v Bedfordshire County Council} \textit{[1995] 2 AC 633, 739} (Lord Browne-Wilkinson).
influenced by the statutory framework within which the acts complained of were done.\footnote{144} That is to say, 'a common law duty of care cannot be imposed on a statutory duty if the observance of such common law duty of care would be inconsistent with, or have a tendency to discourage, the due performance by the local authority of its statutory duty.'\footnote{145} Presumably, then, this will influence the third consideration in the conventional analysis, that is, whether it is just and reasonable to impose a duty of care.

6. Regardless of whether the authority owes a direct duty of care, it may be vicariously liable due to a breach of a common law duty owed by an employee of the authority. Obviously, the direct liability of the authority will be founded on the acts or omissions of its servants, since 'the authority can only act through its servants'.\footnote{146}

According to Hilson and Rogers, the decision has altered the previous position by departing from the reliance on the public law concept of \emph{ultra vires} in the context of a negligence claim; however the effective change is not as great as it might appear.\footnote{147} A more substantial change is the total exclusion of the common law of negligence from decisions by statutory bodies on policy matters. Previously the possibility of a claim had been considered to be difficult, but not impossible.\footnote{148} As Hilson and Rogers suggest, it is 'hard to see why policy decisions, no matter how absurd, should automatically and in all circumstances be insulated from the force of tort law, since there is no foundation for the proposition that a policy decision is outside the scope of judicial review.'\footnote{149}

One of the implications of this shift away from the \emph{Anns} policy/operational distinction is

\begin{itemize}
\item \footnote{144} Ibid 739.
\item \footnote{145} Ibid.
\item \footnote{146} Ibid 740.
\item \footnote{147} Hilson and Rogers, above n 141, 226.
\item \footnote{148} \emph{Anns v Merton London Borough Council} [1978] AC 728, 754 (Lord Wilberforce); Hilson and Rogers, above n 141, 226.
\item \footnote{149} Hilson and Rogers, above n 141, 226.
\end{itemize}
to remove from the area of matters considered non-justiciable those which are
discretionary but may not involve policy matters. Another is the clarification of the
distinction between matters which 'need to pass through a public law filter before being
subjected to the general Caparo principles and matters which generally have no
meaningful public law overtones (for example, matters of safety in schools').\footnote{150}
Obviously, however, there is significant overlap between categories of action, and
problems will still occur if the distinctions are religiously maintained.

\textit{X v Bedfordshire County Council} was applied by the House of Lords in \textit{Stovin v Wise}\.\footnote{151}
That case considered the common law liability of the Norfolk County Council for
personal injury caused to a motorcyclist travelling along a highway maintained by the
council. A motor vehicle making a difficult turn from a side road had collided with the
motorcyclist. The motorist’s view had been obscured by a bank of earth on an adjoining
property, and although the council knew of the problem, and a number of accidents had
occurred at the junction in the past, it had not done anything about it.

The case involved a duty of positive action, an area of law which was not really resolved
in \textit{X v Bedfordshire County Council}. As Lord Hoffmann says,

\begin{quote}
[t]here are sound reasons why omissions require different treatment from positive
conduct. It is one thing for the law to say that a person who undertakes some activity
shall take reasonable care not to cause damage to others. It is another thing for the
law to require that a person who is doing nothing in particular shall take steps to
prevent another from suffering harm from the acts of third parties ... or from natural
causes.\footnote{152}
\end{quote}

Lord Hoffmann cites some examples in which a duty of positive action is owed; Lord

\begin{footnotes}
\item[150] Ibid 228.
\item[151] [1996] AC 923.
\item[152] Ibid 943.
\end{footnotes}
Nicholls cites other examples:

Familiar instances are parent and child, employer and employee, school and pupil ... but these categories are no more closed than any other categories of negligence. Their unifying thread is some circumstance, or combination of circumstances, which makes it fair and reasonable that one person should be required to take reasonable steps for another’s protection and benefit.\textsuperscript{153}

It is not difficult to find circumstances in which the university may have a duty of positive action, even if the relationship of institution and student is insufficient to create such a duty of itself. A university will, in certain circumstances, owe such a positive duty as occupier: ‘[a]n occupier is under a common law duty to take positive action to remove or reduce hazards to its neighbours, [particularly neighbours who are invitees] even though the hazard is not one the occupier brought about.’\textsuperscript{154}

\textsuperscript{153} Ibid 930. Note that Lord Nicholls was in dissent on another point. The duty of a parent to take positive action to protect a child is doubtful: Robertson v Swincer (1989) 52 SASR 356; Williams v Minister, Aboriginal Land Rights Act 1983 [1999] NSWSC 843; (1999) 25 Fam LR 86 [affirmed Williams v The Minister Aboriginal Land Rights Act 1983 [2000] NSWCA 255 (NSW CA, Spigelman CJ, Sheller and Heydon JJA, 12 September 2000, unreported, BC200005431). The rationale behind the restriction of the duty of a parent to a child may be that in normal circumstances the child’s suit against the parents, if successful, would result in no benefit to the child.

\textsuperscript{154} Stovin v Wise [1996] AC 923, 930. See Goldman v Hargrave [1967] 1 AC 645 where a bushfire originating in a lightning strike caused damage to neighbouring properties, and the landowner was held liable. See also Leakey v National Trust [1980] QB 485, where an attack on the principal case was repelled and it was held that an occupier with a naturally occurring nuisance on their land will not be held liable in the absence of negligence, but also the question of negligence will, in some cases, be judged taking the occupier’s physical and financial resources into account. See also McGeown v Northern Ireland Housing Executive [1995] 1 AC 233 for the duty of an occupier of land over which there is a public right of way - the House of Lords decided that the ‘occupier owes no duty to take reasonable steps to make it safe for members of the public who use it. Because he has no choice as to whether to allow them upon his land or not he should not be required to spend money for their
However, these arguments did not succeed in *Stovin v Wise*. The case was founded on the basis that the Council was a public authority: the argument depended 'upon the public nature of its powers, duties and funding.'\(^{155}\) The argument must be that the reasons for not imposing a positive duty on a private individual - political, moral and economic reasons\(^{156}\) - do not apply to public authorities and that, moreover, the existence of a statutory power creates sufficient 'proximity' between the authority and the injured person, so that a relationship exists and a duty arises.\(^{157}\) However, that does not mean, as Lord Hoffmann said, 'that there are not other arguments, peculiar to public bodies, which may negative the existence of a duty of care'.\(^{158}\)

The majority did not extend the liability of the Council to omissions in this case. Accepting that the policy/operational distinction was not an adequate tool with which to determine the circumstances in which a statutory 'may' could be translated into a common law 'ought', Lord Hoffmann set out several reasons:

1. That the distinction between operational and policy matters is often elusive.
2. Even if the matter is an operational decision, and it would be irrational, in a public law sense, for the authority not to exercise its power, 'it does not follow that the law should superimpose a common law duty of care'.\(^{159}\)

The second reason is supported by policy reasons which only apply to public bodies: 'it is one thing to provide a service at the public expense. It is another to require the public to pay compensation when a failure to provide the service has resulted in loss.'

\(^{155}\) *Stovin v Wise* [1996] AC 923, 946 (Lord Hoffmann).

\(^{156}\) Ibid 943 (Lord Hoffmann).

\(^{157}\) Ibid 947 (Lord Hoffmann).

\(^{158}\) Ibid 946 (Lord Hoffmann).

\(^{159}\) Ibid 951 (Lord Hoffmann).
Apart from cases of reliance ... the same loss would have been suffered if the service had not been provided in the first place. ¹⁶⁰

Thus, the majority concluded,

I think that the minimum preconditions for basing a duty of care upon the existence of a statutory power, if it can be done at all, are, first, that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act, and secondly, that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer because the power was not exercised. ¹⁶¹

4.5 Conclusions

The courts' attitude to the categorisation of universities as public bodies for the purpose of applying the methodology applicable to statutory functions is difficult to assess, given the lack of attempted actions in negligence against universities and the range of potential actions against universities. However, it is likely that the arguments appropriate to public bodies would be focussed on two major points. Firstly, decisions of the university which are of a policy nature would not be justiciable. Secondly, and more particularly, decisions which are legislative or quasi-legislative in nature would not be justiciable.

Certainly, a number of cases demonstrate acceptance of the principles applicable to a case of negligence by a public body. However, many are of limited value. For instance,

¹⁶⁰ Ibid 952 (Lord Hoffmann). See also Lord Hoffmann's extrajudicial statements to this effect in Rt Hon Lord Hoffmann, 'Human Rights and the House of Lords' (1999) 62 Modern Law Review 159.

¹⁶¹ Stovin v Wise [1996] AC 923, 953 (Lord Hoffmann). The majority then went on to consider the position arising where the public authority had created an expectation that the power would be used.
Dudzinski v Kellow\textsuperscript{162} which involved an allegation of negligence, was a striking out action by an unrepresented plaintiff, and so was not as useful as it could have been.

One of the primary difficulties in assessing the court's approach to a claim based on negligence is the comparative attraction of other claims to relief. Administrative relief, trade practices actions or claims arising in contract or fiduciary duty have been preferable to claims in negligence. Cases involving the interaction between public and private law have set up a comparison between potential contractual claims and judicial review. If a claim was premised on the argument that the student's relationship with the university was based on contract, an analysis outlined in chapter three, it could be argued that the obligation to interpret and act in accordance with the rules of the university was a contractual obligation, implied into the membership agreement between the student and the university.\textsuperscript{163} This would, according to the traditional distinction, mean that the claim was a private law matter and could not proceed by way of judicial review. However, the courts have not generally proceeded in this way. In \textit{R v Board of Governors of Sheffield Hallam University, ex parte R}\textsuperscript{164} and \textit{R v Manchester Metropolitan University, ex parte Nolan}\textsuperscript{165} the court granted applications for judicial review and quashed the decisions of a Board of Examiners and an academic board because the universities involved had failed to comply with their own regulations. In a rash of cases against universities in the United Kingdom over the last few years, judicial review has been the predominant mechanism by which relief was sought.\textsuperscript{166} It seems

\begin{flushleft}\textsuperscript{162} [1999] FCA 390 (8 April 1999) considered above.\textsuperscript{163} This was an accepted contention in \textit{Clark v University of Lincolnshire and Humberside} [2000] 3 All ER 752.\textsuperscript{164} [1995] ELR 267.\textsuperscript{165} [1994] ELR 380.\textsuperscript{166} See, for instance, \textit{R v Liverpool John Moores University, ex parte Hayes} (Unreported, Court of Appeal, Roch and Mummery JJ, 18 May 1998) - student sought judicial review of several decisions of bodies of the university with the effect that the student was not awarded compensation to allow her to complete her degree in Pharmacy. Also \textit{R v Cambridge University, ex parte Beg} (Unreported, High Court, Sullivan J, 15 April 2000).\textsuperscript{199}
\end{flushleft}
likely that applicants will proceed by way of judicial review, rather than through private law mechanisms, thus accounting for the relative lack of claims in negligence against the university.

An additional consideration arises in response to the nature of university teaching and learning which is unrelated to the public status of the university. If a case arises as a result of an academic decision, adjudication by the courts could quite possibly interfere with academic freedom. Whereas it is easy to overstate the significance of the idea of academic freedom in an age in which the tension between the demands of the corporate university and the public intellectual demands a sometimes overtly managerialist response, the judiciary frequently assert reluctance to enter into questions of academic judgment. This question is most likely to arise in the context of a claim of negligent marking of examination papers, in response to which courts have, on public policy

1998) - student’s application for leave to apply for judicial review of a decision of the university, claiming that disqualification from degree was disproportionate to the alleged offence of plagiarism and failure to afford natural justice, was dismissed. Also R v University College, London, ex parte Dr Christofi (Unreported, High Court, Owen J, 18 June 1997) - student applied for leave to move for judicial review to have the decision of a university that he had been responsible for falsification of laboratory results quashed. Also R v Cranfield University Senate, ex parte Bashir (Unreported, Court of Appeal, Nourse, Buxton and Sedley LJJ, 16 March 1999) - student sought judicial review of a decision of the university not to award him a doctoral degree. Also R v University of Portsmouth, ex parte Lakareber (Unreported, Court of Appeal, Simon Brown, Aldous and Clarke LJJ, 16 October 1998) - student sought judicial review of decision of the university that she should resit two failed units. Also R v The Board of Governors for the South Bank University ex parte Osinake Ayo Mohammed (Unreported, Court of Appeal, Hobhouse, Swinton Thomas and Buxton LJJ, 24 March 1998) - student sought judicial review of decision of university to award him a third class honours degree. See generally Clive Lewis, ‘Litigation and the University Student’ in J Richard McManus, Education and the Courts (1998) 172, David Palfreyman, ‘The University of Barchester, Coketown University, Ipswich Cathedral Choir School, Gas Street Comprehensive School and the European Convention on Human Rights: a Link?’ (2000) 12 Education and the Law 93.
grounds, refused to enter into the question on its merits. In *Moore v Vanderloo*, referring to the case of *Regents of the University of Michigan v Ewing* the court reproduced the comment that '[w]hen judges are asked to review the substance of a genuinely academic decision ... they should show great respect for the faculty’s professional judgment.' Cases in Australia and the United Kingdom have justified this reluctance by reference to the jurisdiction of the visitor: in *Bayley-Jones v University of Newcastle* Allen J considered that the commission of the tort of negligence by the university by failure to consider legal advice and the failure to obtain further legal advice as to the effect of the regulations of the university when making a decision to terminate the PhD candidature of the applicant was a matter within the exclusive province of the visitor. Allen J considered that '[t]hese are matters into which it is undesirable that the Court intrudes. Its jurisdiction is supervisory'. Older authority supports the proposition that the common law tort of negligence is within the jurisdiction of the visitor; in *Thorne v University of London* the court held that the visitor had exclusive jurisdiction in a dispute over the allegedly negligent marking of a student's examination paper, suggesting a possible rationale for this decision by saying 'the High Court does not sit as a court of appeal from university examiners'. This proposition was vehemently supported in *Thirunayagam v London Guildhall University* and *Madekwe v London Guildhall University* in the context of a university without a visitor. In Australia, however, these comments must be subject to

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167 386 NW 2d 108 (1986).


169 (1990) 22 NSWLR 424.


172 Ibid 243, 339.

173 (Unreported, Court of Appeal - Civil Division, Hirst LJ, 14 March 1997).

174 (Unreported, Court of Appeal - Civil Division, Auld, Pill LJ 5 June 1997).
some reservation, given Drummond J’s willingness to accept jurisdiction in *Dudzinski v Kellow*,¹⁷⁵ a case involving an academic decision, albeit in a university without a visitor.

Thus, in a number of cases which would otherwise have raised the spectre of educational malpractice in a clearly operational context, negligence has not been the preferable cause of action, the courts have declined jurisdiction, or have been reluctant to intervene in academic matters.

Absenting those reservations, the public status of the university could have an impact on a claim in negligence if the decision impugned involved policy considerations. For instance, La Trobe University has as its objects under s.5 of the *La Trobe University Act 1964* the general objects ‘to serve the community and in particular the citizens of Victoria (i) by making knowledge available for the benefit of all; and (ii) by providing an institution in which all enrolled students will have the opportunity of fitting themselves for life as well as becoming learned in a particular branch or branches of learning’. The manner in which the university chooses to accommodate these objects could only be a policy matter, involving financial, economic, social or political considerations. The branches of knowledge the university chooses to teach, for instance, may have to do with government policy restricting or increasing available funds, or social considerations such as a conscious decision to broaden students’ learning options, as well as marketing considerations such as a perceived future demand. These policy considerations would not generally be justiciable in Australia. Similarly, a suggestion that the university failed to give an enrolled student an opportunity to fit him- or herself up for life or to become learned in any particular branch of learning by removing or failing to offer a particular course option, or by offering a degree which the student considered too theoretical, or insufficiently marketable, would fail as a cause of action in negligence for the same reason.

In the United Kingdom a discretionary decision - other than a policy decision, which is not justiciable - will not be able to be impugned unless the discretion is exercised so unreasonably that it falls outside the ambit of the discretion.

More particularly, quasi-legislative decisions would also be non-justiciable. Universities are generally possessed of the power to make regulations or statutes, through their governing bodies, by their foundation statutes. This power is generally wide-ranging, and may include the power to make regulations in relation to potentially contentious subjects such as the rules for recognition of previous studies or rules for the conduct of examinations or of disciplinary boards. However, the application of the regulations or statutes would be an operational matter, and, unless within the range of academic matters referred to above, justiciable.

5. Potential Liability of the University

5.1 Introduction

A fundamental way in which the university differs from a commercial operation, and the part of the university's functioning which is most significant for the 'public' aspect of the university, is the education of its students.\(^1\) The potential for liability for negligently educating students is critical to the vulnerability of the university. However, cases in which so-called 'educational malpractice'\(^2\) has been alleged have not been spectacularly successful; in the university context they are quite rare. They raise questions of the operation of public policy in the determination of whether a duty of care is owed, questions of the appropriate measure of damage, and questions of causation. They also raise issues relating to concurrent liability.

An account of the cases in which educational malpractice has been alleged demonstrates the judicial reluctance to extend liability to schools, and the lack of cases involving allegations of negligent teaching by universities is perhaps evidence of the perception that success is unlikely. Even accounting for the features of the university which diminish its engagement with the law of negligence - the role of the visitor, in particular, reduces the potential for determination of common law liability through the courts - a series of factors contributes directly to difficulties in extending liability to universities for negligent teaching. These are commonly perceived as public policy reasons for refusing to extend liability, an inability to measure teaching practices, and the difficulty of identifying compensable damage.

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1. These identifying features are no longer peculiar to the university context; although the university context still has public features and is peculiarly engaged in education, private engagement in the area is increasing. See Ricky Dalton and Matthew Lynn, 'Rise of the Corporate Campus', *The Australian* (Melbourne), 10 February 1999, 37.

2. This term is common in United States sources. It is often used to describe a range of causes of action, including contractual and tortious actions, and those based on local legislation.
This account of the potential liability of the university will commence with a short explication of the judicial approach to cases involving educational negligence in Australia, the United Kingdom and the United States. Commentary and cases, particularly in the United States jurisdictions, demonstrate difficulties attaching to attributing liability to the university under each of the three constituent factors in an action in negligence - establishing that a duty of care exists, establishing the standard of care and identifying a breach, and establishing that some compensable damage has occurred and has been caused by the breach. Insofar as it is possible, this chapter will not consider the issues arising in the application of the laws of negligence to public bodies. This matter has been isolated and dealt with in chapter 4. It will also avoid issues of concurrent liability, which are dealt with in chapter 6.

5.2 Judicial approaches to educational negligence

A student who has suffered loss due to a failure to educate may attempt recourse to a number of statutory and common law remedies; if it could be shown that a contract subsisted between the university and the student and that the terms of that contract included an express or an implied promise to educate, the student could assert a breach of contract. ³ If other promises were made in pre-contractual statements there is the possibility of actionable misrepresentation. If the conduct could be said to be misleading or deceptive conduct in trade or commerce other remedies would arise by operation of consumer protection legislation in most jurisdictions. ⁴ Even given this range of possibilities, liability of the university in negligence would constitute a strong

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³ The contractual term could be imported by the regulations and handbook of the university, or it could be implied in certain circumstances by the Trade Practices Act 1974 (Cth) or its state equivalents. A contractual analysis of the relationship between the student and the university is considered at length in chapter 3 above. The interaction between the contractual and the tortious remedies is considered in chapter 6 below.

common law right for the student. However, although liability for physical injury caused to a student due to the negligence of the university presents few conceptual difficulties, no Australian case has involved a successful assertion by a university student that liability has arisen as a result of a general failure to teach. Newspaper reports suggest that academics ‘face the ...stress of knowing that it is only a matter of time until local students follow the example of their US and New Zealand counterparts and sue over poor quality courses’. Other reports cite the growing commercialisation of the higher education sector, and suggest that this will be a catalyst for an increasing demand for quality of teaching and improved course design. To date, however, the course of negligence has largely been eschewed in favour of cases based on consumer protection legislation.

Australian cases have recognised that a duty of care is owed by primary and secondary school teachers and school authorities to students who suffer physical injury due to negligence, although this duty has hitherto not been extended to intellectual harm.

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5 See Waters v Winter and the University of New England (Unreported, NSW Court of Appeal, Sheller, Powell and Stein JJA, 9 June 1998) for a recent (unsuccessful) attempt to recover damages for personal injury against a university.


8 See, for example, Commonwealth of Australia v Introvigne (1982) 150 CLR 258.

9 Phelps v Hillingdon London Borough Council [1999] 1 WLR 500 is a recent and highly publicised attempt to recover for negligent failure to identify a learning difficulty. The student succeeded at first instance, but an appeal by the Council was allowed. The Court of Appeal noted that ‘[w]e are told that this is the first case in which a plaintiff has succeeded in such a claim against a local authority, but that there are many similar
Again, this seems only to be a matter of time. Certainly, circumstances have arisen in which the facts on their face seem to invite an action in educational negligence - cases in which students, for instance, have been taught an incorrect syllabus for an external examination. Recent English cases have conceded the possibility of judicial recognition of negligence in the form of educational negligence as a cause of action.\(^\text{10}\) This recognition is currently limited to cases involving failure to diagnose intellectual disability, and is affected by the statutory context peculiar to the United Kingdom state school system. However, recognition of this possibility caused a rash of commentary in Australia, and does constitute a significant step in the face of a series of United States' judgments which resolutely deny relief.

Prior to this recent activity in the United Kingdom, however, ‘educational malpractice’ has not been successfully litigated in Australia, the United Kingdom or the United States. Despite the range of claims which could be said to fit within the category, plaintiffs in the United States have consistently been denied relief. Nordberg J in *Ross v Creighton University*\(^\text{11}\) described educational malpractice as ‘[a] tort theory beloved of commentators, but not of the courts. While often proposed as a remedy for those who think themselves wronged by educators, ... educational malpractice has been repeatedly rejected by the American courts.’\(^\text{12}\) As a result of this prevailing view claims in educational malpractice in the United States have consistently been struck out as failing to disclose a cause of action.


\(^{11}\) 740 F Supp 1319 (1990).

\(^{12}\) Ibid 1327.
In England, by contrast, the courts have refused to rule that a duty of care can never exist. In *E (a minor) v Dorset County Council* the civil division of the Court of Appeal refused to strike out three claims in negligence. Sir Thomas Bingham said 'I do not think it possible to hold as a matter of law that no duty can be owed by any of the individuals for whom it is sought to hold the education authorities liable to those plaintiffs. I am not therefore of the opinion that the claim should be struck out as disclosing no reasonable cause of action.' However, he notes 'I wish to make it quite clear to the plaintiffs and their parents that I am not holding in their favour that a duty of care was owed to them or any of them. I am only holding that on the pleadings as they stand I do not conclude that these claims are unarguable or almost incontestably bad.'

On appeal, the House of Lords confirmed the possibility of suit. In *Phelps v Hillingdon London Borough Council* Otton LJ in the Court of Appeal warned that 'it would be wise for those who contemplate instituting or pursuing such claims to be aware of the formidable obstacles which they face in order to avoid or reduce the chances of ultimate disappointment.' In the House of Lords, however, Lord Slynn said that there was no justification for blanket immunity of persons employed to carry out professional services.

In the university context, cases involving allegations of negligence in academic activities occurred in the past but a proper consideration of that ground has been

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14 Ibid 874 (emphasis added).
15 Ibid.
16 *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633.
17 [1999] 1 WLR 500.
18 Ibid 527.
20 *Thorne v University of London* [1966] 2 QB 237, in which Diplock LJ in
stymied by alternative causes of action, the existence of the visitor, or public policy grounds based on academic freedom.

Australia has not seen a significant test case of negligence causing intellectual harm. In the case of state primary and secondary schools, the cases may be diverted to the Ombudsman or may be resolved by reference to state-based statutes. In the university context, cases have tended to be resolved by the visitor, rather than the courts, or have involved administrative law actions or cases based on trade practices or contract law.

5.3 Potential risks

The term 'educational malpractice' has been engaged to refer to a fairly wide range of conduct arising in cases involving schools in the United States. Aside from the lack of success of the plaintiffs claiming relief under this title and the physical and statutory context in which the alleged damage occurred, there appears to be no significant difference between educational malpractice and professional negligence of other sorts.

the Court of Appeal explained why the High Court had properly declined jurisdiction in a writ in which a law student claimed damages against the University for negligently misjudging his examination paper, followed in Thirunayagam v London Guildhall University (Unreported, Court of Appeal - Civil Division, Hirst LJ, 14 March 1997) and Madekwe v London Guildhall University (Unreported, Court of Appeal - Civil Division, Auld, Pill LJ 5 June 1997).

There have been some out of court settlements: see generally P Williams, 'Educational Negligence: An Australian Perspective' (Working Paper), Curtin University of Technology (1995) 14; B Boer, 'Legal Rights and Obligations of Teachers' in R Chisholm (ed), Teachers, Schools and the Law in New South Wales (1987) 20-1.

See, for instance, Fennell v Australian National University [1999] FCA 989 which considered the liability of a University for misleading and deceptive conduct under the Trade Practices Act 1974 (Cth); in New Zealand Grant, Woolley, Staines and Grant v Victoria University of Wellington [1997] (Unreported, Wellington Registry, High Court, 13 November 1997). Newspaper accounts report recent cases based on contract: Judith O'Reilly, 'Redress for Uni's “Poor Course”' The Australian (Melbourne), 4 August 1999, 35.
These cases give rise to some of the same considerations which are likely to concern the court in a claim in negligence arising in the university context. As far as possible this analysis will consider a possibility of claim only in its tortious aspects; insofar as claims to relief have been couched in terms of contract, breach of statutory duty, deceit, misrepresentation or breach of statutory warranty it will consider them only as they have an impact on a claim in negligence.

The range of conduct which has been given this label (largely by commentators in the United States) includes:

1. Failure to adequately counsel or educate students.\textsuperscript{23} This rather amorphous set of circumstances is viewed with disquiet by the courts. However, a subset of this set of circumstances arises where there is a failure of a school authority to identify and/or adequately deal with learning disabilities, resulting in the student's failure to learn and consequent eventual functional illiteracy. This conduct may be exacerbated by the initial decision to select the student. Some cases deal with selection and admission of students with known academic weaknesses and failure to provide resources or instruction to meet those weaknesses.\textsuperscript{24}

2. Improper identification of a student as a student with special needs, resulting in the placement of the student in remedial or special needs classes.\textsuperscript{25} This type of conduct will overlap with the previous type, insofar as such placement may be alleged to result in failure to address social and intellectual needs of the student and eventually retard his or her progress.


\textsuperscript{24} Ross v Creighton University, 740 F Supp 1319 (1990).

\textsuperscript{25} BM v State of Montana, 649 P2d 425 (1982); Parker, above n 23, 303, footnote 11.
3. Negligence of school or university authorities which has injured a third party; for instance, an eventual employer of a student who has completed a course without attaining the requisite skills, and as a result of whose incompetence an employer suffers harm.\textsuperscript{26} This could more properly be regarded as an adjunct to the type of conduct referred to in the former two categories.\textsuperscript{27}

Commentators have identified specific problem areas which have resulted in litigation: writing in the non-tertiary context, Foster identifies a number of bases for a claim in educational malpractice.

(1) failure to provide or maintain reasonably adequate instructional, orientation and career counselling programmes; (2) failure to provide or maintain reasonably adequate academic instruction, supervision, guidance and counselling, and evaluation systems by which a student’s progress is monitored; (3) failure to provide or maintain means to identify and deal with exceptional students or to initiate appropriate action when such a student is identified; (4) failure to provide reasonably adequate, qualified, competent staff and to ensure their continued adequacy and competency; (5) misleading or failing to advise students as to their academic progress, level of achievement or capabilities; (6) failure to maintain discipline in the classroom; (7) failure to assign reasonably adequate and appropriate methods of instruction.\textsuperscript{28}


\textsuperscript{27} Some commentators have added another category: Failure to warn or protect students from another’s known illness resulting in dangerous proclivity. See Parker, above n 23, 303 and footnote 14.

In addition to this list it may be appropriate to add a number of Williams' suggested risk areas: (8) unpreparedness of teachers for the task of teaching or indifference as to whether they teach appropriately or well; (9) use of testing procedures with which the teacher is unfamiliar, or assessment of student achievement or competence in a careless or incorrect way; (10) failure to develop and implement a program of remediation where the teacher knows that the student has not yet attained an acceptable level of achievement; (11) failure to teach subject matter upon which the student is to be assessed. More relevant to the tertiary area, the following matters could be considered: (12) failure to ensure that academic programmes are consistent with professional accreditation guidelines (where the discipline is subject to professional accreditation); and (13) failure to ensure that students have access to resources appropriate to the level of study (particularly in the case of post-graduate students).

However, despite these possible grounds for complaint, actions in negligence resulting in a failure to learn have not been particularly successful, either against schools or universities. Each of the requirements of a case in negligence has thrown up difficulties.

5.4 Establishing the duty of care

Many cases in negligence against schools have failed because the plaintiff has not established that a duty of care is owed. This is counter-intuitive to the layperson; if schools and universities are established to teach students, and they fail to do so, there must have been some dereliction of a duty owed to the student. This attitude is shared by more experienced commentators; Mr Justice Kirby said in 1983 that '[t]here is no reason of principle why the negligence action should be confined to physical injuries. .... why should the loss not be borne by those who have caused it? It is just not possible, either in legal theory or commonsense, to hold the line at liability for physical injury.'

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30 M D Kirby, 'Education: The lawyers are coming!' Unpublished paper
Nevertheless, the courts have shown great reluctance to extend to teachers and academics the duty attributed to other professionals. Many commentators regard this as an anomalous exception; attempts for recognition as professionals by teachers, in particular, lead to claims that, as professionals, teachers should be vulnerable to the same claims in professional negligence. Similarly, 'if the academic can be viewed as a professional, those functions which he or she ultimately delivers could result in a professional negligence type claim against the institution.\textsuperscript{31} The reasons for denying the existence of the duty of care, however, are complex, and the debate has moved on somewhat from the identification of the defendant as a professional. Logically, what is it about intellectual harm which prevents the court from finding that a duty of care is owed where this is the damage being claimed?

\textbf{5.4.1 Reasonable foreseeability of injury}

Clearly, where an established category of duty exists, there need be no further enquiry. In the case of a student of a university, it could be asserted that the professional/client relationship exists, but such an assertion would be vulnerable to the difficulties exposed by the number of cases which have failed to establish a duty of care in the teacher-student relationship. These cases would suggest that such a category is unlikely to be held to exist.

In cases involving claims for recovery for physical harm through positive conduct the question of duty of care is not problematic. Foreseeability of harm is a sufficient criterion. However, if the case involves anything other than physical damage to person or property, foreseeability is not capable of keeping the law within reasonable limits. For those cases, foreseeability is a necessary but not sufficient prerequisite to the

\textsuperscript{31} Mark R Davies, 'Universities, academics and professional negligence' (1996) 12 \textit{Professional Negligence} 102.

establishment of a duty of care.32

Thus, in a case of economic loss, or the even more vague ‘intellectual harm’ which may be said to be caused by negligent teaching, and which is more likely to have been caused by word rather than by act, some further control mechanism is needed. The educational process is primarily mediated by words, and a cautionary factor is attracted when the negligence is in the form of the written or spoken word occasioning economic loss. In these cases the plea of reasonable foreseeability is insufficient as a sole criterion to establish duty of care.33 Further, in most instances involving educational negligence the complaint is of a failure to improve the student, not of making the student worse. There is not necessarily a positive, easily identifiable act which resulted in the failure to learn.

However, there are other considerations which are influential in restraining the breadth of a duty of care. Gleeson CJ in Perre v Apand indicated the grounds for limiting the range of those to whom to a duty of care is owed: firstly, ‘bearing in mind the expansive application which has been given to the concept of reasonable foreseeability in relation to physical injury to person or property, a duty to avoid any reasonably foreseeable financial harm needs to be constrained by “some intelligible limits to keep the law of negligence within the bounds of common sense and practicality.”’34

Secondly, the operation of the law of negligence in the context of foreseeable economic loss may interfere with freedoms, controls and limitations established both by common law and statute which may be informed by specific policy limitations. Thirdly, in cases

32 Perre v Apand Pty Ltd (1999) 198 CLR 180, 197 (Gleeson CJ), 198 (Gaudron J), 282 (Kirby J).


34 Perre v Apand Pty Ltd (1999) 198 CLR 180, 192 [citing Caparo Industries Plc v Dickman [1990] 2 AC 605, 633 (Lord Oliver of Aylmerton); see also Caltex Oil (Australia) Pty Ltd v The Dredge “Willemstad” (1976) 136 CLR 529, 573 (Stephen J.)].
where the loss occurs in a commercial setting, the third party may suffer financial harm as a result of conduct which is regulated by a contract between others, where the contract governs or limits recovery.\textsuperscript{35}

Gleeson CJ also cited the lack of precision in the concept of financial or economic loss, compared with physical injury, which is readily identifiable. He said ‘[t]he law of tort is a blunt instrument for providing a remedy for many kinds of harm which may be suffered as a consequence of someone else’s carelessness, and which are capable of being described as financial.’\textsuperscript{36}

5.4.2 Proximity

In response to these concerns as to the breadth of potential liability when the test of foreseeability was considered alone, and commencing with \textit{Jaensch v Coffey},\textsuperscript{37} the High Court of Australia redefined the test of foreseeability to include consideration of the degree of proximity between the parties.\textsuperscript{38} According to these analyses, the requirement of proximity was said to be a limitation on the extent to which the test of foreseeability

\begin{itemize}
\item \textsuperscript{35} \textit{Perre v Apand Pty Ltd} (1999) 198 CLR 180, 192-3 (Gleeson CJ). The interaction between the action in tort and a contract affecting recovery will be considered in chapter 6.
\item \textsuperscript{36} Ibid 193.
\item \textsuperscript{37} (1984) 155 CLR 549.
\item \textsuperscript{38} The requirement of proximity was given weight in a series of cases: \textit{Sutherland Shire Council v Heyman} (1985) 157 CLR 424, 461-2, 506-7; \textit{Stevens v Brodribb Sawmilling Co. Pty Ltd} (1986) 160 CLR 16, 30, 50-2; \textit{San Sebastian Pty Ltd v The Minister} (1986) 162 CLR 340, 354-5; \textit{Cook v Cook} (1986) 162 CLR 376, 381-2 and \textit{Gala v Preston} (1991) 172 CLR 243. \textit{Gala} is of particular significance, because in it a majority of the court (Mason CJ, Deane, Gaudron and McHugh JJ) joined in an explicit adoption of the proximity criterion (at 252-3). \textit{Burnie Port Authority v General Jones Pty Ltd} (1994) 179 CLR 520 was the high water mark of the concept of proximity. Since that point, however, there has been a retreat: \textit{Perre v Apand} (1999) 198 CLR180.
\end{itemize}
will leave the plaintiff open to liability. It would also draw considerations of public policy into the question of the establishment of sufficient proximity along with assessments of community standards and demands. According to the thinking at the time, without the concept of proximity, 'the tort of negligence would be reduced to a miscellany of disparate categories among which reasoning by the legal processes of induction and deduction would rest on questionable foundations since the validity of such reasoning essentially depends upon the assumption of underlying unity and consistency.'

In *Jaensch*, in a reinterpretation of the neighbour principle, Deane J expanded upon the idea of 'closeness' and 'directness' - proximity - describing it as 'a broad and flexible touchstone of the circumstances in which the common law would admit the existence of a relevant duty of care to avoid reasonably foreseeable injury to another.' Whether or not the common law should recognize a duty of care in a new area or class of case is likely to be a question difficult of resolution and one which may involve value judgments on 'matters of policy and degree'. The breadth of the concept left the way

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39 Brodie expresses proximity as a 'control device' frequently employed by British courts in recent years in cases involving public bodies: D Brodie, 'Public Authorities and the Duty of Care' (1996) 2 *The Juridical Review* 127, 137.


41 For this reason, disquiet in the standards obtained by the educational system is likely to be relevant. This sense of disquiet has been conveyed by a number of commentators; see, for instance, The Hon Mr Justice Kirby, 'Legal and Social Responsibilities of Teachers' (address at the Education Centre for Whyalla and Region, South Australia, 22 March 1982); The Hon Mr Justice Kirby, 'Legal Responsibility and Private Schools' (1984) 14 *Independent Education* 16.

42 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 543.


44 Ibid 585 (Deane J).
clear for the development or recognition of other factors determining the presence of proximity, such as reliance, assumption of responsibility, and possibly expectation. Many circumstances in which these latter factors exist give rise to or contribute to the finding of proximity of a physical, causal or circumstantial sort.

Deane J was the champion of this ‘conceptual taxonomy’. He repeated his enunciation of the principles of proximity in several cases, and his view was ultimately endorsed by a majority of the High. However, proximity was criticised as ‘nebulous and devoid of legal content’. Brennan J described it as ‘a juristic black hole into which particular criteria and rules would collapse and from which no illumination of principle would emerge’.

In Hill (t/a RF Hill & Associates) v Van Erp the High Court finally conceded that proximity was not as useful as had been suggested as a guide to the determination of a duty of care in any particular case. Rather, the correct approach in Australia, as summarised by Toohey J, is as follows: ‘[a]ttention is focused on established categories in which a duty of care has been held to exist; analogies are then drawn and policy

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49 See cases at n 38.
52 (1997) 188 CLR 159.
53 Ibid 175-9 (Dawson J), 188-90 (Toohey J), 210-211 (McHugh J), 237-9 (Gummow J).
considerations examined in order to determine whether the law should recognise a further category, whether that be seen as a new one or an extension of an old one.\footnote{Ibid 189.}

The demise of proximity, and in particular the \textit{Caparo} three point test of foreseeability, proximity and policy,\footnote{\textit{Caparo Industries Plc v Dickman} [1990] 2 AC 605, 617-618 (Lord Bridge of Harwich).} was reiterated in \textit{Perre v Apand}.\footnote{(1999) 164 ALR 606. Kirby J still favours the \textit{Caparo} tests.} Gleeson CJ, in particular, said that ‘the concepts of proximity and fairness are not susceptible of any such precise definition as would be necessary to give them utility as practical tests’.\footnote{Ibid 610 (Gleeson CJ). See also attacks on the \textit{Caparo} tests at 625-6 (McHugh J), 698 (Hayne J).} The concept of proximity in particular was attacked by Gaudron J, who said ‘the notion of proximity can serve no purpose beyond signifying that it is necessary to identify a factor or factors of special significance in addition to the foreseeability of harm before the law will impose liability for the negligent infliction of economic loss.’\footnote{Ibid 614-5 (Gaudron J).} McHugh J, citing Dawson J in \textit{Hill v Van Erp},\footnote{\textit{Hill (t/a RF Hill \& Associates) v Van Erp} (1997) 188 CLR 159, 176-7.} said that proximity was ‘neither a necessary nor a sufficient criterion for the existence of a duty of care. Furthermore, proximity in the sense of nearness or closeness is hardly a useful concept in most cases of pure economic loss’.\footnote{\textit{Perre v Apand Pty Ltd} (1999) 198 CLR 180, 211 (McHugh J).} Hayne J said that ‘to search ... for a single unifying principle lying behind what is described as a relationship of proximity is ... to search for something that is not to be found.’\footnote{Ibid 301 (Hayne J).}

The usefulness of the term ‘proximity’ may be open to question, but the factors
enumerated as significant to a relationship of proximity in Australia have repeatedly been found to be important, and the members of the High Court in Perre who took issue with the concept of proximity then faced the task of identifying matters which should be relevant. A number of salient factors were identified. Gleeson CJ specified knowledge of a reliant, and therefore vulnerable party, physical propinquity, the degree of foreseeability and the control over the relevant activity by the defendant. 62 McHugh J identified vulnerability and knowledge of an ascertainable class. 63 Gaudron J, whilst considering that pure economic loss did not have a governing principle applicable in all cases, 64 identified known reliance or the assumption of responsibility as a category leading to a duty of care. 65 She also identified a second category - protection of legal rights. Where one person is in a position to control the exercise or enjoyment by another of a legal right, the dependence of the other on the person with control would be a special factor leading to a relationship of neighbourhood. 66 Hayne J considered policy matters to be important, particularly the avoidance of indeterminate liability. 67

As will become evident, most of these factors would be present in the university context. There are clearly situations in which an individual student would rely on the statements of a university employee to his or her detriment, and students are a known class. A university may conceivably place itself in a situation in which it has assumed responsibility for the type of loss suffered by the student and public policy factors have always been cited in educational negligence cases although usually as a negative criterion in establishing a duty of care.

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62 Ibid 194-5.
63 Ibid 220.
64 Ibid 197.
65 Ibid 199.
66 Ibid 201.
67 Ibid 303.
5.4.2.1 Reasonable Known Reliance

The requirement of reasonable reliance was expressed by Gibbs CJ in *Shaddock & Associates Pty Ltd v Parramatta City Council (No 1)*\(^{68}\) and more recently in *Esanda Finance Corporation Limited v Peat Marwick Hungerfords (Reg.)*\(^{69}\). Thus, Toohey and Gaudron JJ, in a joint judgment, endorsed the idea of reasonable reliance as a basis for proximity in negligent misstatement cases: 'reliance is to be understood, in the provision of information or advice, as an expectation, which is reasonable in the circumstances, that due care will be exercised in relation to that provision.'\(^{70}\)

Similarly, Brennan CJ said that something more than foresight or reasonable foreseeability that a member of a class which includes the plaintiff might rely on the statement or advice and thereby suffer loss is required. He cited Lord Morris of Borth-y-Gest in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, who required an additional factor in the circumstances leading to reliance:

> in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.\(^{71}\)

In the context of university education, this passage gives some indication of the difficulties attaching to an attempt to reason by analogy from the negligent misstatement cases. Those cases usually point to some specific word or series of words, leading to a specific act by the listener, which has in turn resulted in loss. However, unless there is

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\(^{68}\) (1981) 150 CLR 225, 231.

\(^{69}\) (1997) 188 CLR 241.

\(^{70}\) Ibid 264.

one or a set of clear misstatements by a lecturer, or by an academic or administrator providing course or subject advice to a student, it is often a process, rather than a set of words, which is in doubt.

However, although known reliance, if it can be shown, would be sufficient to indicate a duty of care, a series of cases indicate that where there is an ongoing 'protective' relationship, specific reliance would not be necessary to establish a duty of care.\textsuperscript{72}

Depending on the nature of the representation, more fundamental difficulties arise when trying to establish that a duty of care was owed by a university to its students to educate them. The process of education involves a combination of factors over a long period of time, and this would suggest that extension of the duty of care in that case would be dangerous to the process of education. These factors include,

most notably those informal learning environments where the palpable human emotions of anger, wonder, enthusiasm, doubt and delight have real educational value, and where the physical nuances of body language, including intonation, gesture, silence and intuitive appreciation, play an important part of the fundamental educational transaction that links student with student and student with teacher.\textsuperscript{73}

A student in a tertiary institution should not be described as merely a receptor - someone who uncritically accepts the instructions of lecturer or tutor and acts in reliance on him or her. It is difficult, therefore, to adopt the model which has become acceptable for the


\textsuperscript{73} 'Cyberspace an Irresistable Force in Academe: VC' (1996) 5 \textit{UniNews} 1, 5 (Vice-Chancellor of The University of Melbourne, Professor Alan Gilbert).
resolution of claims involving negligent words. Education, unlike information or advice, involves the active participation of the recipient, in a form other than merely putting the precepts received into action. A student who complains about differences in emphases, or who asks to have material presented to him or her formally, rather than reading it independently, misses the point about autonomous learning, and arguably mistakes reception of knowledge with learning.

That reservation applies to generalised negligence claims - those involving a 'failure to educate'. It is a less pressing concern in cases involving a claim of specific wrongdoing, such as the negligent marking of an exam paper, negligent instructions given to students on enrolment, or negligent advice to a student by a course advisor. In those cases of specific misstatement, it is not difficult to postulate a relationship where it is reasonably foreseeable that the student would suffer harm by the actions of the advisor.

There are circumstances in which a 'failure to educate' claim may be supported by a duty relationship founded on or supported by reasonable reliance. These circumstances belong to the range of technical courses which deliver a particular methodology or specific knowledge which will be applied in the course of the graduate’s employment. For instance, if a medical student is taught a technique which, if applied, causes injury to a patient, the duty relationship seems less remote. Although the same arguments of student independence and the professional obligations upon the student and the graduate to keep abreast of new or revised techniques apply to this set of students, they have less force when the newly graduated student begins a residency in which he or she is obliged to apply these skills or techniques. The environment in which the application will occur will often be an unsupervised, busy ward or emergency room in which the potential for critical analysis of the learned skills is minimal. If the knowledge accumulated by the resident doctor is insufficient or wrong, physical injury may result to the patient. As the resident may not have sufficient liability insurance and may have few assets, the injured patient may seek redress directly from the hospital or from the medical school.74 There

74 Stewart R Reuter, 'Professional Liability in Postgraduate Medical Education' (1994) 15 The Journal of Legal Medicine 485, 488. This article is written in an American context, but the comments here are

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is no reason to think, however, that a suit against the resident doctor would not arise, and generate a claim by the resident against the university.

It is not difficult to postulate similar examples applying to disciplines in which the generalisation of inquiring student autonomy adopted from the liberal arts will not apply. In some cases the imposition of accredited standards by professional bodies and the intervention of examinations prior to professional admission may ameliorate the possibility of liability reposing in the university, but many situations exist in which there is no professional accrediting body or in which a student may practise as a resident prior to admission.

The concept of reasonable reliance was considered by McHugh J in *Perre v Apana*. He considered that reasonable reliance and assumption of responsibility were part of the general question of vulnerability, which is a consideration in cases involving indeterminate liability. Gleeson CJ also identified knowledge of a reliant, and therefore vulnerable party as an indication of duty. Gaudron J identified known reliance as a factor indicative of a duty of care.

### 5.4.2.2 Assumption of responsibility

The High Court in *Esanda Finance Corporation Limited v Peat Marwick Hungerfords (Reg)* also considered the requirements necessary to establish that there had been an assumption of responsibility by the defendant. It followed the decision of the majority in *San Sebastian Pty Ltd v The Minister* that there was no need for a plaintiff to show

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76 McHugh J’s analysis is considered in more detail under 5.4.2.2 below.
that it requested the information upon which it relied in order to establish an assumption of responsibility.\textsuperscript{80} None of the judges found that it was necessary to induce reliance on the advice. However, their Honours referred with approval to the judgment of Barwick CJ in \textit{Mutual Life & Citizens' Assurance Co. Ltd v Evatt}\textsuperscript{81} on this point, and Toohey and Gaudron JJ concluded that assumption of responsibility leading to the requisite proximity amounted to an 'assumption of responsibility for providing information or advice in circumstances where it is known, or ought to reasonably be known, that it will be acted upon for a serious purpose, and loss may be suffered if it proves to be inaccurate.'\textsuperscript{82}

Commonsense requires the conclusion that a special relationship of proximity marked either by reliance or by the assumption of responsibility does not arise unless the person providing the information or advice has some special expertise or knowledge, or some special means of acquiring information which is not available to the recipient.\textsuperscript{83}

In \textit{Phelps v Hillingdon London Borough Council}\textsuperscript{84} Otton LJ made the point that the assumption of responsibility must be in relation to the type of damage suffered; that the psychologist assumed responsibility to the student to take care to prevent her from sustaining such loss or damage as may be recoverable. The types of compensable damage will be considered at length later in this chapter. In relation to a claim for economic loss, damages would be recoverable in tort provided there has been an assumption of responsibility to protect the plaintiff from the type of loss sustained.\textsuperscript{85} A

\begin{itemize}
\item \textsuperscript{80} (1997) 188 CLR 241, 249 (Brennan CJ), 263 (Toohey and Gaudron JJ) and 309-10 (Gummow J).
\item \textsuperscript{81} (1968) 122 CLR 556.
\item \textsuperscript{82} (1997) 188 CLR 241, 264 (Toohey and Gaudron JJ).
\item \textsuperscript{83} Ibid.
\item \textsuperscript{84} [1999] 1 WLR 500.
\item \textsuperscript{85} \textit{Phelps v Hillingdon London Borough Council} [1999] 1 WLR 500, 513.
\end{itemize}
case involving a university student suing a university may involve a claim for loss of future earnings; in that case, the question will be whether the defendant university had voluntarily assumed responsibility to the plaintiff to take care to prevent him or her sustaining the type of loss or damage claimed. However, in *Phelps* at Court of Appeal level a set of public policy considerations prevented the local education authorities from owing a duty of care in the exercise of their discretionary functions, so that the case was argued on the basis of vicarious liability. *Phelps* considered the question of assumption of responsibility as a foundation of the psychologist's duty of care for the student. It involved an allegation of vicarious liability - it was argued that the defendant council was vicariously liable for the negligent failure of the psychologist to correctly diagnose dyslexia. The Court of Appeal was uneasy about the attempt to render the council liable vicariously where there were clear public policy reasons for immunity from primary liability. 86

Stuart-Smith LJ said that 'the critical question ... is whether [the psychologist] had assumed or undertaken personal responsibility towards the plaintiff (to take reasonable care) to assess her educational potential and provide strategies to improve her position.' 87 The peculiar position of the educational psychology service in *Phelps* as one established for the benefit of the defendant council and its employees meant that there was no direct relationship between the student and the psychology service, and thus no assumption of responsibility to treat him or her. Merely because the child was the object of the assessment did not mean that the psychologist assumed responsibility. 'The court ought to be slow to superimpose on a duty which the employee owed his employer, the defendants, a further duty towards the plaintiff, in the absence of very

(Stuart-Smith LJ); citing *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 and *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

86 On appeal in the House of Lords it was argued that direct liability could arise.

87 *Phelps v Hillingdon London Borough Council* [1999] 1 WLR 500, 514.
clear evidence that the employee has undertaken such responsibility'. The psychologist was doing no more than discharging her ordinary duties to the defendant. Stuart-Smith LJ drew an analogy between the position of the director in Williams v Natural Life Foods Ltd whose 'routine involvement' for and through his company did not amount to a personal commitment or an assumption of responsibility.

Moreover, allowing recovery for vicarious liability would mean that 'the immunity of the local education authority from suit granted for powerful policy reasons will be completely circumvented.'

The House of Lords allowed an appeal from the decision of the Court of Appeal. Hearing the case along with another three cases, two involving students with dyslexia and one involving a student with muscular dystrophy, the House of Lords agreed unanimously that local education authorities in the United Kingdom had a duty to ensure that students' needs were met. However, there was no cross-appeal from the finding that the teachers were not negligent, so the judgment was not concerned directly with the liability of the teaching staff or the vicarious liability of the authority for the negligent acts of the teachers. In relation to the public policy question, Lord Slynn denied that there was a justification for a blanket immunity from liability. He said that there may be circumstances in which recognition of vicarious liability would interfere with the performance of the duties of the education authority, but that such circumstances should not be presumed. Just as a duty is owed by others exercising a particular skill or profession where it could be foreseen that others would be injured if due skill and care are not exercised, so may a duty be owed by an education officer.

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88 Ibid 519.
Lord Slynn noted that the critical question in the Court of Appeal was whether there was an assumption of responsibility by the psychologist to prevent the type of damage claimed. He said that it must be shown that the educational psychologist acted in relation to a particular child in a situation where the law recognises a duty of care - that there must be an assumption of responsibility. A casual remark or isolated act would not necessarily give rise to a duty, but where the psychologist is specifically called in to advise in relation to a certain child, and it is clear that the teachers and parents of the child will follow that advice, prima facie a duty of care arises. It is not necessary that there by a deliberate acceptance of responsibility - the test is an objective one. It is not so much that responsibility is assumed - it is recognised or imposed by the law.

Phelps in the House of Lords, therefore, provides no reason in policy for denying the existence of a duty of care in every case. Facts may be cited which would provide a public policy exception, but there is no blanket immunity. Whereas it could be strongly argued that the policy reasons which would prevent a finding that a local education authority owed a duty of care would apply to the university, and these policy reasons will be considered under 5.4.2.3 below, it is necessary to determine whether a university assumes responsibility to take reasonable care to prevent compensable damage to its students. The case also provides some insight into the facts necessary to find that there had been an assumption of responsibility. In the light of recent Australian cases, these factors are among those relevant to a finding that a duty of care is owed in an Australian school or university.

In the university context, *Dudzinski v Kellow*\(^\text{92}\) suggested that the published policy of the university, which dealt with the grant of credits for subjects studied, and the assumption of the staff member of the authority to make a decision as to whether a credit should be granted, was an assumption of responsibility which could possibly found a duty of care.

In *Perre v Apan* McHugh J considered that the concepts of ‘reasonable reliance’ and ‘assumption of responsibility’ are merely indicators of the plaintiff’s vulnerability to harm from the defendant’s conduct.\(^9^4\)

What is likely to be decisive, and always of relevance, ... is the answer to the question, ‘How vulnerable was the plaintiff to incurring the loss by reason of the defendant’s conduct?’ So also is the actual knowledge of the defendant of the risk and its magnitude.\(^9^5\)

The question of vulnerability is considered at length below.

**5.4.2.3 Public policy**

In the United States, where cases of ‘educational malpractice’ have been common, questions of public policy, the statutory context, the viability of alternative remedies, and the type of injury involved are considered to be relevant to the determination of whether a duty of care exists. The considerations of policy enumerated in the United States’ cases were initially employed in the Court of Appeal in the United Kingdom in *Phelp* to deny that a local education authority owes a duty of care. In the House of Lords the different legislative and administrative context in which the schools in the United States operated were seen as a impediment to the applicability of those cases.

In more settled areas of the law of negligence, particularly where the case involves ordinary physical injury caused by an act of the defendant, reasonable foreseeability of injury will be enough to establish that a duty of care is owed. In a novel category of case policy considerations will bear more weight. This was a feature of cases in which proximity was cited as the relevant test – public policy was a legitimate proximity


\(^9^4\) Ibid 228 (McHugh J).

\(^9^5\) Ibid 220 (McHugh J).
consideration.\textsuperscript{96} Although the High Court of Australia departed from the proximity taxonomy in \textit{Hill v Van Erp},\textsuperscript{97} the court will still take account of public policy considerations. Public policy was a factor even absenting the proximity test. \textit{Giannarelli v Wraith}\textsuperscript{98} cited a number of policy factors to support the immunity in negligence of a barrister with respect to court work.

The two stage test adopted in \textit{Anns v Merton London Borough Council},\textsuperscript{99} which required consideration of, firstly, proximity, and secondly, public policy, was held to be inappropriate in a situation where a duty of care had already been recognized,\textsuperscript{100} and inappropriate in a situation where a duty of care had been repeatedly held not to exist.\textsuperscript{101} However, in a novel category of case policy considerations would become critical. Like the other ‘proximity’ factors, the identity and relative importance of policy considerations are likely to vary from situation to situation.

The considerations relevant to establishing whether a duty of care is owed, particularly the concept of proximity and the role of public policy factors, has been a point of difference between Australian and English authorities. In England, the two stage \textit{Anns} test is said to have resulted in or facilitated the unchecked expansion of the law of negligence. In response, courts in the United Kingdom have turned to the incremental approach advocated by Brennan J in \textit{Sutherland Shire Council v Heyman}.\textsuperscript{102} By this


\textsuperscript{97} (1997) 188 CLR 159.

\textsuperscript{98} (1988) 165 CLR 543.

\textsuperscript{99} [1978] AC 728.

\textsuperscript{100} \textit{Sutherland Shire Council v Heyman} (1985) 157 CLR 424, 441 (Gibbs CJ).

\textsuperscript{101} \textit{Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd} [1986] AC 785, 815 (Lord Brandon (HL)).

\textsuperscript{102} (1985) 157 CLR 424.
approach, the question of whether a duty of care is owed is resolved by reference to established categories of negligence. Where a novel category of duty is proposed the court must identify with some degree of precision a factor in addition to reasonable foreseeability of loss. Without that, no duty exists. The English courts had also retreated from *Anns* and it had already been replaced by a three stage approach when it was overruled in *Murphy v Brentwood District Council*. In *Perre v Apand Pty Ltd* all members of the High Court of Australia referred to the incremental approach; McHugh J said that ‘neither proximity nor the categories approach or any synthesis of them has gained the support of a majority of Justices of this Court. Indeed, since the fall of proximity, the Court has not made any authoritative statement as to what is to be the correct approach for determining the duty of care question’ before concluding that the incremental approach was the most satisfactory approach. Other members were less explicit. Gleeson CJ referred to the incremental approach, and agreed with the reasons of Gummow J for deciding that a duty of care existed in the circumstances of the case. Gummow J, however, considered that the ‘making of a new precedent will not be determined merely by seeking the comfort of an earlier decision of which the case at bar may be seen as an incremental development, with an analogy to an established category. Such a proposition, ... “suffers from a

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106 Ibid 210 (McHugh J).

107 Ibid 217 (McHugh J). See also 302 (Hayne), 325 (Callinan) and 198 and thereafter by implication (Gaudron).

108 Ibid 194.
temporal defect - that rights should be determined by the accident of birth." 109 Kirby J adopted the *Caparo* three stage approach. 110

Consideration of questions of policy was evident in all reasoning. However, judicial approaches differed, insofar as some were prepared to state a general test, which included a reference to global ‘policy considerations’, whilst some refused to state a test which included reference to policy, but referred to policy matters in their decisions. McHugh J said that the law should develop incrementally, by reference to established categories, and that the reasons for upholding or denying a duty should be regarded as principles in analogous cases. Those reasons would reflect policy considerations recognised by the court as relevant. Those policy considerations could, in some cases, be so decisive in determining duty that they could be applied as rules or principles in other cases. 111 Kirby J, by his adoption of the *Caparo* approach, expressly accepted the inclusion of policy considerations – or matters which would determine whether it was fair, just and reasonable to impose liability. 112

Callinan J’s review of precedent frequently referred to policy considerations, and his conclusion indicated that he considered it to be an important factor. Referring to the cases subsequent to *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* 113 he said that all judges consider that policy dictates that there be a control mechanism to limit the availability of relief for pure economic loss. 114

In contrast, Hayne J did not mention ‘policy’, and eschewed references to ‘fairness’ or ‘reasonableness’ as obscuring the reasons for the determination of whether or not

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110 Ibid 286.

111 Ibid 217.

112 Ibid 275.

113 (1976) 136 CLR 529.

liability existed. However, he did make reference to 'additional considerations that may have to be taken into account'. In *Perre* the two matters which were considered relevant were indeterminancy of liability and 'whether the liability is consistent with basic assumptions about the economy in which the conduct takes place.'

Gummow J did not specifically mention policy considerations, but did refer to 'control mechanisms' which would militate against a finding that a duty of care was owed where, for instance, such a finding would result in indeterminate liability to a large class of plaintiffs.

Gaudron J accepted policy considerations by implication, by referring to two policy considerations in her judgment. Whilst Gleeson CJ did not consider it specifically, it was an apparent consideration in his reference to 'convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope' and to the reference to the apprehension of indeterminate liability.

Policy considerations which impress courts of one jurisdiction may be as influential in each other jurisdiction. A number of cases in the non-tertiary context in the United States elaborated on the public policy grounds which would be relevant to a case involving a student alleging educational malpractice in the form of a generalised 'failure to learn'. Two of the earliest are particularly influential in their consideration of this

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115 Ibid 303.
116 Ibid.
117 Ibid 254.
118 Ibid 199-200.
119 Ibid 194; citing *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 617-618 (Lord Bridge).
point.

In Peter W v San Francisco Unified School District\textsuperscript{121} the Californian Court of Appeal, First Appellate District, denied relief to the applicant largely on policy grounds. Peter W was an eighteen year old graduate of a high school operated by the defendant. He had been in that school system for twelve years. Upon graduation, he had little or no ability to read or write. The court noted that the concept of duty of care was 'not immutable' but that amongst the things which remained constant an awareness of public policy considerations was 'most important' in this case.\textsuperscript{122} The court cited the following factors:

- the social utility of the defendant's conduct, compared with the risks involved in that conduct;
- the workability of the rule of care, especially with regard to the practicality of means of prevention;
- the relative ability of the parties to bear the financial burden of the injury, and the capacity to spread the loss;
- the body of statutes and judicial precedents governing the relationship;
- the prophylactic effect of a rule of liability;
- any legislative or regulatory restrictions on the conduct of the defendant;
- moral imperatives;
- the policy of preventing further harm;
- the extent of the burden to the defendant and the consequences to the community of imposing a duty;
- the availability, cost and prevalence of insurance for the risk involved;
- 'administrative factors' such as the possibility of feigned claims and difficulties of proof of injury;

\textsuperscript{121} 131 Cal Rptr 854 (1976).
\textsuperscript{122} Ibid 859.
the prospect of limitless liability for the same injury.\textsuperscript{123}

In \textit{Donohue v Copiague Union Free School District}\textsuperscript{124} the plaintiff alleged that, despite being a High School graduate, he lacked even a rudimentary ability to comprehend written English on a level sufficient to enable him to complete applications to obtain employment. He attributed his failure to the failure of the educational authority through its employees to perform their duties and obligations. The Court considered the question to be one of public policy - should the claim, as a matter of public policy, be entertained. The Court held that it should not. These public policy considerations were located by Jasen J (with whom Cooke CJ, Jones and Fuchsberg JJ concurred) within the context of the Constitutional and Statutory provisions in the State.

To entertain a cause of action for ‘educational malpractice’ would require the courts not merely to make judgments as to the validity of broad educational policies - a course we have unalteringly eschewed in the past - but more importantly, to sit in review of the day-to-day implementation of these policies. Recognition in the courts of this cause of action would constitute blatant interference with the responsibility for the administration of the public school system lodged by Constitution and State in school administrative agencies.\textsuperscript{125}

Wachtler J concurred in a separate opinion with which Gabrielli J agreed. He stated slightly wider public policy grounds; in particular he said that the cause of action would have to be reasonably manageable within the legal system. He considered that questions of proximate cause would cause so much difficulty as to make the cause of action unmanageable.\textsuperscript{126}

\textsuperscript{123} Ibid. Here, Rattigan J is quoting largely from \textit{Raymond v Paradise Unified School District}, 31 Cal Repr 847 (Ct App, 1963) and \textit{Rowland v Christian}, 69 Cal 2d 108, 70 Cal Rptr 97, 443 P 2d 561 (1968).

\textsuperscript{124} 418 NYS 2d 375 (1979).

\textsuperscript{125} Ibid 378 (Jasen J).

\textsuperscript{126} Ibid 379 (Wachtler J).
In the United Kingdom, the House of Lords in X and the Court of Appeal in Phelps confirmed the role of public policy in a case of this nature. The American cases were cited in the House of Lords in X, and Stuart-Smith LJ in the Court of Appeal in Phelps quoted them with approval. He cited the refusal of the House of Lords in X to impose a duty of care on the local education authority for policy reasons, and extended those policy reasons to deny that an employee of the educational authority would owe a duty of care to the student. He summarised these policy reasons as follows:

1. There is a serious risk of vexatious claims, which may be brought years after the event, and in relation to which documents and witnesses may be difficult to find.
2. Scarce resources would be diverted from the provision of free information in order to fight these cases.
3. The decisions of the authority in the exercise of its discretion (in this case, in the measures to be taken for the benefit of a poorly performing student) are made in close consultation with the parents of the child.
4. Options are available to the parent to appeal the decision, and judicial review may be ordered if the appeal to the educational authority does not result in a favourable statement. These procedures are more appropriate than a claim for damages, since they can be completed at the time of the grievance, when evidence is fresh.
5. The question of causation presents enormous difficulties.
6. The public education system is established at the taxpayers' expense for the benefit of the public generally. The possibility of litigation may result in teachers and education authorities engaging in defensive practices, such as over-testing, which will result in a waste of resources.

The judgment went on to say that the reasoning of the American courts, which extend immunity in educational malpractice suits to individual servants or agents, was persuasive, although in English jurisprudence the same result would be obtained by

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holding that there is no assumption of responsibility giving rise to a duty of care when a
servant or agent merely performs his or her duty. Alternatively, he suggested, 'it can
be put on the basis that it is not fair, just and reasonable to single out one of a number of
professionals for the imposition of such a duty in the absence of a clear assumption of
responsibility.'

Although the existence of a blanket immunity afforded to education authorities in the
United Kingdom was denied on appeal to the House of Lords, it was still conceded that
circumstances may exist on a case by case basis to justify a finding that no duty is
owed. Lord Nicholls noted, however, that a finding that a duty of care existed in the
context in which Phelps arose would not open the door to claims based on poor quality
teaching. He said that a claim based on specific, identifiable mistakes are altogether
different from those based on claims of a general nature that a child did not receive an
adequate education at the school or that a teacher failed to teach properly. Thus, the
influence of public policy considerations may differ between jurisdictions, but they are
always likely to bear some weight.

In the higher education context, where cases have been brought in negligence, the policy
considerations are not identical but the result has consistently favoured the institution.
These cases did not involve the general claim of a ‘failure to learn’; two of the most
useful involve negligence of the institution allegedly resulting in damage to a person
other than the student; that is, damage by the student as a result of the negligent teaching
of the institution. Swidryk v St Michael’s Medical Centre sounded in educational
malpractice, and so gave rise to the difficulty in establishing that a duty of care was
owed. However, the defendant was not a state school, which accordingly gave rise to
different policy considerations.

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128 Ibid 523. The House of Lords also considered that there had been an
assumption of responsibility.

129 Phelps v Hillingdon London Borough Council [2000] 3 WLR 776, 792
(Lord Slynn, with whom Lords Lloyd, Jauncey, Millett and Hutton LJJ
agreed), 804 (Lord Nicholls by implication), 809 (Lord Clyde), (HL).

In that case a physician who was undergoing the first year of his residency at the defendant hospital found himself the subject of a medical malpractice claim. He brought a suit against the director of medical education at the hospital. The Superior Court of New Jersey, hearing the director's motion for summary judgment against the plaintiff on the ground, inter alia, that the complaint did not state a cognizable tort or contract, granted the motion. Significantly, the court found that the same public policy considerations which would bar the claim in tort would also bar the claim in contract.

The defendant was running a graduate school medical program. Unlike the previous series of cases, which involved, as Newman JSC says, either high school students who had not acquired basic academic skills, or grade school students who were improperly placed in special education programs, this case did not involve public education, and did not involve compulsory education. However, the court considered that 'the same public policy considerations control the issue of whether to recognize the tort of educational malpractice in New Jersey in the factual context presented.'

The Court then went on to state public policy issues which are relevant to the University context. It started out with the proposition, supported by authority, that '[a]s a general rule courts will not interfere with purely academic decisions of a university.' The Court would not sit in judgment on the day-to-day decisions of the graduate medical education program. Again, the court considered the statutory and regulatory contexts in which the program operated; the development of programs and the accreditation, licensing, examination and admission requirements were heavily regulated by the state board of medical examiners, the board of higher education and the Advisory Graduate Medical Education Council of New Jersey. The Court said that '[i]t would be against public policy for the court to usurp these functions and inquire into the day to day

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131 Ibid 644 (Newman SJC).

operation of a graduate medical education program.\textsuperscript{133}

The court was also concerned about the repercussions of allowing such a claim from the point of view of the workability of the system of court administration:

To allow a physician to file suit for educational malpractice against his school and residence program each time he is sued for malpractice would call for a malpractice trial within a malpractice case. ... [This] would substantially increase the amount of time which a medical malpractice case takes to try now as well as have the potential to confuse the jury in its consideration of the underlying issues.\textsuperscript{134}

The second case involving an educational malpractice suit due to third party damage arose in Iowa. \textit{Moore v Vanderloo}\textsuperscript{135} was decided in the Supreme Court of Iowa on appeal from the District Court, Black Hawk County. This was a case of first impression in Iowa. The defendant was the Palmer College of Chiropractic, from which Dr Lance Vanderloo had received a diploma. The plaintiff, Linda Moore had suffered a stroke after undergoing a cervical manipulation. At the time of the treatment Moore was thirty-five years old and taking an oral contraceptive. She also smoked one to one and one-half packets of cigarettes each day.

An action was brought against Vanderloo for breach of warranty and negligence, the manufacturer of the contraceptive in product liability, and Palmer in breach of warranty and negligence. The action against Vanderloo was settled prior to trial. The district court dismissed the action against Palmer in negligence for failure to state a case. The manufacturer appealed against this ruling. The Supreme Court of Iowa upheld the ruling of the district court.

\textsuperscript{133} 493 A 2d 641, 645.
\textsuperscript{134} Ibid.
\textsuperscript{135} 386 NW 2d 108 (1986).
The basis of the part of the claim against Palmer which dealt with negligence was that Palmer should be held liable for failure to teach Vanderloo certain risks created by manipulation techniques. The court considered that the public policy considerations which had prevented recovery in the series of cases decided in educational malpractice in other jurisdictions applied to the case of a client of a former student. In particular, the court referred to the lack of a satisfactory standard of care against which to measure an educator’s conduct, the inherent uncertainty in determining the cause and nature of any damage, the burden on educational institutions of a flood of claims, the impropriety of interfering with the internal operations and daily workings of the educational institution, and the impropriety of interference with legislatively defined standards of competency. These public policy considerations prevented the court from finding that a duty of care was owed.

The court considered that in the higher education field the impropriety of interference with internal operations is a matter of some significance. Referring to the case of Regents of the University of Michigan v Ewing\textsuperscript{136} the court reproduced the comment that ‘[w]hen judges are asked to review the substance of a genuinely academic decision ... they should show great respect for the faculty’s professional judgment.’\textsuperscript{137}

With respect to the original list of policy considerations applicable to cases in the non-university context, then, courts have specifically noted the workability of the rule of care, the prospect of limitless liability for the same injury, the burden on the defendant as a consequence of the imposition of liability, difficulties in proof of injury, and the statutory and regulatory context in which the activities of the institution were carried out. The persuasiveness of these policy considerations is likely to differ in detail and degree, but they are otherwise clearly considerations in the tertiary context.

In relation to the other public policy factors limiting liability of non-tertiary institutions,


\textsuperscript{137} 474 US 214, 106 S Ct 507, 513 (1985).
there is little reason in principle to suppose that they would not be as relevant to universities. Some differences arise; reference to the body of statutes and judicial precedents governing the relationship will be less helpful in the university context than in the non-tertiary context. University statutes are overwhelmingly mechanical and have little to say about teaching. However, the university statute will be relevant to the question of membership of the body corporate, which is significant in other ways not relevant to the school. Further, the university statutes may provide internal mechanisms for dispute resolution and appeal, in the absence of which the court might be readier to interfere.

There is, however, a body of rules imposed by the central government in the United Kingdom and at State and Federal level in Australia and the United States, regulating the use of the word 'university' and providing a regulatory regime in all countries, although the field is largely self regulating. In addition, there is strong regulation at disciplinary level in some fields, such as medicine, law, engineering, accounting and other vocational degrees which may well cause a court to question the propriety of interference in prescribed standards.

In the United States, the court in *Swidryk v St Michael's Medical Centre* considered the statutory and regulatory contexts in which the program operated; the development of programs and the accreditation, licensing, examination and admission requirements were heavily regulated by the state board of medical examiners, the board of higher education and the Advisory Graduate Medical Education Council of New Jersey. The

138 The membership of the university may be significant in determining whether a contract exists between the university and the student, and will be critical in determining whether the dispute attracts the jurisdiction of the visitor. The first matter was considered in chapter 3, and the second will be considered in chapter 6.

139 This matter is considered at more length below.

140 The regulation of universities was discussed in chapter 2, particularly at 2.1.1.

Court said that ‘[i]t would be against public policy for the court to usurp these functions and inquire into the day to day operation of a graduate medical education program.'

University rules may provide alternative methods of dispute resolution and these, according to the Court of Appeal in Phelps, might constitute a valid policy reason for refusing to erect an additional recovery mechanism. Internal mechanisms may culminate in the jurisdiction of the visitor, whose role has been considered, and will be further considered in chapter 6. In addition, internal and external ombudsmen may afford a more appropriate avenue of complaint. In some cases administrative law remedies also appear to be more appropriate mechanisms for relief. The applicability of these mechanisms was considered in chapter four, and their interaction with the tort of negligence will be considered in chapter six. However, a clear line of authority originating in the United Kingdom cites alternative dispute resolution procedures as an entirely persuasive argument for refusing to countenance a claim that a university had negligently marked examination papers. In Thorne v University of London the Court of Appeal agreed with the High Court that it had no jurisdiction in a writ in which a law student claimed damages against the University for negligently misjudging his examination paper, since the visitor of the university had exclusive jurisdiction. This decision was followed in Thirunayagam v London Guildhall University and Madekwe v London Guildhall University in the context of a university without a visitor on the grounds that the university had an internal mechanism for dispute resolution.

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142 Ibid 645. See also Moore v Vanderloo, 386 NW 2d 108, 115 (1986), where the court said ‘we refuse to interfere with legislatively defined standards of competency’.

143 For an example of the operation of the ombudsman’s office, see Matthew Spencer, ‘Ombudsman in Degree Probe’, The Australian (Melbourne), 10 March 1999, 41.

144 [1966] 2 QB 237.

145 (Unreported, Court of Appeal - Civil Division, Hirst LJ, 14 March 1997).

146 (Unreported, Court of Appeal - Civil Division, Auld, Pill LJJ 5 June 1997).
Bayley-Jones v University of Newcastle is authority for the proposition that the visitor is required to consider whether a wrong complained of was one for which the courts would award compensatory damages, and if it is determined that this is the case, the visitor is required to award such damages. In particular, Allen J considered that the commission of the tort of negligence by the university by failure to consider legal advice and the failure to obtain further legal advice as to the effect of the regulations of the university when making a decision to terminate the PhD candidature of the applicant were matters within the exclusive province of the visitor. Allen J considered that 'these are matters into which it is undesirable that the court intrudes. Its jurisdiction is supervisory'. This policy consideration seems to be a mixture of an unwillingness to intervene in the internal governance of the university and the maintenance of its standards, and an unwillingness to intervene where there is a more appropriate course of action available to the student.

More problematically, there is a strong tradition of self-regulation in all three countries which the courts have shown themselves unwilling to question. Cass R Sunstein says that 'the law has rarely been at odds with academic freedom', and although that thesis relates to the regulation of campus speech codes the same could also be said of negligent speech in an academic setting. In Moore v Vanderloo the court noted that 'it has been recognized that academic freedom thrives on the autonomous decision-making by the academy itself. ... In essence, plaintiffs are asking this court to pass judgment on the curriculum of [the College]. We decline to do so.' Of course, some distinction must be made between the type of speech being impugned. Statements of an

147 (1990) 22 NSWLR 424.
148 Ibid 435.
150 386 NW 2d 108 (1986), citing Regents of the University of California v Bakke 438 US 265, 312, 98 S Ct 2733, 2759-60 (1978).
administrative character do not attract the arguments of academic freedom applicable to statements made in the course of education. Viewed as an essential component of the commitment to a liberal education, academic freedom must be protected. The characteristics of liberal citizenship require that certain characteristics be encouraged: 'activity rather than passivity; curiosity; a capacity to form, scrutinize and follow a plan of life with diverse features; an ability to discuss and evaluate competing conceptions of the good; interest in and empathetic understanding of other people as well as in oneself; and others.'

The law must show good reason before it interferes with the production of these values in citizens, and before it passes judgment on statements made in the course of aiming for this ideal. Although it is unlikely that the law of negligence could be directly invoked against such free-speech acts, the threat of suit amounts to a 'chilling effect' on the ardour of academics for unrestricted speech.

Sir Gerard Brennan, in his capacity as chancellor of the University of Technology, Sydney, drew parallel conclusions with legislative attempts to curb the opportunities for free speech by amendments to the Higher Education Funding Act 1988 (Cth) which would impose government control on university policy relating to membership of student unions.

[Universities'] duty ... to offer informed criticism within their respective domains cannot be compromised without impairing the vigour of Australian society. ... If universities cease to be the venue for discourse and dissent, the next generation will be supine in the face of authority and our democracy will be a hollow incantation.

He suggested a more outward-looking role for universities among the bastions of

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151 Sunstein, above n 149, 95.
152 Geesche Jacobsen, 'Ex-judge Says Fees Bid a Threat to Democracy', The Age (Melbourne), 19 March 1999, 3.
independent thought in a free and democratic society. The courts, the media, the churches and the universities all have a duty to offer informed criticism within their respective domains. To compromise the duty of those bodies would impair the vigour of Australian society.\textsuperscript{153}

The public policy consideration which suggests that imposing liability in negligence upon publicly funded schools would result in 'defensive' teaching practices would also apply to the extension of liability to universities for a generalised 'failure to teach'. Liability would result in reduced innovation in teaching, insipid and unchallenging teaching, and pressure to reduce academic standards. It could also result in an unwillingness by universities to allow academics to speak out in public, since the university could suffer the legal consequences.\textsuperscript{154}

Another variation in the type of policy considerations which may be relevant may arise in relation to the 'moral imperatives' listed by the court in Peter W v San Francisco Unified School District.\textsuperscript{155} Whereas a non-tertiary student is almost invariably a minor, and by his or her youth and inexperience is vulnerable, even to the effects of his or her own decisions, students at a university are usually considered to be adult\textsuperscript{156} and capable

\textsuperscript{153} Sir Gerard Brennan, 'Vitality under threat', The Australian (Melbourne), 24 March 1999, 40.

\textsuperscript{154} Universities have already begun to limit the ability of the academic staff member to 'speak out' in public: see Guy Healy, 'La Trobe lays down the law', The Australian (Melbourne), 22 July 1998, 35. The recently promulgated policy from La Trobe University accepts that academics must retain their capacity to speak publicly as members of the public and as citizens but otherwise restricts the capacity of academics to speak out in areas 'outside their expertise'.

\textsuperscript{155} 131 Cal Rptr 854 (1976).

\textsuperscript{156} In a social sense, at least. In Australia, most would also be legally adult. See Age of Majority Act 1977 (Vic); Minors (Property and Contracts) Act 1970 (NSW); Law Reform Act 1995 (Qld); Age of Majority (Reduction) Act 1971 (SA); Age of Majority Act 1972 (WA); Age of Majority Act 1973 (Tas); Age of Majority Act 1974 (ACT); Age of Majority Act 1974 (NT).
of making and suffering by their own decisions. In that sense, at least, the university would not be charged with a duty as onerous as that imposed upon the school.\textsuperscript{157} Phelps also considered a variant of this policy consideration, when Stuart-Smith LJ pointed out that the exercise of the discretion of the local education authority involved the close participation of the student's parents. The progress of a university student through a course is typically largely autonomous, and the process of learning is based on the student's own participation. This inevitably leads to difficulties in establishing causation, but also leads to questions about the propriety of shifting responsibility for failure to learn from the student to the university or individual academic. In the House of Lords similar sentiments were enunciated by Lord Nicholls, who noted that there are many reasons for under-performance by a child - emotional stress and home environment, the fact that some teachers are better at communicating and stimulating interest, the personal relationship between the teacher and the student to which the student may respond positively or negatively and different styles of teaching to which some students may be suited and others may not.\textsuperscript{158}

5.5 The standard of care

One factor which has been asserted in American cases involving educational negligence in a non-tertiary context is the difficulty in establishing the standard of care. This has been considered to prohibit the finding that a duty of care is owed, on the basis that the court will not construct a duty of care where it is impossible to determine an appropriate standard. This consideration replicates the concern in Gala v Preston,\textsuperscript{159} where the standard of care in the circumstances could only have been determined by taking into

\textsuperscript{157} For an analysis of the question of moral duty in the context of preservation of a student from physical harm as a result of his or her own decisions, see Barbara J Lorence, 'The University's Role Toward Student-Athletes: A Moral or Legal Obligation' (1991) 29 Duquesne Law Review 343.

\textsuperscript{158} Phelps v Hillingdon London Borough Council [2000] 3 WLR 776, 805 (HL) (Lord Nicholls).

\textsuperscript{159} (1991) 172 CLR 243.
account the illegal nature of the activity in which the parties were engaged. In that case the majority clothed their judgment in the language of proximity - a factor in determining whether a duty of care exists. The majority said that proximity required the court to consider policy considerations, and '[w]here ... the parties are involved in a joint criminal activity, those factors will include the appropriateness and feasibility of seeking to define the content of a relevant duty of care.'\(^{160}\) In other words, the difficulty or impossibility of defining the standard of care will prevent the court from establishing a duty of care.

In *Peter W v San Francisco Unified School District*\(^ {161}\) Ratigan J, who delivered the opinion, noted that the question on appeal was a novel one: a claim for relief in circumstances where a person has been inadequately educated in a public school system. The opinion considered questions of governmental immunity, public policy questions in establishing whether a duty of care exists, and difficulties in determining the standard of care. The standard of care was relevant particularly in view of the novelty of the claim: where new areas of tort liability had been sanctioned the Supreme Court noted that the wrongs involved were comprehensible and assessable within the existing judicial framework. In the case of educational malfeasance this was not true. 'Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury.'\(^ {162}\)

In *Donohue v Copiague Union Free School District*\(^ {163}\) the majority could not foresee irresolvable problems in relation to the construction of a standard of care.\(^ {164}\)

\(^{160}\) *Gala v Preston* (1991) 172 CLR 243, 253 (Mason CJ, Deane, Gaudron and McHugh JJ).

\(^{161}\) 131 Cal Rptr 854 (1976).

\(^{162}\) Ibid 860 (Rattigan J).


\(^{164}\) See also J Elson, 'A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching' (1978) 73 Northwestern 253
Nevertheless, commentators have consistently been preoccupied with the argument or refutation of the argument that it is impossible for the courts to interfere in an area in which it as difficult to find consensus as that of pedagogy. The argument covers much of the same ground as the reluctance of the court to interfere with academic decision-making, but does not replicate the argument, since the courts are in this instance concerned with methods of teaching, not with methods of assessment. The two should, of course, bear some relation but that is irrelevant to the significance of the legal point.

Courts and educators make a curious point when they suggest that education is different in kind from other types of professions, in that their conduct is so unmeasurable as to make it impossible to construct a standard of care. In the United States, this argument has been expressed as follows:

The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might - and commonly does - have his own emphatic views on the subject. The 'injury' claimed here is plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process and beyond the control of its ministers.165

Foster questions a number of the assumptions underlying this expression of 'judicial incompetency'.166 In particular, he questions the assumption that the appropriate standard of care is that of the reasonable man on the street, rather than a standard drawn from the professional or occupational group to which the educators belong. Considering the capacity of the courts to assess the relevant standard of care in other professional groups, this appears to be a valid premise upon which to query this policy consideration.

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165 University Law Review 641.

166 Peter W v San Francisco Unified School District, 131 Cal Rptr 854, 861 (1976).

See also Elson, above n 164, 657.
Jasen J in *Donohue* considered that the creation of a standard would not necessarily pose an ‘insurmountable obstacle’.

In the United Kingdom and Australia the standard of care to be observed by a person with some special skill or competence is that of the ordinary skilled person exercising and professing to have that special skill. The existence of doubt, inconsistency or disagreement in the adoption of certain methods has not been sufficient to prevent the construction of a duty of care in other professions. There is no reason to think the courts incapable of dealing with changing standards.

Disagreement on methods is inevitable; and according to *Bolam v Friern Hospital Management Committee*, where there is a body of opinion on a certain method or practice which differs from the opinion of responsible members of the profession, a professional who follows the practice of responsible members will not be liable merely because there is a dissenting body of opinion. This principle has been applied in medical negligence cases in the United Kingdom and has also been applied in decisions outside the field of medical negligence. However, in *Rogers v Whitaker* the High Court of Australia considered the construction of the standard of care in the context of a failure to disclose to a patient the risk of an operation where two responsible bodies of opinion existed on an issue, and did not follow *Bolam*. The court adopted the approach of the Full Court of the Supreme Court of South Australia in *F v R*, an approach

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168 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582; *X (minors) v Bedfordshire County Council* [1995] 2 AC 633; *Barrett v Enfield LBC* [1999] 3 All ER 193 (HL); *Voli v Inglewood Shire Council* (1963) 110 CLR 74; *Rogers v Whitaker* (1992) 175 CLR 479.

169 See, for instance, the comments of Moffitt J in *Pacific Acceptance v Forsyth* (1970) 92 WN (NSW) 29 in relation to auditors.

170 [1957] 1 WLR 582.

171 (1992) 175 CLR 479.
similar to that taken by Lord Scarman in \textit{Sidaway v Bethlem Royal Hospital}.\textsuperscript{173} In the Supreme Court of South Australia in \textit{F v R} King CJ said

\begin{quote}
The ultimate question, however, is not whether the defendant’s conduct accords with the practices of his profession or some part of it, but whether it conforms to the standard of reasonable care demanded by the law. That is a question for the court and the duty of deciding it cannot be delegated to any profession or group in the community.\textsuperscript{174}
\end{quote}

This was applied in relation to diagnosis in \textit{Naxakis v Western General Hospital}.\textsuperscript{175}

The relevant standard of care is ‘not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade.’\textsuperscript{176} This approach resists the itemization of a number of specific professional duties and substitutes, as the subject of the duty owed, the obligation to exercise reasonable care and skill in the provision of professional advice and treatment in a single, comprehensive duty. The duty, however, involves consideration of a number of factors across the whole treatment - diagnosis, treatment and the provision of information or advice - to different degrees depending on the case. The question of the provision of information or advice does not involve considerations of medical skill only, but may involve questions of commonsense.\textsuperscript{177}

There is no reason in principle why the scope of the duty owed by a school to its students could not be resolved by reference to these principles. Nevertheless, however

\textsuperscript{172} (1983) 33 SASR 189.

\textsuperscript{173} [1985] AC 871.

\textsuperscript{174} (1983) 33 SASR 189, 194.

\textsuperscript{175} (1999) 197 CLR 269, 275-6 (Gaudron J), 285-6 (McHugh J).

\textsuperscript{176} \textit{Rogers v Whitaker} (1992) 175 CLR 479, 487.

\textsuperscript{177} Ibid 493 (Gaudron J).
slight the merits of the argument that a standard of care could not be constructed in relation to schools, it is a little more persuasive in the university context. The traditional university is a bastion of independent, often groundbreaking and innovative thought. It could be argued that the task of the university academic is precisely to question prevailing thought and to communicate the principles of scholarship to students through innovative means. It could be suggested that there is no accepted way for a master scholar to instil a love of a discipline in students.

However, the background conditions forming the basis of that persuasiveness may be falling away. It has not traditionally been the case that the primary function of the university is to teach. It may have been a place where students come to learn but to call that activity one of teaching would be a misconstruction of the relationship between the tutor and the student. The traditional university view has been to treat students as part of a community of scholars; less as consumers of a service. As already discussed, this view has undergone so material a change as to cast doubt upon all of the traditionally accepted notions of the university. There are arguments that, whilst the differences between tertiary and non-tertiary students remain in comparisons of youth, experience and autonomy, it will remain difficult to assert that the academic could be found even to be obliged to teach at all. It may be perfectly acceptable to send students away, with or without a reading list, to follow their own researches on a subject. In that case, the benefits to the student could be great, but the actual intervention of the tutor quite small. However, it would be difficult to find any body of students, or any university administration, which would concur with this view. In a mass education system, with the inclusion in the university system of a great number of students who would not, in the past, have even aspired to a university education, the task of the university is, after taking their money (or the governmental quid pro quo), to ensure that they have at least some chance of receiving a passing grade. The techniques that may have been successful with an elite education system cannot successfully be called upon in a mass education system.

If a duty of care could be said to exist, a plaintiff student will succeed only by
establishing that there has been a falling below the standard with which the university should have complied. The applicable standard is that of the reasonable skilled person exercising or professing to have the special skill involved, the standard still applicable after Bolam v Friern Hospital. However, it is not just the skill of the individual lecturer or tutor. After Rogers v Whitaker a more holistic compliance with the obligations of the university must be demonstrated. This may involve academic judgment, but it will also involve appropriate administrative advice, intervention and counselling, appropriate programs and opportunities for consultation. It also may involve the appointment of competent tutors or the provision of training for tutors discovered to be incompetent. These more mundane duties of the university do not touch the bastion of academic freedom and do not attract the same policy considerations which would make the courts wary of intervention in some types of action. The university’s action or inaction in this type of case would be compared with the action or inaction of the reasonable university, rather than the reasonable skilled professional.

5.6 The existence of compensable loss

In the case of educational malpractice the types of damage which the plaintiff may seek to recover may be the financial cost of alternative education; alternatively it may be in the form of reduced intellectual or emotional well-being, or lost opportunities to find gainful employment. A claim which asserted that the student suffered reduced well-being is unlikely to succeed. It is clear that distress alone cannot complete the cause of action for negligence. Although the House of Lords in X did not consider the question of damage, the point was considered in the Court of Appeal. Sir Thomas Bingham MR said ‘I would accept that certain elements pleaded as damage by Richard (for example, the allegation that he suffered distress and that he is a shy, diffident person) cannot be compensated in damages, and similar points may be made about E’s claim that he was

178 [1957] 1 WLR 582.

179 (1992) 175 CLR 479.
“upset”. Although obiter, this statement was cited without question in the Court of Appeal in *Phelps*. In *Calveley v Chief Constable of the Merseyside Police* the House of Lords held that ‘anxiety, vexation and injury to reputation’ do not give rise to damages in negligence. Similarly, in *Hicks v Chief Constable of South Yorkshire Police* the House of Lords made it clear that distress alone would not be compensated in common law. That case involved a claim by the administrators of the estate of two deceased for damages for the pain and suffering of the deceased in the course of their death by traumatic asphyxia in the crush at Hillsborough stadium. The House of Lords dismissed the appeal from the Court of Appeal, which agreed with the trial judge that no damages should be awarded for pain and suffering. Lord Bridge, with whom all agreed, said that the common law had never awarded damages for the pain of bereavement, and the limited statutory exceptions did not apply where, as in that case, there was no dependency. He noted, obiter, that fear by itself is a normal human emotion for which no damages can be awarded, that those trapped in the crush who suffered terror but no injury would not be able to claim, and so it followed that the fear of impending death felt by the victim of a fatal injury before death cannot by itself give rise to a cause of action which survives for the benefit of the victim’s estate.

Whether distress or upset short of physical injury would qualify to complete the cause of action was considered in the Tasmanian Full Court in *Wilson v Horne*. The defendant

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183. Some limited compensatory damages for the pain of bereavement was effected by the *Administration of Justice Act 1982 (UK)*, s 3(1), by the insertion of s 1A in the *Fatal Accidents Act 1976 (UK)*.


sought to prove that a developmental or personality disorder - promiscuity - amounted to compensable injury in order to show that the claim in negligence was made outside the relevant limitation period. Wright J noted that mental anguish or worry falling short of mental shock may be a component of a claim for pain and suffering, but the basis of the claim is the physical injury which completes the action. Mental anguish or worry alone does not suffice.\textsuperscript{186} Cox CJ agreed with the conclusion of the trial judge that 'the common law of Australia does not recognise as compensable, transitory emotional upset. Stress and anxiety do not sound in damages unless they reach the stage of an illness.'\textsuperscript{187} He also noted that emotional upset not amounting to illness may nevertheless be compensated in awards for pain and suffering where physical injury has been caused. Evans J agreed that it was necessary for the appellant to establish that the respondent suffered from a recognisable psychiatric illness.\textsuperscript{188} In \textit{Dudzinski v Kellow}\textsuperscript{189} the student claimed damages, in addition to damages for economic loss, for 'humiliation, embarrassment, anger, annoyance, vexation, disappointment and frustration' as a result of the decision of a university employee to refuse to grant him an exemption for subjects studied. In the absence of any submissions on the question, Drummond J was not prepared to consider whether that part of his pleadings should be

\textsuperscript{186} Ibid 65,792 (Wright J).
\textsuperscript{187} Ibid 65,789 (Cox CJ), citing \textit{Hinz v Berry} [1970] 2 QB 40, 42 (Lord Denning MR) used the description 'any recognisable psychiatric illness'. This description was adopted in \textit{Mount Isa Mines Ltd v Pusey} (1970) 125 CLR 383, 394 (Windeyer J). \textit{Bunyan v Jordan} (1937) 57 CLR 1, 16 (Dixon J) spoke of the relevant compensable condition as a 'neurasthenic breakdown amounting to an illness'. \textit{Jaensch v Coffey} (1984) 155 CLR 549 (Brennan J) referring to the above cases, again stressed the need for a plaintiff to establish the existence of a psychiatric illness.
\textsuperscript{189} [1999] FCA 390 (8 April 1999).
struck out. However, he said there was a ‘real question’ as to whether he could include sums for mental distress not amounting to psychiatric illness.\(^{190}\)

In the United States the courts have also been reluctant to concede a loss resulting from a failure to educate. The Supreme Court, Appellate Division, New York said that the educational enactments ‘were not intended to protect against the “injury” of ignorance, for every individual is born lacking knowledge, education and experience. For this reason the failure of educational achievement cannot be characterised as an “injury” within the meaning of tort law’.\(^{191}\) However, there are cases which provide damages for loss of employment opportunity as a result of failure to diagnose educational disability. *Phelps v Hillingdon London Borough Council*\(^{192}\) in the Court of Appeal considers the possibility of compensation for loss of an economic gain. Whereas Stuart-Smith LJ does not clearly indicate a position on this, he does quote Evans LJ in the Court of Appeal in *M (a minor) v Newham London Borough Council; X (minors) v Bedfordshire County Council*,\(^{193}\) with whom he disagrees in part. In *X* Evans LJ considered the submission of one of the defendants that damages cannot be awarded for the loss or non-realisation of an expected gain, or for the failure of the defendants to confer a benefit on the plaintiff. He considered that this was not an invariable rule, and did not apply in the case of an admitted duty owed by a teacher for the physical well-being, health and safety of the pupil. In a case of dyslexia, the teacher’s duty was analogous to that of a doctor, who must safeguard the patient with a medical condition by preventing it from becoming worse. In *Phelps*, Stuart-Smith disagreed with the identification of dyslexia as a physical injury. The House of Lords agreed that there was room for debate.

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on quantum, but considered the trial judge to have taken the correct approach. The result of the failure of the psychologist to make the correct diagnosis might include emotional or psychological harm, or even physical damage. Psychological damage could constitute compensable harm, as could a failure to diagnose a congenital condition and take appropriate action, as a result of which the child’s level of achievement was reduced, resulting in loss of employment and wages - thus, the House of Lords considered that failure to confer a benefit was compensable in those circumstances.194

In Australia in the university context *Dudzinski v Kellow*195 confirms that, provided a plaintiff is in a sufficient relationship of proximity, an action can lie for purely economic loss in respect of a gratuitous benefit that would have been received but for the defendant's negligence.

*Phelps* recognises the potential for damages for economic loss regardless of the absence of physical injury. In the United Kingdom this potential arises only where there has been an assumption of responsibility to protect the plaintiff from the type of loss sustained. The question is, in the judgment of Stuart-Smith LJ, dependent upon the assumption of responsibility by the defendant to take care to prevent the plaintiff sustaining this sort of loss.

In Australia, *Perre v Apand*196 shows that the potential for damages for economic loss in the absence of physical injury may arise in other circumstances. The case arose when in a South Australian potato-growing region, bacterial wilt was negligently introduced by Apand Pty Ltd onto the land of one of the farmers. Although no potatoes other than those on that farm were actually affected by bacterial wilt, and no neighbouring properties were infected, Western Australian regulations imposed a prohibition on the importation into Western Australia of potatoes grown on land within a certain distance

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of land known to be affected. A number of farmers thus claimed to have suffered financial loss. In determining that there was a duty of care owed by Apand, the High Court considered the circumstances in which a duty of care would be owed in the absence of physical harm. The Court concluded that economic loss in the absence of physical injury or property damage was compensable, although consideration of this point was necessarily merged with the question of whether a duty of care was owed, and there were some differences in relation to ascertaining the duty of care in the context of pure economic loss.\textsuperscript{197} All seven judges held that pure economic loss was recoverable by at least some of the plaintiffs in the case.

Apand argued that the judgment of Blackburn J in \textit{Cattle v Stockton Waterworks Co}\textsuperscript{198} established a rule that a plaintiff is not entitled to recover for economic or financial loss not consequential upon damage to his person or property, and founded its appeal on the Privy Council's criticism of \textit{Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"}\textsuperscript{199} in \textit{Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd.}\textsuperscript{200} The Privy Council there considered the decision in \textit{Hedley Byrne & Co Ltd v Heller & Partners Ltd}\textsuperscript{201} as having breached that rule.

However, Gummow J noted that the proposition attributed to Blackburn J was too wide, and that a number of circumstances existed, even at the time of \textit{Cattle}, which allowed recovery for purely economic loss.\textsuperscript{202} He agreed with McHugh J that there was an 'inherent indeterminacy' of the law of negligence in relation to the recovery of damages

\begin{itemize}
  \item[197] \textit{Perre v Apand Pty Ltd} (1999) 198 CLR 180, 193 (Gleeson CJ), 197 (Gaudron J), 240-1 (Gummow J), 301-2 (Hayne J), 218-19 (McHugh J), 325-6 (Callinan J), 263-4 (Kirby J).
  \item[198] (1875) LR 10 QB 453.
  \item[199] (1976) 136 CLR 529.
  \item[200] [1986] AC 1, 19-20.
  \item[201] [1964] AC 465.
  \item[202] \textit{Perre v Apand Pty Ltd} (1999) 198 CLR 180, 244-5 (Gummow J).
\end{itemize}
for purely economic loss,²⁰³ but said that there was no simple formula which would save the necessity for examination of particular facts. 'That this is so is not a problem to be solved; rather..."it is a situation to be recognised"'.²⁰⁴ He did not consider that the law in this area would be advanced by the imposition of a set of strict categories, rather, that the facts would reveal a number of 'salient features', with room for the operation of appropriate 'control mechanisms'.²⁰⁵ Hayne J’s judgment conceded that liability for purely economic loss was possible in the circumstances.

Thus, although Perre v Apand demonstrated a willingness to expand the set of circumstances in which purely economic loss is compensable, it did not provide a clear articulation of a principle to replace the previous exclusionary rule, and most members of the High Court denied that the articulation of a universal principle was appropriate, or even possible.

However, the High Court in Perre v Apand was clearly concerned to limit the range of potential liability to guard against ‘indeterminate liability’ by the imposition of ‘control mechanisms’ – policy factors which would, in appropriate cases, be considered to deny that a duty exists. An action seeking damages for lost opportunities to find gainful employment is likely to lead to further difficulties, since it raises issues of causation and evaluation which the court may consider inappropriate to resolve. In Phelps Garland J awarded the plaintiff 25,000 pounds for loss of future earning capacity. Stuart-Smith LJ in the Court of Appeal suggested that ‘it is difficult to resist the conclusion that he simply plucked a figure out of the air. One cannot blame him; in my view the task was virtually impossible.’²⁰⁶ Otton LJ was more charitable. He said the figure was arrived

²⁰³ Ibid 253 (Gummow J) citing Burnie Port Authority v General Jones Pty Ltd (1994) 179 CLR 520, 593 (McHugh J).


by adopting the approach in Blamire v South Cumbria Health Authority\textsuperscript{207} and arriving at a lump sum representing the loss of opportunity 'to earn at a higher rate than that which the plaintiff is now able to command, if fit and willing, or may be able to command after two or three years further tuition and education. The uncertainties are so great that any award must be extremely modest.'\textsuperscript{208} Otton LJ found this case distinguishable: '[In Blamire] McCullough J had some established historical facts upon which to base his award. He also had the benefit of a probable future work pattern within a chosen profession. Neither of those factors is present here. There is no history of employment, and the future is entirely speculation.'\textsuperscript{209} Despite the concurrence of the House of Lords with the decision at first instance, the observations in the Court of Appeal seem tailored to the position of the undergraduate university student, whose employment prospects are speculative, and whose compensable damages as a result of negligent teaching could only be described as lost opportunities for employment. However, they do not address the similarities between this situation and the situation arising when a student is physically injured, and suffers brain damage which results in a loss of employment capacity.

A similar set of concerns arose in Norris v Blake [No 2].\textsuperscript{210} In that case a promising film actor in the early stage of his career but with real prospects of much greater success was severely injured in a motor vehicle accident, and the question was how to measure the value of lost earning capacity. It was held that the proper approach is to determine what was the most probable course that the respondent's career would have taken, what amount should be awarded to compensate him for the losses flowing from his inability to follow that course, and finally to make adjustments to the resulting sum to take account of the contingencies, including the loss of the chance to do even better.

\textsuperscript{207} [1993] PIQR Q1.
\textsuperscript{208} Ibid.
\textsuperscript{209} Phelps v Hillingdon London Borough Council [1999] 1 WLR 500, 530.
\textsuperscript{210} (1997) 41 NSWLR 49 (CA). Special leave to appeal to the High Court was refused: S25/1997 (13 March 1998).
However, these cases demonstrate difficulties of quantification only.

In the context of a case for negligent teaching in a university, the problem could be conjured in the following way: a student alleges that he or she has been negligently instructed, with the consequence that the student had lost the chance of a successful career in his or her chosen profession. A successful career is, of course, not assured even in the case of a good education. In these circumstances, the student would not have to prove that on the balance of probabilities he or she would have had a successful career. This would have been a heavy burden, since the nature of education is such that the student is supposed to be in a state of improvement, and it is difficult to project from the commencement of the university years what the eventual outcome would be. This is particularly the case when it is not clear that tertiary entrance scores are a good indicator for tertiary performance. Of course, the difficulty could not be as pronounced in the case of a tertiary student, where the previous academic record is a reasonably good indication of proficiency, as in the case of primary schooling. The rationale for application of this measure of damages would be stronger when the student had enrolled in a vocational, rather than a general course, and would be assisted if the student had a history of employment.

The line of authority supporting the possibility of damages for loss of chance is reasonably well-established. It has, however, been confined largely to claims of loss of commercial opportunity, although it is increasingly being called upon to assist in claims for compensation where the injury is due to non-traumatic injury, where it is 'often difficult to prove medical causation by "particularistic" evidence, that is, direct, anecdotal, non-statistical evidence from the mouth of witnesses'. In *Kitchen v Royal Air Forces Association* [1958] 1 All ER 241; *Yardley v Coombes* (1963) 107 SJ 575; *Takaro Properties Ltd v Rowling* [1986] 1 NZLR 22; *Craig v East Coast Bays CC* [1986] 1 NZLR 99; *Johnson v Perez* (1988) 166 CLR 351; *Waribay Pty Ltd v Minter Ellison* [1991] 2 VR 391; *Sellars v Adelaide Petroleum* (1994) 179 CLR 332. See generally Geoff Masel 'Damages in Tort for Loss of Chance' (1995) 1 *Torts Law Journal* 43.

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the Court of Appeal in England considered that, whereas a client's claim against a solicitor who had negligently allowed an action to become statute barred was well-founded, what the client had lost was the chance of a successful action. Where the original action would have yielded a maximum verdict of 3000 pounds, the court evaluated the loss of chance at 2000 pounds. However, '[t]here is no logical reason why an award could not be made for loss of chance where the prospects of success in the original action were less than 50%, so long as the plaintiff could on the balance of probabilities prove some loss of chance.' This line of authority was accepted in Australia with Johnson v Perez. In Nikolaou v Papasavas, Phillips & Co, which was heard immediately after the appeals in Johnson v Perez the position of a solicitor negligently causing the loss of a cause of action was considered. The case involved an evaluation of the loss of the right to take proceedings for personal injury in the context of psychological harm which, at the date of the negligent failure to act, had not yet resulted in harm but which, by the date of the action, had resulted in a failure to return to employment. The Court found that the amount to be assessed was the value of the claim which was lost by the negligence of the solicitors. The trial judge should have focused on the plaintiff's situation when the claim for damages for personal injury became statute barred, then assessed damage by reference to the loss at that date of the right to claim damages. This would have been quantified by reference to a number of factors: the likely date at which the matter would have gone to trial, the evidence which would have been available to the plaintiff at that time, the relevant principles governing the assessment of damages at that time, the question of contributory negligence, and the prospects of any judgment given in favour of the plaintiff being satisfied.

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214 Masel, above n 211, 44.
216 (1989) 166 CLR 394.
In *Commonwealth v Amann Aviation Pty Ltd*\(^{217}\) it was held that a contract to provide a commercial advantage or opportunity, if breached, enables the innocent party to bring an action for damages for the loss of the advantage or opportunity. This was so even if there was less than a 50% chance of the advantage eventuating.\(^{218}\) Deane J considered the principles relating to assessment of damages for loss of chance or for an increased chance that a detrimental event will occur in future. He said that it was neither desirable nor practicable to attempt to set out an exhaustive and comprehensive rule to define the situations in which a court should assess damages for loss of the probability or possibility of benefit or detriment. He cited *Takaro Properties Ltd. v Rowling*,\(^{219}\) in which Cooke J said that the assessment of damages in contract and tort is ‘a pragmatic subject ... [which] does not lend itself to hard-and-fast rules.’ Deane J accounted for this by noting that it is a matter traditionally left to the good sense of the jury.\(^{220}\) He said that it was sufficient to say in the case at issue that the ‘loss of chance’ approach to the assessment of damages should occur where the extent of the final loss or injury depends upon what would have happened or what will happen, and the court can identify or estimate a precise or approximate proportionate chance of benefit or detriment but can only speculate on what would have or will actually occur.\(^{221}\)

In these cases the High Court did not distinguish between tort and contract. However, the difficulty in awarding damages for loss of chance presents more of a difficulty in a case involving the tort of negligence, where damage is the gist of the action. There is some question whether loss of chance constitutes sufficient damage to complete the cause of action. In New Zealand in *Takaro Properties Ltd. v Rowling*\(^{222}\) the Court of

\(^{217}\) (1991) 174 CLR 64.

\(^{218}\) Ibid 92 (Mason CJ and Dawson J), 102-104 (Brennan J), 118-119 (Deane J).

\(^{219}\) (1986) 1 NZLR 22, 69 (Cooke J).

\(^{220}\) Citing also *Chaplin v Hicks* (1911) 2 KB 786, 792-793, 796.

\(^{221}\) (1991) 174 CLR 64, 120 (Deane J).

\(^{222}\) (1986) 1 NZLR 22.
Appeal held that a commercial opportunity lost as a result of negligence is compensable and to be assessed by reference to the degree of probabilities or possibilities. In Malec v J C Hutton Pty Ltd dealing with the assessment of damages for personal injuries, the High Court was called upon to assess future possibilities and past hypothetical situations. Deane, Gaudron and McHugh JJ said

[i]f the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring. ... But unless the chance is so low as to be regarded as speculative - say less than 1 per cent - or so higher as to be practically certain - say over 99 per cent - the court will take that chance into account in assessing the damages. Where proof is necessarily unattainable, it would be unfair to treat as certain a prediction which has a 51 per cent probability of occurring, but to ignore altogether a prediction which has a 49 per cent probability of occurring. Thus, the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability.

In Sellars v Adelaide Petroleum NL a majority in the High Court held that loss of a commercial opportunity was damage sufficient to complete the cause of action. In that case the High Court considered whether loss of an opportunity to obtain a commercial advantage or benefit amounts to 'loss or damage' within s.82(1) of the Trade Practices Act 1974 (Cth). The High Court held that, although some damage is necessary for the purposes of the statute, and under an action in tort, the loss of a chance of a commercial

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223 Ibid 63-4, 68-70, 74-5. The Privy Council reversed the decision of the Court of Appeal of grounds not presently relevant. The Court of Appeal adopted the same approach in Craig v East Coast Bays City Council [1986] 1 NZLR 99.

224 (1990) 169 CLR 638.

225 Ibid 643 (Deane, Gaudron and McHugh JJ).

226 (1994) 179 CLR 332.
opportunity would be sufficient. Acceptance of the principle in *Malec* necessitated acceptance that damages for breach of commercial opportunity should be ascertained by reference to the court's assessment of the prospects of success of the opportunity had it been pursued, and this principle applied whether the deprivation occurred by reason of a breach of contract, contravention of s.52(1), or as a result of a tortious act.\(^{227}\)

In a case where a student has alleged that a deficient schooling has led to loss of opportunity to earn an income, what actual damage has occurred? If loss of chance is sufficient in itself to complete the cause of action, it is enough to show loss of a chance to make an economic gain. In the case of a student undertaking a law degree, or studying medicine or dentistry, for instance, it is enough to show that the student has lost the chance to practice in those areas. Leaving aside, for a moment, questions of causation and quantum, the loss of chance to be gainfully employed is sufficient to complete the cause of action. A student cannot recover for mere distress or embarrassment, absenting real psychological injury, but damage may exist in the form of costs of alternative tuition or loss of opportunity of gainful employment.

### 5.6.1 Causation

Further difficulties arise in relation to the causal connection between the breach and the damage. Primarily, and trivially, there are multiple causes for the failure of a student to learn. It is difficult to say whether the causes of failure to learn are to be treated as cumulative, or as alternative causes. If, say, a student's failure to learn is claimed to be a result of poor teaching, but in defence it is said that it is due to the student's lack of ability, or lack of application, or inability to concentrate due to illness or personal difficulties, how are the relative weights of these factors to be assessed?

In *Phelps* the Court of Appeal cited cases from the United States of America, which attested to the number of background risks which may result in the failure to learn. It

\(^{227}\) *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 355 (Mason CJ, Dawson, Toohey and Gaudron JJ).
cited Peter W, in which the Californian Court of Appeal said '[there] are ... a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present, but not perceived, recognised but not identified. 228 The Court of Appeal in Phelps suggested that the difficulties facing a case alleging negligence were 'immensely complex', and that they were 'even more so on causation, especially where many different professionals are involved.' 229 However, since the loss of a chance to obtain a benefit can be characterised as compensable damage, the issue becomes one of causation alone, and the difficulty of ascertaining, amongst a number of possible causes, which is the cause of the injury.

In Wilsher v Essex Area Health Authority 230 a new-born baby suffered incurable damage to the retina. The damage could be ascribed either to its premature birth, or to excessive oxygen administered at birth. There is here an 'alternative background risk' 231 such as exists in the instance of negligent teaching. The risk does not connote negligence by a third party, and does not even suggest contributory negligence by the plaintiff. In Wilsher the plaintiff attempted to use the reasoning adopted in McGhee v National Coal Board. 232 In that case, a worker was exposed to brick dust at his workplace. The employer was found not to be responsible for that exposure. However, the employer was found to be negligent in not providing after-work showers, as a consequence of the absence of which the employee was at risk for an additional period and at an increased risk because of the effect of the elements. The worker contracted dermatitis. The House of Lords allowed the plaintiff to recover on the basis that, on the facts, 'no useful distinction could be drawn between a source materially contributing to the risk of

231 Fleming, above n 212, 671.
dermatitis and a source materially contributing to the dermatitis itself. In effect, therefore, the plaintiff succeeded without proof that more probably than not it was the negligent source that had caused his injury\textsuperscript{233} although only Lord Wilberforce shifted the onus of proof. The House of Lords in \textit{Wilsher} refused to apply the reasoning in \textit{McGhee}, to shift the burden of proof to the defendant. However, the reasoning of Lord Wilberforce was thought to be 'compelling' by Kirby J in \textit{Chappel v Hart}.\textsuperscript{234}

The realistic appreciation of the imprecision and uncertainty of causation in many cases ... has driven courts in this country, as in England, to accept that the evidentiary onus may shift during the hearing. Once a plaintiff demonstrates that a breach of duty has occurred which is closely followed by damage, a prima facie causal connection will have been established [citing \textit{Betts v Whittingslowe} (1945) 71 CLR 637, 649]. It is then for the defendant to show, by evidence and argument, that the patient should not recover damages.\textsuperscript{235}

The New South Wales Court of Appeal has also said that if the defendant increases the risk and the risk does eventuate, then the court may, but need not, draw the inference that the defendant's conduct caused the harm.\textsuperscript{236}

These cases, however, unlikely to be particularly informative in the education context. Cases in which causation would be difficult - generalised failure to teach cases - are precisely those cases in which there are multiple and adequate alternative reasons for the damage.

\textsuperscript{233} Fleming above n 212, 669.

\textsuperscript{234} (1998) 195 CLR 232.

\textsuperscript{235} Ibid 273 (Kirby J). See also at 239 (Gaudron J), 247 (McHugh J), 257 (Gummow J); \textit{Naxakis v Western General Hospital} (1999) 162 ALR 540, 547 (Gaudron J), 561 (Kirby J), 574 (Callinan J).

Loss of chance cases provide some difficulties in establishing causation. Where the student alleges that negligence has resulted in the loss of a chance to practice in an income-earning capacity, the student would have to show that he or she probably would have taken up the opportunity to earn. Where a student is studying in those disciplines, however, they would not have much difficulty in establishing that connection.

*Naxakis v Western General Hospital*\(^{237}\) provided the opportunity for the High Court of Australia to consider the question of loss of chance in cases of physical injury. In that case a schoolboy was struck on the head with a school bag, collapsed and was seen by a general practitioner, who referred him to a hospital. He was treated and discharged but later suffered an aneurism, resulting in permanent physical and intellectual impairment. The High Court had to consider an appeal from the Supreme Court of Victoria that there was no case to go to the jury because there was no evidence that ought reasonably to satisfy the jury that the facts sought to be proved are established. The applicant argued, inter alia, that there was evidence, which should have gone to the jury, that the child lost the chance of successful surgery, and although it was not necessary for the High Court to consider the argument, some members of the Court expressed their view. The case is informative in the *Phelps* situation - failure to diagnose, resulting in lost opportunity to remedy a learning difficulty, and is conceivably applicable to the university situation. Gaudron J said that, in cases involving failure to diagnose or to treat a pre-existing condition, there is 'no philosophical or logical difficulty in viewing the loss sustained as the loss of a chance to undergo treatment'\(^{238}\) which may have prevented the difficulties, but went on to say that it was not necessary to adopt this approach because of her approach to causation. She said there was a tendency to exaggerate the difficulties associated with proof of causation ... For the purposes of the allocation of legal responsibility, '[i]f a wrongful act or omission results in an increased risk of injury to the plaintiff and that risk eventuates, the

\(^{237}\) (1999) 162 ALR 540.

\(^{238}\) Ibid 547.
defendant’s conduct has materially contributed to the injury that the plaintiff suffers whether or not other factors also contributed to that injury occurring.239

Where that occurs the trier of fact is entitled to conclude that the injury was caused by the act or omission, ‘unless the defendant establishes that the conduct had no effect at all or that the risk would have eventuated and resulted in the damage in question in any event.’240

5.7 Conclusions

The points of a negligence analysis which have caused the most concern for commentators in the United States, where most cases in this area have occurred, do not necessitate a conclusion that redress for educational negligence in a university context in Australia and the United Kingdom is unavailable. Whereas significant policy reservations characterise analysis of expansion of the duty of care, many of these reservations are limited or contextual and are likely to find fewer adherents in the context of modern higher education. There are cases peculiar to the university examination context which deny the jurisdiction of the court, but there is no reason to suggest that this principle extends to decisions of the university not involving academic judgment, such as those involving the provision of resources to students, or the accreditation of courses. Many of the concerns of the court in these jurisdictional cases are considered in chapter 6, which analyses the interaction of the visitorial jurisdiction and administrative law mechanisms with an action in tort.

Similarly, concerns expressed in the United States about the workability of the standard of care are not immutable. Whereas difficulties surround questions of damage and

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240 (1999) 162 ALR 540, 547. See Bennett v Minister of Community Welfare (1992) 176 CLR 408, 420-1; and the cases there cited; Chappel v Hart (1998) 156 ALR 517, 520 (Gaudron J), 527 (McHugh J), 535 (Gummow J) and 548 (Kirby J).
causation, these will not extend to every case of negligence. There are no conceptual
difficulties preventing a finding that a university is liable to a student in negligence.
However, the cases which are likely to be successful are those involving particular
instances of breach and clear damage. It remains unlikely that a generalised failure to
teach case would be successful.
6. Concurrent and alternative liability

This chapter will consider, firstly, the principles governing concurrent liability in contract and tort and the limitations attaching to a claim in negligence where some part of the relationship between the student and the university is governed by contract. It will also consider the situation which arises when a contractual remedy is available against a third party. It will then consider the impact on the negligence action where other avenues of complaint are available; in particular, administrative relief or alternative complaints procedures, particularly where the visitorial jurisdiction remains. The chapter will conclude with an analysis of the impact of an action under consumer protection legislation on a tortious claim. This account will make particular reference to the Trade Practices Act 1974 (Cth) and its Australian State equivalents.

6.1 Concurrent liability in contract and tort

6.1.1 Introduction

Chapter 3 considered the analysis that places the university in a contractual relationship with its students. Whereas the contractual analysis will not be universally applicable, and may not cover the entirety of the relationship between the student and the university, it is so strongly arguable in a sufficient number of institutions as to make it a real consideration. In addition, student residences and student associations both undeniably enter into contracts with students. In the case of contracts entered into between the university and its students, analyses of the content of the alleged contract vary, and there appears to be no real consensus on the existence of a contractual promise to apply skill, care and diligence to the teaching functions carried out by the institution, or promises of a similar nature upon which a student could found a contractual claim for educational malpractice. However, where that promise exists in a contractual form, a question arises relating to concurrent liability in contract and tort. In the case of an injury caused in the context of a student’s occupation in residence, or in the course of student association activities undertaken pursuant to a contract, it is possible that an
injury to the student could give rise to a claim against the university. In that case the ‘triangular’ situation arises - the tort claim against the outsider (the university) could be affected by the contractual arrangements between the other parties. In either case, the contractual context in which a tortious claim is raised is significant to the resolution of the tortious claim.

6.1.2 The degree of overlap between contractual and tortious duties owed by a university to its students

Although concurrent liability in contract and tort is conceded in English and Australian law, it is argued that where a relationship is governed by a contract which governs only part of the relationship, but does not deal with the aspect of the relationship which gave rise to the dispute - that is, there is no express or implied contractual duty - there can be no tortious duty either. If it is conceded that part of the relationship between university and student is governed by contract, then a student’s claim cannot be bolstered by an appeal to tort law if the contract fails to cover the disputed aspect of the relationship.

The types of situations that may arise in this connection may involve a direct contract between the university and the student with express or implied terms which include a duty to exercise due skill and care in teaching. Where it is alleged that there has not been appropriate exercise of that skill and care a plaintiff may attempt a suit in either contract or negligence, but the results in negligence would depend upon the existence of an implied term in the contract.

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6.1.3 Principles governing concurrent liability

In the event that the relationship between the university and the student is wholly or partially contractual, the defendant university may be concurrently liable in contract and tort. Some commentators consider that the existence of a contract between the plaintiff and the defendant is a powerful countervailing factor which should inhibit a finding that a duty of care is owed. In a situation in which the relationship between the parties is governed by contract, there is a well-founded argument that the plaintiff was in a position to secure contractual protection from the risk from the defendant and, failing to do so, is not entitled to that protection. The arguments against concurrent liability and the preference for contract may be based on a ‘respect for the autonomy and freedom of choice of individuals and on a view that economic relations ought to be regulated by the market ... rather than by government regulation or court intervention in the name of justice or fairness through the medium of tort law’.

Despite this, recent years have seen an expansion of tort law into the contractual domain. Many of the cases which have developed this tendency have been the economic loss cases. Fleming says ‘[i]t is no exaggeration to say that the tort law of the last twenty five years has been virtually obsessed with the question of negligent economic loss. That exclusive focus tended to obscure that the defining element in many of these cases was the contractual matrix in which the loss occurred.’ He says that ‘English law, in contrast to the French, has more recently taken the view that a contractual obligation between the parties does not preclude the concurrence of a tort

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3 Jane Stapleton, ‘Duty of care: peripheral parties and alternative opportunities for deterrence’ (1995) 111 Law Quarterly Review 301, 308. This rationale falls away when the contract specifically deals with the risk. The payment pursuant to the contract elevates the adviser from peripheral to principal causal status.

4 Cane, above n 2, 311.

duty in the same respect, so as to give the injured party an option between pursuing a contractual or a tortious remedy.\textsuperscript{6} He attributes this development to claimant procedural and other advantages in tort, rather than to any doctrinal conviction.

In \textit{Astley v Austrust Ltd}\textsuperscript{7} a majority in the High Court (consisting of Gleeson CJ, McHugh, Gummow and Hayne JJ) found that in situations of concurrent liability, a plaintiff may sue in either tort or contract, or both. The duty to take reasonable care will exist under both causes of action unless the contract expressly or impliedly excludes the duty. The Court recognised that 'the law has evolved to the conclusion that concurrent liabilities in both contract and tort may arise in cases of professional negligence' but did not accede to the view that tort had superseded the implication by law of contractual terms.\textsuperscript{8}

Thus, although concurrent liability is conceded, the limitations of the contractual relationship will be influential in the tortious claim: 'such a tort duty is subject to any contractual modification, like a lower standard of care or limitation of liability, in deference to the belief in the primacy of private ordering. In short, the starting point for tort in a contractual matrix is that "contract trumps tort" (to borrow Peter Cane's pithy axiom).\textsuperscript{9} This position applies in both the United Kingdom and Australia. In \textit{Astley v Austrust} the majority of the High Court quoted with approval the reasoning of the House of Lords in \textit{Henderson v Merrett Syndicates Ltd}.\textsuperscript{10} The House of Lords held that an action could be brought for professional negligence in contract or in tort.

Where there is a contract subsisting between the parties, but the contractual terms do not

\textsuperscript{6} Ibid.

\textsuperscript{7} (1999) 197 CLR 1.

\textsuperscript{8} \textit{Astley v Austrust Ltd} (1999) 197 CLR 1, 20, 23; see also \textit{Perre v Apand Pty Ltd} (1999) 198 CLR 180, 253 (Gummow J).

\textsuperscript{9} Fleming, above n 5, 270.

\textsuperscript{10} [1995] 2 AC 145.
provide a cause of action for the damage for which restitution is claimed in tort, the principles are less generous to the plaintiff. Tort law cannot provide a remedy if the contractual terms do not provide one where the damage claimed is purely economic loss. In *Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd* 11 there was a contractual relationship between the two parties to the dispute, but the contract, 'while it imposed a duty on the sub-contractors to exercise due care and skill in the design of the contract works, was silent as to their execution'. 12 In that case, where there was a direct contract, with an express undertaking of a direct but limited contractual responsibility, the direct contract was inconsistent with an assumption of responsibility beyond that expressly undertaken. Whereas the subcontractor's normal liability in tort is not affected by this circumstance, it does mean that the exceptional circumstances needed for liability for economic loss are negatived. 13

If a student's relationship with a university is considered to be a contractual one, the implication of this primacy of contract over tort could be to read down the liability for educational negligence of the university (as the party by whom the contractual terms are typically drafted) by limiting or removing the obligation to teach, to provide effective supervision, or to provide adequate facilities. The university could protect itself by inserting into the documentation which makes up the contract the precise scope of work and standard of skill and care which the professional undertakes to exercise. The court cannot imply a term by operation of law in a contract which is inconsistent with an express term. 14

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12 Ibid 105.
13 Ibid 106 (Lord Woolf).
Conversely, the university could protect itself by defining the student’s responsibilities and the standard of skill and care which it must exercise in carrying out those responsibilities. Although the university will not be able to claim the student’s contributory negligence, it may have a contractual cause of action against the student which may have the effect of a claim in contributory negligence. For instance, the provision of full information by the student on enrolment, student obligations to attend classes, to read course documentation, to prepare for tutorials and lectures, to seek advice and assistance in a timely manner, and to follow advice may be reciprocal obligations imposed on the student by the contract. This approach would emphasise the mutual dependence of the student-university relationship and limit the ability of a student to successfully claim a failure to exercise due care and skill by making the exercise of care and skill dependent on the exercise of student obligations.

Whereas legislation in particular jurisdictions\(^\text{15}\) could limit the ability of the university to take this approach, the possibility remains that, if appropriate notice is given to the student, a university could effectively manage its potential liability. The discussions in chapter 3 concerning the existence of a contract, the time at which the contract comes into effect, and the documents which constitute the student/university contract, are relevant here. It is open to the university, for instance, to reserve the decision to offer particular courses: the Committee of Vice-Chancellors and Principals of the Universities of the United Kingdom issued for implementation a set of guidelines on documentation to be included in the university prospectus; as an example it suggested that the following be included.

\(^{15}\) For instance, the *Unfair Contract Terms Act 1977* (UK) which appears to apply to universities and requires that clauses seeking to exempt universities from liability need to be both clear, and effectively brought to the attention of students, and the *Consumer Contracts Regulations 1994* (UK), which imposes a requirement of ‘good faith’, as well as a requirement that terms of a contract be in clear and intelligible language, would apply to student/university contracts. The regulations also set out a non-exhaustive list of terms which may be regarded as unfair. In Australia, the unconscionability provisions and the non-excludable terms and conditions implied by the *Trade Practices Act 1974* (Cth), Pt V, may also restrict the use of such terms.
The University will use all reasonable endeavours to deliver courses in accordance with the descriptions set out in this prospectus. However, the University does not provide education to UK undergraduates on a commercial basis. It is also very largely dependent upon charitable and public funds, which the University has to manage in a way which is efficient and cost-effective, in the context of the provision of a diverse range of courses to a large number of students. The University therefore:

(a) reserves the right to make variations to the contents or methods of delivery of courses, to discontinue courses and to merge or combine courses, if such action is reasonably considered to be necessary by the University [in the context of its wider purposes]. If the University discontinues any course, it will use its reasonable endeavours to provide a suitable alternative course.

(b) cannot accept responsibility, and expressly excludes liability, for [insert further exclusions of liability relating, for example, to damage to students’ property, transfer of computer viruses to students’ equipment, liability for breach of contract etc, together with a limitation of liability].

In this manner the university rules and course documentation, which are the foundation of any purported contract between the university and the student, are also likely to affect the standard of care in any concurrent action in tort.

However, the implied term of reasonable care in the contract of professional services does arise by operation of law. The law attaches the term as an incident of contracts of that class. In that case, a concurrent duty would exist in tort. It is reasonable to say

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17 Henderson v Merrett Syndicates Ltd [1995] 2 AC 145; approved in
that, where the terms of reasonable skill and care are left to be implied in the contract, the same duty will arise in tort. If the parties expressly limit or bargain away that duty, then the duty will not arise in tort. The limitations on exclusion of statutorily imposed terms and conditions will be considered later in this chapter.

6.1.4 Tortious liability in the event of a contractual relationship with a third party

An alternative situation may arise where the plaintiff has a possible cause of action in contract against one party but elects, instead, to sue another in negligence. For instance, a student may have a contract with a student organisation for attendance at a function, but in the event of injury chooses to sue the university upon whose premises the function was held.

There are a number of reasons why the student would choose to do this; there may be some rule in tort law which is more advantageous to the student than the equivalent rule in contract law, such as a rule dealing with limitation of actions or assessment of damages. There may be an effective disclaimer or exclusion clause in the contract which would destroy or limit the student's claim. Alternatively, one party may be more amenable to the jurisdiction or to service out of it, have ceased to exist or be bankrupt; or it may not be entirely clear who may be sued in contract, thus making it prudent to make an alternative claim in tort.\(^\text{18}\)

This situation could arise in the context of a student’s contract with a student organisation, a student’s contract with a residence which is a separate entity from the university, or, in an attempt to circumvent any limitation clause in a contract between the university and the student, in a suit against an individual employee of the university.

The authority for the ability of the student to sue the university in the first two situations

\(\text{Astley v Austrust Limited (1999) 197 CLR 1.}\)

\(\text{Cane, above n 2, 319.}\)
is well-established: 'none less than Donoghue v Stevenson seems to teach that the days have gone when a contract duty to A precluded a tort duty to B in the same matter' [sic]. \(^{19}\) The principle is frequently asserted in construction cases, in which, for instance, the building owner has a contract with a head contractor for the construction of the premises. Part of the work is subcontracted, and the subcontractor causes damage for which the owner is seeking recovery. If the owner cannot, for any reason, recover against the head contractor, it may well attempt recovery against the subcontractor, with whom there is no direct contractual relationship.

In the last situation, where the student attempts to sue an individual employee in an attempt to circumvent a limitation clause in the contract with the university, there are serious policy reasons for refusing to extend liability to the employees. For obvious reasons, this possibility is disturbing to university employees, particularly in the context of employees performing consultancy work in which incorrect information or advice could lead to substantial losses by the other party. In many jurisdictions this situation has been addressed by statute - New South Wales, South Australia and the Northern Territory have provided an indemnity against the tort liability of employees provided the conduct is not serious or wilful. \(^{20}\) However, there are situations in which it could be relevant. This situation was considered in the Supreme Court of Canada in London

\(^{19}\) Fleming, above n 5, 270.

\(^{20}\) See the Law Reform (Miscellaneous Provisions) Act 1956 (NT), s.22A, the Wrongs Act 1936 (SA) s.27C which, subject to reservations, makes the employer liable to indemnify an employee where the employer is sued in tort for things done in the course of employment; and the Employee’s Liability Act 1991 (NSW) s.5, which expressly precludes a statutory claim by an employer for contribution as well as indemnity from an employee where the tort committed by the employee occurred in the course of, or arose out of employment, except where the conduct was serious and wilful. Section 4 prohibits the employer from suing an employee for loss of the services of another employee. See also the Workers Rehabilitation and Compensation Act 1988 (Tas) s.97, which provides for the compulsory insurance of a worker’s liability to a fellow worker.
Drugs v Kuehne & Nagle, the majority of the court resolved the case by allowing the employees to have the benefit of the limitation clause in the contract:
The minority preferred a tort approach. McLachlin J suggested that the policy aspect of the requirement of duty of care would apply to ensure that the employees were not liable: an approach which recognised 'that the question of whether there are circumstances qualifying or negating the duty of care “can only be answered in the context of the factual matrix including especially the contractual structure against which such duty is said to arise”'. However, La Forest J suggested what Fleming calls a more 'drastic departure from orthodoxy'. Where a case involves a planned transaction with an employer, the plaintiff can be said to have chosen to deal with the employer, not the employees. Moreover, the employees were not given to understand, and there was no reason to think, that the plaintiff was relying on them for compensation. The employer is in a position to modify its exposure by contractual term, but the employees are not in a position to decline the risk and their union could not be expected to bargain over an issue so rarely arising.

This view certainly accords with public perception of the liability of the employee.

There are other circumstances in which the liability of the third party in contract will act as a 'countervailing factor' which may justify the decision of a court to deny liability by denying that a duty of care exists. In some situations the countervailing factor arises because the defendant is a peripheral party, and the plaintiff could have taken action in tort against a causally principal party. For instance, a student may have suffered harm

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25 Fleming, above n 5, 273.


28 Again, I am using terminology from Stapleton, ibid.
in the course of an activity organised by a separate body, or due to the actions of a separate body acting on campus but upon whose activities the university exercises some control or influence. In those circumstances, the student could sue the other organisation in tort, but may choose to sue the university instead or as well. However, another countervailing factor which may influence the court in deciding whether a duty of care is owed in negligence is the existence of a *contract* with the other body. In particular, where a contract does exist with another body, the plaintiff may have been in a position to protect him or herself.

The other difficulty for the third party which may arise in this situation is the existence of a limitation clause in the contract with the principal party. In *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)*\(^{29}\) this situation arose. In it the consignee of cargo sued the shipowner who had contracted with the consignor in circumstances in which the risk, but not the property, had passed to the buyer, and the goods were damaged in transit. Whereas Donaldson MR and Oliver LJ denied the existence of a tort duty, the former on the principal basis that a tort duty would be 'original' (not derivative) and could not, therefore, be subject to the limitation clause, and the latter citing this as an alternative reason, Robert Goff LJ recognised a tort claim subject to the contractual limitation, on the basis of the concept of 'transferred loss'.\(^{30}\) However, this suggestion was disposed of in the House of Lords.\(^{31}\) The exclusion of relational loss in such circumstances - where the loss is suffered by reason of an intervening transfer of risk, is difficult to justify. It cannot be justified by reference to the floodgate arguments which apply to other relational loss cases, since the claim is not multiplied, but merely substituted for another. The disadvantages of this outcome are ameliorated by allowing the owner to recover from the tortfeasor by virtue of the proprietary or possessory title, then holding the proceeds for the party suffering the economic loss.\(^{32}\)


\(^{30}\) See Fleming, above n 5, 271.

\(^{31}\) [1986] AC 785.
limitation clause in the contract with the principal party denies full recovery, this device cannot be effective.

6.2 Impact of the existence of administrative procedures on the plaintiff’s claim in negligence

Some aspects of the impact of the visitorial jurisdiction and the position of the university as a public body - or at least as a body in which certain procedures are governed by statute - were considered in previous chapters. These alternative remedies suggest another consideration which may affect the question of whether a duty of care is owed. In some cases the court has emphasised that the denial of a duty of care will not mean that the plaintiff is left with no recourse, because judicial review or some other complaints procedure is available.33 The existence of alternative administrative remedies can limit the availability of a tortious remedy. A suggestion that a dispute may be resolved by administrative means gives rise to three questions: is the university a body subject to administrative law? Is the particular decision one subject to public law? What is the impact of the administrative remedy on the liability of the university in negligence?

6.2.1 The scope of administrative law

The scope of administrative law has expanded in recent years, and it is necessary to give some definition to what is meant by administrative law and what is considered to be an

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administrative decision. One text says 'basically, administrative law is a study of the controls exercisable by the law over the decisions of persons, bodies or tribunals of governmental or semi-governmental status, established by or under the authority of government and acting outside the respective fields of Parliament and the traditional law courts.' Administrative law is not usually understood to mean the range of tortious remedies available against governmental authorities. This general definition is subject to reservations: the legislative changes introduced into the administrative law field in Australia over the period from 1975 to 1982 have provided the opportunity to review administrative decisions through specific tribunals. Other changes have occurred at state level, although only Victoria has provided the full range of legislative measures. Secondly, there exists a range of options for redress, which do not involve procedures through the courts or other tribunals. In particular, the possibility of recourse to the visitor is still a common attribute of many universities. In many jurisdictions there is the possibility of recourse to an ombudsman or other statutory tribunal such as a discrimination tribunal or industrial relations body. Thirdly, as indicated above, some university disciplinary tribunals could be treated as having their origin in the rules of a private organisation and judicial scrutiny in those cases is not founded on the governmental status of the organisation.

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35 The package of reforms includes the Administrative Appeals Tribunal Act 1975 (Cth), the Ombudsman Act 1976 (Cth), the Administrative Decisions (Judicial Review) Act 1977 (Cth) and the Freedom of Information Act 1982 (Cth).

Since this account is primarily concerned with liability in tort, it is not appropriate to give a full account of administrative remedies available to the student. Rather, it will attempt to give an account of the structure of the remedies available, the fact situations which will attract their application in the university context, and the impact of the administrative remedy on an action in tort, if there is such an impact. Given the purpose of the analysis, it will not attempt a full comparison of statutory administrative remedies in the United Kingdom and the United States, although it will make reference to those jurisdictions where appropriate.

It is necessary at the outset to provide some explanation for the difficulty in generalising the university cases in relation to administrative review mechanisms. Most universities are created by statute, and have dispute resolution procedures established by statute or with the authority of statute. In those cases, a party aggrieved by the decision of the internal decision-maker could use an appropriate prerogative writ (or the modern alternative) or an appeal on the merits when that is available. If these alternatives are not available the common law procedure of judicial review allows intervention in the case of legal error only.37

However, some universities' procedures have the status of private systems of adjudication, whose private rulings are generally legitimate, although the private, non-statutory tribunal could be subject to judicial scrutiny if the grievance could be presented as a civil cause of action in equity, contract, or for restraint of trade.38 In these cases, the prerogative writs are not appropriate.39

Notwithstanding this, the clear distinction between these two situations is sometimes blurred in case law; for instance, in R v Senate of the University of Aston, ex parte

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38 Ibid 3.
Roffey\(^{40}\) the university was founded by charter and the disciplinary rules were contractual, yet the applicants sought orders of certiorari and mandamus, the complaint being that they had been sent down without having been accorded an opportunity of being heard.\(^{41}\) Roffey’s case was not proceeded with - it was Michael Pantridge’s case which was considered by the court. The court did not give him the relief he sought, because he had allowed too much time to elapse before bringing his case.

The blurring of the distinction between the public and the private in the application of public law remedies mirrors the ambiguous status of the university as a quasi-public organisation. It is now some decades since Wade said that ‘[i]t would... surely be regrettable if universities generally were made amenable to the prerogative orders and thus identified with the machinery of government. There must be many who will hope that the courts will preserve the character of universities as independent institutions in law.’\(^{42}\) Those decades have changed the face of the higher education system irrevocably.\(^{43}\) It is now not uncommon to describe universities as public bodies, and it is

\(^{40}\) [1969] 2 QB 538.

\(^{41}\) See Forbes, above n 37, 260, B A Hepple, ‘Natural Justice for Rusticated Students’ [1969] Cambridge Law Journal 169. Note that no appointment of a Visitor to the University had been made, and it does not seem to have been argued that the Queen-in-Council should have been Visitor until the power to make such an appointment had been exercised.


\(^{43}\) This is not to say that the public influence on the university system has not been coming on for some time - it has never entirely been absent. Rashdall expressed a perception of the growing involvement of government in the university sector very early in the twentieth century, which differed from previous practice: ‘[e]xcept at a few crises in the national history, when it was judged necessary to bring the Universities into tune with the dominant religious or political faction of the moment, English Governments have for the most part left education to take care of itself.’ H Rashdall, ‘The Universities and the Legislature’ (1913) 29 Law Quarterly Review 76, 76. Dicey had, similarly, demonstrated the ‘nationalisation’ of the universities and their gradual separation from their ecclesiastical foundations, although he noted the delayed success of university reform. A V Dicey, Law and Public Opinion in England (1914) 350-1.
not uncommon, even inside England, for a university to be formed by means other than charter. It is quite uncommon in Australia that it be so formed. More significantly, the level of government intervention in the university sector has increased to the extent that the government exerts significant control over the internal governance and decision-making of the modern university - even if that control has the effect of requiring the university to operate according to market principles.\(^{44}\)

Whereas this interrelatedness does not of itself render a university a public authority, it tends to subvert the level of independence which, if never really consistent with the organisational structure of the newer universities, was maintained as an ideal in the chartered universities. It gives force to the suggestion of a number of cases and several commentators that a university is a public authority, which exercises public duties.\(^{45}\)

This analysis suggests that the university is concerned with providing a public service, and must be subject to public scrutiny; that its public importance makes it subject to the supervision of the courts, and that since its internal relationships are not governed by individual agreement but by the law, it is akin to a governmental body.\(^{46}\) This could,

44 Some of the sources and results of that control were considered in chapters 2 and 3.

45 Clark v University of Lincolnshire and Humberside [2000] 3 All ER 752, 759 (Lord Woolf MR); Ex Parte King; Re University of Sydney (1943) 44 SR (NSW) 19; Ex Parte Forster; Re University of Sydney [1963] SR (NSW) 723; White v University of Sydney (1992) EOC 92-473; Clark v University of Melbourne [1978] VR 457; cf Clark v University of Melbourne (No 2) [1979] VR 66. See also G H L Fridman, 'Judicial Intervention Into University Affairs' [1973] Chitty's Law Journal 181, 181. Alec Samuels expresses no doubt that English universities have the status of a public authority: 'The university is a public body set up by prerogative and in disciplinary matters fills a judicial or quasi judicial role in a dispute involving the student, and thus the prerogative order of certiorari probably lies'. Alec Samuels, 'The Student and the Law' (1972-73) 12 Journal of the Society of Public Teachers of Law 252, 255.

46 Fridman, above n 45, 181.
therefore, render it amenable to administrative law in some circumstances. This would also have an impact on the extent of the jurisdiction of the visitor: public duties arising as a result of the founding statute would not be amenable to resolution by the visitor in jurisdictions in which that jurisdiction remains. Further, the applicability of administrative law remedies provides an alternative to an action in tort which is, in many ways more desirable.

The status of a particular university will be dependent, amongst other things, on its founding statute and the degree of autonomy exercised by its managing body, so it is impossible to make generalisations which could be guaranteed to obtain in a particular case - particularly across national boundaries. Where the courts have 'widened the concept of "public" to take in bodies which have a public character, notwithstanding numerous private features' it could be argued that the changing environment of higher education and the increasing calls for accountability may lead to greater acceptance of the view that the university is in the nature of a public body. Any account of the

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47 Cases certainly indicate the applicability of administrative law procedures and remedies to certain decisions of certain universities: *Australian National University v Burns* (1982) 43 ALR 25 - whether a decision to terminate the appointment of a professor on the grounds of incapacity was a decision of an administrative nature made under an enactment, so as to attract the operation of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). See also, for instance, *R v Board of Governors of Sheffield Hallam University, ex parte R* [1995] ELR 267; *R v Manchester Metropolitan University, ex parte Nolan* [1994] ELR 380; *R v Liverpool John Moores University, ex parte Hayes* (Unreported, Court of Appeal, Roch and Mummery JJ, 18 May 1998); *R v Cambridge University, ex parte Beg* (Unreported, High Court, Sullivan J, 15 April 1998); *R v University College, London, ex parte Dr Christofi* (Unreported, High Court, Owen J, 18 June 1997); *R v Cranfield University Senate, ex parte Bashir* (Unreported, Court of Appeal, Nourse, Buxton and Sedley LJJ, 16 March 1999); *R v University of Portsmouth, ex parte Lakareber* (Unreported, Court of Appeal, Simon Brown, Aldous and Clarke LJJ, 16 October 1998); *R v The Board of Governors for the South Bank University ex parte Osinuke Ayo Mohammed* (Unreported, Court of Appeal, Hobhouse, Swinton Thomas and Buxton LJJ, 24 March 1998).

changing environment of the university over the last few decades will be an account of the degree to which the universities have become part of the administrative infrastructure of the state, and are controlled by the economic steering mechanisms provided by the funding agencies and the government to achieve the aims of the state.  

Public law principles are applied to public authorities on the 'premise that government activity is sufficiently different from private activity that it ought to be governed by different rules,' not least in the requirement that government has to govern. 'The business of government requires that officials be given powers that are not accorded to private individuals and, when exercising those powers, it is plain that officials are not subject to the "ordinary" law.' This difference must be sufficient to override the competing principle, described in Dicey's idea of equality; that is, that 'the same law is applied to the government and its officials as is applied to private citizens.'

However, there are reservations on the automatic application of this rationale to universities. In the first place, the reasons for the application of public law principles to governmental agencies do not necessarily apply to universities. A public law regime is appropriate because, 'since the government has the job of running the country it must have some functions, powers and duties which private individuals do not have'. Although it is true that the university is empowered by its founding instrument to make rules that will bind the student, it cannot bind persons who do not voluntarily bring themselves within the scope of those rules. This distinction is given force by a corollary to the principle: that those powers and duties are entrusted for the public good, and thus the collective good.

51 Ibid 3.
The administration makes decisions for the collective good, weighing and balancing competing concerns. It is not the place of the judiciary to review these decisions; rather, it is up to the voter at the ballot box ... If local authorities are continually in fear of civil suit, they will be more and more cautious in their actions, to the ultimate detriment of the general public.\(^{54}\)

This rationale for the application of a different set of rules does not apply to the operation of universities. The decisions of the university are neither generally applicable, nor are they subject to continual fear of rejection at the ballot box, although they may be fearful, in the current university environment, of rejection in the marketplace.\(^{55}\)

Public law principles will also apply because 'of the very great power which the government can wield over its citizens',\(^{56}\) resulting in the imposition of rules of natural justice not normally applicable to transactions between private individuals. The university as a decision maker can, it is true, wield a power over a student to the extent of accepting them into a course or terminating or suspending that course, and the courts have held that at least some of the principles of natural justice apply to those transactions: Hepple says that 'judicial review of university action on the grounds of failure to observe the rules of natural justice is at least as old as Dr Bentley's case: R v Chancellor, Master and Scholars of the University of Cambridge (1723) 1 Str 557.'\(^{57}\)

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55 Cf the comments of Professor Steven Schwartz, vice-chancellor of Murdoch University, in the Bert Kelly lecture for the Centre for Independent Studies, an edited extract of which appeared as 'Uni monopoly inc lies on the brink', The Australian (Melbourne), 16\(^{th}\) February 2000, 38.

56 Cane, An Introduction to Administrative Law, above n 53, 13.

However, rules of natural justice have also been applied to decisions to oust a member from an unincorporated association, especially where membership of a particular association is a pre-requisite for carrying on a trade or profession.\textsuperscript{58} Sievers also notes that ‘in cases of this kind some courts have taken a more liberal view and have applied public law principles to questions of standing’.\textsuperscript{59} There is no reason to suppose that the court would refuse to apply the rules of natural justice to private universities, such as Bond University Limited or The University of Notre Dame, on the same basis as it would apply them to a voluntary association where the question was one of membership.\textsuperscript{60} It is not possible to argue, therefore, that imposition of rules of natural justice leads inevitably to the conclusion that the university is a public authority subject to the unreserved application of public law principles. Some argument exists for the imposition of public law principles, but not necessarily on the basis that the university is a public authority.

Cane also notes that ‘the activities of governmental agencies are often subject to forms of “public accountability”, notably to Parliament, to which the activities of private individuals are usually not subject.’\textsuperscript{61} This, he notes, is particularly important where there is no other provider of the goods or services. Although the university sector is being required to pay increasing attention to the ideas of accountability, and rules made pursuant to the founding statute may be tabled in Parliament, their activities do not have the characteristic of monopoly which makes that type of reporting particularly

\textsuperscript{58} A S Sievers, \textit{Associations and Clubs Law in Australia and New Zealand} (2nd ed, 1996) 53; \textit{Innes v Wylie} (1844) 1 Car & Kir 257; 174 ER 800 - a member must be given notice and an opportunity to defend him or herself before an expulsion from an unincorporated association; \textit{Young v Ladies Imperial Club Ltd} [1920] 2 KB 523 - an association will normally be required to conduct disciplinary proceedings according to the principles of natural justice.

\textsuperscript{59} Sievers, above n 58, 58.

\textsuperscript{60} Note that both universities are established pursuant to statute: \textit{Bond University Act 1987} (Qld) and \textit{University of Notre Dame Australia Act 1989} (WA).

\textsuperscript{61} Cane, \textit{An Introduction to Administrative Law}, above n 53, 13.

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The fourth characteristic of the activities of governmental agencies which distinguishes them from purely private matters lies in the difference in the role of the courts in relation to each matter. In the case of government authorities, according to Cane, 'the courts take a more restrained view of their role. The legislature is largely free of judicial control'.\(^{62}\) In one sense this is true of universities, since most matters which are internal to the university are within the exclusive jurisdiction of the visitor, where that institution exists, and the court will ordinarily have no jurisdiction. Where the visitor does not exist, the courts are unwilling to intervene in academic matters.\(^{63}\) However, the rationale for the difference is quite dissimilar; a university is certainly not free of control on the cited basis of the separation of powers doctrine.

Even if a university is a public authority and exercises public duties for some purposes, not all responsibilities arising from the founding statute can be described as public duties:

I am unable to accept the proposition that the fact that a duty is imposed by the Act of parliament, as distinct from the statutes or regulations of the University, in itself, makes it a public duty or is the source of public rights taking their enforcement outside the jurisdiction of the Visitor. It is all a question of the character of the provision, and of the duty or right it creates, and whether it is concerned with public interest so as to deprive a matter arising in connection with it of the character of an internal matter, or whether it merely qualifies or accentuates some aspect of a domestic matter.\(^{64}\)

Conversely, it is not necessary even that the university has its origin in statute to attract

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\(^{62}\) Ibid 13.

\(^{63}\) See discussion above at 3.2.2.

\(^{64}\) \textit{Re University of Melbourne; Ex parte De Simone} (Visitor) [1981] VR 378, 387.
designation as a public body. In the United Kingdom case of *Majid v London Guildhall University* the Court of Appeal accepted that a university was a public body even though it was a company limited by guarantee carrying on a university. In the case, Dr Amir Majid sought judicial review, but the court held that his claim of racial discrimination and victimisation was a private law matter, and notwithstanding that the university could attract public law remedies, this was not a matter amenable to judicial review.

These difficulties in categorisation may arise from the age of the university as an institution. The applicability of the public law principles of procedural decency or due process in private bodies such as clubs and trade unions, and to universities and the church, is historically rooted in the presence of a property interest. Membership of such a body was considered to give rise to a property interest in the assets of the body, which generated a claim to procedural fairness in expulsion and suspension proceedings. The holding of an office or position of power in the university could bring with it an entitlement to property, or the holding of the office itself could be a species of property. Later justifications for the application of principles of natural justice called upon an implied term in the contract between the student and the university, and the adhesionary nature of those contracts supported that application even though the bodies were essentially private. The private nature of the contract gave way to higher notions, perhaps ordained by natural law, and these notions were more important than the statutory context.

The question of whether or not a body is public has been given some significant analogies since the creation of a set of 'fringe organisations' consequent upon the

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65 *The Times Higher Education Supplement* 12 November.

66 Dr Majid was subsequently successful before an industrial tribunal: *Majid v London Guildhall University* (1995) 25 DCLD 2,3.


68 Ibid 139.
privatisation of many government utilities. These bodies, which exist around the edges of government but which have been reconstituted in the corporate form, are in an odd legal position, adopting the form of an independent, private, profit-making entity but maintaining strong links with government and suffering the direction and control, through various mechanisms, of government. The position of these bodies, and the significant controversy to which they have given rise, make them instructive as comparisons to the university and have also led to a stronger focus on the distinction between the public and private law claims. This trend has had an impact on cases in the university sector.

In recent years, for reasons quite unconnected with education cases, there has been a sharper division between public law claims enforceable by way of judicial review and private law claims enforceable by ordinary court action for breach of contract or negligence. Courts have focussed more acutely on the question of whether a claim was in fact amenable to judicial review, asking first whether the body in question was a public law body and secondly, whether the subject matter of the dispute really involved questions of public law.69

The refocussing has, perhaps, become necessary because the question of whether a body is amenable to public law remedies has become more complex. The trend towards privatisation of government functions created a new class of corporation which exists in a 'bifurcated provenance'70 between company law and administrative law; a category of organisations which take the corporate form, but are subject to a high level of governmental involvement in their functioning. Although many of these hybrid organisations adopt a corporate form, their form is not an adequate guide to the question of whether they are public or private bodies.71 Rather, the blurring of the public/private


divide has resulted in a need to take into account the decision in question as well as a number of the aspects of the body making the decision. In England, the decision of the English Court of Appeal in *R v Panel on Take-overs and Mergers, ex parte Datafin plc* demonstrated a judicial awareness of the lack of distinction in the public/private divide and a willingness to scrutinise the decisions of those involved in corporatist arrangements with government. In that case, the English Court of Appeal held that the Panel on Takeovers and Mergers was subject to administrative law even though its creation was a private initiative and it had no statutory, prerogative or common law powers. This case has been followed by a line of authority which has provided a number of criteria by which the courts determine whether there is a sufficiently public element to establish jurisdiction.

Thus, the nature of the body and the nature of the power exercised will be considered to determine whether they are governmental. In *Majid v London Guildhall University* the court accepted that, despite its private structure as a company limited by guarantee carrying on a university, the university was a public body. The structure of the organisation was not relevant; rather, there had to be a potentially governmental interest in the decision-making power in question. According to *Council of Civil Service*

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72 [1987] QB 815 (‘Datafin’).


74 The following discussion is necessarily attenuated; a full discussion of this matter, although interesting, is not justified in this context. There are few cases in the Australian jurisdictions on this point, although the matter was raised in *Chapmans Ltd v Australian Stock Exchange Ltd* (1994) 51 FCR 501. Suggestions that prerogative writs lie against private bodies exercising public functions also arose in *Dorf Industries Pty Ltd v Toose* (1994) 54 FCR 350.


Unions v Minister for the Civil Service, a body comes within those judicially reviewable if the power is conferred directly by statute or subordinate legislation under a statute or by prerogative powers.

The existence of a Royal Charter itself is insufficient to inject a public law element; notwithstanding that, according to Lord Diplock, '[t]he earlier history of the writ of certiorari shows that it was issued to courts whose authority was derived from the prerogative, from Royal Charter, from franchise or custom as well as from Act of Parliament' recent authorities have denied that the mere fact that the institution was created by charter or statute renders the body amenable to public law principles. In Rajah v The Royal College of Surgeons in Ireland it was argued that the High Court in Ireland did not have the jurisdiction to grant relief by way of judicial review. The College was originally incorporated by a Charter of George III in 1784, and although that Charter had been repealed and replaced twice, the origin of the modern institution was a Charter of Victoria, originating in 1844. The Court held that

The jurisdiction of the Student Progress Committee and the Appeals Committee in the present case derive [sic], not from public law, but from the contract which came into being when the applicant became a student in the College. The jurisdiction of the respondents is derived solely from her agreement, express or implied, to be bound by the regulations of the College, including the procedures under consideration in this case.
Public law remedies were not considered appropriate to a body deriving its jurisdiction from contract or from a voluntary association or domestic tribunal deriving its jurisdiction solely from or with the consent of its members.\textsuperscript{82}

These difficulties were reconciled to some extent by the Court in \textit{Datafin}, which held that a body's source of power was not the sole test of whether the body was subject to judicial review. The nature of the function being performed was also relevant, and if the body were performing a public duty, regardless of whether it was self-regulatory, this would expose it to administrative remedies.\textsuperscript{83} Educational services have, to some extent, traditionally been offered by government, but the participation of the private sector in the provision of education is significant enough to suggest that if the dispute involves the provision of the educational service it will not be considered to be a public body under the \textit{Datafin} line of cases.\textsuperscript{84} However, if the decision involves the university exerting disciplinary authority, the nature of the judicial power may suggest a public

\textsuperscript{82} Here the Court applied \textit{Murphy v The Turf Club} [1989] IR 171; \textit{R v National Joint Council for the Craft of Dental Technicians, ex parte Neate} [1953] 1 QB 704 and \textit{The State (Colquhoun) v D'Arcy} [1936] IR 641.

\textsuperscript{83} In \textit{Chapmans Ltd v Australian Stock Exchange Ltd} (1994) 51 FCR 501, 510 Beaumont J alluded to this argument in the Australian context: 'It is also true that the legislative scheme establishes a regime which permits a degree of regulation by public authorities in the public interest. It may be possible to argue from this that, for instance, there are imposed upon the respondent duties of a public character which may be susceptible of judicial review ... As some commentators have pointed out, there are policy reasons why there should be public duties justiciable in this area.'

\textsuperscript{84} The case drew, in particular, on \textit{Council of Civil Service Unions v Minister for the Civil Service} [1985] AC 374; and \textit{R v Criminal Injuries Compensation Board, ex parte Lain} [1967] 2 QB 864. It was applied in \textit{R v Advertising Standards Authority Limited, ex parte The Insurance Service plc} (1989) 2 Admin LR 77; \textit{Bank of Scotland v Investment Management Regulatory Organisation Limited} 1989 SLT 432 but cf \textit{R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan} [1993] 1 WLR 909; \textit{R v Imam of Bury Park Jame Masjid Luton, ex parte Sulaiman Ali} [1994] COD 142 (Court of Appeal) which attempted to circumscribe the scope of the 'nature of the power' test in \textit{Datafin}. See Sinclair above n 73.
role. This is in line with the cases asserting a role for judicial review in university disciplinary cases in the absence of a visitor.

To be subject to judicial review, the subject matter of the dispute must have a 'public law' element, which gives rise to all of the uncertainties inherent in the definition of 'publicness', particularly as the public/private distinction is increasingly challenged. Certainly, 'it is not simply a question of whether or not the state or a state agency is involved in a dispute with a citizen.'

The formal independence of the university structure, and the growing tendency to equate a university's relationship with its students as one defined by private law forms, should not be allowed to obscure the fact that this may be an exercise of public power. 'The courts must develop the constitutional x-ray vision to see through the private law forms or techniques that modern governments are increasingly using to further their policies. This has little, if anything, to do with statute and everything to do with public power', so the absence of a specific statutory origin of the power exerted is irrelevant. This is consistent with the Datafin approach. The importance of this approach

lies in the courts' recognition that 'governments achieve many of their ends by means other than the traditional methods of legislation and use of "prerogative" powers'. The judges in this case recognised the reality of executive power and did not allow their eyes to be clouded by the subtlety or the complexity of the way in which that power was exerted. To have decided otherwise would have created 'major no-go areas' for the law and have rendered the courts impotent in the face of governmental abdication to the market and the deregulation of business.

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85 Farrington, above n 76, 237.
88 Taggart, 'Corporatisation, privatisation and public law', above n 86, 105.
Thus, criticism that the application of administrative remedies is problematic in view of
the increasing use of private law forms may not answer the point. Farrington, for
instance, suggests that, in the light of Moran v University College Salford (No 2)89 'the
relevance of administrative law in this area, and hence much of the material from the
1960s and 1970s, has been questioned on the basis that the relationship of the student to
the institution is contractual and hence (in England at least) based in private rather than
public law.'90 The use of private law forms in the university sector raises similar issues
to those raised in relation to the privatisation of public utilities. It comes down to a
question of the purpose of the remedy, rather than the forms used to obscure its
application.

The second criterion for the application of common law public remedies according to
the Datafin line of cases is the level of governmental involvement in the body. This
need not necessarily be formal control, as decisions in other jurisdictions have
illustrated.91 The English courts take into account the manner of establishment of
bodies, and have developed a 'but for' test - would the government, but for the existence
of the body regulating the activity, have had to enact legislation or set up a public body
to regulate the activity? However, this test would probably be satisfied if there had been
an authority which had previously controlled the activity.

In the case of the universities, the level of government involvement has increased
significantly in recent years. However, this move has more recently been accompanied
by a demand that the universities operate in a manner more responsive to market forces.

89 Farrington, above n 76, 363. His comments are not entirely applicable to
the Australian experience given that the regime of administrative law in
Australia is far wider. However, Australian cases have not provided a
clear pronouncement on whether the student-university relationship is
contractual, and the experience in the United Kingdom is instructive on
this point.
91 Sinclair, above n 73, 66 (footnotes omitted).
The level of government involvement in Australia, in the United Kingdom, and in the United States differs according to historical, constitutional and economic factors. In Australia the responsibility for the provision of education in Australia, including higher education, is vested in States rather than in the Commonwealth Government. However, the Commonwealth government has a major influence - de facto control - on the operation and management of the university sector because it is a major source of finance. The high level of government-sourced funding results in the potential to exert a significant level of influence over the higher education sector. The impact of this sector-wide control on the individual university is felt in the mechanisms for attracting funding and through other compulsory mechanisms for accounting for that funding and ensuring that it is being used in a manner conforming with government policy. Although the individual university has autonomy in most of its operations, and the autonomy of the individual institution increases with increasing levels of non-government funding, the level of government funding remains a significant influence over the individual institution. Similarly, all universities in the United Kingdom, except the privately funded University of Buckingham, receive a proportion of their public funding for teaching and research from the relevant funding agency. In the United States, by way of comparison, the degree to which the state can control the provision of higher education through funding mechanisms is circumscribed, firstly, by the large number of private institutions whose reliance on government funding is tempered by alternative funding sources, and secondly, by a greater availability of alternative funding sources in general. Whereas the number of enrolments is not directly comparable with Australian and United Kingdom figures, since higher education comprises both four year universities and two year institutions, the proportion of students enrolled in private institutions is significant. As in the university sector in Australia, United States institutions are influenced, to different extents, by both Federal and State governments. The degree to which either government can influence outcomes through funding constraints is more limited due to the level of private income available; however, it is

92 Farrington, above n 76, 5.
93 Report of the National Committee of Inquiry into Higher Education (the Dearing Committee) Appendix 5, Section 7, [7.3].
still significant.

Some authorities suggest that a distinguishing characteristic can be made out of the fact that the function is a traditional or historical government function. However, the functions of the state may change over time, and it is clear that matters considered classical state functions in one jurisdiction may not be considered to be so in another. Certainly, it cannot be the exclusive test to found jurisdiction. In *R v Fernhill Manor School, ex parte Brown* the fact that education is often considered to be a core governmental function did not prevent the court from holding that a private school owned and operated by a registered company was not subject to judicial review. Further, there is no consensus as to the core functions of government even within a jurisdiction. '[G]iven the lack of consensus as to the proper functions of government this seems a test which is singularly difficult to apply with any degree of certainty.' In the case of universities, the number of private universities, although not large in Australia, is perhaps significant enough to throw doubt on the likelihood that university education would be classed as a core government function in any event.

Another factor said to influence the application of common law administrative remedies is the magnitude of the power exercised. In *Forbes v New South Wales Trotting Club Limited* Murphy J said:

[w]hen rights are so aggregated that their exercise affects members of the public to a significant degree, they may often be described as public rights and their exercise as that of public power. Such public power must be exercised bona fide, for the

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94 R v Panel on Take-overs and Mergers, ex parte Datafin plc [1987] 1 All ER 564; R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan [1993] 1 WLR 909.

95 (1992) 5 Admin LR 159.


97 (1979) 143 CLR 242.
purposes for which it is conferred and with due regard to the persons affected by its exercise... There is a difference between public and private power but, of course, one may shade the other. When rights are exercised directly by the government or by some agency or some body vested with statutory authority, public power is obviously being exercised, but it may be exercised in ways which are not so obvious. 98

The magnitude of power exercised is particularly significant where the body is exercising privatised functions. The types of decisions that may be taken and the significance of those decisions render the body more appropriate for administrative remedies. Although private bodies are, in many cases, capable of exercising powers to a significant extent, that does not mean that the capacity to exert massive influence is not a factor to be considered in determining whether public power is being exerted.

In the case of the decisions of a university, it can be strongly argued that their significance to the individual is critical. A decision to exclude a student for a disciplinary offence, or for poor results, or a decision not to admit a student, can have a devastating influence on the student’s career, self-esteem, income-earning potential and reputation. 99 However, it is difficult to cite the student as a member of the public. The student has voluntarily brought him- or herself within the scope of the university’s decision-making power. The decision is directed against an individual, or perhaps a group of individuals, and has no more than a marginal significance to the ‘public’ that has not brought itself within the university’s grasp. In the current climate of competition between universities, moreover, the influence of an individual university is diluted to such an extent that the significance of individual decisions has diminished. Farrington notes that ‘the acquisition of graduate status is no doubt of economic and social significance, but an individual institution is not generally a monopoly supplier.’ 100

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99 For instance, in R v Senate of the University of Aston, ex parte Roffey [1969] 2 QB 538, 556 Bain J stressed the significance of possession of a degree in a job market.

100 Farrington, above n 76, 332.
However, there are some circumstances in which some universities have significant power; some universities act as certifier of the fitness of graduates to professional bodies.

Similarly, the possession of a monopoly was considered to be important in some of the early cases which followed Datafin;\textsuperscript{101} however, in \textit{R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan}\textsuperscript{102} the Court of Appeal held that the possession of a monopoly was not, in itself, sufficient to establish jurisdiction. Where it has been so conferred or protected in other jurisdictions, however, it has been held to be a relevant matter. Thus, the European Court of Justice and the House of Lords consider that, for the purposes of EC law, the possession of such a monopoly should be equated with the state for certain purposes.\textsuperscript{103}

Whereas, to some extent, it is possible to say that entry into the university ‘market’ is protected by licence, since in many countries it is not possible to use the title of ‘university’ without mandate, the licence is not exclusive. In \textit{R v Lloyds of London, ex parte Briggs}\textsuperscript{104} the Court held that Lloyd’s of London was not exercising a public power in relation to decisions affecting its ‘names’ because those decisions did not regulate the whole market, but a portion of it. The reasoning in \textit{Briggs} could apply to universities; since, whilst the power exercised by a monopoly may have a public element, this may


\textsuperscript{102} [1993] 1 WLR 909.

\textsuperscript{103} For instance, in \textit{Foster v British Gas plc} [1990] 3 All ER 897 the European Court of Justice had to determine whether the Gas Corporation was, prior to privatisation, part of the State. It said that it was up to the domestic courts to decide whether the particular body satisfied the relevant test. The House of Lords considered the matter in \textit{Foster v British Gas plc} [1991] 2 All ER 705. Monopoly power was considered a special power for the purposes of EC law.

\textsuperscript{104} (1992) 5 Admin LR 698.
cease to be public once competitors enter the market. Most markets in which universities operate are subject to competition.

Whereas some English cases have held that decisions involving the exercise of business judgment are not sufficiently public to establish jurisdiction, later cases have established that the commercial character of the decision does not necessarily mean that the body is not public. Whereas the particular decision may not be justiciable, jurisdiction may nevertheless be established. Thus, in *Mercury Energy Limited v Electricity Corporation of New Zealand Limited* the Privy Council held that, although jurisdiction to review a decision of a corporatised body was established, the particular decision was non-justiciable.

It is not possible to assert that the public nature of the body necessarily means that the decision itself is public. However, although the court may not substitute its own view for that of the corporation, it may consider the process by which the decision is reached.

It is clear that universities make decisions based on commercial judgment, and that tendency is increasing; however, that will not preclude a determination that the university is a public body. Rather, the nature of the decision itself will have to be determined. The set of considerations surrounding a decision as to whether a university is a ‘trading corporation’ and whether its conduct is ‘in trade or commerce’ for the purposes of the *Trade Practices Act 1974* (Cth) may be relevant to this discussion, but they have been canvassed at length elsewhere. The question, however, is likely to be less important in the case of universities, where the decisions sought to be impugned by common law public remedies have tended to involve decisions relating to student progress or expulsion.

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English courts have applied principles very similar to those applicable to public law cases when dealing with cases involving private decisions in, for instance, company law and trusts. In *Sheason Lehman Hutton Inc v Maclaine Watson & Company Limited*, *J.H. Rayner (Mincing Lane) Limited* Webster J rejected the assumption that 'decisions in the field of judicial review or public law, to the effect that the decisions of 'bodies' subject to jurisdiction can be challenged on certain grounds, are not necessarily to be, or cannot automatically be, carried over into the field of private law'. Rather, he said, the distinction between private and public law rights relates to the procedures by which they are protected, rather than their substance. There was no reason why public law rules should not, in principle, be applied to administrative or regulatory bodies acting in the public domain. Similar arguments have been made in the American context.

Thus, principles of fairness apply in both the public and private cases, as principles of good administration. They prohibit the fettering of discretion, the delegation of discretion, abuse of power, arbitrariness, capriciousness, unreasonableness, bad faith, and breach of accepted moral standards.

The position of the hybrid organisations was considered recently by Justice Thomas of the Supreme Court of Queensland, who acknowledged that the role of administrative review of such bodies has received critical attention, and continued:

'[t]he erosion of direct ministerial responsibility may have opened up a need for administrative law to fill up the gap in public accountability in those areas. Review

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108 Ibid 625.
109 Christopher D Stone 'Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?' (1982) 130 University of Pennsylvania Law Review 1441. See also Sinclair above, n 73 190-1, who develops this argument further.
by the courts is seen by the promoters of corporatisation as an 'unnecessary impediment' to effective competition with private sector businesses. Statutory judicial review over activities of GOCs [Government-owned corporations] has accordingly been in some instances removed by Parliament, so far on a fairly limited basis. The purpose of this is no doubt to ensure that GOCs are not disadvantaged in competition by having to face procedures which are not available against their private sector competitors.  

The risk that the process of corporatisation could be a mechanism to remove the administrative law jurisdiction has been acknowledged: '[t]here is a widely held view that in providing essential resources like water and electricity and even traditional governmental services such as transport and communications, the public has a stake in seeing that the services and commodities are provided honestly and lawfully'. The ownership of the organisation should not be allowed to be an impediment for judicial oversight of the bodies. Recognition of the changing form of public sector bodies in the Datafin line of cases, and in the state action cases in the United States, should prevent the erosion of judicial oversight provided by public law.

6.2.2 Potential circumstances for the application of common law administrative remedies

Judicial review may be directed towards the legislative or the judicial or quasi-judicial actions of the university. It may involve a claim of illegality, including ultra vires, error of law and unlawful delegation of power; abuse of powers, including irrationality, not taking into account relevant considerations and taking into account irrelevant considerations, bad faith, improper motive and the fettering of discretion; and procedural unfairness, including bias, failure to provide a proper hearing and material irregularity. In Australia, common law judicial review has been modernised and largely

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112 Ibid.
The common law of judicial review was based upon the prerogative writs. In the present context the important writs are certiorari, which nullifies a decision which has been made, and prohibition, which orders a tribunal not to proceed to a decision or to refrain from enforcing it.\textsuperscript{113}

The procedures accompanying the prerogative writs were modernised in Australia in both Commonwealth and State jurisdictions by statute.\textsuperscript{114} New statutory remedies were introduced in the Commonwealth and some State jurisdictions.\textsuperscript{115} Prerogative orders largely replace the prerogative writs in New South Wales,\textsuperscript{116} Queensland,\textsuperscript{117} South Australia,\textsuperscript{118} Victoria and the Northern Territory.\textsuperscript{119} The old writ forms are now used only in the Federal Court,\textsuperscript{120} the High Court,\textsuperscript{121} the Australian Capital Territory,\textsuperscript{122} Western Australia\textsuperscript{123} and Tasmania.\textsuperscript{124}

\begin{itemize}
\item\textsuperscript{113} Forbes, above n 37, 6.
\item\textsuperscript{114} Administrative Decisions (Judicial Review) Act 1977 (Cth); Administrative Law Act 1978 (Vic); Supreme Court Act 1970 (NSW) s.69; Supreme Court Rules 1970 (NSW) Part 54 rr 1, 4; South Australia by amendment to the Rules of the Supreme Court in 1987; Judicial Review Act 1991 (Qld). See Forbes, above n 37, 258.
\item\textsuperscript{115} Administrative Decisions (Judicial Review) Act 1977 (Cth); Administrative Law Act 1978 (Vic); Administrative Decisions (Judicial Review) Act 1989 (ACT); Judicial Review Act 1991 (Qld).
\item\textsuperscript{116} Supreme Court Act 1970 (NSW) s.69(1), SCR (NSW) 1970 Part 54.
\item\textsuperscript{117} Judicial Review Act 1991 (Qld) s.41, Schedule 4.
\item\textsuperscript{118} Supreme Court Rules (SA) Part 1 r 98.
\item\textsuperscript{119} Supreme Court Rules (NT) O 56.
\item\textsuperscript{120} Judiciary Act 1903 (Cth) s.39B.
\item\textsuperscript{121} Constitution s.75(v); High Court Rules O 55.
\item\textsuperscript{122} Rules of the Supreme Court (ACT) O 55.
\item\textsuperscript{123} Rules of the Supreme Court 1971 (WA) O 56.
\end{itemize}
There are three areas in which there is a potential for administrative remedies and in which those remedies are potentially in competition with an action in negligence by a student against a university: admission of a student, disciplinary procedures, and appeals from academic assessment or progress decisions. In all cases, the students' position will be determined by reference to the regulations relevant to the course or degree program being followed, and those regulations may be created pursuant to statute, or may have the status of rules of a private organisation. There may also be an overriding set of principles in place. 125

The cases in this area are complicated by the continued role of the visitor in many jurisdictions. The exclusive and final jurisdiction of the visitor has kept a number of cases out of the courts altogether, and out of the administrative jurisdiction in particular. For instance, in Janaki Viyatunga's case 126 the visitor declined to intervene in the appointment of the examiners of a PhD thesis, and the student sought to impugn that decision in the courts. The court upheld the exclusive jurisdiction of the visitor. However, there are many cases in which there is no visitor, or in which the visitor has an attenuated jurisdiction, or in which the court has considered the matter despite the existence of a visitor, perhaps because the visitatorial jurisdiction has not been pleaded. 127

124 Rules of the Supreme Court 1965 (Tas) O 72. See Forbes, above n 37, 259.

125 For instance, the Committee of Vice Chancellors and Principals (CVCP) in England have promulgated a Code of Practice governing appeals procedures at postgraduate research degree level. Individual universities have either adopted the provisions or made equivalent provisions in their regulations.


127 See, for instance, R v Senate of the University of Aston, ex parte Roffey [1969] 2 QB 538, where no visitor had been appointed to the University. In a dispute involving Professor Kim Sawyer and the Department of Economics and Finance at the Royal Melbourne Institute of Technology the visitor found that he lacked jurisdiction because RMIT had not taken
There is also the potential for administrative review of the visitor's decision.

Admission of a student

The admission cases have usually been grounded in contract, rather than in the administrative remedies. It is sometimes said that these cases are outside the jurisdiction of the visitor, because the student has not yet become a member of the university. *Dean and Chapter of Chester v Bishop of Chester*\(^{128}\) makes it clear that membership of the corporation is required before appeal to the visitor is possible. Similarly, in *Casson v University of Aston in Birmingham*\(^{129}\) the visitor was denied jurisdiction in matters governed by the common law, in this case contracts entered into between student and the university, made prior to the student entering the university. Lord Hailsham said:

> once a relationship has been established which is governed by the general laws of the realm over which the visitor can have no jurisdiction, the visitor is wholly excluded from considering any question concerning that relationship. There does not seem to be any good reason why this reasoning should not be equally applicable to the relationship of contract which is likewise governed by the

\(^{128}\) The necessary steps to prescribe staff as members of the University under the *Royal Melbourne Institute of Technology Act 1992* (see the report of the Senate Select Committee on Public Interest Whistleblowing (*In the Public Interest*, Canberra, 1994) and the report of that committee on unresolved whistleblower cases: *The Public Interest Revisited*, Canberra, 1995. See also Peregrine W F Whalley and David M Price, 'The University Visitor in Tasmania: Retention, Repeal or Reform?' in Rick Snell (ed), *The Role of the University Visitor: A Symposium* University of Tasmania Law School Occasional Paper Number 5 (1997) 8, 18. In some states the jurisdiction of the visitor is attenuated by legislation: for instance, the *University Legislation Amendment Act 1994* (NSW) provides that, for each of the universities with a visitor, the Governor is the visitor but has ceremonial functions only.

\(^{129}\) (1902) 87 Lt 618.

\(^{129}\) [1983] 1 All ER 88.
general laws of the realm ... [T]he fact that a contracting party is also a member of the corporation will not have the effect of excluding the jurisdiction of the courts and putting the matter exclusively within the visitor’s authority.\textsuperscript{130}

What of common law administrative remedies? In Australia the previously mentioned case of \textit{Ex Parte King; Re University of Sydney}\textsuperscript{131} and a similar case involving the University of Sydney, \textit{Ex Parte Forster; Re University of Sydney},\textsuperscript{132} involved decisions whether to admit a student to the university. In both cases there was held to be such a duty. However, where a contract has been entered into between the applicant and the decision-making body, the courts are likely to deny that judicial review is appropriate, given that it is a private law matter. For that reason, the recent rash of cases which consider the enrolment of the student at least to be a matter of contract may take this set of cases out of the realm of judicial review. Obviously, this must be regulated to some degree by the facts of the case, but the likelihood that this aspect of the relationship is governed by private law is stronger than would be the case with any other aspect of the relationship, particularly in the United Kingdom, in light of the \textit{Moran} case.\textsuperscript{133}

Otherwise, if an application for judicial review is to be entertained the subject-matter of the dispute has to have a ‘public law’ element.

\textbf{Disciplinary procedures}

Where the traditional jurisdiction of the visitor applies, academic and social behaviour or misconduct issues are considered to be internal matters to be decided by reference to

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\textsuperscript{131} (1943) 44 SR (NSW) 19.

\textsuperscript{132} [1963] SR (NSW) 723.

\textsuperscript{133} Moran v University College Salford (No 2) [1994] ELR 187 discussed in chapter 3 above.
\end{flushright}
the rules of the institution with appeal only to the visitor.\textsuperscript{134} The visitor’s decision is subject to judicial review only in limited circumstances, for instance, where the visitor fails to apply or exceeds the jurisdiction.\textsuperscript{135}

Where there is no visitor, academic and social behaviour issues fall to be challenged by prerogative writ, in the case of a public institution,\textsuperscript{136} or by way of an action in contract.

In cases involving non-statutory disciplinary tribunals, it is common to require that the matter be considered firstly by reference to internal procedures. However, there is no such rule, even if the rules of the organisation specify that internal mechanisms must be exhausted.\textsuperscript{137} The enforcement of the exhaustion clause is discretionary.\textsuperscript{138} Clark v University of Lincolnshire and Humberside\textsuperscript{139} makes it clear that grievances against universities are preferably resolved within the grievance procedure, and that courts will not usually intervene. If there is no visitor, the courts may intervene but this ‘should normally happen after the student has made use of the domestic procedures for resolving

\begin{footnotes}
\item[134] R v University of Hull Visitor ex parte Page [1993] AC 682; R v University of Nottingham ex parte K [1998] ELR 184. In the latter case the Court said ‘the exclusive visitorial jurisdiction, certainly over academic decisions and the proper application of university procedures in reaching them, is alive and well ... there is no arguable basis ... for the assumption of the courts of an overlapping review before the visitor has exercised his jurisdiction’ (Auld LJ). Ex parte Death (1852) 18 QBD 647 demonstrates the judicial reluctance to review university disciplinary proceedings.

\item[135] David Palfreyman, ‘The HEI-Student Legal Relationship, with Special Reference to the USA Experience’ (1999) 11 Education and the Law 5, 18.

\item[136] Forbes, above n 37, 12-13. He says ‘[m]ost if not all Australian universities and tertiary colleges possess hybrid tribunals’ - the universities originally exercised purely consensual jurisdiction, and retain domestic features, but they now have statutory support.

\item[137] Ibid 254.

\end{footnotes}
the dispute'.

It is possible that a student who does not mitigate his or her loss by using an internal appeal mechanism may be awarded no damages where damages are sought. It is possible that, in the event that internal procedures do not comply with rules of natural justice or due process, there will be a capacity for judicial review where the tribunal is exercising a public function. In the United Kingdom, a pre-1992 Act university may be judicially reviewed in relation to a matter regulated by a statute.

A case in which a student claimed that university disciplinary procedures were improperly applied occurred in University of Ceylon v Fernando. That case caused a great deal of comment at the time, perhaps because '[i]n modern times the English courts have shown a marked reluctance to intervene in disputes arising out of the internal affairs of universities'. The student, Fernando, had sat for the final examination for the degree of Bachelor of Science, after which an allegation was made that he had had prior knowledge of a passage of German which was required to be translated in one of the papers. A commission of inquiry was conducted, and it found that the claim was substantiated. The student was suspended indefinitely from all university examinations. The student sought a declaration that the finding of the

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139 [2000] 3 All ER 752.
140 Ibid 760 (Lord Woolf MR).
141 Oliver Hyams, ‘Correspondence’ (1999) 11 Education and the Law 147.
144 [1960] 1 All ER 631.
commission of inquiry and the decision to suspend him were null and void, as the finding of the commission was contrary to the principles of natural justice in that, inter alia, the evidence of witnesses was given in his absence, and he was not aware of the evidence or the case he had to meet.

It was held that, in the absence of any express requirement as to the procedure to be followed at the inquiry, it had to comply with the elementary and essential principles of fairness - with the principles of natural justice - consistent with its quasi-judicial role. These principles were adequately followed.

Although a *cause celebre*, the case is less useful than it could have been; the Privy Council did not find it necessary to determine whether the courts had any jurisdiction to grant the relief sought, and the quasi-judicial nature of the Vice-Chancellor's functions was admitted.

De Smith, commenting on the case, suggested that the court would have found it difficult to piece together a contract between the student and the university. Nevertheless, he said that the governing principle should be that, where authorities have the power to make decisions that could seriously impair the liberty, proprietary rights, livelihood, status or reputation of individuals, those affected should be afforded prior notice and an opportunity to be heard. He suggests that an exception should be made where 'the imposition of such duties would be impracticable or manifestly contrary to the public interest or parliamentary intent.'146 Where the discretion of the deciding authority is so wide as to be almost unreviewable on its merits, the importance of imposing these duties increased.

In the years following this case, administrative law in relation to student discipline expanded rapidly as a consequence of the student unrest over this era. However, the imposition of the principles of natural justice was the main contribution in the area of administrative law.

146 Ibid 431.
Farrington asserts that much of the administrative law from the 1960s and 1970s is questionable, since it places the university in the public, rather than the private arena, and ignores the jurisdiction of the visitor, which he treats as purely private.\textsuperscript{147} However, cases since that era have not been entirely satisfactory either, insofar as, although they frequently take into account the jurisdiction of the visitor, they are not clear on the student/university contract. It is frequently suggested that judicial review is available for matters arising out of a contractual relationship, and implied that the student/university relationship is contractual.\textsuperscript{148} Most of the recent cases involving judicial review of decisions of higher education institutions in England have ignored the contractual analysis.\textsuperscript{149}


\textsuperscript{148} See, for instance, David Palfreyman and David Warner (eds), \textit{Higher Education and the Law - A Guide for Managers} (1998) 134. \textit{Clark v University of Lincolnshire and Humberside} [2000] 3 All ER 752 noted that the relationship between a fee-paying student and one of England's 'new' universities was contractual.

\textsuperscript{149} See, for instance, \textit{R v Liverpool John Moores University, ex parte Hayes} (Unreported, Court of Appeal, Roch and Mummery JJ, 18 May 1998) - student sought certiorari and mandamus by judicial review; \textit{R v Cambridge University, ex parte Beg} (Unreported, High Court, Sullivan J, 15 April 1998) - application for leave to apply for judicial review of a decision of the university was dismissed. Also \textit{R v University College, London, ex parte Dr Christofi} (Unreported, High Court, Owen J, 18 June 1997) - student applied for leave to move for judicial review. Also \textit{R v Cranfield University Senate, ex parte Bashir} (Unreported, Court of Appeal, Nourse, Buxton and Sedley LJJ, 16 March 1999) - student sought judicial review of a decision of the university not to award him a doctoral degree. Also \textit{R v University of Portsmouth, ex parte Lakareber} (Unreported, Court of Appeal, Simon Brown, Aldous and Clarke LJJ, 16 October 1998) - student sought judicial review of decision of the university that she should resit two failed units. Also \textit{R v The Board of Governors for the South Bank University ex parte Osinake Ayo Mohammed} (Unreported, Court of Appeal, Hobhouse, Swinton Thomas and Buxton LJJ, 24 March 1998) - student sought judicial review of decision of university to award him a third class honours degree. See chapter 4, footnote 169.
For instance, in *R v Manchester Metropolitan University; ex p Nolan*[^150^] a case involving a student who took notes into a Common Professional Education examination, the university was formed as a body corporate pursuant to the *Education Reform Act* 1988 (UK). The jurisdictional point was stated as follows: ‘[a]s a public institution discharging public functions, and having no visitor, it is subject to judicial review of its decisions on conventional grounds. It is not disputed that the applicant has sufficient interest to bring the grounds upon which he relies before this court.’[^151^]

*Clark v University of Lincolnshire and Humberside*[^152^] considered the relationship between the contractual relationship and the administrative remedies, along with the role of the visitor in a ‘new’ university. The student was given a zero mark for work submitted for assessment in her primary degree. The work had been largely copied from another source. However, as she explained to her tutor prior to submitting the work, all but this material had been lost from her hard drive immediately prior to submission.

She was originally marked at zero for plagiarism by the board of examiners but the academic appeals board found no intention to deceive and referred the paper back to the Board of Examiners for remarking. They again gave the paper a zero mark. A further appeal to the academic appeals board was unsuccessful, but an appeal to the governors appeal committee was successful, insofar as it decided that the mark was not ‘an appropriate academic response’. Her assessment was referred back to the academic board, which rejected the appeal. The student resat her finals but could only achieve a third class degree, which precluded the career options she preferred.[^153^] The student sued, basing her claim in contract.


[^151^]: Ibid (Sedley J).

[^152^]: [2000] 3 All ER 752.

[^153^]: [2000] 3 All ER 752, 755.
The Court of Appeal noted that the University of Lincolnshire and Humberside, as one of the ‘new’ universities, had no charter and no visitor. If it had had a visitor, it was common ground that the dispute would lie within the visitor’s exclusive jurisdiction.\(^{154}\)

The Court of Appeal accepted that the relationship between such a university and its fee-paying students was contractual and that the procedures for dispute resolution were part of that contract.\(^{155}\)

The relationship between the contract and administrative relief was considered because the University argued that the student had a sufficient interest to seek judicial review of its acts and omissions towards her, and that she should have taken that route. It was argued that it was an abuse of process to sue in contract, thus circumventing the limitation period for judicial review. The court rejected this view on that basis that the court could intervene if it appeared that the court’s processes were being misused.\(^{156}\)

It was not the case, as in *O’Reilly v Mackman*\(^{157}\) that the issues were purely public law ones and the problem therefore entirely procedural. It is not necessarily an abuse of process to elect to sue in contract where the public law element is not dominant.\(^{158}\)

*Clark* was stronger from this point of view than *Roy’s* case, in which a statutory relationship happened to include a contractual element. In *Clark* a contractual relationship happened to possess a public law dimension.\(^{159}\)

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\(^{154}\) Ibid 756, citing *Thomas v University of Bradford* [1987] AC 795 and (where no visitor has been appointed) *Patel v University of Bradford Senate* [1978] 1 WLR 1488.

\(^{155}\) *Clark v University of Lincolnshire and Humberside* [2000] 3 All ER 752, 756 (Sedley LJ). There were, however, pastoral matters and matters of academic judgment which were inappropriate to adjudicate in the courts: see chapter 3.

\(^{156}\) Ibid 757 (Sedley LJ).

\(^{157}\) [1983] 2 AC 237.

\(^{158}\) *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624.

\(^{159}\) *Clark v University of Lincolnshire and Humberside* [2000] 3 All ER 752, 757 (Sedley LJ).
Thus, where the court possesses this degree of procedural flexibility the interaction between the contract and the administrative remedy is not likely to cause concern. If the student chooses to bring a claim in contract the availability of the public law remedy is not going to present a problem unless the court considers that its processes are being misused, or where the lapse of time or other circumstances demonstrate that no worthwhile relief would be available.  

Particular confusion arises in England in relation to the chartered universities. Carroll argues that the enforcement of student rights in academic and disciplinary matters in the case of the chartered universities arises from the contract, since those institutions do not have statutory underpinnings.

In Australia, the universities are formed by statute, and their disciplinary proceedings are generally formed pursuant to a power specified by statute. However, some have a visitor with traditional functions. For those with a visitor, disciplinary matters must be within the jurisdiction of the visitor. For those with no visitor, or in jurisdictions in which there is a concurrent jurisdiction, disciplinary proceedings must be generally subject to judicial review.

The confusion that surrounds the applicability of public law remedies to universities, which were not historically public institutions, is explained to some extent by Forbes, who says:

> The expression ‘hybrid tribunal’ is used, in the absence of any settled term of art, to refer to bodies which originally exercised purely consensual jurisdiction and which retain ‘domestic’ features although they now have statutory support. Their social importance has drawn them into the domain of public law. ‘Hybrid’

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160 Ibid 757 (Sedley LJ).
tribunals are technically administrative tribunals despite their ‘domestic’ appearance. Statutory underpinning of private tribunals occurred as early as 1571 when the disciplinary systems of England's old universities were given legislative recognition.\(^{162}\)

In a footnote, he says that the domestic features of such a tribunal could be, for instance, confinement to a self-selected group, such as members of a university, a learned profession, or a racing club. He says that most Australian universities possess hybrid tribunals, and that judicial review of these tribunals is normally sought by means of prerogative writ or its equivalent, unless the university retains a visitor:

**Academic assessment or progress**

For similar reasons, cases involving academic assessment or progress will be subject to the jurisdiction of the visitor where that exists,\(^{163}\) judicial review, in appropriate cases, in the case of statutory universities and contract otherwise. In the case of an institution in which the visitor’s jurisdiction remains, the visitor replaces the function of judicial review, although it has been argued that where the university is carrying out a public function, or one regulated by statute, it may still be subject to judicial review, rather than the jurisdiction of the visitor.\(^{164}\) Generally, the decisions of the visitor are not subject to review,\(^{165}\) although the judiciary may intervene if a visitor refuses to exercise

\(^{162}\) Forbes, above n 37, 12.

\(^{163}\) Thorne v University of London [1966] 2 QB 237; Clark v University of Lincolnshire and Humberside [2000] 3 All ER 752.


\(^{165}\) Thomson v University of London (1864) 33 LJ Ch 625; Thorne v University of London [1966] 2 QB 237; Bell v University of Auckland [1969] NZLR 1029; Herring v Templeman[1973] 2 All ER 381; [1973] 3
jurisdiction, or fails to observe natural justice.

The university's own rules and regulations establish the sole forum for dispute resolution in relation to academic matters and it has been suggested that judicial review will not be visited unless the university's internal procedures have been exhausted.

In *R v Aston University Senate, ex p Roffey* Derek Roffey and Michael Pantridge had failed their examinations and sought judicial review of the Senate's decision to exclude them. The grounds for review were that extraneous matters were taken into account by the examiners and that the students were not given an opportunity to comment on those matters. The court assumed jurisdiction, but refused relief because of delay in bringing the case. To allow the students to comment would possibly have been a useless

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All ER 569; *Patel v Bradford University Senate* [1978] 1 WLR 1488; *Re University of Melbourne; ex parte De Simone* [1981] VR 378.

166 *R v Bishop of Lincoln* (1785) 2 TR 338n; *R v Bishop of Ely* (1794) 5 TR 475; 101 ER 267; *King v University of Saskatchewan* (1969) 1 DLR 3d 721; (1969) 6 DLR 3d 120.


168 *Hazan v La Trobe University (No 2)* [1993] 1 VR 568. See Forbes, above n 37, 15.

169 *Clark v University of Lincolnshire and Humberside* [2000] 3 All ER 752; *R v University of Humberside ex parte Cousens* [1995] Ed LM 2 (6) 11; *M v London Guildhall University* [1998] ELR 144.

170 *R v Liverpool John Moores University, ex parte Hayes* (Unreported, High Court, Collins J, 27 November 1996); *Clark v University of Lincolnshire and Humberside* [2000] 3 All ER 752; Palfreyman, above n 135, 20; cf Forbes, above n 37, 253-4.

formality in any event, since the examiners would have reached the same decision.\textsuperscript{172} However, counsel in the case, following \textit{Fernando}, conceded that the rules of natural justice were applicable, bringing the university within the realms of administrative law.

The court in \textit{R v Universities Funding Council, ex p Institute of Dental Surgery}\textsuperscript{173} demonstrated willingness to intervene where it is alleged that extraneous matters have been considered. The court considered that where irrelevant and damaging personal factors were considered in the evaluation of the candidate's written paper, this made the evaluation something more than an informed exercise of academic judgment.

As already noted, another dimension is added when the question involves an academic decision rather than a procedural one. \textit{Viyatunga}'s case\textsuperscript{174} demonstrates the unwillingness of the visitor and of the court to interfere with the professional judgment of examiners. Other cases have underlined the courts' antipathy to substituting their judgment for that of an academic.\textsuperscript{175} Cases in which the court has assumed jurisdiction and has ruled in relation to student progress or assessment matters have been decided on the ground of failure to follow internal procedures or where there has been a breach of the principles of natural justice. These cases confirm that the court will not act as an appeal tribunal against the decisions of examiners. \textit{Clark v University of Lincolnshire and Humberside},\textsuperscript{176} outlined above, confirmed that there are matters in relation to which it is inappropriate for the court to adjudicate, even though the relationship may be

\textsuperscript{172} D L Foulkes, \textit{Administrative Law} (5th ed, 1982), 241.

\textsuperscript{173} [1994] 1 All ER 651.

\textsuperscript{174} \textit{R v Committee of the Lords of the Judicial Committee of the Privy Council acting for the Visitor of the University of London, ex p Viyatunga} [1988] 1 QB 322.

considered to be contractual.

This is because there are issues of academic or pastoral judgment which the university is equipped to consider in breadth and in depth, but on which any judgment of the courts would be jejune and inappropriate. This is not a consideration peculiar to academic matters: religious or aesthetic questions, for example, may also fall into this class. It is a class which undoubtedly includes, in my view, such questions as what mark or class a student ought to be awarded or whether an ægrotat is justified.\textsuperscript{177}

6.2.3 Statutory intervention into administrative law

6.2.3.1 Australia - Commonwealth

The history of Commonwealth legislative intervention into administrative law was considered in \textit{Hamblin v Duffy}.\textsuperscript{178} Administrative decisions and actions of Commonwealth ministers, officials and statutory bodies are subject to scrutiny through three Acts of the Commonwealth Parliament: the \textit{Administrative Appeals Tribunal Act 1975 (Cth)}; the \textit{Ombudsman Act 1976 (Cth)}; and the \textit{Administrative Decisions (Judicial Review) Act 1977 (Cth)}. These Acts will have an influence where the legislation empowering the administrative decision is federal - in the case of the Australian National University, for instance.

The \textit{Administrative Appeals Tribunal Act 1975 (Cth)} established the Administrative Appeals Tribunal and empowered it to review on the merits any decision of a minister, official or statutory body acting under a statutory power. However, the Act will only apply if the relevant legislation provides for an appeal to the Tribunal. Where an appeal

\textsuperscript{176} [2000] 3 All ER 752.

\textsuperscript{177} Ibid 756 (Sedley LJ). See also [2000] 3 All ER 752, 759 (Lord Woolf MR).

\textsuperscript{178} (1981) 34 ALR 333, 334-5.
lies to the Tribunal it may review on the merits the decision appealed from and, if necessary, substitute its own decision. Appeals on questions of law lie to the Federal Court. The *Australian National University Act* does not provide, in the terms of s.25 of the *Administrative Appeals Tribunal Act* 1975 (Cth), that applications may be made to the tribunal for review of the decisions made in the exercise of powers conferred by the ANU Act.

The Commonwealth Ombudsman, established by the *Ombudsman Act* 1976 (Cth), is empowered to investigate complaints against decisions of Commonwealth officials and statutory bodies. Jurisdiction is not confined to decisions made under a statutory power. The ombudsman is not empowered to substitute a decision for that under review, and can only recommend corrective action where there has been maladministration.

The *Administrative Decisions (Judicial Review) Act* 1977 (Cth) confers jurisdiction on the Federal Court to hear and determine applications by persons aggrieved for 'an order of review' in relation to a decision of an administrative character made under Commonwealth Acts or regulations. Judicial review does not enable the court to substitute its own decision; rather, the court is concerned to determine whether the action is lawful in the sense that it is within the power conferred on the body; or that the prescribed procedures have been followed; or that the general rules of law, including adherence to the principles of natural justice, have been observed.

The court may enjoin action, or quash a decision it finds unlawful, and it may direct action to be taken in accordance with law. It may also compel action by a person or body who has not acted, but who ought to have done so.\(^\text{179}\)

Whilst these Acts are limited in their application to bodies formed under federal legislation, the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) has been of use in the case of some universities. In *Australian National University v Burns*\(^\text{180}\) the


\[^{180}\] (1982) 64 FLR 166.
question was whether the decision of the Council of ANU to terminate the appointment of a professor was a decision of an administrative character made under an enactment under the Act. The enactment in question was the Australian National University Act 1946 (Cth), under which the Council exercised the power to enter into contracts including contracts of service. The Act was the source of the Council’s power, but the decision to dismiss was not necessarily made under that enactment. The rights and duties were those under a contract, rather than under the enactment.

The argument that the decision of the university, although empowered by an enactment, is not in fact a decision made under an enactment, is significant where a decision involves a student and the decision arises under a contract between the student and the university. It does not follow, however, that a student is not entitled to seek a review under the enactment merely because the decision is made under a contract. Section 10 of the Administrative Decisions (Judicial Review) Act provides that the rights conferred by the Act are in addition to, and not in derogation of, any other rights that the person has to seek a review. It is possible that the making of the contract is authorised by the enactment and that the decision, nevertheless, is made under the enactment rather than the contract. That must depend on the language and operation of the enactment and the contract. In particular, if a university Act gave the Council of a university the power to make rules and regulations relating to discipline or academic progress, and the Council had done so, as is frequently the case, the rules may be considered to be terms of the contract.

Similarly, in Australian National University v Lewins the Australian National University asserted that it was not required to give a staff member a statement of reasons under s.13 of the Administrative Decisions (Judicial Review) Act for a decision not to promote him to a position of reader. The Australian National University Act 1991 (Cth) stated that the powers of the university included the power to employ staff and made the Council the governing authority. Again, the question was whether the decision to refuse Lewins’ application for appointment was a decision made ‘under an enactment’. The

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decision was certainly made pursuant to a staffing policy which had been promulgated by the university, so the question was whether the statement on Policy and Procedures was an 'instrument' under the *Administrative Decisions (Judicial Review) Act*, and therefore an enactment. It was not alleged that the statement on Policy and Procedures was contractual in effect. It was imposed by the unilateral act of the university.

The court held that the statement on Policy and Procedures did not derive from statute, and decisions made pursuant to it were not made under an enactment. Again, this decision may be relevant in the case of statements of policy relating to student progress or discipline. Depending on the facts, it is unlikely that mere policy statements would bring decisions made pursuant to them under the *Administrative Decisions (Judicial Review) Act*.

Another enactment in the Federal jurisdiction which adds to the package of statutory administrative provisions is the *Freedom of Information Act 1982* (Cth). The Act has been used by students against universities to obtain access to information held in documentary form held by the university relating to the assessment of students' performance.182 Whilst the Act does not have a direct impact on the conduct of an action in negligence, it is certainly possible that it will provide the foundation for such an action by giving the student access to documents which would support their case. For instance, access to examination papers or marking schemes (where they exist) may bring to light inadvertent discrepancies in marking.

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6.2.3.2 Australian states

State and Territory Supreme Courts have powers of judicial review over tribunals operating under statute. 183 Decisions of other statutory bodies are also reviewable. The Judicial Review Act 1991 (Qld) provides judicial review of decisions made or proposed to be made by an officer or employee of the state or a state authority, or a local government authority in some circumstances. The Administrative Law Act 1978 (Vic) defines ‘decision’ as ‘a decision operating in law to determine a question affecting the rights of any person or to grant, deny, terminate, suspend or alter a privilege or licence …’; and decisions are reviewable if made by a tribunal. A tribunal is defined as a body which is under a duty to observe one or more of the rules of natural justice in arriving at the decision. This may include private bodies which are under a duty to observe natural justice, but authorities are divided. 184

The prerogative writ is employed in some States but Victoria, New South Wales and Queensland have provided for simpler forms by statute. 185

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183 Forbes, above n 37, 12, citing as examples Australian Capital Territory Supreme Court Act 1933 (Cth) ss 11, 26; Supreme Court Act 1979 (NT) s.14. See also Administrative Law Act 1978 (Vic) s.2.

184 Compare Monash University v Berg [1984] VR 383 and Dominik v Eutrope [1984] VR 636, which are authorities for the proposition that the Act does not extend to private law authorities, with Carman v Foley (unreported, Vic Sup Ct, 27 May 1980, Starke J) in which it was held that decisions of the Victorian Football League Tribunal were reviewable.

185 See Supreme Court Rules (NSW) Part 54 rr 1 and 4; Judicial Review Act 1991 (Qld); Administrative Law Act 1978 (Vic), which is merely procedural (s.12, Monash University v Berg [1984] VR 383) and does not extend to private tribunals (Monash University v Berg [1984] VR 383); Forbes, above n 37, 12.
6.2.4 Is the administrative action an alternative to an action in tort?

In cases where the court has refused to impose a duty of care on a public body the court has emphasised that there are alternative remedies open to the plaintiff in the form of some complaints procedure, or, alternatively, judicial review.\(^{186}\) This consideration emphasises that the denial will not deny the plaintiff any avenue of complaint, and will not mean that the defendant is immune from control.\(^{187}\) This argument in part, on a concern not to duplicate protection already available.\(^{188}\) There may be no great hardship in exhausting alternative administrative remedies and having a decision quashed, given that judicial review can be 'relatively speedy in its operation'.\(^{189}\)

However, this argument is only feasible when the alternative means are an adequate alternative to a case in negligence. 'Thus, where the protection afforded by the alleged alternative means is in some substantive way narrower than the tort of negligence ... the "adequate alternative" argument collapses.'\(^{190}\) The remedies available under judicial review are certiorari, prohibition, mandamus, injunctive relief, and declaratory relief. Under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) these remedies have been recast in the form of orders, removing 'the need to identify the remedy sought, avoiding the technicalities of the law relating to the availability of the prerogative remedies'.\(^{191}\) The availability of a remedy in damages through the administrative law mechanism is limited to those situations in which a tortious remedy overlays the administrative action.\(^{192}\) There is no remedy in damages available for a

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186 Cane, above n 2, 274.
187 Stapleton, above n 3, 319.
188 Ibid 320.
189 Cane, above n 2, 275.
190 Stapleton, above n 3, 321.
192 So, for instance, damages are available where the wrongful
breach of administrative action per se. Thus, to a certain extent, this superimposition of remedies is more problematic in philosophy than in practicality. Although administrative law may not provide the best mechanism for accountability - may not, for instance, replace the public service ethic - it may yet provide a yardstick against which decisions may be measured in terms other than those of competitiveness, efficiency, productivity, and profitability.\footnote{195} The role of administrative law is to provide an appropriate measure where public power is exercised, and the guise in which this power is exercised - whether it uses private law forms or not - is irrelevant.

In \textit{Takaro Properties Ltd v Rowling}\footnote{194} the court held that a claim for damages could not be founded simply on an invalid administrative claim causing loss.\footnote{195} This position is

\begin{itemize}
\item These pro-market values are identified as the ethic replacing the traditional ideas of the public service: accountability, representativeness, responsibility, neutrality, responsiveness, integrity, equity, impartiality, anonymity, benevolence, and justice. M Shamsul Haque, 'Public Service Under Challenge in the Age of Privatization' (1996) 9 \textit{Governance} 186, 190.
\item [1978] 2 NZLR 314. When the case reached the Privy Council, it was accepted that the decision involved matters of policy - Lord Keith, speaking for the Privy Council in \textit{Rowling v Takaro Properties Ltd} [1988] AC 473, 500-3 suggested that the policy/operational distinction was 'expressive of the need to exclude altogether those cases in which the decision under attack is of such a kind that a question whether it has been made negligently is unsuitable for judicial resolution.' This seems to mean that a negligence action will not lie in relation to a policy decision if the allegation of negligence relates to the substance of the decision: Francis Trindade and Peter Cane, \textit{The Law of Torts in Australia} (3rd ed, 1999) 700.
\item [1978] 2 NZLR 314, 326 (Woodhouse J). See also \textit{Macksville and District Hospital v Mayze} (1987) 10 NSWLR 708, 724 (Kirby P).
\end{itemize}

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not altered by the legislative provisions which provide remedies for wrongful administrative action. In *Park Oh Ho v Minister for Immigration and Ethnic Affairs*¹⁹⁶ the Federal Court considered its powers under s.16 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and held that an award of damages was not available simply for breach of s.5 of the Act. On appeal, the High Court commented that declaratory and injunctive orders are appropriate remedies, as distinct from an order for damages.¹⁹⁷

Although there is sufficient authority to suggest that common law administrative remedies are available to aggrieved students these remedies may not be preferable to tortious remedies, since the availability of damages is restricted. Lachlan Roots argued in 1995 for the introduction into the Australian system of administrative law of a new remedy designed to achieve public law objectives in the form of a general right to damages for wrongful administrative actions and for losses sustained as a consequence thereof.¹⁹⁸ He suggested that damages in administrative law would achieve two objects: the private law purpose of compensation for wrongs suffered, and the protection of the rights and interests of the person, which is an underlying function of administrative law.¹⁹⁹ In the absence of such a remedy available in an administrative action, the existence of the administrative alternative in an action against a university by a student may prevent recovery of damages.

*Harding v University of New South Wales*²⁰⁰ demonstrates this difficulty in the university context. The applicant sought damages in negligence for a university's

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¹⁹⁸ Roots, above n 192, 129.

¹⁹⁹ Ibid 136.

²⁰⁰ (Unreported, New South Wales Supreme Court, Master Greenwood, 3 June 1997). This case is considered in more detail in chapter 4.
failure to comply with its own regulations relating to student progress. The university’s case was that there is no legally recognisable cause of action for damages as a result of the breach of the requirements of procedural fairness or the rules of natural justice. Master Greenwood cited Roots’ article, noting his conclusion that ‘[n]o general cause of action exists by our law under which a public authority, which exceed their jurisdiction (as by denial by natural justice which they are obliged to record) are liable in damages for the consequences which they thereby occasion. Damages are currently only available where the wrongful administrative act conforms to a known and existing tort’. In Harding’s the likelihood of establishing a case of negligence against the university was extremely remote.

6.2.5 Relationship between the administrative jurisdiction and the visitor

The visitorial jurisdiction stands uneasily with recourse to the courts. It is considered to be a purely domestic remedy, and one commentator has considered that the visitorial jurisdiction is an example of the ‘private’ aspect of the public/private divide: ‘[p]erhaps the demarcation line between the visitor and the courts (expressed in terms of whether the issue is “domestic” or one involving legal rights) in university cases is to some extent a parallel to the private/public distinction as it operates in the law of judicial review.’

For that reason, the existence of the visitorial jurisdiction has limited the number of cases heard in the courts. Thus, the relationship between the visitorial jurisdiction and the common law courts should be straightforward. The visitorial jurisdiction, where it exists, is said to be exclusive and final. However, several cases draw a distinction between the system of ‘private law’ based on the statutes of the particular jurisdiction,

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201 Ibid, 9, quoting Roots, above n 192, 137.

and the law of the land. These cases argue that where a dispute involves the general law, the proper forum for adjudication is the court.\textsuperscript{203}

More oblique references were made to the interface between the visitorial and the common law jurisdictions in \textit{R v Purnell}.\textsuperscript{204} This was an information in the King’s Bench against the Vice-Chancellor (The Warden of New College) for neglect of the duties of his office as Vice-Chancellor and magistrate for Oxfordshire, in not punishing two undergraduates for treasonable words spoken in the streets at Oxford. The information against Dr Purnell was dismissed on the ground that the King’s Bench had no power to order inspection of the statutes and archives of the university so as to inform itself what the duties of the Vice-Chancellor were, as such inspection would have tended to made the defendant incriminate himself. Williams suggests that this case appears to be an authority for the proposition that one of the ordinary tribunals may supplement a punishment inflicted by a university court.\textsuperscript{205} The age and the subject matter of the decision, however, make it a suspect authority.

\textit{Herring v Templeman},\textsuperscript{206} on its facts, would have been directly relevant to the interface between administrative law remedies and the role of the visitor, since it involved allegations of breaches of natural justice by various bodies, brought by a student at a teacher training college who was expelled for failing a component of his course. However, the usefulness of the case in this context was reduced when the plea was changed to breach of contract upon the realisation that the institution was actually created as a trust, and did not have members as such. The applicability of the visitorial jurisdiction was left unresolved. The case did recognised that there is no need for


\textsuperscript{204} (1748)1 Black.W 37; 96 ER 20.

\textsuperscript{205} James Williams, \textit{Williams’s Law of the Universities} (1910).

\textsuperscript{206} [1973] 2 All ER 581; aff’d [1973] 3 All ER 569.
natural justice to be observed before an academic body makes an assessment of a student’s work and capabilities, as distinct from a question of discipline. The examiner’s assessment is not subject to the court’s jurisdiction, but if, having decided that the student should fail, the academic body then took extraneous matters into account, the principles of natural justice should then be observed.\(^{207}\)

In the Canadian jurisdictions, *Vanek v Governor of University of Alberta*\(^{208}\) emphasised the exclusive jurisdiction of the visitor on internal matters and refused to set aside a decision to refuse an academic tenure, even though the application was made on the grounds of breach of natural justice by the university in coming to the decision. *King v University of Saskatchewan*\(^{209}\) involved an application by a student for mandamus to compel the university to hear properly the appeal of the applicant against the decision of the College of Law not to grant him the degree of Bachelor of Laws. The court at first instance held that the matter was one falling within the jurisdiction of the visitor. On appeal to the Court of Appeal, King was unsuccessful on the grounds that, although the university Council was a statutory body and the duties were public duties, in this case they had been performed satisfactorily. The Supreme Court of Canada agreed.

In relation to the finality of the visitor’s decision, it has been established that judicial review is available from the decision of the visitor in certain cases:\(^{210}\) in *Bishop of Chichester v Harvard and Webber*\(^{211}\) it was held that judicial review lies where a visitor has acted outside his jurisdiction in the sense that he/she did not have the power under


\(^{208}\) [1975] 3 WWR 167 (Alta SCTD); affirmed [1975] 5 WWR 429 (Alta SC, AD).


\(^{210}\) See discussion above: 6.2.2.

\(^{211}\) (1787) 1 TR 650.
the regulating documents to enter into the adjudication of the dispute. This is consistent with Dr Bentley’s Case,212 in which it was considered that visitors are not to be tied to any particular forms, or to be prohibited for irregularity in their proceedings or informality in their acts, but only for want of jurisdiction. In a modern expansion of this principle in R v Lord President of the Privy Council, ex parte Page213 the House of Lords by a 3:2 majority held that the visitor’s decision was not open to judicial review on the basis of errors in either fact or law. The decision of the visitor could, however, be challenged if made outside of the visitorial jurisdiction. The visitor may also be subject to the scrutiny of the courts if he or she refuses to exercise jurisdiction214 or fails to observe natural justice.215

Further, in Australia the finality of the visitors’ decisions is made less clear by statutory developments: a number of other avenues are available to the aggrieved party. The Ombudsman exercises jurisdiction over many universities and there are a number of specialist tribunals which retain jurisdiction in specified areas; in particular sexual harassment or discrimination and racial or disability discrimination. Whalley and Price point out the potential for ‘forum shopping’ and suggest that ‘[a]necdotal information would suggest that many petitioners demonstrate a willingness to pursue their causes through other avenues in the event of an initial unsatisfactory decision.’216

212 There were a number of cases involving Dr Bentley: see R v University of Cambridge (1723) 2 Ld Ray 1334; 92 ER 370; Dr Bentley v Bishop of Ely (1729) 1 Barn KB 192; Bishop of Ely v Bentley (1732) 2 Bro Parl Cas 220.


214 R v Bishop of Lincoln (1785) 2 TR 338n; R v Bishop of Ely (1794) 5 TR 475; 101 ER 267; King v University of Saskatchewan (1969) 1 DLR 3d 721; (1969) 6 DLR 3d 120; Forbes, above n 37, 15.

215 Dr Bentley v Bishop of Ely (1729) 1 Barn KB 192; Hazan v La Trobe University (No 2) [1993] 1 VR 568.

6.3 Action under consumer protection legislation

Many jurisdictions supplement contractual protection with legislation designed to protect the consumer. Whereas, in the past, it may have been considered inappropriate to refer to the student as a ‘consumer’, or to a university education as a ‘product’, consumer protection legislation provides an increasingly popular remedy, particularly where the student has paid a fee to enrol in the institution.

Other jurisdictions have similar protections. For instance, in the United Kingdom Hyams argues that s.13 of the Supply of Goods and Services Act 1982 (UK) applies to the obligations of higher education institutions to students, so that there will be an implied term within the contract that the university will use appropriate professional skill and judgement in teaching and examining the student. He also asserts that the university will be subject to the Unfair Contract Terms Act 1977 (UK) and the Unfair Terms in Consumer Contracts Regulations 1994 (UK). These provisions will limit the ability of the university to contractually exclude or restrict liability for failure to

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217 In Quickenden v O’Connor [1999] FCA 1257 Lee J said ‘[w]hen 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.’

218 See, for instance, Fennell v Australian National University [1999] FCA 989, where the student paid $25,000 for a Master of Business course through the Australian National University. Birtwhistle and Askew expand on a similar argument when they suggest that the Teaching and Higher Education Act 1998 (UK) will, by requiring students to pay a direct contribution to fees, result in a move to a student/university contract that is a consumer contract: Tim Birtwhistle and Melissa Askew, ‘The Teaching and Higher Education Act 1998 - impact on the student contract’ (1999) 11 Education and the Law 89.

219 Hyams, Law of Education above n 143, [12.096]. See also Palfreyman, above n 135, 17.

220 SI 1994 No 3159.
comply with the implied promise to use professional skill and judgement. The Act and Regulations demand that exclusion and limitation clauses satisfy the test of reasonableness where the person acts as a consumer. A person is a consumer under s.12 of the *Unfair Contract Terms Act* if he or she neither makes the contract in the course of a business, nor holds him- or herself out as so doing.

Further, s.3 of the Act imposes a test of reasonableness on written standard terms of business where the person dealing with the business is a consumer. Section 3 applies where:

(a) a business seeks to exclude or restrict its liability when it is in breach of contract;

(b) a business claims to be entitled to render a contractual performance substantially different from that which was reasonably expected of them;

(c) a business claims to be entitled to render no performance at all in respect of the whole or part of the contract.

Thus, if the university relies on an exclusion clause contained in its standard terms and conditions, that clause must satisfy the test of reasonableness. The burden of proof would lie on the university.

The test of reasonableness is contained in s.11:

In relation to a contract term, the requirement of reasonableness ... is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of parties when the contract was made.

The Regulations have the effect that any term in a contract between the university and a consumer which has not been individually negotiated and which is unfair will not be
binding on the consumer. A term is unfair if it causes significant imbalance in the parties' rights and obligations under the contract, contrary to the requirement of good faith, and to the detriment of the consumer. Examples of standard contract terms which may be unfair are listed in Schedule 3, and include terms excluding liability for breach of contract, the right not to provide services, general variation clauses, and the right to change what is supplied.

The situation in the United States is complicated by the range of Constitutional protections, which tend to have eclipsed other protections, and the acceptance of sovereign immunity from contract liability in some states. For instance, in *Charles E Brohawn & Bros Inc v Board of Trustees of Chesapeake College* 221 the court recognised a broad immunity defence. The applicability of consumer protection statutes which imply terms into any student contract with the university would vary according to the applicability of the doctrine from state to state.

The scope of this research does not permit a full account of legislation in these jurisdictions. It will focus primarily on Australian legislation.

### 6.3.1 Australia

The *Trade Practices Act* 1974 (Cth) ('the Act') provides three 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*, 222 but do not employ the problematic reference to a 'corporation'.

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221 304 A 2d 819 (Md. 1973).

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. Thirdly, some circumstances may attract the unconscionability provisions in ss 51AA and 51AB of the *Trade Practices Act* 1974 (Cth).

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 acting '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. However, this matter has been considered at length in chapter 3 and will only be mentioned here.

### 6.3.1.1 The coverage of the *Trade Practices Act*

Although Part IV of the Act has been affected by a co-operative agreement between the

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223 The possibility that the university is entitled to crown immunity was considered in chapter 4.
States and the Commonwealth which extends its operation to the States, 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'.

A preliminary point, dealing with the validity of the legislation, was considered in the university context in *Quickenden v O'Connor*. In considering whether the corporations power could be used as a 'peg' on which to hang legislation with any purpose or effect, Lee J cited *Re Dingjan; Ex parte Wagner*, the culmination of a series of cases in the High Court which examined the scope of the corporations power. Analysing the decisions in that case, he said,

> [t]he ratio of *Dingjan* would appear to be that there must be a sufficient or necessary connection between the law made under the corporations power and a constitutional corporation in that the law fixes upon events or circumstances that impact upon, or have significance for, such a corporation by, at least, affecting

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224 Conduct Code Agreement between the Commonwealth, States and Territories of Australia, agreed to on 25 February 1994, by which the parties agreed that the Competition Code test would apply by way of application legislation to all persons.

225 Other relevant constitutional powers can extend Commonwealth powers to persons other than corporations by virtue of s.6 of the *Trade Practices Act* 1974 (Cth). 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 Deborah Healey and Andrew Terry, *Misleading and Deceptive Conduct* (1991), 8.


the activities, functions, relationships or business of the corporation.\textsuperscript{228}

He then went on to consider whether there was such a connection between the corporation and the provisions of the Act, sufficient to ground the constitutional power. He said:

it may be said that a law empowering, or controlling, a corporation in the relationship it may form with its employees has a necessary or sufficient connection with that corporation by the impact it has upon the activities, functions, relationships or business of the corporation and satisfies the requirements for validity identified in Dingjan.\textsuperscript{229}

In the same way, the \textit{Trade Practices Act} 1974 (Cth) has an impact on the relationship between the corporation and those with whom it does business, and could be similarly grounded in the Constitution.

In partial satisfaction of the corporations 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 \textit{Corporations Law}.\textsuperscript{230} It is necessary, subsequently, to show that the institution is within one of the categories of foreign, trading or financial corporations. 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\textsuperscript{231},


\textsuperscript{229} (1999) 91 FCR 597, 604.

\textsuperscript{230} 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.

\textsuperscript{231} 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
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.'

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

'Trading' is the activity of providing, for reward, goods or services. 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).* The mere fact that a corporation trades does not mean that it is a trading corporation. To determine whether a corporation is a trading corporation the court will consider the current activities of the corporation and the 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.'

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232 (1978) 36 FLR 134, 158.


234 (1986) 69 ALR 660.

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

constitution of the corporation.\textsuperscript{237} 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’.\textsuperscript{238} 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 \textit{State Superannuation Board v Trade Practices Commission} the corporation was required to carry on trading activities on a significant scale.\textsuperscript{239}

The range of judicial opinion in \textit{R v Federal Court of Australia; Ex parte Western Australian National Football League}\textsuperscript{240} included the judgment of Murphy J, who considered that the term included a body which does in fact trade, even if it was incorporated under legislation which bans trading.

The categorisation of a university as a trading corporation under the Constitution was considered in \textit{Quickenden v O’Connor},\textsuperscript{241} in which it fell to the Federal Court to determine whether the Australian Industrial Relations Commission was validly empowered under Pt VIB of the \textit{Workplace Relations Act 1996} (Cth) to certify an agreement made between the relevant Education Union and the University of Western Australia. The \textit{Workplace Relations Act 1996} (Cth) sought to source its constitutional power over the university as either the conciliation and arbitration power or the corporations power of the constitution. It defined in section 4(1) of the Act a

\textsuperscript{237} \textit{Fencott v Muller} (1983) 152 CLR 570, 602.
\textsuperscript{238} \textit{R v Federal Court of Australia; Ex parte Western Australian National Football League} (1979) 143 CLR 190, 208 (Barwick CJ).
\textsuperscript{239} (1982) 150 CLR 282, 304 (Mason, Murphy and Deane JJ); also Deane J in \textit{Commonwealth v Tasmania (The Tasmanian Dam Case)} (1983) 158 CLR 1, 293.
\textsuperscript{240} (1979) 143 CLR 190.
\textsuperscript{241} (1999) 91 FCR 597.
'constitutional corporation' as, inter alia, a body corporate that is, for the purposes of s 51(xx) of the Constitution, a financial corporation or a trading corporation formed within the limits of the Commonwealth. Dr Quickenden asserted that the University of Western Australia was not a trading corporation. The university contended that it was both a trading and a financial corporation.

Lee J emphasised the mismatch between the traditional and the modern idea of trading corporation when he said:

[the essence of trade remains the buying or selling of goods and services, but, in earlier times, conduct in the nature of trade engaged in by authorities established for public purposes, such as Universities and other educational bodies, eleemosynary bodies such as churches and hospitals, and municipal corporations and like public authorities, did not stamp those authorities with the character of trading corporations.]

Rather, 'the term “trading corporation” has been taken to have wider application ... it is now accepted that public authorities, established for, and carrying out, public services, may be, at the same time, trading corporations.' The traditional reluctance to consider public services as other than trading activities cannot hold out against the universal tendency to treat them in exactly that way - a tendency not denied by the

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242 Ibid 605-6.

243 R v Trade Practices Tribunal; Ex parte St George County Council (1974) 130 CLR 533, 539 (Barwick CJ); E v Australian Red Cross Society (1991) 99 ALR 601, 632.

244 See R v Trade Practices Tribunal; Ex parte St. George County Council (1974) 130 CLR 533, 553 (Menzies J); 562 (Gibbs J); R v Federal Court of Australia; Ex parte Western Australian National Football League (Incorporated) (1979) 143 CLR 190 ('the Adamson Case'), 219 (Stephen J).

university sector, and with which the university sector itself has, to an extent, collaborated.

The expansion of matters considered to be trading activities could be a reflection of wider societal changes in patterns of work. Trade has shifted from a focus on primary industry to a focus on secondary industry, and it is now ‘overwhelmingly centred around tertiary industry’. This trend is not confined to Australia: ‘[t]he commercialization of sport, education, religion, medicine and other social or professional activities is a world-wide phenomenon.’

In its application to universities, the expansion of the concept of trade to take in tertiary industries, even those of a public authority formed for a public purpose, extends the application of the Trade Practices Act 1974 (Cth) to a wide range of their activities. This is particularly the case where the university has sought to reduce its reliance on government funding, as has been demanded by recent government policies.

Accordingly, in Quickenden, Lee J analysed the recent activities of the University of Western Australia; activities which would not be unusual in any university in Australia, although their extent may vary. The Annual Reports of the university indicated university involvement in the conduct of the Festival of Perth, in which public attendance was largely achieved by ticket sale, and through which the university received revenue of around $4.5 million in 1997. Sales of publications and services by the university yielded around $1 million in that year, although Lee J considered the sale

246 Ibid, citing Murphy J in the Adamson Case (1979) 143 CLR 190, 240.
247 Ibid, citing Murphy J in the Adamson Case (1979) 143 CLR 190, 240.
249 See analysis in chapter 2. See also Jane Richardson, ‘Universities face up to private funds’ revolution’, The Australian (Melbourne), 23 February 2000, 37, which reports on a cost-benefit analysis by the University of Melbourne’s Centre for Independent Studies, which shows that that Australian taxpayers make a profit from higher education.
of faculty handbooks or course outlines to be incidental to the university's principal purpose and to have only a slight connection with an activity by way of trade.

In addition, the university sold computing equipment and services under a business name for gross revenue which was $4.8 million in 1997. The university collected $22.5 million in fees and charges from overseas students in that year.\(^{250}\) The university also charged fees for accommodation provided by the university under another business name. The revenue collected in this manner was approximately $1.6 million in 1997. Fees for the use of parking spaces also provided income in an amount of around $0.8 million.\(^{251}\) Those activities, which could be said to be incidental to the operation of the university as an institution of learning, must be considered in conjunction with other trading activities. Thus, Lee J considered the receipt of interest or dividends from investments or leaseholds, and those activities were on a scale such that they could be regarded as part of the business carried on by the university.\(^{252}\) Accordingly, Lee J concluded that this university was a trading corporation for the purposes of the Act.

6.3.1.2 Provisions of the Act

Part V of the Act contains provisions relating to unfair practices. This section will consider only provisions relating to misleading and deceptive conduct (s.52), false representations (s.53), unconscionable conduct (ss51AA and 51AB), and misleading conduct in relation to services (s.55A). It 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.’

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.

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 phrase. Re Kur­Ring-Gai Co-operative Building Society (No 12) Ltd described the terms ‘trade’ and ‘commerce’ to be 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.’

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 arm’s 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

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

255 (1978) 36 FLR 134.

256 (1978) 36 FLR 134, 139 (Bowen CJ).
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*[^257^] 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 about the manner of performing a task 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'.[^258^] 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'.[^259^]

A number of activities routinely carried on by a university in relation to its students would attract the provisions of the Act. For instance, promotional activity carried out by the university to attract students would attract the provisions of the Act.

Promotional activity may take 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


[^258^]: Ibid 601, (Mason CJ, Deane, Dawson and Gaudron JJ).

[^259^]: Ibid 603, (Mason CJ, Deane, Dawson and Gaudron JJ).
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.

After attracting the students to enrol in the institution, statements made to those students may also attract the operation of the Act. The activities of the university which relate to the student body may take on a number of forms. For instance, perhaps a lecturer delivers 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 gives 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 resemblance 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*[^260] 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,[^261]

> [r]epresentations designed to attract investment are analogous to representations made about the terms of a contract of employment. *Concrete Constructions* made 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.[^261]

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.[^262] 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. 263 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:

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. 264

This matter was considered in a slightly different context in Fasold v Roberts. 265 Roberts delivered lectures which were arranged by an unincorporated association known variously as the ‘Noah’s Ark Foundation’, ‘Noah’s Ark Research Foundation’, ‘Noah’s Ark Research Project’ and ‘Ark Search’. The organisation raised its funds primarily through the sale of tapes from the lectures and attendance fees. It was alleged that

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263 McCabe, above n 261, 170-5.

264 Ibid 174.

statements made in the lectures were misleading and deceptive. Roberts asserted, inter alia, that he had discovered Noah's Ark.

The case attracted extensive media interest, 'doubtless', in the words of Sackville J, 'because it has been thought by some to be yet another contest in the legal arena between science and what is sometimes referred to as "creation science"'\(^\text{266}\). The notoriety of the case arose because the background of the dispute was the public statement and defence of the position that a particular geological formation in Turkey was or could contain the remnants of Noah's Ark, 'thereby providing tangible evidence of the literal truth of the account of the great flood in Genesis, 6:13 - 8:19.'\(^\text{267}\) The case, however, did not directly involve discussion of such fundamental issues; the applicant, Professor Plimer, did not attempt to establish the invalidity of the hypothesis. He attacked particular statements made by the respondent, Dr Roberts, in the course of lectures and in publications.

If he had framed his argument more widely, the case may have had an even more interesting conclusion. Nevertheless, the issues raised are significant in their application to one of the few undisputed roles of the modern university - avoidance of litigation. The context in which the statements arose - in public lectures - suggests the question: to what extent are lectures provided by universities brought under the provisions of the \textit{Trade Practices Act 1974} (Clth)\(^\text{268}\)?

As originally stated, the case would have been more spectacular; 'as the case progressed, the issues were narrowed. In particular, the way in which the applicants put the case based on misleading and deceptive conduct was considerably narrower than the affidavits filed in the proceedings might have suggested'.\(^\text{268}\) In the end the case was quite prosaic; the applicants contended that Dr Roberts misrepresented his qualifications

\(^{266}\) (1997) 145 ALR 548, 557.

\(^{267}\) Ibid 556-7.

\(^{268}\) Ibid 559.
and the nature and extent of his investigations at the site in contravention of section 52 of the Act - the prohibition against misleading or deceptive conduct or conduct which is likely to mislead or deceive. To bring these representations within s.52 they have to be made by a corporation in trade or commerce.

The relevance of this case for universities is the question of the extent to which the conduct of Dr Roberts in giving the lectures constituted activity ‘in trade or commerce’. Other questions arose in the case which are of tangential relevance to universities, but the central question is whether lectures could be conduct ‘in trade or commerce’. This question is important because, as has long been accepted, not everything done by a corporation engaged in trade or commerce is done in trade or commerce, and although in these days of privatised universities, consultancies and full fee paying students the university could be said to be a trading corporation, the provision of a lecture may not be conduct in trade or commerce.

The result in the case was that, although there had been misleading and deceptive conduct by the respondent, no liability arose because the conduct was not in trade or commerce:

I have found that some of the representations made by Dr Roberts were false. In particular, I have found that his representation that he had personally undertaken or participated in systematic investigations at the Site and had personally carried out scientific tests on objects retrieved from the Site, was false. Even so, the applicants are not entitled to any relief under the Fair Trading Acts or the TP Act because of the conclusion I have already reached that none of the representations was made in trade or commerce.

One other, rather more philosophical point may be made; the case illustrates a

269 See in particular Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594.

fundamental restraint applicable to the Act. In the course of his judgment, Sackville J said:

I make one additional observation. This case demonstrates that there are limits to the scope and reach of the TP Act and the Fair Trading Acts. Not every false statement attracts a legal remedy, under the legislation. This reflects a broader principle, namely, that the legal system cannot and should not attempt to provide a remedy for every false or misleading statement made in the course of public debate on matters of general interest. The simple fact is that some issues - no matter how great the passions they arouse - are more appropriately dealt with outside the courtroom.271

It is likely that statements made during the course of a normal lecture series conducted by a university would not be in trade or commerce. Questions arise, however, in relation to lecture series which attract fees, or which are provided on a consultancy basis. Plimer v Roberti72 does not address this question.

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.

271 Ibid 597. See above n 265.

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.

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'.

Section 51A may be relevant in some circumstances. Section 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, as in some of the situations above, it will be considered to be conduct which will 'lead into

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error'. So, for instance, where a course co-ordinator gives 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.*

- 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.

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

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274 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 198 (Gibbs CJ).

275 (1982) 42 ALR 177.
material of the other institution.

The acceptance of a student into a course will give rise to a number of implied representations on the part of the university: that the student has the language skills to give the student a chance to complete the course,276 and the 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 importantly, to implement and maintain a system of compliance with these principles.'277 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 salesmen are models of good practice when contrasted with the representatives of some UK universities and polytechnics'.278

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 or lecture theatres to satisfactorily support the students. There is an implied

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276 Of course, if the student has made representations that he or she has an appropriate facility in the language required by the institution, the university will not have made the implied representation.


promise upon recruiting the student that there will be sufficient accommodation. 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. 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'. 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 incurs 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. In all of these cases it may be argued that the student has also incurred costs relating to texts, living expenses, relocation expenses and so on which are attributable to the conduct of the defendant.

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280 Wardley Australia Ltd v Western Australia (1992) 175 CLR 514, 525 (Mason CJ).
Similarly, a student who enrolled in a course on the basis that it would contain the advertised subject-matter may recover the cost of the course if it could be established that damage occurred as a result of the omission of that subject matter, perhaps because the professional accreditation requirements could not be met and the student could not otherwise gain a benefit in having completed the course. However, where a student has enrolled in a course as a result of a misrepresentation, completes the course and then sues, the benefits to the student arising from the completion of the course will have to be considered in determining whether damage has occurred and if so, in what amount.

In *Fennell v Australian National University* [281] a student instituted proceedings against the Australian National University ("the ANU") claiming that he was induced by false representations to enrol in the Master of Business Administration (Managing Business in Asia) Program offered by the ANU. The fee for the program was $25,000. The representation referred to by the applicant was that the MBA course included a twelve week supervised work placement in Asia and that the ANU would arrange a work placement in Asia for him in that semester. He claimed that the representation was made in an advertisement published in the *Age* newspaper and that it was reinforced, or not contradicted, in an interview with a co-ordinator of the course prior to enrolment. The MBA Course Handbook for the relevant year specifically stated that the primary responsibility for finding a placement lay with the individual candidate, but the applicant gave unchallenged evidence that he did not receive a copy of the Handbook until after he had enrolled in the course.

As already noted, section 52 does not, of itself, create liability. In *Fennell* the applicant acknowledged difficulties in establishing the existence of damage. He sought damages or compensation pursuant to s.82 or alternatively s.87 of the *Trade Practices Act*, relying on the fact that he had been out of full-time work from April 1996 until 30 October 1997, at which time he obtained a position. He claimed damages equalling the amount he would have earned had he remained in his previous employment, and an additional amount for 'distress, anxiety and upset'. His difficulty in establishing

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damage arose from the fact that in October he did find a job for which he obtained a far higher salary than he had received in his previous position, and the increase in salary was attributable to his additional qualification. His claim for damages failed to take into account the economic benefits flowing from completion of the program. In *Marks v GIO Australia Holdings Ltd*\(^\text{282}\) the court said that it was necessary that a comparison be made between the actual position of the party and the position he would have been in save for the contravening conduct. In *Marks* the court said that central to all forms of economic loss,

when it is said that the loss was, or will probably be, caused by misleading or deceptive conduct, is that the plaintiff has sustained (or is likely to sustain) a prejudice or disadvantage as a result of altering his or her position under the inducement of the misleading conduct. ... A party that is misled suffers no prejudice or disadvantage unless it is shown that that party could have acted in some other way (or refrained from acting in some way) which would have been of greater benefit or less detriment to it than the course in fact adopted.\(^\text{283}\)

In the context of a student who, having successfully completed a course, then complains about a misrepresentation or misleading or deceptive conduct which induced him or her to enrol in the course, the question of damage is likely to be influenced by this consideration.

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 less those that would have been incurred at the other institution and,

\(^\text{282}\) (1998) 196 CLR 494.

\(^\text{283}\) Ibid 513-14.
perhaps, for lost opportunity, 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

284 Sellars v Adelaide Petroleum NL (1994) 179 CLR 332.
services.

The term false has been interpreted to mean 'contrary to fact'\textsuperscript{285}. ‘Supply’ is defined inclusively; in relation to goods it includes supply by way of sale, exchange, lease, hire or hire-purchase. In relation to services it includes supply by provision, grant or conferral.\textsuperscript{286} 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.\textsuperscript{287}

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 dictionary definition of ‘quality’ as an ‘attribute, property, special feature... the nature, kind or character (of something)’ has been accepted.\textsuperscript{288} Section 53(c) and (d) could be breached by an assertion that a course offered by an institution was accredited by a professional organisation.

Like s.52, 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. Further, s.53 will attract criminal as well as civil consequences.

\textsuperscript{285} Given v CV Holland (Holdings) Pty Ltd (1977) 29 FLR 212, 217.

\textsuperscript{286} Trade Practices Act 1974 (Cth) s.4.

\textsuperscript{287} Gwen v Pryor (1979) 39 FLR 437, 441.

\textsuperscript{288} Given v C V Holland (Holdings) Pty Ltd (1977) 29 FLR 212, 216.
Section 55A provides 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 provides 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.

Section 51AA of the Act states 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 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 and Commercial Bank of Australia Ltd v Amadio. The circumstances which may give rise to issues under this section recall those relevant to the English legislation relating to fairness in consumer contracts. For instance, an attempt to include in the contract with the student unreasonable restrictions, or to take advantage of a strong position in the market to charge unreasonably high fees, could

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289 (1956) 99 CLR 362.
291 See references above to the Unfair Contract Terms Act 1977 (UK) and the Unfair Terms in Consumer Contracts Regulations 1994 (UK).
attract the unconscionability provisions.

(e) Section 51AB

Section 51AB provides 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 domestic fee-paying students or overseas students is a possible source of potential liability. Even the marketing of courses to domestic HECS students could be caught by these provisions, as a ‘possible supply’ of services. Further, any attempt to exclude liability for poor courses, or unavailability of subjects could be caught by these provisions. 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'. 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) states:

[i]n 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.

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 for the purposes of the Act. Some circumstances are clearer than others; full-fee paying students are a clearer case of contract than those students paying on a HECS basis, where consideration is not clear. *E v Australian Red Cross Society*, which deals with the liability of the Red Cross and a hospital for damage caused by the supply of blood contaminated by HIV, 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,

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although it was a contract for the supply of services. The matters relevant to the existence of a contract between the university and the student, considered in chapter three, are also relevant here. 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\(^293\) said that 'supply' is a word of wide import and neither s.4C nor the definition in s.4 require any restrictive interpretation 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 difficulties in determining the application of the Act to university matters. Section 4 of the Act defines 'business' to include a business not carried on for profit. E v Australian Red Cross Society\(^294\) may provide an analogy. In that case Wilcox J said:

> [t]hen 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, [Concrete Constructions (NSW) Pty Ltd v Nelson]\(^295\) Mason

\(^{293}\) (1985) 7 FCR 509, 532 (Lockhart J).
\(^{294}\) (1991) 27 FCR 310.
\(^{295}\) (1990) 169 CLR 594
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, by 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’.296

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*297 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

297 (1991) 27 FCR 310, 354-5 (Wilcox J). On appeal the Full Court did not find it necessary to decide whether the patient was a consumer: (1991) 31
not be regarded as a consumer. In the case of a university, it is necessary to also consider the amount paid. A problem arises firstly with the definition of the university-student contract. As outline in chapter six, one view is that there are two contracts - a contract of matriculation and a contract of enrolment. Further, the contract of enrolment could be considered to be renewed each year, or each semester upon re-enrolment. Comalco Aluminium Ltd v Mogal Freight Services Pty Ltd \(^{298}\) suggests that the overall scope of a contract should be considered, rather than artificially compartmentalising it into separate contracts - in that case contracts of packing and carriage. Sheppard J said that the words 'contract for the supply ... of services to a consumer' in subsection 74(1) should be construed broadly and in a common sense and commercial way. The argument was based on the exception in s.74(2) relating to the transportation of goods, which is hardly relevant here, but a broad, common sense construction of the university-student contract would look at the entirety of the academic services offered by the university to the student over the entire proposed course. If it were otherwise absurd results may ensue: students would be contracting only for a semester, or for an academic year, so that during the non-instruction period between semesters or academic years they would not be entitled to be on campus, even though their enrolment would normally continue until the next re-enrolment period. Supplementary or special examinations, which are commonly held outside a normal academic year, would not be covered by the university-student contract, so that the student would not have a claim in contract for adherence to university rules for the conduct of those procedures, despite a number of authorities to the effect that university rules form part of a contract. \(^{299}\)

On any definition of the university-student contract, it is conceivable that a course could cost in excess of $40,000 in total, in which case it is necessary to consider whether a university degree is of a kind ordinarily acquired for personal, domestic or household use or consumption.

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\(^{298}\) FCR 299, 305 (Lockhart J).

\(^{299}\) See the discussion as to the nature and content of the university-student contract in chapter three.
The expression ‘personal, domestic or household use or consumption’ can be read disjunctively, and the words can be given their ordinary meaning.\(^{300}\) Whereas it may be difficult to conceive of a degree purchased by a student as a domestic or a household acquisition, it is possible to consider it as purchased for personal use. Some question arises as to the application of the degree - is it the intention of the statute to discriminate between degrees purchased to be applied in the practise of, say, law or medicine, and generalist degrees such as the liberal arts? It is not necessary that the degree be actually applied for a personal purpose - it need only be ordinarily acquired for that purpose.\(^{301}\) Again, artificial distinctions between the types of course would lead to absurd results. It is difficult to conceive of any more personal contract than the provision of educational services to an individual.

Aside from the question considered in chapter 3 - whether students enrolled on a HECS basis have a contract with the university for educational services - there seems no reason why services provided by a university to a student should not be affected by the implied and non-excludable term that the services are rendered with due care and skill and are fit for the purpose for which they are acquired.

Two final questions arise: what constitutes ‘reasonable fitness’ in the context of provision of education? Correspondingly, when will a student have made known, ‘expressly or by implication’ any particular purpose for which the services are required or the result that he or she desires?

The concept of ‘reasonable fitness’ in relation to a university degree or course offering


\(^{301}\) Carpet Call Pty Ltd v Chan (1987) ATPR (Digest) 46-025 - an item that can be classified as domestic does not lose that characteristic merely because it has commercial uses.
could be easily conceptualised in relation to a vocational degree, in which a student might have to complete a certain number of subjects or particular subjects in order to be eligible for professional admission. Similarly, it could easily be applied to a situation in which the student sought to use subjects from one institution to apply for advanced standing in that or another institution. It could also conceivably be applied to a situation in which a student sought to use certain subjects as pre-requisites for other subjects.

In *Zoneff v Elcom Credit Union Ltd*[^302^] a claim made by a claimant under an insurance policy that the policy did not cover the claimant as represented failed because, on the facts, the claimant had not either expressly or by implication, made known to the respondent that he desired the insurance to cover him for a disability which prevented him from resuming his ordinary employment.

It is possible to conceive of situations in which a student may obtain specific advice as to the subject prerequisites for a higher degree, or the requirements of professional admission in courses such as accounting or law. In those situations, incorrect advice from an administrator or academic on those matters could lead to a claim under s.74(2). Circumstances which might amount to a factual finding that the student had implied that the course was required for a particular purpose would include any representations made on course documentation or in advertisements. It is possible that a student who had enrolled in a vocational degree had impliedly indicated to the institution that the degree was to be used to practise in that discipline, particularly if the student was in a later year of the degree. However, a student who had not sought specific advice would be unlikely to be able to show that he or she had expressly or impliedly made known to the university the purpose for which the degree was sought,[^303^] especially given the number of graduates, even from vocational degrees, who do not practise in the discipline.

The suit would be based on contract, and damages might include damages for lost

[^302^]: (1990) 6 ANZ Insurance Cases 60-961.

[^303^]: This was the factual finding in relation to one of the applicants in *Zoneff v Elcom Credit Union Ltd* (1990) 6 ANZ Insurance Cases 60-961.
opportunity to study the relevant subjects and obtain qualifications or professional recognition earlier.\textsuperscript{304}

6.3.1.3 Likelihood of an action under statute

It is clear that there is a wide range of potential liability under the \textit{Trade Practices Act} 1974 (Cth) and the equivalent provisions in State Acts. Considine says

\begin{quote}
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 to some legal qualifications). Legally, then, every employee is a potential 'loose cannon on the deck.'\textsuperscript{305}
\end{quote}

The ease with which a litigant may prove liability under s.52 in particular may make the Act a more attractive alternative than an attempted action in tort.

6.4 Conclusion

The range of actions available to students for incorrect statements, decisions or representations is extensive. The degree to which the availability of causes of action would limit the number of claims brought in tort is difficult to assess, but it is likely that, for instance, claims in tort and under the trade practices legislation are coupled together and dealt with in the alternative. The student is likely to take a particular route in litigation on the basis of the ease of proving the case, limitation periods or speed of resolution. In particular, an action in tort is not appropriate where the student merely

\begin{footnotes}
\textsuperscript{304} As was sought in \textit{Zoneff v Elcom Credit Union Ltd} (1990) 6 ANZ Insurance Cases 60-961 and \textit{Warnock v ANZ Banking Group Ltd} (1989) ATPR 40-928.

\textsuperscript{305} Considine, above n 277, 36.
\end{footnotes}
seeks to impugn an administrative decision, nor will it be appropriate where damage has not resulted. The relative ease with which a student may maintain an action under consumer protection legislation has led to increasing potential liability under the legislation.
7. Conclusions

This dissertation sought to place the perception of an increasing risk of litigation in the context of the political and economic environment of the modern university to determine whether the changing environment in which the university operates has resulted in a real change in the principles determining liability. It focussed on liability arising from the 'core business' of the university - teaching.

It commenced with an account of the changing environment of the university sector; an environment characterised by increasing governmental influence and increasing calls for the university to adopt market mechanisms. It attempted to draw parallels between the pressures placed on universities as a result of these two tendencies and the position of the newly privatised utilities - those bodies operating on the 'fringes' of government. It concluded that the experience of the universities in attempting to come to terms with the type of 'regulated market' principles espoused by successive Australian governments and governments in the United Kingdom does bear affinity with that of other fringe governmental bodies. From these similarities, it attempted to draw parallels between the treatment by the common law of privatised utilities; particularly in relation to actions in negligence. It argued that the response of the universities to externally imposed principles has been to reinvent themselves in the image of private organisations, however in many cases this has been a cosmetic reinvention only, and the foundation of the university has stayed the same. Although the shift has not been without its opponents, the economic importance of higher education has ensured that it could not be permitted to resist change.

The responses of the universities to the environment of higher education have included fundamental shifts in the internal governance of higher education institutions, and changes in the way in which universities self-describe. In particular, universities have increasingly described the relationship between themselves and their students as based on contractual principles. Legal authority for this view exists, although it is preceded by ancient authorities which view the relationship as one based on status. The self-
definition accepted by the universities, however, is likely to have the effect of making the contractual description of the relationship the most appropriate one. The impact of this shift on a case in negligence is two-fold: firstly, it has started to erode the traditional reluctance on the part of the courts to intervene in disputes between the university and the student on academic matters. This reluctance was due partly to the existence of the visitor in some jurisdictions, and partly to the belief that the judiciary should not act as a court of appeal from boards of examiners. The role of the visitor is diminishing for other reasons. Conceptualisation of the university-student relationship as contractual has resulted in an increased potential for litigation because universities have obligingly enunciated their obligations in contractual terms. This has indirectly fuelled an increasing potential for litigation in tort both by encouraging suits in contract, which could be argued in the alternative, and by setting out a range of specific obligations, which act as standards by which other universities could be measured. The second effect on the potential action in tort is the effect of a concurrent action in contract, or the consequence of the existence of contractual terms on the action in tort. This matter was considered in chapter six, where it was conceded that actions in contract and tort could exist concurrently, however the existence of contractual terms could limit or exclude liability in tort.

The universities have also responded to criticisms of their internal management structures by re-inventing some management strata in the image those of a corporation managed for profit, or by creating private off-shoots of the organisation. However, the increasing range of commercial ventures entered into by universities increases the potential for contractual actions against the university. The changing structure of the university, including the adoption of the commercial corporate form, gives rise to a number of issues common to the quasi-government corporation. In particular, the ambiguous position of a statutory corporation formed and funded for public purposes but with increasingly commercial goals leads to speculation on the application of administrative law remedies. It is clear that these remedies are frequently applied to universities; the common law remedies where the matter is one of public interest, regardless of the corporate form of the body, and the statutory remedies in the
Australian jurisdictions where the matter arises under the relevant statute.

The quasi-governmental nature of the university suggests the existence of sovereign immunity from tortious action, but it is clear that such immunity cannot apply. More importantly, in a tortious action certain fact situations would require the application of the policy-operational distinction to determine the justiciability of the question. Where that threshold question is satisfactorily answered, as it would be in the majority of cases, educational negligence cases suggest that the governmental nature of the university is significant to the existence of the duty of care. Recent Australian and English cases, however, suggest that public policy is unlikely to preserve the university from liability in negligence on the basis that it would be against public policy that a duty is owed.

There are few theoretical impediments to the application of the general principles of negligence to the university in a case alleging failure to learn. It is conceivable that a duty may be owed, it is possible that that duty could have been breached, and there is potential for cases involving compensable damage to arise. Practical impediments, however, are substantial. The availability of more attractive causes of action which do not have damage as the gist of the action is the most severe of those. In some cases the jurisdiction of the visitor, where it exists, is exclusive and final, although it is necessary that the attention of the court be drawn to that jurisdiction. Since the university is a statutory authority, in an action in tort there are possible constraints on justiciability where the matter involves a policy decision, and where that threshold test is satisfied public policy matters, whilst not constituting a final impediment, are part of the number of factors to be taken into account in determining whether a duty is owed. Courts in Australia, as in the United Kingdom, are unlikely to follow the line taken in the United Kingdom on this point. The practical aspects of showing that there has been a breach of the duty of care are substantial in an allegation of failure to teach, since there are a multitude of reasons for failure to learn. Finally, although it is possible to identify cases in which compensable damage has occurred, showing causation in individual cases is likely to be difficult.
The peculiarities of the university as an institution, coupled with externally mandated change, introduce a number of interesting factors into a negligence analysis. The perception of increasing potential liability is certainly theoretically justified, but the practical difficulties of an action in negligence mean that it is unlikely that negligence will be the most attractive option for potential litigants.
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