

## Chapter 7

# The Contract Between the University and the Student

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### I Introduction

It is commonly understood that the relationship between universities and their students is governed, at least partially, by contract.<sup>1</sup> This seems to be conceded even in jurisdictions in which the matter has not been the subject of authoritative pronouncement, as in the case of Australian jurisdictions. However, this was not the historical position. Case law established that historically the relationship was primarily one of status – a continuing, institutional conferral of position as an incident of a relationship rather than as a consequence of agreement. This chapter reconciles these two positions, as least as far as can be attempted with the current state of the law in Australia. University structures and practices<sup>2</sup> have changed in line with the contractual understanding to such an extent that contractual intention is likely to be established, however this is not inconsistent with the existence of internal rules and procedures aligned with a status relationship, failure to follow which may trigger administrative remedies.

This analysis will briefly articulate the ‘status’ interpretation of the relationship between the student and the university, and recount the transition from status to contract. The analysis will then consider cases which provide authority to ground a contractual interpretation of the modern relationship, and provide an analysis of the formation of such a contract. However, the relationship between the university and the student is rarely litigated on the basis of contract, potentially because of imbalances of power, the availability of more expeditious statute-based or administrative remedies, or because of the lack of attraction of contractual remedies. This suggests that the contractual designation is at the least unhelpful, and perhaps simply a rhetorical explication of the relationship.

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1 See David Palfreyman, ‘Phelps ... Clark ... and Now Rycotewood? Disappointment Damages for Breach of the Contract to Educate’ (2003) 15 *Education and the Law* 237. In the United States, see *Ross v Creighton University*, 957 F 2d 410 (7th Cir 1992); Alec Samuels, ‘The Student and the Law’ (1972-1973) 12 *Journal of the Society of Public Teachers of Law* 252 posits a hybrid relationship.

2 See Jane Kelsey, ‘Privatizing the Universities’ (1998) 25 *Journal of Law and Society* 51.

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