The Marketing of University Courses under Sections 52 and 53 of the *Trade Practices Act 1974* (Cth)

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Introduction

If there was ever a notion of a university, college or school providing something other than a product or a service, or being outside the grubby world of business, business plans, and corporate strategies it has long gone. The Oxbridge tradition of learning at the feet of the aging don in an ivy coated seminary has been replaced by a more hard nosed business attitude. Educational administrators speak of education as a *product* and about providing students with services as *consumers* or *clients* and universities as *brands*, and about student recruitment as *marketing*. The term "enterprise university" has also come into the lexicon.[1] All this represents useful admissions for those who would argue that higher education, like any other product or service is, and should be, regulated under legislation such as the *Trade Practices Act 1974* (Cth) or State *Fair Trading Acts*. If this is the case, significant legal remedies flow to the damaged actual or prospective student.

The paper first describes relevant law relating to misrepresentation at common law and under statute. A series of hypothetical examples are proposed and suggestions are provided as to how the legal system might deal with these. Comments are then made which may assist in maintaining the reasonably litigation free record of universities in this area.

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1 An earlier version of this paper was presented at the NAPSA Queensland Conference, Gold Coast November 11- 13, 1998. As to universities as businesses and the enterprise university see: Considine D, "The Loose Cannon Syndrome : Universities as Businesses and Students as Consumers" (1994) 37 *Australian Universities Review* 36; Marginson S and Considine M, *The Enterprise University* (Cambridge University Press 2000); and Australian Senate, Senate Employment, Workplace Relations, Small Business and Education References Committee, *Universities in Crisis*, Canberra, 27 September 2001, Chapter 4.

The Law Relating to Misrepresentation and Misleading/Deceptive Conduct

(a) Contractual context

The common law on misrepresentation is a little more restrictive than the statutory principles which will be described shortly, but an understanding of it is necessary to comprehend the legislation.[2]

Misrepresentation law normally operates in a contractual and/or tortious context. Accordingly a court may grant rescission of a contract induced by a misrepresentation and/or allow damages for the tort of deceit or negligence. Though not without argument [3] it is submitted that students generally are in a contractual relationship with their universities. This was accepted by Allen J in relation to a doctoral student in *Bayley-Jones v University of Newcastle*[4] :

> No less untenable is the University's complaint that the plaintiff should not be allowed to rely upon breach of contract as supporting her claim to damages. In the petition she set out at great length and with fine particularity all the documentation relating to her candidacy being accepted and all the arrangements made between her and the relevant University officials. The relevant documents and the relevant rules were reproduced in full. Any lawyer reading the petition would have been evincing a remarkable lack of perspicacity if his mind did not turn immediately to the law of contract. The word "contract" is not used. The expression "breach of contract" is not used. But the relevant facts are alleged. One can have contractual rights which are a reflection of the rules of the University. Where in such a case what constitutes the breach of contract is breach of the rules of the University the Visitor' jurisdiction, which is exclusive, is attracted. In my opinion it is clear that in the present case the plaintiff is entitled

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2 In one way the common law is more expansive. It does not contain certain restrictions contained in the statute, specifically that the conduct occur "in trade and commerce", as in ss 52 and 53 of the *Trade Practices Act 1974* (Cth), or in the "course of a business" under s 74 of the *Trade Practices Act 1974* (Cth).

3 See Rorke F, "The Application of the Consumer Protection Provisions of the *Trade Practices Act 1974* (Cth) to Universities" (1996) *QUTLJ* 176 at 176 but compare Considine D, Note 1 at 37

4 *Bayley-Jones v University of Newcastle* (1990) 22 NSWLR 424.

> to rely upon any breach of contract between her and the University which was involved in the ultra vires purported termination of her candidacy.[5]

In that case it was argued that the university misapplied rules relating to the termination of Ms Bayley-Jones' doctoral candidature.[6] Allan J held that these rules were contractual.

Analysis of the position under contract law does not form the basis of detailed discussion in this paper though the possibility of students bringing breach of contract actions against universities is very real. In the United States it has been held that the relationship is contractual:

> It is held generally in the United States that the "basic legal relation between a student and a private university or college is contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract."[7]

In the United Kingdom Farrington notes that "the status of students has changed irrevocably…to one of a consumer of services."[8] Citing the effects of certain United Kingdom legislation he continues:

> All students are in effect consumers contracting with an institution to purchase those services which are themselves provided under a separate contract with the state.[9]

The possible status of students as members and corporators under university statutes[10] could also give rise to a contractual relationship

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5 Note 4 at 436.

6 Note 4.

7 Per Ripple J, in *Ross v Creighton University* 957 F.2d 410 (7th Cir, 1992) extracted in Olivas M, *The Law & Higher Education: Cases and Materials on Colleges in Court*, 2 Ed, Durham, 1997, 689 at 693

8 Farrington DJ, *The Law of Higher Education*, Butterworths, London, 1998 at 307

9 Note 8 and see Chapter 4 generally. See also Evans GR, and Gill J, *Universities and Students: A Guide to Rights, Responsibilities, and Practical Remedies*, Times Higher Education Supplement, London 2001. The authors state that the student relationship is a contractual one, (at 31) though they also acknowledge that some students will have rights as members. (at 37)

under the company law principle in *Hickman v Kent and Romney Marsh Sheep-Breeders Association*[11].

Breach of contract actions may relate to the failure of the institution to follow its rules, provide a service, or could go to the quality or fitness for purpose of the service provided. The American courts have held:

> To state a claim for a breach of contract, the plaintiff must do more than simply allege that the education was not good enough. Instead he must point to an identifiable contractual promise that the defendant failed to honor.[12]

In Australia the "identifiable contractual promise" might arise expressly or impliedly under common law or statute, including the implied conditions relating to service quality under s 74 of the *Trade Practices Act 1974* (Cth), assuming a university can be said to be acting in the "course of a business" as required under that section. As will shortly be discussed, there is significant doubt as to whether a lecturer incompetently delivering a series of lectures could be said to be engaging in misleading and deceptive conduct under s 52 of the Trade Practices Act or engaging in trade and commerce in so doing. Nevertheless, and lest this lawyer also be charged with Allen J's "remarkable lack of perspicacity" in analysing a student/university contract, there is an implied term that the educational services under the contract will be delivered with due care and skill.[13]

(b) Misrepresentation at Common Law

To establish a misrepresentation a plaintiff must show that before or at the time of a contract the other party made a false statement, of fact,

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10 This is discussed in Jackson J and Cowley J, "Blinking Dons or Donning Blinkers: Fiduciary and Common Law Obligations of Members of Governing Boards of Australian Universities" (2002) 6 *Southern Cross University Law Review* 8 at 46

11 *Hickman v Kent and Romney Marsh Sheep-Breeders Association* [1915] 1Ch 881

12 *Ross v Creighton University* 957 F.2d 410 (7th Cir, 1992) extracted in Olivas M, *The Law & Higher Education: Cases and Materials on Colleges in Court*, 2nd ed, Durham, 1997 at 689 per Ripple J. (at Olivas 693)

13 Though there will be an argument about what is the appropriate level of skill required in a University. In a non university context see *Fanhaven Pty Ltd v Bain Dawes Northern Pty Ltd* (1975) 50 ALJR 402

which was intended to induce him / her to make a contract; and which did so in fact. As a general rule mere silence, or non-disclosure, does not amount to a representation. [14]

The requirement that there be a statement of fact excludes statements of law, of opinion or mere puffs.[15] A statement of opinion may also imply a statement of fact that there were reasonable grounds for holding the opinion.[16] A stricter position under the *Trade Practices Act 1974* (Cth) will be discussed later. Rescission or damages at common law will not be available to a plaintiff if the representation did not in fact deceive or mislead.

False statements may be made innocently or fraudulently; the distinction affects the remedies available to an injured party, damages not being available for innocent, non negligent conduct. A misrepresention will be innocent if it is untrue and there is no intention to mislead and no knowledge of the falsity. An innocent misrepresentation can also be a negligent misrepresentation where the statement is made carelessly by a person owing a duty of care to the person to whom the statement was directed.[17] In a fraudulent misrepresentation the statement is made knowing it was false, or recklessly as to whether it was true or false.[18]

In a university context it is not anticipated that misrepresentations made in promotional material will be made fraudulently, a matter notoriously difficult to prove. Furthermore in negligence law proving the existence of a duty of care to prospective, and as yet unidentified students will be difficult at law and very expensive to prove and litigate. This could leave a student damaged by an innocent misrepresentation without an effective common law remedy. In any

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14 *Smith v Hughes* (1871) LR 6 QB 597. This will not be the case if there has been some partial disclosure on the subject: *Dimmock v Hallett* (1866) LR 2 Ch App21; or where a statement true at the time of making later becomes false to the knowledge of the maker before the contract is complete: *With v O'Flanagan* [1936] Ch 575: or where the parties are in a fiduciary relationship.

15 Nevertheless a statement of opinion could imply a statement of fact that the opinion was held, thereby allowing a remedy: *Smith v Land and House Property Corp*. (1884) 28 Ch.D 7

16 Note 15

17 See *Hedley Byrne v Heller* [1964] AC 465; *Shaddock v Parramatta City Council* (1981) 55 ALJR 713; *Council of Sutherland v Heyman* (1985) 157 CLR 424; (1985) 59 ALJR 564

18 *Derry v Peek* [1886-90] All ER Rep 1.

case, normally a student can withdraw from a course and there may be no need for formal rescission of an enrolment contract. The case for rescission may be stronger if the student is well into his/her course because this would give an opportunity to seek a refund of fees paid. However at that stage the remedy may not still be available to the student because of effluxion of time or delay,[19] affirmation,[20] execution[21] or the intervention of third party rights.[22]

It follows that the important remedy of damages often will not be effective or available to a student at common law. Furthermore given that damages may be difficult to quantify and students often have insufficient funds to pursue a claim, the best remedy may be complaint to a government department charged with the responsibility of pursuing such matters. At common law the student may have been limited to the visitorial jurisdiction, and even this has been removed in New South Wales. Fortunately modern consumer law provides a number of State and Federal departments to whom the complaint can be taken. I now turn to that law.

(c)Statutory Misrepresentation and Misleading and Deceptive Conduct – *Trade Practices Act 1974 (Cth)* Sections 52 and 53

Section 52 provides:

> *(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*
>
> *(2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subsection (1).*

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19 *Leaf v International Galleries* [1950 2 KB 86

20 *Coastal Estates Pty Ltd v Melevende* [1965] VR 433

21 *Seddon v North Eastern Salt Co Ltd* [1905] 1 Ch 326, though the rule in *Seddon's case* is not without controversy, see for example the discussion in *Vimig Pty Ltd v Contract Tooling Pty Ltd* (1986) 9 NSWLR 731

22 This raises interesting legal issues in relation to the remission of the statutory charge under the Higher Education Contribution Scheme, (HECS) if for example the HECS liability had been generated under a voidable contract which had been induced by a university's misrepresentation.

The section is not limited to actions directly against "consumers" in any narrow sense of that term. Accordingly the section is often used by one business against another. In theory, the section could be used by one university against the misleading marketing practices of another.

The respective elements in this section will now be discussed in the context of universities.

(I) A corporation

The conduct must be performed by a trading, financial or foreign *corporation* but there are technical devices to extend the constitutional operation of the Act. As will shortly be discussed, a university has been held to be trading corporation.[23] In any case, the Fair Trading Acts mirror these provisions and typically catch a *person* a term which includes corporations, trading, financial, foreign or otherwise.

(II) Trade and Commerce

The conduct must occur *in* trade and commerce and not merely *with respect to* trade and commerce. This fine distinction was drawn by the High Court in *Concrete Constructions Pty Ltd v Nelson* [24]. This limits the operation of the section,[25] and raises the issue whether professionals or bodies such as universities, colleges, or schools are engaged in *trade and commerce*?

Useful analogies can also be drawn from the professions: In *Bond Corporation Pty Limited v Theiss Contractors Pty Ltd & Ors*[26] it was argued, inter alia, that services provided by a member of a profession were not conduct in trade or commerce for the purposes of s 52(1) of the Act and that a professional is engaged in what is "essentially an

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23 *Quickenden v Commissioner O'Connor of the Australian Industrial Relations Commission* [2001] FCA 303 (23 March 2001)

24 *Concrete Constructions Pty Ltd v Nelson* (1990) 92 ALR 193.

25 See *Concrete Constructions (NSW) Pty Ltd v Nelson* note 24, and note the distinction drawn by the High Court between conduct "in trade and commerce" and conduct "with respect to trade and commerce*": Larmer v Power Machinery* (1977) 29 FLR 490. In the latter case even though brochures were not widely displayed the conduct took place in trade or commerce. See also *Finucane v NSW Egg Corporation* (1980) 80 ALR 486

26 *Bond Corporation Pty Limited v Theiss Contractors Pty Ltd & Ors* (1987) ATPR 40.771

intellectual activity and not an activity of a commercial or mercantile kind". In response to this argument, French J. considered a number of relevant cases, sections 4 and 53 of the Act, the views expressed in the 1976 Report of the Trade Practices Review Committee and various interpretations of the concept of a "profession". He concluded:

> where the conduct of a profession involves the provision of services for reward then in my opinion, even allowing for widely differing approaches to definition, there is no conceivable attribute of that aspect of professional activity which will take it outside the class of conduct falling within the description "trade or commerce".[27]

He was then able to conclude that s 52 of the Act was applicable to the giving of advice by a consulting engineer. He cited the judgment of Mr Justice Dixon in *Bank of New South Wales v The Commonwealth*[28] where Dixon J said:

> It has been said that "trade" strictly means the buying and selling of goods. That, however, is a specialized meaning of the word. The present primary meaning is much wider, covering as it does the pursuit of a calling or handicraft, and its history emphasises rather use, regularity and course of conduct, than concern with commodities.[29]

Later in his judgment, Dixon J, speaking of the expression "trade commerce and intercourse" in s 92, stated:

> The conception covers, in the United States, the business of press agencies and the transmission of all intelligence whether for gain or not. Transportation, traffic, movement, transfer, interchange, communication, are words which perhaps together embrace an idea which is dominant in the conception of what the commerce clause requires. But to confine the

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27 Note 26 at 48,386. But there are decisions which suggest otherwise, see *Holman v Deol* [1979] 1 NSWLR 640.

28 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1

29 Note 28 at 381

> subject matter to physical things and persons would be quite out of keeping with all modern developments. [30]

These definitions suggest that universities should assume that they are engaged in trade or commerce. This conclusion is strengthened by *Quickenden v Commissioner O'Connor of the Australian Industrial Relations Commission*[31] where the full Federal Court had to examine whether the University of Western Australia was a trading corporation for the purposes of s 51(xx) of the Constitution. The issues concerned the constitutional application of the *Workplace Relations Act 1996* (Cth) to Universities. The University argued it was a trading corporation and this was accepted by the Full Court, though the Court did not accept that all of the university's activities were trading, regarding as "questionable" whether "provision of educational services within the statutory framework" was trading. Black CJ and French J concluded:

> The University also submitted that the fees charged by it for courses are fees for services notwithstanding that they are regulated by legislation and ministerial guidelines. So it was said that under the *Higher Education Funding Act 1988* (Cth) the regulation of fees is a condition of receiving Commonwealth grants and not a requirement imposed directly by law. The guidelines themselves, it is said, do not limit the University in such a way as to deny the fees the character of payment for services and facilities provided in the courses offered by the University. No limits are imposed on the number or content of the courses nor on their promotion or design, nor on ancillary matters such as accommodation and other student benefits which may attract potential students. Specifically, in respect of payments made by the Commonwealth to the University under the *Higher Education Funding Act* it is said that they should properly be characterised as revenue from trading activities. The argument is put thus. Some students pay HECS contributions directly to the University. That is, they pay a fee for services rendered to them. In 1995 fees paid in this way amounted to $8.849

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30 Note 28 at 381-2

31 Note 23

> million. HECS payments by the Commonwealth to the University in that year amounted to $17.318 million. Those payments, it was submitted, should also be characterised as revenue derived from trading.
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> It is questionable whether the provision of educational services within the statutory framework of the *Higher Education Funding Act* amounts to trading. The Act creates a liability for each student to the University in respect of each course of study undertaken in a semester. The amount is not fixed by the University but rather by the Minister under published guidelines. The concept of "trading" is a broad one. It is doubtful, however, that it extends to the provision of services under a statutory obligation to fix a fee determined by law and the liability for which, on the part of the student, appears to be statutory. For present purposes, however, this aspect of the claimed trading activities can be disregarded. For it is plain that the other activities cited are trading activities and are a substantial, in the sense of non-trivial, element albeit not the predominant element of what the University does. The University was not established for the purpose of trading and at another time, closer to the time of its creation, it may not have been possible to describe it as a trading corporation. But at the time relevant to this case and at present, it does fall within that class.
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> It may be added that the characterisation of a body corporate as a trading corporation is a matter of fact and degree. Dr Quickenden has been unable to point to any error in that assessment on the part of the learned primary judge. As to the status of the University as a financial corporation that too is established on the evidence. His Honour's reasons and findings in that respect also are not shown to have been in error.[32]

Recognition of a university as a trading corporation certainly removes any constitutional defence universities might seek to use, even though many of the Part V Div 1 provisions under discussion are repeated in

[32] Note 23 at paras 50, 51 and 52

state legislation. The court's comments raise the issue that certain conduct, for example, teaching itself may not be in trade or commerce. This echoes the approach in *Plimer v Roberts* [33] where the Federal Court of Appeal held that misrepresentations made in a public lecture were not made in trade or commerce. The Court was undecided as to whether the organisation which ran the lecture series (a non profit organisation) was engaged in trade or commerce in charging for admission to and selling recordings of the lecture series, though two of the judges appeared to regard this as trade.

In the light of that latter suggestion from *Plimer*, the finding of a contract in *Bayley-Jones v University of Newcastle*, and the decision in *Quickenden*, universities *should* assume that their promotional activities are caught.[34] It is far less likely under *Concrete Constructions* and *Plimer* that an ill prepared lecture containing misleading lecture material would have occurred in trade and commerce, though, as noted earlier, a breach of contract action might be available in such a situation.

High schools and TAFE colleges would have more success in arguing that they are non-profit state instrumentalities and do not operate in trade or commerce. The far greater independence of universities from state direction and control would lessen the likelihood of any defence based on crown immunity. [35]

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[33] *Plimer v Roberts* (1997) 150 ALR 235

[34] A point made convincingly by Rorke F, Note 3 at 188.

[35] In *Clarke v University of Melbourne* [1979] VR 66 the Full Court of the Supreme Court of Victoria found "no reason for identifying the University with the Crown, or as a governmental agency of any kind…." (at 73). See further Rorke F, Note 3. After that article was written a Full Bench of the Australian Industrial Relations Commission was asked to determine whether Australian universities are agents of the state. In finding that they were not, the Commission had to examine the nature of a university. It stated: "The passages quoted from *Halsbury* identify the character of a university as an incorporated charitable foundation of a distinctive rank. The characteristics of the foundation include the status and personality of a corporate body, established by an instrument of foundation emanating in those times from the Crown. The staff and students are the primary constituents of the corporate body together with the organs of management of it…" *National Tertiary Education Industry Union and Australian Higher Education Industrial Association* 526/98 N Print Q0702
http://www.osiris.gov.au/html/decisions/98/MISC-98/2/IA011590.htm, at para 2.3.3 citing *Halsbury's Laws of Australia* Vol 10 Chapter 160 at 302 – 411.
On state immunity see *Bradken Consolidated Ltd v Broken Hill Pty Co Ltd* (1979) ATPR 40-106. Section 2B of the Trade Practices Act has removed state crown immunity for Part IV, but not part V which includes s.52. However the *Fair Trading*

(III) Conduct that is Misleading or Deceptive

In establishing whether the conduct is likely to mislead or deceive proof that an individual was actually misled or deceived is not required, though if a person is seeking damages then that person will have to show that the conduct caused the loss. It is clear from the decision in *Hornsby Building Information Centre v Sydney Building Information Centre*[36] that it is not necessary to prove an intention to mislead. Any doubt was removed when the section was amended in 1977 to include the words "likely to mislead or deceive". The relevant section of the public must be identified, but there is no need to show that the public generally would have been misled by the conduct.

Accordingly marketing will be evaluated in light of its target audience. In *CRW v Sneddon*[37], a case under the (now repealed) *NSW Consumer Protection Act*, it was stated: "the advertiser must be assumed to know that the readers will include both the shrewd and the ingenious, the educated and the uneducated and the experienced and the inexperienced in commercial transactions". But in *Parkdale v Puxu*[38] Gibbs CJ thought that the class to be considered is the class of consumers likely to be affected by the conduct. He qualifies the general rule from *Sneddon's case* in favour of a rule which tests the effect of the conduct on reasonable members of the class likely to be affected by the conduct. [39]

Acts generally remove state immunity, making state instrumentalities subject to action, though generally not prosecution. The provisions removing immunity vary from state to state. In NSW s.3 of the *Fair Trading Act* states: "This Act binds the Crown in right of the State in so far as the Crown in right of the State carries on a business, whether directly or by right of the State. (2) Nothing in this Act renders the State liable to prosecution for an offence."

36 *Hornsby Building Information Centre v Sydney Building Information Centre* (1977) 140 CLR 216

37 *CRW v Sneddon* (1972) 72 AR (NSW) 17

38 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 199

39 In *TPC v Annand and Thompson* (1979) ATPR 40.116 the trade meaning of the word "new" in relation to motor vehicles which had been held in storage was not to be taken as the yard stick: "the test is whether in an objective sense the conduct of the appellant was such as to be misleading or deceptive when viewed in the light of the type of person who is likely to be exposed to that conduct. Broadly speaking, it is fair to say that the question is to be tested by the effect on a person, not particularly intelligent or well informed, but perhaps of somewhat less than average intelligence and background knowledge, although the test is not the effect on a person who is for example quite unusually stupid" per Franki J

In the case of universities one target student population is made up of younger adults, but it must not be forgotten that at the time these students are recruited they are often under 18 and regarded as children in the eyes of the law.[40] Given the special place and trust given to universities as knowledge discovers and disseminators[41] one can expect little sympathy from courts for any level of sharp practice in course promotion where the section of the audience largely is made up of children.

(IV) Remedies for breach of Section 52

Section 52 is very wide in scope but it is not criminal. This should be compared to s 53 considered below which has criminal and civil sanctions. The possible consequences of breach of s 52 are very wide, but commonly include injunctions and damages awards.

(V) Promises and predictions

Section 51A provides:

> *(1) For the purposes of this Division, where a corporation makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.*
>
> *(2) For the purposes of the application of subsection (1) in relation to a proceeding concerning a representation made by a corporation with respect to any future matter, the corporation*

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40 see for example section 9(1)of the *Minors (Property and Contracts) Act 1970* (NSW) which sets 18 as the *sui juris* age. Many potential university students will be below this age when targeted and often below this age on commencement of their university course.

41 See for example the *Universities Legislation Amendment (Financial and Other Powers) Act 2001* (NSW) which provides that all New South Wales universities now have as a common function:
(2) The University has the following principal functions for the promotion of its object:
(b) the encouragement of the dissemination, advancement, development and application of knowledge informed by free inquiry.

> *shall, unless it adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation.*
>
> *(3) Subsection (1) shall be deemed not to limit by implication the meaning of a reference in this Division to a misleading representation, a representation that is misleading in a material particular or conduct that is misleading or is likely or liable to mislead.*

Speaking of s 51A Heerey J said in Peter Sykes & Ors v Reserve Bank of Australia[42]:

> The ordinary s 52 misrepresentation is treated as misleading or deceptive even if the representor be innocent of fraud or negligence. Section 51A, a subset of s 52, applies that strict liability to representations as to future matters. The only difference is a concession in favour of representors. Liability is avoided - in contrast to the ordinary s 52 case - if the representor had reasonable grounds for making the representation. Subject only to that, a representor as to a future matter cannot be heard to say that the occurrence or non-occurrence of the future event was unpredictable, any more than the s 52 representor can say that the untruth of his or her representation was not reasonably to be expected.[43]

Noting this, an understanding of section 51A is *vital* to any university marketing department. Where a representation is made as to any future matter the onus of proof shifts to the person who made the representation requiring that person to show that there were reasonable grounds for making the representation. If this onus cannot be discharged then the representation will be taken as misleading. The importance of this onus on educational marketers will be shown in the discussion of hypothetical situations, post.

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42 *Peter Sykes & Ors v Reserve Bank of Australia* [1998] 1405 FCA (6 November 1998)

43 Note 42

(VI) Section 53

Only those parts of section 53 of likely relevance are reproduced below.

Section 53 provides:

> *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;*
>
> *(bb) falsely represent that a particular person has agreed to acquire goods or services;*
>
> *(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;*
>
> *(e) make a false or misleading representation with respect to the price of goods or services;*
>
> *(f) make a false or m*isleading representation concerning the need for any goods or services;

The matters described in this section may give rise to criminal and civil penalties. Damages action could be brought against the institution and "any person involved in the contravention"(s 82). Criminal prosecutions can be brought against those who aid and abet, or are "in any way, directly or indirectly, knowingly concerned in, or party to, the contravention (s 79).

It is not necessary to show that the person making the representation knew it was false[44] but lack of knowledge may bring about a s 85 defence such as reasonable mistake or reliance on another person. Section 85 only provides a defence against criminal prosecutions.

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44 *Given v C V Holland (Holdings Pty Ltd)* (1977) 29 FLR 212; *TPC v The Vales Wine Company Pty Ltd* (1996) ATPR 41-480

Unlike s 52, s 53 is limited to goods or services. There is a detailed definition of services in s 4. This includes:

> Any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce, and without limiting the generality of the foregoing, includes the rights, benefits, privileges and facilities that are, or are to be, provided, granted or conferred under:
>
> (a) a contract for or in relation to: …
>
> (iii) the provision or making available for use, of facilities for amusement, entertainment, recreation or instruction …

It is submitted that a university course would fit within this definition either generally as "benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce, or as a contract relating to instruction.[45]

The specific paragraphs in s53[46]:

(i) Sections 53(aa), (c), and (d)

These sub-sections would catch a representation that a course had a particular accreditation or approval. It would also apply to a college or school which claimed it had a particular affiliation (for example guaranteed admission for students) with another organisation such as a university when this was not the case.[47] That other organisation should also take steps to distance itself from the claim, lest its inaction operate as an estoppel against it. Section 53(aa) refers to *standard* and *quality*, and *value* and should dampen enthusiastic marketing of the attributes of courses, especially those relating to jobs and salaries the

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45 There is no necessity to find a contract under this definition given the opening words of the section: *TPC v Legion Cabs (Trading) Co-operative Society Ltd* (1978) 35 FLR 372.

46 It should be noted that the examples provided would also be caught under s52.

47 See for example *ACCC v Optell Pty Ltd* (1998) ATPR 41.460

course may lead to, or which represent the course to be at a higher level than it is in fact.

(ii) Section 53(bb)

This section is less likely to cause problems though it could create difficulty in odd circumstances, for example not seeking permission from well known people whose images are included in marketing material, when the brochure could imply they have some association with the university but in fact do not. In some circumstances this might also be caught under 53 (c) and (d) as a *sponsorship* or *approval.*

An example of behaviour which would breach s 53(c) occurred in *ACCC v The Australasian Institute Pty Ltd*[48] where the ACCC, after commencing procedures for breach of sections 52, 53(c) and 55A, was able to obtain a s 87B undertaking by the Australasian Institute Pty Ltd (TAI) that it had made misleading representations. These were that its internet MBA degrees had approval of certain universities in Australia and that "TAI was a body of high academic standing". Typical of the claims agreed to be misleading was that "The Global Master of Business Administration Degree delivered by TAI was an approved internet version of the University of Ballarat."[49] Commenting on this matter, Professor Fels, Chairperson of the ACCC made his views very clear in relation to the application of the Act to educational providers:

> The Trade Practices Act 1974 applies to educational providers and businesses operating over the Internet just as it applies to businesses involved in traditional forms of trade and commerce.[50]

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48 An Australian Competition and Consumer Commission media release *Court Finds The Australasian Institute Misled Students* describing the mediated outcome can be found at <http://www.accc.gov.au/media/mr1999/mr-251-99.htm>

49 The settlement *Undertaking to the Australian Competition and Consumer Commission given for the Purposes of Section 87B of the Trade Practices Act 1974 (Cth)* is at: http://www.accc.gov.au/pubreg/87b_1999/18481_d99.pdf

50 Note 48

(iii) Section 53(e)

This section is directed at false or misleading representation with respect to the price of goods or services. Particular care should be taken not to state half the case, for example by describing a HECs charge but not include compulsory SRC or union fees.[51] If fees (such as HECS) are outside the control of the institution, the university should indicate that fact or simply reproduce HECS publicity material rather than attempt to paraphrase or describe HECS where inadvertent error may occur. If a full fee is being charged and this increases from semester to semester or year to year this fact should be made clear. The *Trade Practices Act* provides no obligation *per se* to disclose the price of the service but if a statement is made in relation to the price it must be complete and accurate.

(iv) Section 53(f)

This section prohibits the making of false or misleading representations concerning the need for any goods or services.[52] This section would be breached if marketing material indicated that a particular course was required to carry on a trade or profession where this was not the case. This is a section where change by outside bodies, for example. accrediting agencies could render university course promotional material dangerously misleading.

If a representation is true at the time a brochure is printed but later becomes false a university should make reasonable efforts to withdraw the brochure if it is to establish successfully a s 85 defence.

It may also be useful to include a prominent statement in the brochure stating that the information is correct at a certain date. Such a statement would not excuse the distribution of that brochure after the organisation became aware that the statement therein was no longer accurate. This will be a matter of common sense and assessment of risk. Thus if the predicted accreditation of the new degree described in the brochure has now been refused the institution should immediately withdraw the brochure, and, as a minimum, advise all enrolling students of the change in the circumstances. On the other hand, if

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51 See for example *TPC v Advance Bank Australia Ltd* (1993) ATPR 41-229.

52 See for example *Keehn v Medical Benefits Fund of Australia Ltd* (1977) 14 ALR 77

there has been a minor change in say subject name or in course content the brochure remains technically misleading but probably not such as to warrant legal action by a student or potential student.

(VII) Other parallel legislation

It should be noted that the *Fair Trading Acts* in the various Australian States mirror the consumer protection provisions of the Trade Practices Act. For example the corresponding provisions in the Fair Trading Acts from various states are:

TPA	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
51A	11	41	41	37	54	11	4	9
52	12	42	42	38	56	14	9	10
53	14	44	44	40	58	16	12	12

Generally the legislation is couched in terms of references to 'person', for example, s 42 of the *Fair Trading Act 1987* (NSW) states:

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

Consequently, the *Fair Trading Acts* have broader coverage, applying to, inter alia, individuals, partnerships and corporations without constitutional restriction. The term "trade or commerce" includes any business or professional activity: Section 4 of the *Fair Trading Act 1987* (NSW).

Some Hypotheticals

(i) Oldbutcrakin University and Newandnotorious University

In the first example Oldbutcrakin University and Newandnotorious agree that they will charge the same fee for similar courses to international students.

The relevant law has not been discussed above, but this example has been included because it would be easy enough for the two universities to do and they may not understand the implications. This is a clear example of price fixing and is prohibited under Part IV of the Trade Practices Act, in particular sections 45 and 45A. As a general rule a university should assume it is in competition with any other Australian university and consequently avoid any behaviour which could lessen competition, for example, by agreeing not to market in each other's "territory", agreeing on prices, or agreeing not to offer certain types of courses.

(ii) Newandnotorious University indicates in its prospectus that guaranteed entry arrangements have been made into Oldbutcrakin University's highly prestigious MBA program for students who achieve credit averages in their degrees. This is true at the time the 15,000 copies of the prospectus are printed but shortly after OldbutCrakin University gives Newandnotorious notice that the special entry arrangement has been terminated. Newandnotorious continues to use the prospectus unamended relying on this disclaimer: *The details in this prospectus are true as at the date of publication, but Newandnotorious University takes no responsibility for events occurring thereafter.*

The law would regard the special entry statement as having been made each time the brochure is distributed. The disclaimer might be effective to protect Newandnotorious from an action from a student who received the brochure prior to Oldbutcrakin's change of policy, but even then there would be a duty on Newandnotorious University to correct the now misleading statement on enrolment. Use of the brochure after the change of policy is a clear breach of s 52 and also ss 53(aa), (c), and (d). Enrolment contracts based on the misleading statements could be rescinded. Newandnotorious should immediately trash these brochures.

(iii) Melissa, the marketing manager of Newandnotorious University is rather fearful of her job. The Bachelor of Astrology has not been a real success and may have to close. The Head of Astrology, Professor Aries is blaming the marketing department, unfairly in Melissa's view, and the Vice Chancellor Professor Moonface and her Academic Board and Council are hovering with intent to strike.

Melissa rewrites the glossy course brochure. She includes a photograph in the brochure of Professor Knowsitall, the world

astrological expert, who recently gave a paper at a conference at Newandnotorious.

Professor Knowsitall has not given permission for photographs to be used by Newandnotorious. The use of his image may carry an implication that he teaches in or endorses the program, thereby establishing a s.52 misrepresentation.

She also includes these statements in the brochure:

- *all previous graduates have found jobs within one month of course completion at very high salaries.*

  This statement is literally true, but there have only been five previous graduates, three of whom lost their jobs within a month of commencing work. Starting salaries were in the range $35,000 - $38.000.

  This is a likely breach of s 52. The use of a statement which is literally true may still carry with it a misleading impression, that is, there were reasonable numbers upon whom the claim is made. To put this another way the statement conveys the clear impression of course quality leading to high employment, but that is based on inadequate data, and does not reveal the inability of students to keep their jobs. This program would be far better to say nothing about graduate employment. It is also questionable whether the salaries are very high.

- *Graduates from this course have a much higher rate of employment than from other universities.*

  This may be true but Melissa has not checked and has no evidence to support the claim. Section 51A reverses the onus and will deem this to be misleading unless Melissa and Newandnotorious University can prove otherwise. There may also be a breach of s 53(aa).

  It should be noted that in a claim such as this the notion that the claim was a mere puff with no intended material consequences would not apply. There are few cases where the puffing defence has been successful.[53]

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53 There is a brief discussion of puffing in *Riley McKay v Bannerman* (1977) 31 FLR 129.

- *This course has been accredited by the International Astrological and Stargazing Society*.

  Application has been made for accreditation but it has not yet been obtained. This is an obvious breach of s 52 and probably also sections 53(aa), (c), and (d). Melissa should hope that the accreditation is obtained, but nevertheless she and the university are still in breach of the Act even if it is, because at the time she made the statement it was untrue. She is unlikely to be sued by potential students, because they have suffered no damage as yet, but could face action from the Australian Competition and Consumer Commission or from other universities. Enrolments should not be taken into this course.

Consider the problems if instead Melissa's brochure had said:

- *Application has been made for accreditation by the International Astrological and Stargazing Society*.

  Take two alternate possibilities, the first is that Aries and Melissa know that it will not be accredited because the core unit Crystal Ball Gazing 1 is only one semester in duration. The second is that Aries and Melissa know that the International Astrological and Stargazing Society will list any course because they are aware the Society carries no accrediting authority and has no accrediting process.

  The first alternative is misleading under s 52 because it conveys the impression "and we expect to get that accreditation". A statement which is literally true can also be misleading or deceptive.[54] Under common law, representations are regarded as being made continuously and accordingly a duty to correct may arise under s 52.[55] The second statement is also misleading because it uses the word accreditation to suggest a requisite approval by an outside body. This is not the case on the facts.

- *This is a HECS based course*.

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54 per Stephen J in *Hornsby Building Information Centre v Sydney Building Information Centre* Note 36; and see also *Demagogue Pty Ltd v Raminsky* (1992) 39 CLR 31

55 *Finucane v NSW Egg Corporation* (1988) 80 ALR 486; *Lam v Austintel* [1990] ATPR 40-990.

While this is generally true, the degree carries a compulsory summer term where full fees are charged. In addition there are significant administrative processing, union and SRC fees not mentioned in the brochure.

The same brochure is used to market the degree in Asia, but international students are charged a full fee of $9000 per year.

Both situations give rise to breaches of s 52 and also s 53(e).

- *Admission to this prestigious high level course will be based on students achieving a UAI of at least 70.*

  In the past admission has been completely open to anybody who possesses a school certificate. Melissa knows that this is unlikely to change, indeed she knows that Professor Aries will take just about anybody possessing vague human like features.

  Further she knows the University and the tertiary admission centres will formally publish the UAI of 85 as the mark for the course, but she also knows the university will "force" many other offers to students with UAIs as low as 35.

  There is no legal problem per se in forcing offers to students with low marks, but this statement gives the impression of relative high quality in student intake, a relevant factor for some students, and notably an impression the university (falsely) seeks to make. This statement "makes a representation with respect to any future matter" under s 51A and accordingly Melissa will have the onus of establishing its truth, or it will be deemed to be misleading. On the facts she cannot do this, accordingly there is breach of s 52 and probably s 53(aa).

- *Our young and progressive and learned staff teach this innovative course in new premises using the most up to date equipment.*

  In fact none of the staff are under fifty, the buildings are very old but have recently been refurbished, and the students get to use the university computer laboratories which contain machines dating back to 1991. At least one of the lecturers in the course is still using course materials he first wrote in 1975 when teaching a similar course at another university. These materials are now badly out of date. Over 80% of the staff teaching the course are part timers or casuals who do not have research experience or publications.

Melissa repeats all the above statements in newspaper, television and radio advertisements. She uses many of them at careers days, and her helpers, including some grumbling academics, also make similar statements to prospective students. Assume her campaign is very successful, and the course in soon crowded with eager, keen and very litigious students. The students may do nothing, typically they do not have the funds to bring action against wealthier organisations such as universities. But angry parents may be a little less reasonable, and will certainly complain to the Australian Competition and Consumer Commission (ACCC), state consumer affairs departments and to State and Federal education departments for obvious breaches of the Act. The former organisation may well bring an action against Newandnotorious University.

Conclusions

Universities are notable by their absence from litigation in the field under consideration. This does not mean that universities should feel complacent. One well publicised case will be sufficient to bring misrepresentation law home to university vice chancellors.[56]

Universities are caught constitutionally as trading corporations, indeed one university ironically has successfully argued that position in court. This opens the door for scrutiny of their activities by the Australian Competition and Consumer Commission[57], a very important outcome because this body may proceed against a university where an impoverished student will not, either because of lack of funds or an identifiable measure of damage.

Furthermore the enterprise university is particularly vulnerable to international students and to full fee students generally. They demand service and course quality which must measure up to the high fees they are paying. HECS rates are at high levels, and such students equally should demand quality in their courses and truth and honesty

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56 Considine suggests that universities will hide rather than publicise such matters, citing a case involving a university and a student which was settled with standard non disclosure clauses: see: Considine D, Note 1 at 36.

57 Very recent evidence of such scrutiny under the *Trade Practices Act (1974)* is the ACCC's rejection of a s 47 third line forcing notification regarding membership of the James Cook University Student Association. The draft notice of rejection is at: <http://www.accc.gov.au/adjudication/notif/N90962.pdf>

in promotional materials from their universities. After all, such bodies exist for knowledge discovery and dissemination and cannot harbour sharp practices yet meet their statutory obligations. Universities hold a special place in society and need to ensure that their procedures offer appropriate systematic protection against misrepresentations in their course promotion.

Accordingly universities need to consider putting in place compliance programs as recommended by the ACCC.[58] That body has created a checklist of matters that should exist in a compliance program. First the Commission speaks of behavioural compliance:

> Behavioural compliance will be achieved through mechanisms such as:
>
> - regular and ongoing training that has been tested for comprehension;
> - including relevant regulation in induction courses and annual development;
> - where an employee breaches the law, imposing penalties, including the ultimate penalty of dismissal, or disciplinary measures and running a high profile campaign to ensure that the policy is understood throughout the enterprise, particularly by those employees whose everyday activities may result in behavioural breaches of relevant laws;
> - giving incentives for compliance (e.g. making compliance implementation an element of job selection criteria, or making compliance part of performance review) in recognition that any incentive provided would be a fraction of the liability saved;
> - withholding incentives for non-compliance (e.g. withholding bonuses where increased sales result from price fixing);
> - including compliance with the relevant laws as part of the annual performance review. [59]

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58 Website of The Australian Competition and Consumer Commission <http://www.accc.gov.au/fs_compliance.html>

59 Note 58

The Commission then describes what is necessary for procedural compliance:

- Checking contracts for compliance - for example, ensuring that they do not include illegal exclusive dealing terms, and ensuring that they do not offend the unconscionable conduct provisions.
- Having checking systems for labels - for example, the ACCC's *News for Business* on fruit juice labelling recommends a mechanism to ensure that any changes made to the process, labelling and/or other promotional material - after the trade practices and Food Standards Code audit - have been cleared by the compliance expert and the senior manager responsible for compliance. The mechanism should ensure that contracts/order forms for products from other suppliers stipulate that the product complies with relevant laws and regular testing.
- Having a clearing system for promotional and advertising material - for example, a 'sign off' procedure by someone versed in trade practices, or an advertising standards committee which involves someone with trade practices expertise.
- Having checking systems testing for compliance with standards.
- Having a mechanism in place to ensure conduct discovered to be in breach of the law is stopped immediately and reported to the compliance manager or the senior executive responsible for compliance, the CEO, and the board or the responsible committee. [60]

Faced with the legal risks described in this paper and elsewhere[61] universities will need Council approved policy on systems in place to ensure compliance with legislation, including a process of training and educating all staff as to their truth in advertising responsibilities. Such systems should ensure that marketing representations are passed

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60 Note 58

61 See: Considine D, note 1 and Rorke F, note 3.

through more than one member of staff, including the head of department responsible for the course. That person, rather than the head of marketing should "sign off' on statements made in promotional material, because the academic is in a better position to verify what is said. The universities also need to be able to verify the existence of such systems to lessen penalties should they be found in criminal breach of the Act.