Christina Do and Leigh Smith***

HIGHER EDUCATION PROVIDERS' LIABILITY TO STUDENTS FOR FAILING ADEQUATELY TO EMBED LEARNING OUTCOMES IN THE EDUCATIONAL EXPERIENCE

Abstract

Australian higher education providers are required by Standard 1.4 of the *Higher Education Standards Framework (Threshold Standards) 2015* (Cth) to ensure that learning outcomes are adequately embedded in the educational experience. However, the question arises as to what extent, if at all, a student can initiate legal action to hold the higher education provider liable in the event of a failure to comply with stand 1.4. This article approaches that question from three avenues: the *Australian Consumer Law*, educational negligence, and breach of contract. The likelihood of an aggrieved student successfully suing their higher education provider under each avenue is explored, and common themes and challenges are highlighted. Ultimately, the analysis shows that none of the three avenues are likely to provide a reliable or cost-effective mechanism for aggrieved students.

I Introduction

The last two decades have seen the higher education sector globally place significant focus on the 'graduate skills agenda'[1] to address the recognised 'skills gap' within the sector.[2] The shift towards learning outcomes-based curriculum

* LLM, LLB, BCom, GradDipLegPrac, GradCertHE, Lecturer, Curtin Law School.

** BA (Hons), LLB (Hons), Lecturer, Curtin Law School.

1 Wendy Green, Sarah Hammer and Cassandra Star, 'Facing Up to the Challenge: Why Is It So Hard to Develop Graduate Attributes?' (2009) 28(1) *Higher Education Research and Development* 17, 18. The terms 'learning outcomes' and 'graduate attributes' are often used interchangeably within the higher education sector and academic literature. For a comprehensive explanation of the interchange of these two terms: see generally Christina Do and Leigh Smith, 'The Integration of Learning Outcomes and Graduate Attributes in the Australian Higher Education Sector. Part I: Integration, Evidence and Legal Consequences' (2021) 47(1) *Monash University Law Review* (forthcoming).

2 Lorraine Anderson, 'The Learning Graduate' in Carey Normand and Lorraine Anderson (eds), *Graduate Attributes in Higher Education: Attitudes on Attributes from Across the Disciplines* (Taylor & Francis, 2017) 4, 7.

was aimed at addressing quality assurance concerns around whether university graduates were acquiring the necessary skills for the purpose of employment.[3] The *Higher Education Standards Framework (Threshold Standards) 2015* (Cth) ('*Threshold Standards*')[4] require higher education providers to specify the learning outcomes for each course of study offered by the institution and to assess students' achievement and attainment of the set learning outcomes.[5] Failing to do so can result in an institution being investigated by the Tertiary Education Quality and Standards Agency ('TEQSA'), the regulator for the Australian higher education sector, and facing an array of sanctions and penalties if it is ultimately found that the institution failed to adequately implement and assess its promoted learning outcomes.[6]

Despite this movement within the sector and the legal requirement for Australian higher education providers to ensure the implementation and assessment of learning outcomes, research investigating learning outcomes reveals that the implementation, assessment and measurement of learning outcomes within the sector can be problematic.[7] Students are likely to be the most adversely affected by a higher education provider's failure adequately to implement and assess learning outcomes, particularly since learning outcomes are often framed with the purpose of optimising graduate employability.[8] Despite Australian university students generally paying between $20,000 and $45,000 for an undergraduate bachelor degree,[9] there appear to be limited avenues for aggrieved students to seek redress in circumstances where their university has failed adequately to implement and assess the learning outcomes that the institution advertises.

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3 Ibid 5.

4 *Higher Education Standards Framework (Threshold Standards) 2015* (Cth) ('*Threshold Standards*'), as enacted by *Tertiary Education Quality and Standards Agency Act 2011* (Cth) s 58(1) ('*TEQSA Act*').

5 *Threshold Standards* (n 4) stands 1.4.1–1.4.4.

6 Such as administrative sanction, civil penalties, removal of accreditation and withdrawal of registration: see *TEQSA Act* (n 4) pt 3 div 6, s 54, pt 7 divs 1–2.

7 See, eg, Simon Barrie, Clair Hughes and Calvin Smith, *The National Graduate Attributes Project: Integration and Assessment of Graduate Attributes in Curriculum* (Final Report, 2009) 20, 41; David Spencer, Matthew Riddle and Bernadette Knewstubb, 'Curriculum Mapping to Embed Graduate Capabilities' (2012) 31(2) *Higher Education Research and Development* 217, 218; Simon C Barrie, 'Understanding What We Mean by the Generic Attributes of Graduates' (2006) 51(2) *Higher Education* 215, 218; Beverley Oliver, *Assuring Graduate Outcomes* (Good Practice Report, 2011) 3; Green, Hammer and Star (n 1) 18.

8 See generally Duncan Bentley and Joan Squelch, *Internationalising the Australian Law Curriculum for Enhanced Global Legal Practice* (Final Report, 2012); Duncan Bentley and Joan Squelch, 'Employer Perspectives on Essential Knowledge, Skills and Attributes for Law Graduates to Work in a Global Context' (2014) 24(1) *Legal Education Review* 95; Leigh Smith and Christina Do, 'Law Students' Awareness of University Graduate Attributes' (2018) 11(1) *Journal of the Australasian Law Teachers Association* 68, 68.

9 'Education and Living Costs in Australia', *Study Australia* (Web Page) <https://www.studyinaustralia.gov.au/English/Live-in-Australia/living-costs>.

Although the *Threshold Standards* require that higher education providers have internal and external complaint management systems in place to investigate and address concerns raised by aggrieved students,[10] if the aggrieved student is dissatisfied with the outcome of their hearing there are very few viable options available for the student to enforce their legal rights. While the aggrieved student could lodge a complaint with the Australian Competition and Consumer Commission ('ACCC') or TEQSA,[11] whether these regulatory bodies will pursue the complaint will largely depend on the regulatory bodies' priorities and the nature of the grievance.[12] The final option for an aggrieved student is to commence private legal action against their higher education provider.

This article highlights the legal difficulties associated with a student bringing such an action for a provider's failure adequately to embed learning outcomes in the educational experience. It begins by outlining the legislative framework that requires higher education providers to specify, implement and assess learning outcomes. The paper then explores the potential private legal action an aggrieved student could bring against their higher education provider in circumstances where it has failed adequately to implement and assess the learning outcomes that the institution advertises. Three potential causes of action are explored in this article: contravention of the *Australian Consumer Law* ('*ACL*'), contained within sch 2 of the *Competition and Consumer Act 2010* (Cth);[13] educational negligence; and breach of contract. Analysis of these three causes of action highlights two significant legal hurdles that a student plaintiff would need to overcome in order to succeed: the low likelihood of judicial intervention, and the need to demonstrate loss or damage.[14] Both barriers would be very difficult to overcome and, as a result, the likelihood of an aggrieved student succeeding in a private legal action against their university is presently very low.

The authors contend that there are limited causes of action available to students to enforce their legal rights in circumstances where they believe their higher education provider has failed adequately to implement and assess its promoted learning outcomes. This is especially so in light of the numerous government-funded projects

10 *Threshold Standards* (n 4) stands 2.4.1–2.4.5.

11 'Higher Education Student Complaints', *Study Assist* (Web Page) <https://www.studyassist.gov.au/support-while-you-study/higher-education-student-complaints>. The ACCC will only investigate complaints alleging contraventions of the *Competition and Consumer Act 2010* (Cth) ('*Competition and Consumer Act*') and TEQSA will only investigate complaints alleging contraventions of the *Threshold Standards* (n 4).

12 See generally 'Compliance & Enforcement Policy & Priorities', *Australian Competition and Consumer Commission* (Web Page, 2021) <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>; 'Higher Education Student Complaints' (n 11); Do and Smith (n 1) pt III.

13 *Competition and Consumer Act* (n 11) sch 2 ('*ACL*').

14 Do and Smith (n 1) pt III.

which have indicated that the implementation and assessment of learning outcomes within the higher education sector require significant improvement.[15] Higher education providers need to prioritise the comprehensive coverage of the learning outcomes they promote, while external regulation from TEQSA must ensure that educational services provided reflect what providers advertise in respect of those services.

II Learning Outcomes

Higher education in Australia is heavily regulated, with the *Threshold Standards*, created pursuant to s 58(1) of the *Tertiary Education Quality and Standards Agency Act 2011* (Cth), an important source of regulation. The *Threshold Standards* are categorised into seven 'Domains',[16] the first of which is 'Student Participation and Attainment'.[17] Central to the present article is stand 1.4, which is about the acquisition of learning outcomes.[18] Standards 1.4.1–1.4.4 provide:

> 1. The expected learning outcomes for each course of study are specified, consistent with the level and field of education of the qualification awarded, and informed by national and international comparators.
>
> 2. The specified learning outcomes for each course of study encompass discipline-related and generic outcomes, including:
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> a. specific knowledge and skills and their application that characterise the field(s) of education or disciplines involved
>
> b. generic skills and their application in the context of the field(s) of education or disciplines involved
>
> c. knowledge and skills required for employment and further study related to the course of study, including those required to be eligible to seek registration to practise where applicable, and
>
> d. skills in independent and critical thinking suitable for life-long learning.

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15 See, eg, Oliver, *Assuring Graduate Outcomes* (n 7) 3; Beverley Oliver, *Assuring Graduate Capabilities: Evidencing Levels of Achievement for Graduate Employability* (Final Report, 2015) 10–11.

16 'Contextual Overview of the HES Framework 2015', *Tertiary Education Quality and Standards Agency* (Web Page) <https://www.teqsa.gov.au/contextual-overview-hes-framework-2015>.

17 *Threshold Standards* (n 4) stand 1.

18 Ibid stand 1.4.

> 3. Methods of assessment are consistent with the learning outcomes being assessed, are capable of confirming that all specified learning outcomes are achieved and that grades awarded reflect the level of student attainment.
>
> 4. On completion of a course of study, students have demonstrated the learning outcomes specified for the course of study, whether assessed at unit level, course level, or in combination.[19]

As can be seen from the above extract, stand 1.4 is centred on the concept of a learning outcome. Within the literature on learning and teaching in higher education, there is considerable discussion of learning outcomes and their operation.[20] One notable example is the work of John Biggs and Catherine Tang, who identify three levels of learning outcomes, namely (1) institutional, (2) program, and (3) course levels.[21] In the Australian context, these are better expressed as (1) institutional, (2) course, and (3) unit levels.[22] Adjusting for the Australian terminology, learning outcomes at these levels can be defined thus:

> • the *institutional* level, as a statement of what the graduates of the university are supposed to be able to do;
>
> • the … [*course*] level, as a statement of what graduates from particular degree … [courses] should be able to do;
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> • the … [*unit*] level, as a statement of what students should be able to do at the completion of a given … [unit].[23]

19 Ibid stands 1.4.1–1.4.4. See also stands 1.4.5–1.4.7 which relate to research training.

20 See, eg, Joakim Caspersen, Nicoline Frølich and Johan Muller, 'Higher Education Learning Outcomes: Ambiguity and Change in Higher Education' (2017) 52(1) *European Journal of Education* 8, 10–11; Hamish Coates, 'Research and Governance Architectures to Develop the Field of Learning Outcomes Assessment' in Olga Zlatkin-Troitschanskaia et al (eds), *Assessment of Learning Outcomes in Higher Education: Cross-National Comparisons and Perspectives* (Springer International Publishing, 2018) 3, 4–5.

21 John Biggs and Catherine Tang, *Teaching for Quality Learning at University* (Open University Press, 4th ed, 2011) 113.

22 Pursuant to the *Higher Education Support Act 2003* (Cth) ('*Higher Education Support Act*'), a 'unit of study' is defined as '(a) a subject or unit that a person may undertake with a higher education provider as part of a course of study …', while a 'course of study' is defined as '(a) an enabling course; or (b) a single course leading to a higher education award; or (c) a course recognised by the higher education provider at which the course is undertaken as a combined or double course leading to 1 or more higher education awards': at sch 1 cl 1. See also the definitions of 'course of study' and 'unit of study' pursuant to the *TEQSA Act* (n 4) s 5.

23 Biggs and Tang (n 21) 113.

The language of stand 1.4 suggests that it is focused on the middle level of learning outcomes, namely, course learning outcomes,[24] being those learning outcomes associated with each course of study, such as the Bachelor of Arts or Bachelor of Commerce. For the purposes of this article, when reference is made to learning outcomes in the context of stand 1.4, it is a reference to course learning outcomes.

Standards 1.4.1–1.4.4 show that the *Threshold Standards* contemplate far more than a higher education provider paying cursory attention to learning outcomes; rather, as noted in stand 1.4.4, students must have 'demonstrated' their acquisition of the learning outcomes.[25] But what if the standard is not met, that is, what if a student has not acquired the requisite learning outcomes? In such a case the student may seek to lodge a complaint with their higher education provider.[26] Likewise, there may be an opportunity for the sector's regulator, TEQSA, to take action.[27] However, what if the student wishes to pursue a private legal action against their higher education provider? What avenues are available to the student? Analysing these two questions is the focus of Part III of this article.

III Private Legal Action

For a student aggrieved by an alleged failure of their university adequately to cover the relevant learning outcomes, it is likely that an internal complaint would be the first step to seek redress. However, if this avenue fails, the student may be left with no choice but to litigate or walk away. This Part explores the potential for a student to litigate against their university for: contravention of the *ACL*; educational negligence; and breach of contract. Each cause of action will be discussed in turn. First, however, it is important to comment briefly on the justiciability of such claims.

A *Justiciability*

In the context of a dispute between a student and their university, justiciability could be a key issue and a significant challenge for the student plaintiff.[28] Put simply,

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24 This is evident from the use of the phrase 'course of study' in the standard itself: *Threshold Standards* (n 4) stand 1.4.

25 Ibid stand 1.4.4.

26 For example, the authors' institution, Curtin University, has a Teaching category for complaints, which includes '[q]uality of teaching/support/guidance/feedback': Integrity and Standards Unit, 'Complaint Categories', *Curtin University* (Web Page, 27 July 2020) <https://complaints.curtin.edu.au/management/complaint_categories.cfm>.

27 *TEQSA Act* (n 4) s 134(1)(c).

28 See, eg, Patty Kamvounias and Sally Varnham, 'Legal Challenges to University Decisions Affecting Students in Australian Courts and Tribunals' (2010) 34(1) *Melbourne University Law Review* 140, 159–65.

justiciability refers to the '[s]uitability of a matter for adjudication by a court'.[29] Essentially, a student plaintiff would need to show that the alleged failure of a university adequately to embed learning outcomes in the educational experience is a matter that the courts can and should intervene in. The authorities establish, however, that matters of academic judgment are non-justiciable, that is, not appropriate for court intervention.[30] To succeed, a student plaintiff would first need to convince a court that the matter in question is justiciable; if they could not do so, the claim would fail. Keeping this in mind, the discussion now turns to the specific causes of action presently under consideration.

B *Contravention of the ACL*

In Australia, it is generally accepted that students are consumers of educational services offered by universities.[31] As consumers, university students are entitled to a

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29 *Encyclopaedic Australian Legal Dictionary* (online at 25 November 2020), 'justiciability'. See also Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 126–7 [3.70]. Later in their text, Aronson, Groves, and Weeks describe 'non-justiciability' as follows:

> Concepts of non-justiciability vary between countries, and even within the same country, different meanings will be used for different contexts … 'Non-justiciability' might signify the court's unwillingness to entertain disputes that are best left to the political process, or disputes which cannot be framed in legal terms or be resolved by the application of manageable legal criteria. It might signify the inability of our adversarial or judicial processes to handle large-scale fractal inquiries or a judicial sense of prudent self-restraint in second-guessing essentially political, religious, economic, or other non-legal debates.

At 1115 [19.250].

30 See, eg, *Griffith University v Tang* (2005) 221 CLR 99, 121 [58] (Gummow, Callinan and Heydon JJ), 156–7 [165] (Kirby J); *Hanna v University of New England* [2006] NSWSC 122, [66] (Malpass AsJ), citing *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988; *Walsh v University of Technology, Sydney* [2007] FCA 880, [86] (Buchanan J); Dennis Farrington and David Palfreyman, *The Law of Higher Education* (Oxford University Press, 2nd ed, 2012) 333; J Joy Cumming 'Where Courts and Academe Converge: Findings of Fact or Academic Judgment' (2007) 12(1) *Australia and New Zealand Journal of Law and Education* 97, 99–100; Lisa Goldacre, 'The Contract for the Supply of Educational Services and Unfair Contract Terms: Advancing Students' Rights as Consumers' (2013) 37(1) *University of Western Australia Law Review* 176, 180.

31 See, eg, Goldacre (n 30) 176. Although there is general support for the proposition that the *ACL* applies to the provision of educational services, there has been debate as to whether the activities and conduct of higher education providers with respect to students who utilise the Higher Education Contributions Schemes ('HECS') occur in 'trade or commerce'. However, Stephen Corones contends that, since the *Higher Education Support Act* (n 22) amendments, higher education providers' conduct in relation to HECS students occurs in 'trade or commerce': Stephen Corones, 'Consumer Guarantees and the Supply of Educational Services by Higher Education Providers' (2012) 35(1) *University of New South Wales Law Journal* 1, 6.

number of legal rights arising from the *ACL*. An aggrieved student has two potential *ACL* causes of action available to them, namely

1. that the university has engaged in misleading or deceptive conduct, contrary to s 18(1) of the *ACL*, by promoting acquisition of specified learning outcomes and/or graduate attributes in their handbooks, but nonetheless being unable to provide convincing evidence that the learning outcomes have been comprehensively and systemically acquired by their students; and

2. that the university has not satisfied the consumer guarantee relating to the supply of services, pursuant to s 60, ensuring that academic staff have exercised due care and skill in teaching and assessing the institution's specified learning outcomes.

These causes of action are discussed in turn.

1 *Misleading or Deceptive Conduct*

Section 18(1) of the *ACL* stipulates: 'A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.'[32] An aggrieved student who is able to establish a claim under s 18(1) would be able to seek damages pursuant to s 236 of the *ACL*.[33]

The first hurdle for students pursuing a claim against their higher education provider for alleged misleading or deceptive conduct under the *ACL* is to establish that the conduct in question occurred in 'trade or commerce'. To determine whether the educational service or conduct occurred in 'trade or commerce', the courts will apply the test developed by the High Court in *Concrete Constructions (NSW) Pty Ltd v Nelson* ('*Concrete Constructions*').[34] There, a majority of Mason CJ, Deane, Dawson and Gaudron JJ emphasised that the conduct in question must have occurred '"*in*" trade or commerce' and not merely 'with respect to … [t]rade and commerce'.[35] Their Honours stated:

> [T]he words 'in trade or commerce' refer to 'the central conception' of trade or commerce and not to the 'immense field of activities' in which corporations may engage in the course of, or for the purposes of, carrying on some overall trading or commercial business.[36]

Hence, the conduct in question must bear a trading or commercial character.

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32 *ACL* (n 13) s 18(1).

33 Ibid s 236.

34 (1990) 169 CLR 594 ('*Concrete Constructions*').

35 Ibid 602 (emphasis in original).

36 Ibid 603.

Whilst it has historically been questionable whether a non-private university's educational services and conduct were of a trading or commercial nature, since the introduction of the *ACL* the definition of 'trade or commerce' has been extended to include 'any business or professional activity (whether or not carried on for profit)'.[37] It is contended, as it is by Lisa Goldacre, that the inclusion of the phrase 'professional activity' extends the application of the *ACL* to include providers of educational services, such as higher education providers.[38]

Drawing on the decision in *Concrete Constructions*, Jessup J of the Federal Court in *Shahid v Australasian College of Dermatologists*[39] (with whom Branson and Stone JJ agreed) held that, in order to satisfy the phrase 'any professional activity', 'the activity in question [must] be unequivocally and distinctly characteristic of the carrying on of a profession, giving to the latter concept a connotation which is not limited to engagement in professional practice'.[40] Applying this reasoning, Jessup J held that representations made by the Australian College of Dermatologists in published handbooks relating to record-keeping and the availability of a meaningful appeal process were 'unequivocally and distinctly characteristic of the carrying on of the profession of dermatologists'.[41] Although the matter concerned the activities of a professional association, the Full Court of the Federal Court's reasoning can be extrapolated to universities more generally. Although there is no direct Australian authority on the matter, Goldacre provides a useful analysis of how the Full Court's reasoning in *Shahid* can be broadly applied to higher education providers.[42] Drawing parallels from the five key reasons for which the Full Court found that the Australian College of Dermatologists' actions constituted 'the carrying on of a profession', Goldacre argues:

> First, academics and their institutions are likely to regard themselves as a profession, or a collection of professionals. Second, HEIs [higher education institutions] are institutions whose main concern is to advance knowledge and to maintain standards of learning for many disciplines and often in accordance with accrediting bodies' approval. Third, the establishment of standards of learning and the enforcement of those standards are significant elements of a HEI's overall activities and are not merely incidental. Fourth, transactions with students in relation to the delivery of educational services occur as an instrumental act of the HEI. … Fifth, the entrance into and the provision of education services are tightly organised, systematic and ongoing activities of a HEI. Many academic activities that make up the supply of educational services will thus be unequivocally and

37 *ACL* (n 13) s 2(1).

38 Goldacre (n 30) 185.

39 (2008) 168 FCR 46 ('*Shahid*').

40 Ibid 103 [194] (Jessup J, Branson and Stone JJ agreeing at 48–9 [1]).

41 Ibid 104 [197]. It was ultimately held that, 'in making the record-keeping representation … the College engaged in misleading conduct': at 104–5 [198].

42 Goldacre (n 30) 186.

> distinctly characteristic of the carrying on of the profession and therefore come within the extended meaning of 'trade or commerce' under the *ACL*.[43]

Where a university publishes its learning outcomes and graduate attributes is a factor that can influence whether the conduct occurs in 'trade or commerce'. If the learning outcomes and graduate attributes are published in an institution's 'promotional activities in relation to, or for the purposes of, the supply of goods or services to actual or potential consumers',[44] then such actions fall within the scope of the expression 'in trade or commerce'.[45] In the context of higher education, the publication of materials and activities which promote courses — such as prospectuses, advertisements and handbooks — is likely to be characterised as conduct occurring 'in trade or commerce' as the conduct is likely to have been carried out 'in the central conception' of the provider's commercial activities.[46] Similarly, where institutions publish their learning outcomes and graduate attributes in their handbooks, ie, publications that outline information regarding the courses that are offered by the institution, such representations will also be considered to have been made 'in trade or commerce'.[47] If the learning outcomes and graduate attributes are published in the institution's policies and procedures, such representations will likely be considered to be actions that are 'characteristic of the carrying on of the profession', and thereby to have been made 'in trade or commerce'.[48] A university's policies and procedures represent the institution's standards with respect to teaching, learning and research, and 'the enforcement of those standards are significant elements of a HEI's overall activities and are not merely incidental'.[49]

An aggrieved student must also demonstrate that the conduct in question was 'misleading or deceptive or is likely to mislead or deceive'.[50] Conduct is misleading or deceptive when it 'lead[s] into error'.[51] In determining whether the conduct in question was misleading or deceptive, the courts will take into consideration the class of consumers that the alleged conduct was directed at, and whether an ordinary and reasonable person from that class would likely be misled or deceived.[52]

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43 Ibid (citations omitted).

44 *Concrete Constructions* (n 34) 604.

45 Ibid.

46 See, eg, *Shahid* (n 40) 54 [28] (Branson and Stone JJ).

47 Ibid 53–4 [28].

48 Ibid 104 [197].

49 Goldacre (n 30) 186.

50 *ACL* (n 13) s 18(1).

51 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 198 (Gibbs CJ). See also *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640, 651–2 [39] (French CJ, Crennan, Bell and Keane JJ).

52 *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177, 202–3 (Deane and Fitzgerald JJ).

Learning outcomes and graduate attributes are often found in university promotional materials and handbooks. Arguably the class of consumers that read these materials is the public at large, especially given that universities attract interest from a cross-section of society. Furthermore, the representations made in these sources contain general information about the facilities and courses offered at the institution to entice enrolment. In contrast, the relevant section of the public that the university's specific policies and procedures are likely to be directed at are students enrolled at the institution, who may have a stronger understanding of the higher education sector than members of the general public. Furthermore, the information contained in the institution's policies and procedures is specific to the processes that the institution is required to follow in the course of its dealings with its various stakeholders.

Whether an ordinary and reasonable member of the class of consumers that university promotional materials and handbooks are directed towards would be led into error as a result of the representations is a question for the court to determine — this test is an objective one.[53] The fact of persons having actually been misled is not essential, although such evidence may be adduced.[54] Jim Jackson contends that because of the 'trust given to universities as knowledge discovers [sic] and disseminators one can expect little sympathy from courts for any level of sharp practice in course promotion',[55] especially since a significant portion of universities' targeted audience is made up of teenagers (some of whom are under 18) and young adults.[56]

Prudent universities may incorporate a disclaimer in their marketing materials and handbooks negating any liability for any loss or damage incurred from the use of the materials. The presence of such disclaimers does not necessarily alleviate an institution from liability in relation to an allegation of misleading or deceptive conduct. In general, courts tend to interpret disclaimers with respect to misleading or deceptive conduct very critically as such clauses may be contrary to the public policy underpinning the *ACL*.[57] Justice Wilcox of the Federal Court in *Hutchence v South Seas Bubble Co Pty Ltd*[58] acknowledged that:

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53 Ibid.

54 Ibid.

55 Jim Jackson, 'The Marketing of University Courses under Sections 52 and 53 of the *Trade Practices Act 1974* (Cth)' (2002) 6(1) *Southern Cross University Law Review* 106, 118 (citations omitted).

56 Ibid.

57 *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546, 561 (Lockhart J, Burchett J agreeing at 568, Foster J agreeing at 568). Justice Lockhart explained the Court's objections with respect to the effect of disclaimers to exclude liability against claims made under the predecessor legislation to the *ACL*:

> Parliament passed the Act to stamp out unfair or improper conduct in trade or in commerce; it would be contrary to public policy for special conditions such as those with which this contract was concerned to deny or prohibit a statutory remedy for offending conduct under the Act.

At 561.

58 (1986) 64 ALR 330.

> There are occasions upon which the effect of otherwise misleading or deceptive conduct may be neutralized by an appropriate disclaimer. But such cases are likely to be comparatively rare and to be confined to situations in which the court is able to reach satisfaction — the onus resting on the party relying upon the disclaimer — that the disclaimer is likely to be seen and understood by all those — leaving aside isolated exceptions — who would otherwise be misled before they act in relation to the relevant transaction.[59]

Most importantly, in order for an aggrieved student to succeed in an action for damages, the student must demonstrate that they relied and acted on the alleged misleading or deceptive conduct and, as a result, suffered loss or damage.[60] An action for damages will be unsuccessful if the applicant cannot demonstrate that they acted on the conduct in question, regardless of whether the conduct was misleading or deceptive. Therefore, a student claiming that they suffered damage as a result of their university's misleading or deceptive representations regarding its teaching and assessment of learning outcomes and graduate attributes must demonstrate that they relied and acted on these representations. A possible argument would be that the university's course learning outcomes or graduate attributes enticed the student to enrol at the institution. A key aspect of establishing this causative link is first demonstrating that the student was aware of the learning outcomes or graduate attributes. This may prove to be difficult, as a research project conducted in 2018 indicated a lack of general awareness and understanding by students of their institution's graduate attributes.[61] Further, the student must demonstrate that reliance on the promoted learning outcomes and graduate attributes by their university caused them to suffer loss or damage.[62]

2 *Consumer Guarantee Relating to the Supply of Service: Due Care and Skill*

Section 60 of the *ACL* stipulates: 'If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.'[63] This is one of three consumer guarantees that are legally imposed on suppliers of services acting in trade or commerce under the *ACL*.[64] These consumer guarantees cannot be excluded, restricted or modified.[65] An aggrieved student who is able to establish a claim under s 60 against their higher education provider is able to seek damages pursuant to s 267(1) of the *ACL*.

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59 Ibid 338 (citations omitted).

60 See, eg, *Ford Motor Co of Australia Ltd v Arrowcrest Group Pty Ltd* (2003) 134 FCR 522, 538 [116] (Lander J, Hill and Jacobson JJ agreeing at 524 [1]) ('*Ford Motor*').

61 Smith and Do (n 8) 80.

62 *Ford Motor* (n 60).

63 *ACL* (n 13) s 60.

64 See ibid ss 60–2.

65 Ibid s 64(1).

As previously discussed, many of the activities carried out by higher education institutions in the course of providing education services are likely to be characterised as 'the carrying on of a profession'.[66] Therefore, it is probable that education services, such as curriculum design and delivery, would be categorised as being carried out 'in trade or commerce' within the *ACL*.

Higher education students must also satisfy the definition of 'consumer' under the *ACL*. Section 3(3) of the *ACL* states:

> (3) A person is taken to have acquired particular services as a consumer if, and only if:
>
> (a) the amount paid or payable for the services … did not exceed:
>
> (i) $100,000; or
>
> (ii) if a greater amount is prescribed for the purposes of subsection (1)(a) — that greater amount; or
>
> (b) the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.[67]

In circumstances where a student acquires education services to the amount of $100,000 or less, the student is automatically classified as a 'consumer'. However, if the educational services exceed $100,000, the nature of the service acquired must be examined. The courts will consider whether the essential character of the service acquired is '"commonly" or "regularly"' acquired for personal use or consumption.[68] This is not a contentious issue, as it is generally accepted that students are consumers of higher education in accordance with the definition of 'consumer' under s 3 of the *ACL* and the equivalent provision of its predecessor.[69]

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66 *Shahid* (n 40) 103 [192] (Jessup J).

67 *Treasury Laws Amendment (Acquisition as Consumer: Financial Thresholds) Regulations 2020* (Cth) sch 1 item 3, inserting *Competition and Consumer Regulations 2010* (Cth) reg 77A.

68 *Bunnings Group Ltd v Laminex Group Ltd* (2006) 153 FCR 479, 496 [81] (Young J).

69 See generally Francine Rochford, 'The Relationship between the Student and the University' (1998) 3(1) *Australia and New Zealand Journal of Law and Education* 28, 36; Bruce Lindsay, 'Complexity and Ambiguity in University Law: Negotiating the Legal Terrain of Student Challenges to University Decisions' (2007) 12(2) *Australia and New Zealand Journal of Law and Education* 7, 11; Goldacre (n 30) 176; Patty Kamvounias and Sally Varnham, 'Getting What They Paid for: Consumer Rights of Students in Higher Education' (2006) 15(2) *Griffith Law Review* 306, 322–4; Corones (n 31) 5; Jackson, 'The Marketing of University Courses under Sections 52 and 53 of the *Trade Practices Act 1974* (Cth)' (n 55) 106.

Under the *ACL*, the term 'service' includes

> (a) any rights … benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce …
>
> (b) … under:
>
> (i) a contract for or in relation to the performance of work (including work of a professional nature), whether with or without the supply of goods …[70]

It is likely that the educational services provided by universities would constitute 'services'.[71] Therefore, the consumer guarantees that the *ACL* provides would apply to universities and their students.

The question whether a university or an academic employed by the institution has 'rendered with due care and skill' the coverage and assessment of the institution's learning outcomes and graduate attributes is legally complex. This is largely attributed to the fact that there is no definition of 'due care and skill' in the *ACL*. Further, there is limited explanation as to the requisite standard that is required to be met in order to discharge this guarantee under the *ACL*. The Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) explains:

> This guarantee requires that the provider of services must have an acceptable level of skill in the particular area of activity involved in the supply of services. The provider must also exercise due care in providing the services. These requirements ensure that services are provided in accordance with the specifications agreed …[72]

The first limb of the guarantee specifies that the provider of the service possesses an 'acceptable level of skill'.[73] With respect to the provision of educational services, this requires that universities ensure that academic staff have the necessary academic and professional qualifications to undertake and discharge their duties.[74] Failing this,

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70 *ACL* (n 13) s 2.

71 Patty Kamvounias, 'Students and the Australian Consumer Law' in Sally Varnham, Patty Kamvounias and Joan Squelch (eds), *Higher Education and the Law* (Federation Press, 2015) 96–7.

72 Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) 192 [7.59] ('Explanatory Memorandum').

73 Ibid.

74 See *Threshold Standards* (n 4) stand 3.2.3, which provides that, in addition to relevant discipline knowledge and skills, academic staff must have at least one qualification level higher than the course of study which they have academic oversight (except academic staff with a doctoral or equivalent research experience supervising doctoral degrees).

the institution will not have discharged the consumer guarantee of due care and skill in the provision of the educational services.

The second limb requires that the provider of service 'exercise due care in providing the services'.[75] Stephen Corones, in his article on the consumer guarantees that apply to the provision of education services by universities, offers a detailed analysis of the guarantee of due care and skill with respect to curriculum design and delivery.[76] Relying on the decision in *Read v Nerey Nominees Pty Ltd*,[77] Corones contends that this guarantee requires that the service provider carry out the service in a 'careful, skilful and workmanlike' manner,[78] which is an objective test. Drawing on s 28 of the *Consumer Guarantees Act 1993* (NZ), Corones suggests that the courts are likely to assess the duty against the 'standard appropriate to the profession'.[79] Given that the *Threshold Standards* 'set the requirements a higher education provider must meet — and continue to meet — in order to be registered by … [TEQSA] to operate in Australia',[80] and that the Australian Qualifications Framework ('AQF') is the national policy regulating education and training qualifications in Australia,[81] these instruments represent the minimum standard expected of universities in providing educational services.

Whilst the AQF learning outcomes and the Learning Teaching Academics Standards Threshold Learning Outcomes ('TLO') are different from the learning outcomes referred to in the *Threshold Standards*, it appears that some universities have used the AQF learning outcomes and the TLOs to frame their institutions' learning outcomes and graduate attributes.[82] Therefore, provided a dissatisfied student can produce convincing evidence that demonstrates their institution has not adequately achieved the *Threshold Standards* and AQF learning outcomes associated with their course qualification, they may be able to contend that their institution failed to satisfy the guarantee of providing the educational service with due care and diligence.[83]

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75 Explanatory Memorandum (n 72) 192 [7.59].

76 Corones (n 31).

77 [1979] VR 47 ('*Read*').

78 Corones (n 31) 11, citing *Read* (n 77) 48 (Marks J).

79 Corones (n 31) 11. This position has been supported by other Australian legal commentators: see, eg, Kamvounias (n 71) 96, 97.

80 Explanatory Statement, Higher Education Standards Framework (Threshold Standards) 2015 (Cth) 2.

81 See *Australian Qualifications Framework* (National Policy No 2, January 2013) 9 <https://www.aqf.edu.au/sites/aqf/files/aqf-2nd-edition-january-2013.pdf>.

82 For example, the Curtin Law School's Bachelor of Laws course has nine Course Learning Outcomes, which appear to have largely incorporated the six TLOs for the Bachelor of Laws: 'Courses Handbook 2021: B-LAWS v1 Bachelor of Laws', *Curtin University* (Web Page, 2021) <http://handbook.curtin.edu.au/courses/31/319279.html>; Australian Learning and Teaching Council, *Bachelor of Laws* (Learning and Teaching Academic Standards Statement, December 2010) 10 <https://cald.asn.au/wp-content/uploads/2017/11/KiftetalLTASStandardsStatement2010.pdf>.

83 Corones (n 31) 12; Kamvounias (n 71) 97.

Similar to a student raising a claim for misleading or deceptive conduct, a student claiming that their university failed to act with due care and skill must demonstrate that they suffered damage as a result of the failure. If a university is found to have not met its obligation to ensure that its educational services are rendered with due care and skill, it may be found responsible for the losses and damages that flow from the breach.

The remedies available for a breach of a consumer guarantee depend on the extent of the provider's failure to comply with the guarantee.[84] If the failure can be remedied and does not constitute a 'major failure',[85] the consumer can require the supplier to remedy the failure within a reasonable time.[86] If the supplier refuses or is unable to do so, or the failure cannot be remedied, the consumer may commence an action against the supplier for all reasonable costs incurred in remedying the failure or, alternatively, terminate the contract.[87] Furthermore, where there has been a failure to comply with a consumer guarantee, a consumer may seek to recover damages for any reasonably foreseeable loss or damage incurred.[88]

If a university is found not to have exercised due care and skill in its provision of education services with respect to curriculum design and delivery of promoted learning outcomes and/or graduate attributes, it is unlikely that the university will be able to remedy the failure within a reasonable time. Students are only likely to become aware of the university's failure adequately to cover the learning outcomes once the course has commenced or nearer to its completion. As such, it is difficult to envisage a situation in which a university would be able to remedy a failure to comply with the guarantee within a reasonable time. If classified as a 'minor breach', students would need to re-enrol in units which did not adequately cover the learning outcomes in question again — such a process could take multiple study periods. Therefore, the most likely remedy available to an aggrieved student would be compensation for the reduction in value of the services rendered or compensation for the money they paid. Furthermore, if a student were able to demonstrate that it was reasonably foreseeable that a provider's failure adequately to teach and assess its promoted learning outcomes would significantly reduce their prospects of obtaining employment, the student might have a claim for this consequential loss.

The *ACL* lists a number of circumstances which constitute a 'major failure'.[89] An aggrieved student could contend that the educational services provided 'would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure',[90] that is, they would not have enrolled in the relevant course

84 *ACL* (n 13) ss 267(2), 268.

85 Ibid s 268, which outlines the circumstances where a breach of a consumer guarantee constitutes a 'major failure'.

86 Ibid s 267(2)(a).

87 Ibid s 267(2)(b).

88 Ibid s 267(4).

89 Ibid s 268.

90 Ibid s 268(1)(a).

of study had they been aware that the university would not comprehensively cover its promoted learning outcomes and/or graduate attributes. In order to make good this argument, the student would need to demonstrate that the university's learning outcomes and/or graduate attributes are influential factors in a prospective student's decision to enrol at the institution. On that basis, knowledge that they may not adequately be covered could be said to be influential in deciding not to enrol. Given that research has indicated that there is a lack of general awareness and understanding by students of their institution's graduate attributes,[91] however, it is unlikely that an institution's promoted learning outcomes and/or graduate attributes are a factor that influences prospective students' decision-making in this way.

The foregoing discussion demonstrates that student plaintiffs would likely face significant hurdles in seeking to establish a claim against their university under the *ACL*. The next possible cause of action considered by this article is educational negligence.

C *Educational Negligence*

The question whether an aggrieved student could establish an action in negligence against a provider of education is not new. Delivering a speech in March 1982, then Chairman of the Australian Law Reform Commission Michael Kirby stated:

> I do think it likely that increasing community concern about educational standards will evidence itself one day in an endeavour to test the legal duty of teachers to give education of a suggested standard to pupils in their care. … If teachers claim full membership of the club of professionals, they may have to expect the ultimate development of legal liability to meet the appropriate standard in the exercise of their professional talents.[92]

While this speech concerned schoolteachers, these comments can be readily extrapolated to those who teach in the Australian higher education sector. Despite the passage of time, however, educational negligence in Australia is still underdeveloped. 'Educational negligence occurs when a student suffers harm as the result of incompetent or negligent teaching.'[93] It has been the subject of some commentary in Australia.[94] However, the legal position is still unclear. Consider, for example,

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91 See, eg, Smith and Do (n 8) 80.

92 MD Kirby, 'Legal and Social Responsibilities of Teachers' (Speech, Education Centre for Whyalla and Region Annual Dinner, 22 March 1982) 14–15.

93 Ian M Ramsey, 'Educational Negligence and the Legalisation of Education' (1988) 11(2) *University of New South Wales Law Journal* 184, 184.

94 See, eg, Rosemary Antonia Dalby, 'A Human Rights Analysis of a Claim for Educational Negligence in Australian Schools' (SJD Thesis, Queensland University of Technology, July 2013); Caroline Cohen, 'Australian Universities' Potential Liability for Courses That Fail to Deliver', *Colin, Biggers & Paisley Lawyers* (Web Page, 15 December 2016) <https://www.cbp.com.au/insights/insights/2016/december/australian-universities-potential-liability-for-c>; Ramsey (n 93).

a school authority, which will owe a duty of care to a student.[95] The scope of that duty is primarily focused on physical injury; according to Amanda Stickley, whether or not 'a duty is owed for failing to provide a child with an appropriate standard of education … has not yet been directly addressed in Australia'.[96] With respect to the higher education sector, Robert Horton, Kerry Smith and Abigail Tisbury comment that there 'is little specific Australian authority on the nature of a university's duty of care to its students, who are members of their universities'.[97] Consequently, the question whether a university owes a duty of care to their students is arguably even more complicated.

The approach generally taken by commentators on whether an educational negligence claim has the potential to succeed is to consider the elements of negligence.[98] That is the approach adopted below. Where relevant, reference is made to the *Civil Liability Act 1936* (SA) ('*CLA*') by way of illustration.[99] There is similar legislation in other Australian jurisdictions.[100]

The first element of a negligence claim is duty of care.[101] A duty can be of an established category, such as that of employer and employee,[102] or novel.[103] A duty of care also has a defined scope, as outlined by Gummow J in *Roads and Traffic Authority (NSW) v Dederer*[104] (with whom Callinan J and Heydon J agreed):

> [D]uties of care are not owed in the abstract. Rather, they are obligations of a particular scope, and that scope may be more or less expansive depending on the relationship in question. …
>
> … [A] duty of care involves a particular and defined legal obligation arising out of a relationship between an ascertained defendant (or class of defendants) and

95 See, eg, Amanda Stickley, *Australian Torts Law* (LexisNexis Butterworths, 4th ed, 2016) 173–4 [9.69]–[9.76]; Harold Luntz et al, *Torts: Cases and Commentary* (LexisNexis Butterworths, 8th ed, 2017) 964–6 [17.6.9]–[17.6.11].

96 Stickley (n 95) 174 [9.74].

97 Robert Horton, Kerry Smith and Abigail Tisbury, 'The Tort of Negligence and Higher Education' in Sally Varnham, Patty Kamvounias and Joan Squelch (eds), *Higher Education and the Law* (Federation Press, 2015) 179.

98 See, eg, Ramsey (n 93) 198–207; Cohen (n 94); Dalby (n 94) ch 6.

99 *Civil Liability Act 1936* (SA) ('*CLA*').

100 *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Personal Injuries (Liabilities and Damages) Act 2003* (NT); *Civil Liability Act 2003* (Qld); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (WA).

101 Stickley (n 95) 143 [8.4].

102 See generally ibid ch 9.

103 See generally ibid ch 10.

104 (2007) 234 CLR 330 ('*Dederer*').

> an ascertained plaintiff (or class of plaintiffs). Sometimes, the determination of that legal obligation is … complicated …[105]

Pure economic loss, that is, economic loss not consequent upon physical injury or property damage, is one such complicating factor.[106] It is recognised in educational negligence commentary that the most appropriate characterisation of the loss suffered in such a context is purely economic.[107] In her discussion of duty of care, Rosemary Dalby compares educational negligence with other types of negligence involving pure economic loss, including professional negligence and negligent misstatement,[108] before considering the concept of foreseeability and the salient features of the school authority–student relationship that govern the existence and scope of any duty.[109] Caroline Cohen draws attention to the vulnerability of the plaintiff, the indeterminacy of liability, and the defendant's knowledge of any risk of harm as being the 'key issues'.[110] A student plaintiff's first hurdle would be to demonstrate that they were owed a duty of care, having regard to not only reasonable foreseeability but also these salient features.

Assuming a duty could be established, the student would then need to show that the university fell below the requisite standard of care[111] by failing adequately to cover the institution's promoted learning outcomes and graduate attributes. Absent a non-delegable duty (which Horton, Smith, and Tisbury argue would be unlikely to arise in the higher education context),[112] 'the exercise of reasonable care is always sufficient to exculpate a defendant in an action in negligence'.[113] The challenge in the educational negligence context is to identify what is reasonable. This is particularly difficult given the extensive range of subject material taught by universities (usually well beyond what is taught in a school context). Establishing a breach of duty, however, is not necessarily insurmountable for a student plaintiff. As noted by Ian Ramsey,

> [p]rofessional negligence cases frequently involve difficult issues associated with determining an appropriate standard of care. Teaching is not the only profession where there exists a vigorous debate concerning the very nature of the professional process and the role of the professional in that process. … Moreover, it is a fundamental part of being a professional that complex matters requiring the exercise of skill and judgment and are common place and therefore, professionals

105 Ibid 345 [43]–[44] (Gummow J, Callinan J agreeing at 405–6 [270], 408 [282], Heydon J agreeing at 408 [283]).

106 Stickley (n 95) 219 [10.77].

107 Cohen (n 94).

108 Dalby (n 94) 190–3.

109 Ibid 195–9. See also Ramsey (n 93) 196–201, 204; Cohen (n 94).

110 Cohen (n 94).

111 See generally Stickley (n 95) ch 11. See also, *CLA* (n 99) ss 31–2.

112 Horton, Smith and Tisbury (n 97) 180.

113 *Dederer* (n 104) 348 [50] (Gummow J).

> should not be liable for mere errors of judgment. Courts usually give wide latitude to the exercise of judgment by professionals in the course of their duties.[114]

The above extract is particularly relevant here. On one hand, a negligence claim will not necessarily fail simply because it may be difficult to determine the standard of care. (Such complexity is also discussed by Cohen and Dalby.)[115] However, on the other hand, establishing a breach where there are a range of potentially acceptable teaching methods and practices could be difficult.[116]

The establishment of factual causation is also complex in the context of educational negligence. Factual causation in South Australia is generally governed by s 34(1)(a) of the *CLA*.[117] Closely linked to factual causation is the concept of the scope of liability,[118] which is a more policy-focused inquiry.[119] Pursuant to s 34(1)(a), to establish factual causation, it must be shown that the negligence was a 'necessary condition of the occurrence of the harm' suffered.[120] Put another way, and in the educational context, it must be shown that, 'but for' the negligence,[121] the harm suffered by the student would not have occurred. Consider, for example, an allegation that, due to educational negligence, a student received a poor grade and therefore missed out on a valuable job opportunity. There are potentially a wide range of factors (both student- and recruitment/selection-related) that could lead to such an outcome.[122] Being able to establish that the alleged educational negligence was a necessary condition of that outcome would be difficult, especially in the context of the coverage of learning outcomes and graduate attributes. Despite the above discussion, however, it is possible that, in time, factual causation could be more viable to establish. Dalby proposes that 'the ideal case would be if there were empirically verified, universally applicable principles of teaching that could be used to rule out all likely causative factors other than teacher or school error'.[123] While this is unlikely to happen in the near future, it is not necessarily impossible that such a development might occur.[124]

Finally, it is important to consider the potential for a university to raise a defence to a claim of educational negligence. Here, the focus will be on the defence of contributory negligence, which may be easier to establish than other defences such

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114 Ramsey (n 93) 203 (citations omitted).

115 Cohen (n 94); Dalby (n 94) 202.

116 Ramsey (n 93) 203.

117 *CLA* (n 99) s 34(1)(a).

118 Ibid s 34(1)(b).

119 See generally Stickley (n 95) 311–23 [12.56–12.89].

120 *CLA* (n 99) s 34(1)(a). Note also s 34(2).

121 See, eg, *Wallace v Kam* (2013) 250 CLR 375, 383 [16] (French CJ, Crennan, Kiefel, Gageler and Keane JJ).

122 Cohen (n 94).

123 Dalby (n 94) 229.

124 Ibid 229–30.

as voluntary assumption of risk.[125] In South Australia, contributory negligence is a partial defence.[126] Pursuant to the *CLA*, contributory negligence uses a similar approach to breach of duty, but applied to the plaintiff.[127] Dalby engages in a detailed discussion of contributory negligence in the educational negligence context.[128] An important point of differentiation between Dalby's analysis and this article, however, is that students in the higher education sector are generally aged 18 or above. In the educational negligence context, a university alleging that a student was contributorily negligent would, in essence, be arguing that the student failed to take reasonable care with respect to their own education. Any non-attendance of (or lack of engagement with) lectures, tutorials and other classes, non-completion of assigned readings, lack of effort in assessments, late submissions, etc, by the student could all potentially be facts relevant to the question of contributory negligence.

Overall, therefore, while educational negligence may be a possibility for a student dissatisfied with their learning experience from an Australian university, such a claim is likely to be difficult, costly,[129] and with limited guarantee of success, at least at present. This article now turns to consider breach of contract as a possible cause of action in this setting.

D *Breach of Contract*

Despite the limited Australian judicial authority exploring the potential contractual relationship between students and universities,[130] there appears to be a general consensus amongst Australian legal commentators that contracts between universities and students do exist.[131] However, due to the legislative instruments and university by-laws that regulate the relationship, it is unlikely that the entirety of the relationship is purely contractual.[132] The scarcity of legal authority exploring the student–university contractual relationship is largely attributable to the fact that most claims brought before the courts have been predominately brought under legislation

125 See generally Stickley (n 95) ch 13.

126 *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) s 7.

127 *CLA* (n 99) s 44(1).

128 Dalby (n 94) 231–3.

129 See, eg, Pamela Stewart and Anita Stuhmcke, 'Lacunae and Litigants: A Study of Negligence Cases in the High Court of Australia in the First Decade of the 21st Century and Beyond' (2014) 38(1) *Melbourne University Law Review* 151, 167–7.

130 But see *Bayley-Jones v University of Newcastle* (1990) 22 NSWLR 424, 428, 435–6 (Allen J).

131 See, eg, Jim Jackson, 'Regulation of International Education: Australia and New Zealand' (2005–06) 10(2)–11(1) *Australia and New Zealand Journal of Law and Education* 67, 74–5; Goldacre (n 30) 188; Lindsay (n 69) 7; Rochford (n 69) 28–9.

132 See, eg, Francine Rochford, 'The Contract between the University and the Student' in Sally Varnham, Patty Kamvounias and Joan Squelch (eds), *Higher Education and the Law* (Federation Press, 2015) 84–8; Goldacre (n 30) 188; Lindsay (n 69) 7.

concerning consumer protection, discrimination and freedom of information, or on application for administrative remedies.[133]

Although there is support for the position that a contract exists between students and universities, given the lack of judicial authority, the express and implied terms of any such agreements are uncertain.[134] However, there appears to be support for the proposition that the contract for the supply of educational services consists of two contracts: 'a "contract to enrol"' and 'a "contract to educate"'.[135] The contract to enrol is entered first, at the time a student enrols at the institution, and is followed by a broader contract to educate.

Although a contract to enrol will often make reference to the university's statutes, rules and by-laws, it is contentious as to whether these non-contractual authorities are legally binding.[136] Justice Jagot in *Soliman v University of Technology, Sydney* ('*Soliman*'),[137] in determining the terms of a university employment contract, held that these authorities could form part of the contract 'if a reasonable person in the position of a promisee would conclude that a promisor intended to be contractually bound by a particular statement'.[138] Francine Rochford suggests that it is likely that this legal reasoning will be extended to a student's contract to enrol with their university.[139] In *Soliman*, however, Jagot J held that merely stating that the contract was 'subject to and governed by' the institution's constitutive statute and by-laws 'could not reasonably have been intended to represent obligations that were contractually binding'.[140]

An aggrieved student contending that their university has not adequately covered its promoted learning outcomes and/or graduate attributes will not likely succeed in a claim for breach of contract bringing into issue the contract to enrol. The case law suggests that references to learning outcomes and graduate attributes in the institution's statutes and by-laws are unlikely to be incorporated into the contract to enrol.[141] Therefore, a claim that the higher education provider breached a term of the contract by failing adequately to cover the learning outcomes and/or graduate attributes will be unlikely to succeed.

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133 Rochford, 'The Contract between the University and the Student' (n 132) 85.

134 Lindsay (n 69) 10–11.

135 Goldacre (n 30) 189. See also Rochford, 'The Contract between the University and the Student' (n 132) 86.

136 Goldacre (n 30) 191; Rochford, 'The Contract between the University and the Student' (n 132) 86–8.

137 (2008) 176 IR 183 ('*Soliman*').

138 Ibid 198 [65], quoting *Goldman Sachs JBWere Services Pty Ltd v Nikolich* [2007] FCAFC 120, [23] (Black CJ).

139 Rochford, 'The Contract between the University and the Student' (n 132) 86–8.

140 *Soliman* (n 138) 199 [67].

141 Ibid.

Commentators have indicated that the contract to educate relates to the provision of teaching and learning facilities, but does not necessarily stipulate the standard and quality expected of the educational service provided.[142] Given the general reluctance of courts to interfere with matters concerning academic judgment, it is unlikely that courts will consider claims for breach of contract by students bringing into issue the standard and quality of the educational services rendered by universities. The court will likely perceive the regulator, TEQSA, as being a more appropriate decision-maker.[143] Therefore, an aggrieved student claiming that the university has breached the terms of the contract to educate by failing to ensure adequate coverage of the learning outcomes and/or graduate attributes will be unlikely to succeed. In such circumstances, the university would have likely delivered the units specified in the course study plan, but the coverage of the learning outcomes or graduate attributes may have not been to the standard and quality the student had expected. Commenting on the quality of educational services, Neville FM in *Yee v Hort (ANU College)*,[144] in obiter, said:

> [I]t is not uncommon that courses in educational institutions … are not delivered to the absolute, highest quality. Such is the reality of most human endeavour. However, it is one thing for educational courses, to be, among other things, of varying quality; it is quite another for the delivery of a course (or courses) to provide a base, in law, for a dissatisfied student to claim … relief …[145]

Based on the above discussion, it is apparent that the *ACL*, educational negligence and breach of contract are not suitable options for students seeking a remedy against their higher education provider for a failure adequately to embed learning outcomes in the educational experience.

IV Conclusion

Theoretically, there are several options available to a student who contends that their higher education provider has not adequately taken measures to ensure that 'all specified learning outcomes are achieved [by students] and that grades awarded reflect the level of student attainment'.[146] The aggrieved could seek redress through the higher education provider's internal complaint management system, by lodging a complaint with the relevant regulatory body, and/or, ultimately, by pursuing a private legal action. Although students theoretically have these options available to them, if a student is dissatisfied with the decision reached from the internal complaint management system, there is no real viable option for the student to seek redress

142 See, eg, Rochford, 'The Contract between the University and the Student' (n 132) 88–9.

143 See, eg, *Kweifio-Okai v Australian College of Natural Medicine [No 2]* [2014] FCA 1124, [37] (Tracey J).

144 [2012] FMCA 391.

145 Ibid [21].

146 *Threshold Standards* (n 4) stand 1.4.3.

beyond this point. Lodging a complaint to either ACCC or TEQSA does not necessarily equate to legal action with a tangible remedy for the student.

Likewise, as shown in Part III of this article, private legal action is unlikely to result in success for the student. Arguably, the greatest challenge highlighted by the discussion is the causation element, that is, the requirement to establish a causal relationship between the conduct of the university (here, the failure to embed learning outcomes in the educational experience) and the effect on the student (for example, a missed job opportunity). While this element can take multiple forms, and use different terminology (for example, reliance in the *ACL* context versus factual causation in the negligence context), it is apparent that this will amount to a significant burden on any student seeking to bring a private legal action against their university.

Given that students have limited viable options for enforcing their rights with respect to the coverage of learning outcomes within their higher education experience, and the 'trust given to universities as knowledge discovers [sic] and disseminators',[147] Australian universities need to do more to address this recognised shortcoming within the sector. While it is widely acknowledged that learning outcomes within the higher education sector are generally vague, of 'patchy' implementation and often treated as a compliance-based exercise,[148] Australian universities must not be complacent with respect to learning outcomes, especially given the acknowledgement that 'graduate attributes are now recognised globally as a critical outcome of modern university education'[149] and are legally mandated.[150] In the event that Australian universities do not develop measures of assuring attainment of learning outcomes for graduates, then it will be left largely for the regulator, TEQSA, to step in and hold universities accountable, given that, for students, enforcement through private legal action is likely to be time-consuming, expensive,[151] and unsuccessful.

147 Jackson, 'The Marketing of University Courses' (n 55) 118.

148 See, eg, Simon Barrie, 'Rethinking Generic Graduate Attributes' (2005) 27(1) *Higher Education Research and Development Society of Australasia News* 1, 3; Green, Hammer and Star (n 1) 18; Do and Smith (n 1); Barrie (n 7) 218; Barrie, Hughes and Smith (n 7) 6, 20; Spencer, Riddle and Knewstubb (n 7) 218.

149 Alex Radloff et al, *The B Factor Project: Understanding Academic Staff Beliefs about Graduate Attributes* (Final Report, 2009) 1.

150 *Threshold Standards* (n 4) stands 1.4.1–1.4.4.

151 See, eg, Stewart and Stuhmcke (n 129) 166–7.