

# **The Relationship Between The Student And The University**

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## **Abstract**

It is becoming common to assert the contractual origins of obligations owed by the university to the student. However, the means of creation of the contract and the terms of that contract are not subjected to great scrutiny. The desirability of such an analysis is also frequently assumed. The author suggests that it is possible to assert the existence of a contract governing the relationship between the university and students as members, but that this analysis will not necessarily support the existence of a generalised contractual right to be educated. The author suggests that the contractual analysis is a simplification of the relationship between the parties, and that it is a representation which tends to support the commoditification of the product of the university. However, it would be dangerous to ignore the implications of the prevailing tendency to conceptualise the relationship as contractual.

## **Introduction**

It is becoming more common to represent the relationship between the university and the student as a contractual one. Whilst a contractual analysis is certainly supportable, it moves away from the traditional judicial analysis of the relationship. Authorities have, until relatively recently, analysed the relationship as a corporate one and have conceded that, in many cases, the relationship is within the exclusive jurisdiction of the visitor.

Conversely, there has long been a body of opinion which considers that the contract is the most appropriate way of governing the relationship: that '[t]he legal relationship of a University with its members is much more suitably governed by the ordinary law of contract and by ordinary contractual remedies' (Wade, 1969: 471).<sup>1</sup> However, the means by which the relationship is effected is often not subjected to great scrutiny. In particular, if it is asserted that the contractual analysis is capable of supporting the interests of a student in a dispute with the university over the quality or outcome of a course of education, the source of the contractual duty is not clear.

This paper considers the corporate representation of the relationship, with a view to distinguishing the features of that representation which set it apart from the contractual analysis. However, for other purposes, which do not rely on the statutes of the university, the creation of the contract is more problematic. The paper therefore considers the technical aspects of the contractual

representation of the more substantial aspects of the student-university relationship, and the characteristics of the student/university relationship which are not easily reconciled with the contractual analysis. The paper concludes that there are a number of obligations which are capable of enforcement by contractual means, but that the assertion of a more widely framed 'duty to educate' which arises by contractual means is more difficult to sustain.

Consideration is also given to some of the policy arguments which may affect the eventual judicial characterisation of the relationship. In addition the motivations for the adoption of the contractual analysis, and the lack of any clear demonstration that that analysis is to be preferred in the context of the university are addressed. Although the means by which the judiciary have implied the contract into a corporate relationship in cases involving other types of incorporated bodies has been used in the university context to inform the judicial analysis, the results do not necessarily arrive at a happy compromise between the preservation of the interests of the student and the achievement of the goals of the university. A characterisation of the university which will provide a more complete and attractive view of the university/student relationship is beyond the scope of this paper. At this point it is suggested only that the alternative models should not be forgotten. However, it is clear that the identification of the university/student relationship as a contractual one has become common enough to render it dangerous to ignore the implications and to create the need to give due attention to upgrading prospectus, registration and course documentation.

### **The Corporate Analysis**

The difference between the contractual and the corporate analysis could perhaps be reworded as the difference between the views that students are *at* the university, and that students *are* the university. The first view emphasises the service provided by the university to the student; the second emphasises that the student, as a member of the university, is part of the corporation.

A modern university may have its foundation by statute or by royal charter. In Australia, it is typically created by statute, and takes the form of the eleemosynary corporation. Beyond Australia, it may take on one of three forms: one of the two types of lay corporation - that is, an eleemosynary corporation or a civil corporation - or a trust.<sup>ii</sup>

Where the statutes of the university provide that the student is a member of the corporation, it is clear that at least part of the relationship is one of status; the students are members of the corporation - stand as corporators in relation to the university - and that the relationship is governed by the by-laws of the corporation.<sup>iii</sup> There are circumstances, of course, where the founding instrument will limit the definition of corporators, perhaps by including only academic staff, and in those cases non-corporators may be in a contractual relationship for the internal aspects of the relationship. It is fairly typical, however, in Australia, to list undergraduate, postgraduate, and even ex-students as corporators.<sup>iv</sup> In the United Kingdom a species of university developed as a consequence of the *Further and Higher Education Act 1992* (UK) limit the range

of corporators to the governing body of the institution, but universities with their origin in a Charter or another Act of Parliament frequently adopt the approach followed in Australia.<sup>v</sup>

Where students are members of the corporation, the rules of the university are binding upon them in the same manner as municipal laws are binding upon the constituents of the municipality:

when they are consolidated and united into a corporation, they and their successors are then considered as one person at law: as one person, they have one will, which is collected from the sense of the majority of the individuals: this one may establish rules and statutes for the regulation of the whole, which are a sort of municipal laws of this little republic; or rules and statutes may be prescribed to it at its creation, which are then in the place of natural laws (Blackstone, 15th ed. 1982: 468).

This characterisation suggests an element of collegiality and common purpose about the process of education which does not, however, sit happily with the new environment within which higher education in Australia takes place. The university is more commonly represented as a 'business', the students as 'clients', and their respective interests as not necessarily coinciding. It is becoming more common to represent the relationship as governed by contract, although the details of the purported contract are rarely considered with depth. Moreover, the interpretation of the university as a business and the consequent attraction of the contractual analysis is assumed to be appropriate to all species of institution, regardless of origin or the source of powers.

### **The Contractual Analysis**

The contractual analysis could be simply described as follows: a student receives an offer from a university for a place, and upon acceptance of that offer an agreement ensues. This agreement is supported by some form of consideration from each party - a price paid for the promise of the other party. This could be represented by fees, or it could be in the form of a detriment incurred or a benefit foregone, or it could be the promise of one of these. Both parties intend to enter into a legal relationship, in the sense that the agreement is more than frivolous, social or domestic. Thus, the three essential elements of a contract exist - agreement, consideration and intention. It is not difficult to identify each of these elements in the agreement between the student and the university; however, it is less simple to argue that the entirety of the relationship between the university and the student can be reduced to these terms.

The rationale for the preference of a contractual analysis over other analyses could be closely linked to the changing values of the society which gives the university its identity. As the university sector is increasingly challenged by a modern ethos committed to accountability, the consequences of failure to provide satisfaction in the terms of that account may include liability for compensation through contractual suit. This is not to say that the contractual analysis is a new

one. However, in the past, the contractual theory, if applicable at all, was more frequently applied to private institutions, where the privilege of attendance has been set against the conditions of attendance, which are to be found in bulletins or regulations which serve as notice of academic and non-academic standards of conduct (Furay, 1970).

This rationalisation of the relationship has certainly occurred in cases in the United States. In *Anthony v Syracuse University*<sup>vi</sup> the registration agreement stated that the school reserved a 'right to require withdrawal of any student at any time for any reason deemed sufficient to it and no reason for requiring such withdrawal need be given'. A student was dismissed on the grounds that she was not 'a typical Syracuse girl'. The court ruled that the student was bound by the registration agreement, regardless of the vagueness of the document and the possible injustice of the result, and this rationale has been adopted in a number of cases in the United States.<sup>vii</sup>

In the United Kingdom the contractual interpretation has received new attention as a result of the ruling in *Moran v University College, Salford (No 2)*<sup>viii</sup>. The question has been addressed by the Committee of Vice-Chancellors and Principals of the Universities of the United Kingdom in the light of the *Moran* case and pressures exerted by the Citizen's Charter initiative and the subsequent Charters for Higher Education. Universities in the United Kingdom appear to be resigned to the treatment of the relationship as a contractual one, although there still appears to be some doubt as to the point at which the contract comes into existence. It is suggested that the contract comes into existence at the point at which the student accepts an offer from the Universities and Colleges Admissions Service (UCAS). It has been suggested that another contract arises at the point of matriculation, however universities are inclined to act on the former view. If that view is accepted, it becomes imperative to provide appropriate notice of terms in the documentation provided to the student. In particular, in the United Kingdom, universities have been advised to alter their prospectus documents to leave them in a position to charge 'top-up fees' should that expedient be necessary. Changes to UCAS documentation were also advised, in light of their status as contractual documents. One suggested difficulty with this approach was the perception that the obligation to pay fees did not arise until matriculation, but this was considered to be unproblematic in view of the number of other contracts in which obligations arose at different points in the contract.

For many, the differences between the normal commercial setting, in which the contract is such an attractive device, and the situation of a student enrolling in a university, are so pronounced as to make it, in practicality and in policy, a poor rationalisation of the relationship (Goldman, 1966: 653; Furay, 1970: 264). Indeed, it is not yet common to see the contractual analysis adopted in cases in Australia.

In contrast to the suggested simplicity and applicability of the contractual device, the view that the relationship between student and university was clearly *not* contractual was expressed by Kindersley V.C. in *Thomson v University of London*.<sup>ix</sup> The University of London had been incorporated by Royal Charter, granted on the 28th of November 1836. Since then it had been regulated by different charters from time to time, but at the relevant time the University was

governed by Royal Charter granted by letters-patent. Although the judgment related to a rather limited relationship between Thomson and the University in that Thomson had paid a sum to sit a number of examinations for a gold medal, Kindersley VC considered the situation of a person who had paid the fee for admission to one of the colleges, paid tutors' fees, and had become a member of the College by matriculation, and paid more fees. His Honour considered that a representation of that relationship as contractual was, 'although perhaps in one sense ... not quite absolutely and metaphysically a misnomer, but in a legal point of view it is a misnomer - it is not a legal contract'. He concluded:

it is this: that the Crown having established, for public purposes, this University for the public benefit, for the promotion of learning, with its privileges and with its Visitor, the purpose is, that persons may come and submit themselves to examination. It is a misnomer to say that by that, and because they have paid the regulation fees, therefore they have entered into a contract, and a contract which this Court would enforce (p. 638).

*Thomson* is, on its facts, restricted to the holding of examinations, and 'the holding of examinations and the conferring of degrees being one, if not the main or only object of this University', (p. 634) the regulations therefore and their construction were considered to be a matter for the members of the University. In essence they were internal matters and matters within the exclusive jurisdiction of the Visitor. It is not clear from the language of the case whether different aspects of the university's function, say, provision of tutorials, would be considered differently. It appears that, in a matter involving examinations, policy considerations would arise which would not arise in other aspects of the university's function.

However, although the Australian cases have typically followed the same line and have not adopted an exclusively contractual analysis with any enthusiasm, the courts have suggested a contractual analysis which is consistent with the corporate analysis. In *Bayley-Jones v University of Newcastle*<sup>x</sup>, (which concerned the termination of the enrolment of a PhD student by the university), after considering these authorities, Allen J concluded that there was no difficulty in construing that it was possible there was a contract which incorporated the terms arising from the rules of the university:

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

This hybrid analysis adopts the same justification for intervention as is employed in cases involving other types of corporation. In particular, s.180 of the Corporations Law states that the memorandum and articles of association have the effect of a contract under seal between the company and each member, between the company and each officer, and between a member and each other member, under which each of those persons agrees to observe and perform the provisions of the constitution. However, the effect of the contract is confined to those situations. A member or officer is given no rights at common law in any other capacity. This distinction originated in the common law. In *Eley v Positive Life Assurance Co Ltd*<sup>x1</sup> Eley was appointed as solicitor to a company for life and he later became a member of the company. His appointment was contained in the articles, but was not contained in a separate contract. He was later removed as the company's solicitor and sued for breach of contract. The court held that the articles conferred no rights upon him in any capacity other than that of member, and that these rights were not affected by the dismissal. The common law view was that the articles were regarded as creating a contract between the members and the company, and between the members themselves, and ss 180(1)(a) and (c) of the Corporations Law codify this view.

The restrictions placed upon those contracts, however, are instructive in the student-university situation. They give rights to the member as member only, and in no other capacity. Alleged rights other than those contained in the articles are not enforceable against the company. So although the statutory rules of a university may be enforceable contractually, they will not provide assistance to the student for any purposes other than the enforcement of the statute (leaving aside, for the purposes of this analysis, the fact that disputes over internal matters are typically within the exclusive jurisdiction of the visitor). The statute and statutory rules are rarely specific on the obligation of the university to teach the students. Where does that leave the student alleging a failure to comply with a contractual duty to teach effectively, or to provide sufficient facilities, or to hire competent staff? This must be the subject of some other contract, aside from the statute.

### **Agreement**

From the point of view of finding some substantive basis upon which the student can allege a breach of a contractual duty by the university, it has been said that the content of the contract - the agreement, represented by the offer and acceptance - is not clear. Writing in the context of United States' law, Goldman (1966) says:

... the courts usually look to contract law to rationalize decisions in suits involving such conflicts. The bench generally assumes that the provisions of the student-university contract are to be found in all of the statements contained in the admissions application, the registration form, the school's rules and regulations and the catalogue. The rather obvious questions to be raised to this

approach under the Statute of Frauds and the parol evidence rule are ignored in the decisions, possibly because the litigants fail to raise them (p. 652).

Whereas these questions do not translate directly to the Australian context, the failure of courts in the United States to address the issues, despite a reasonably long-standing acceptance of a contractual analysis, is representative of a general failure to address the elements of the student-university contract. If these documents do make up the contract, and if it is possible, by reference to these documents, to assert that the contract requires that a particular procedure will be followed before a student can be removed from an institution, or that a degree will be conferred after compliance with certain conditions, it is not, however, likely to give any more substantial basis upon which to found a student's claim of failure to comply with a duty to educate. What is the expected 'product' of a university? What has the university agreed to provide the student? Chancellor of The University of Melbourne, Sir Edward Woodward, suggests that a graduating student should be taking away an 'enquiring mind', a 'well-developed capacity to reason', a 'capacity for problem solving', the 'ability to communicate', 'interests beyond work', 'tolerance' and 'a number of friendships'. (Woodward, 1997: 1). Which of these 'intangibles' is likely to appear in the documentation with the force of a contractual promise? Even if, through the implication of terms by common law or statutory means, there is an implied promise to educate, problems of proof arise. The contract theory is a limited basis upon which to assert substantive student rights beyond the right, for instance, to insist that the course be offered, or to insist that the promised number of contact hours are offered, or to have examinations conducted in a certain way, or to have the relevant regulations followed in a disciplinary hearing. A student attempting to enforce a right to 'an education' or 'employability' would have an uphill battle. The contractual analysis may have the benefit of implying certain, easily definable rights, but would not necessarily provide more substantial assistance in a case where a student alleged a breach of contract resulting in a failure to learn.

Cases which have adopted a contractual analysis have looked to the re-enrolment materials, the prospectus, the handbook - any publication in which the university has made statements to a prospective student - to find the content of the agreement between the parties.

By his act of registration the student could be deemed to accept the university's honour code, to pledge to abide by all institutional regulations, or even to accept the traditions and principles of the university. In return for tuition and these undertakings, the courts have implied a right to continued attendance as long as the student remains in good standing (Note, 1968: 1146).

These documents could incorporate a statement to the effect that the university reserves to itself the right to charge top-up fees at a later date, as do many prospectus documents now in the United Kingdom, and statements to the effect that the university reserves the right to alter subject offerings, or to suspend the offer of a particular subject, or require the student to complete a bridging course as a condition on enrolment in a particular course. Obviously, in those

jurisdictions in which legislation regulates the inclusion of unfair terms, as is the case in England, these terms would be required to comply with the provisions.

There is no reason to suppose that an Australian case which adopted the contractual analysis would use a different set of documents to determine the content of the contract.

Of course, the input of the student into this process of negotiating the contents of the contract is small. As one commentator put it, 'the registration contract is not the result of bargaining. It is unlikely that a student wishing to re-negotiate its terms would be able to find someone during the registration period who had the authority to vary the provisions of the contract' (Goldman, 1966: 653). I would add that, in many cases, it would be difficult for the student to find someone who had *knowledge* of the provisions of the contract, let alone sufficient knowledge of the rules of agency to know whether they were in a position to renegotiate any existing contract. In the case of universities formed pursuant to legislation, amongst which are numbered all Australian universities and many of those in the United Kingdom, the rules of the institution will not be capable of renegotiation by an individual, having been enacted by the governing body of the university pursuant to the enabling act and existing in the form of by-laws. So in the case of the limited contract reflecting the rules of the institution, the possibility of renegotiation is limited. The remaining purported contractual obligations would have to originate with the course handbook, publicity materials, the fairly unexceptionable statements contained on enrolment forms, and some comments of course co-ordinators or advisors.

### **Consideration**

A frequently cited difficulty of a contract-based analysis is, in the case of a public institution, the difficulty in defining consideration. However, this difficulty is relatively easily resolved. Some students pay fees to attend university - both overseas and Australian full-fee paying students. Presumably that number will increase with the announcement by several universities that they are to introduce the opportunity for domestic students to pay fees to attend.<sup>xiii</sup> Nonetheless in Australia most students attend on an HECS basis; that is, they pay a fee to the government and the government funds the university. It is possible to characterise that relationship as contractual if the students' attendance at the university is regarded as consideration, with the exchange the promise to provide lectures and the opportunity to sit an examination. This argument fails in the context of non-tertiary education, where the students' attendance is compulsory; it may also fail in the context of tertiary education, where attendance is optional. However, sufficient consideration may be provided in the form of compliance with the procedure for enrolment or a promise to abide by the rules of the institution. In the United Kingdom it is argued that the consideration from the university is the promise to provide the course, and that from the student the foregoing of a chance to take up an offer from another university. That argument is as applicable in the Australian case, where, by accepting the offer of an Australian institution (and enrolling in it) the student has foregone a chance to attend another institution. Prior to the point of enrolment, however, the

comparison with the United Kingdom is a little less clear-cut. An Australian student can accept a second-round offer despite having already accepted one from another institution.

In some jurisdictions it is also possible to characterise the relationship as a contract between two other parties of which the student is a beneficiary: Funston (1981) argues that in the context of non-tertiary schools in the United States:

A slightly different contract theory on which a public school student suing for a failure to learn might rely is that of the third party beneficiary. The contract of which the student would argue that he or she was the third party beneficiary might be either the contract between the teacher and the school district, an implied term of which was that the teacher would teach non-negligently, or an implied contract between the taxpayers and the school district (or the state), whereby the district promised to educate the students committed to its care. In either case, the student as third party beneficiary of the contract would be entitled to recover for its breach. But the student would first have to show that the contracting parties had manifested an 'intent to benefit' third parties ... (p. 761-2)

In Australia, this analysis would prove less helpful to the student. The relative rigidity of the privity concept in Australia would mean that, although the party who provided the consideration (on this analysis, the government) would be able to insist on provision of the benefit to the third party (the student). The student would not be able to enforce the contract on his or her own behalf without having provided some consideration.

### **Considerations of Policy**

As an instance of the role of policy in defining the relationship between the student and the university, it is arguable that the relationship will be affected by the perceived function of the university, as those functions are an expression of contemporary values; if the student is considered to be a merely passive consumer of a commodity, it may be more easily accepted that the relationship is contractual, whereas if the student is considered to be an active participant in a community of scholars, the relationship looks more like a corporate model. For that reason, it has been suggested that the shift in the relationship of higher education to the society in which it exists has resulted in a change in the perception of the relationship between the university and the student, so that

[i]n the light of these changes, it is evident that a rational theory of the legal relationship between the student and the university can only develop within the context of the university as an instrument of society. In this concept, student-university relationships cease to be the private affairs the university has long considered them. The university's responsibility to its students is a responsibility to society (Furay, 1970: 245).

The recent round of changes to the Australian university system brings this comment into a sharper focus. Having regard to the policy aspects of the relationship will also be a difficult proceeding in the prevailing climate of change in the university sector. Yet another report into the Higher Education sector in Australia, the Federal Government's review of Higher Education Financing and Policy by Roderick West, has the potential to produce an alteration in government policy which will direct a shift in the attitude of the university to its students, if not the attitude of each university to itself. At the same time Furay's (1970) comments illustrate that change in the university sector is no new phenomenon, and has been cited in the past as a reason for difficulty in determining the relationship between student and university:

The rights and responsibilities of one must be weighed against the rights and responsibilities of the other, in terms acceptable before the law as imposing a duty on one or the other to act in a certain way. The difficulty is compounded by the fact ... that the university's relationship to society itself is in transition, at the same time as the university's clientele becomes larger and more independent, with higher proportions of adult students (p. 261).

So it is commonplace today to assert that, where the university has certain rights which it would not have if it did not perform certain roles, it must accept certain corresponding duties and responsibilities. According to Hamlyn (1996), '[h]ow that works out is a complex matter and it is equally a complex matter what duties and rights the individual members of a university have in consequence' (p. 217). This is as applicable to the legal context as to the sociological or philosophical context as it will have an impact on the direct legal rights of students. Given that most Australian universities are allocated a certain amount of money upon the enrolment of a student, there is a natural expectation that the money will be spent at least in part upon the education of the student.

Similarly, the public nature of most universities in Australia is likely to warrant more interference by the state than would necessarily be acceptable in a private institution, particularly with a view to *enforcing* the responsibilities which the government may attach to the provision of funding. With a private institution, it is possible to argue that individuals have come together in pursuance of a common interest, and they are entitled to regulate the internal workings of the group without the arbitrary intervention of government authority. The only grounds upon which the government would be entitled to intervene would be the grounds that some interest greater than that represented by the claims to group autonomy should be protected. In a public university, that philosophical objection doesn't hold. A university in Australia is typically required to conform to the objectives of the government, and with restrictions on its functioning which hamper, although they do not prevent, the operation of group autonomy.

That being the case, the present move to abolish the jurisdiction of the visitor, consequently opening the operation of the university to external scrutiny, is consistent with the

idea of the university as a public, rather than a private institution. The consequence of the view that the students are incorporators is that, in many instances, the relations between the university and the student is rendered incapable of external scrutiny. There are reservations. In some states the jurisdiction of the visitor has been abolished (although with the retention of ceremonial offices). In others it is exercised concurrently with the jurisdiction of the courts. Moreover most cases, where the jurisdiction of the visitor remains, the university visitor has exclusive jurisdiction over all matters relating to the 'internal management of the *domus*, such as regulations, examinations and degrees'.<sup>xiii</sup> 'The authority of a visitor acting within his jurisdiction is both exhaustive and final' although it appears that while there is some judicial control over the visitor, that control is circumscribed (Bridge, 1970). A civil corporation remains subject to the control of the courts, but this is not particularly relevant in Australia, as in all cases the university is an eleemosynary corporation.<sup>xiv</sup> An eleemosynary corporation is defined as being 'founded for the perpetual distribution of charity and alms-giving', (Sadler, 1981: 3) and in the context of educational establishments, they are 'that type of lay corporation set up for the purpose *ad studendum et ad orandum*, (Ricquier, 1977-8: 649-50) for the 'promotion of learning and the support of persons engaged in literary pursuits' (Bridge, 1970: 533). The office of the visitor 'attaches as a necessary incident to all eleemosynary corporations' (Sadler, 1981: 3) and stands at the 'apex of the judicial arm' of the university. (Sadler, 1981: 3) Notwithstanding that comment suggests that the visitor is a 'necessary incident', the university must be capable of operating without such an office, since it has been modified or abolished in several jurisdictions. It would be going too far to suggest that statutory abolition of the visitorial jurisdiction over universities would alter the relationship between student and university. Although it may say something about the way in which the legislature would like to see the university operate, a symptom of the policy change, it would take something more to establish that references in other statutes to the members of the university should be interpreted differently. I will leave the visitorial jurisdiction aside as a common, but not a necessary incident of a university, and proceed with the claims urged by a corporate analysis unrelated to the visitorial jurisdiction. The abolition of the visitorial jurisdiction does not, after all, abolish other forms of internal regulation of disputes.

In light of these policy considerations, what matters may be claimed in favour of a corporate model to represent the relationship between the university and the student? The corporate model certainly has authority to recommend it; few cases suggest that the relationship between the student and the university, where the student has been named in the foundation instrument as a incorporator, is a contractual one.<sup>xv</sup>

It is certainly possible to assert that the corporate model is more appropriate to a participatory view of education where students are considered to be part of a collegiate enterprise engaged in a common purpose. However, this could be impugned as an idealistic or dated view of university education. In a modern higher education system, characterised by mass participation, large classes, and government funding models linked to throughput, the idea and the incidents of a community of scholars seems irrelevant. In addition to these factors, the environment in which university education is carried out is affected by a general requirement that recipients of

government funding must be accountable, and the accountability criteria are seldom sympathetic to the idea of unmeasurable goals of collegiality.

There are difficulties, however, in the adoption of the contractual analysis as the preferable characterisation of the relationship between a university and its members, (assuming, in any event, that the preconditions of the existence of a contract can be satisfied in any particular case). The initial reluctance to adopt this view stems from the feeling that, although universities are now used to analysing relationships in terms of contract, as a satisfying rationalisation of the more complex realities, the relationship between student and university does not *look* like a contract - the presumptions of freedom of bargaining power, however fictional they are in the realities of the commercial world, are completely inappropriate here; and the parties, however solemnly they may be considering the process of enrolment, do not consider themselves to be entering into a contract.

American courts and commentators are more used to adopting the contractual analysis than their Australian or United Kingdom counterparts. '[W]ith respect to private education the courts have generally employed the law of contracts to adjust student-school relations by enforcing the contractual terms which many colleges and universities have incorporated into their publications' (Note, 1968: 1145). With their greater experience of the effects of the rationalisation comes a greater concern:

The law of contracts is not, however, an appropriate basis for deciding student-university disputes. Contract rules were developed to deal with the hard bargains made by self-interested persons operating in a commercial setting. The environment in which a student deals with a university is far removed from the market place and it is unwise, therefore, to judge student-university conflicts by the law of the market (Goldman, 1966: 653).

There are a number of aspects to this assertion. Firstly, Goldman (1996) develops the idea of an overriding relationship between the student and the university which is informed by history and has 'unique juristic attributes' (p. 667) He considers it to be a status relationship, inappropriate to confinement to a contract. Read in that context, Goldman's view is capable of supporting a claim for an alternative theory which does accommodate the complexities of the relationship. Secondly, Goldman is making the more limited point already mentioned that any purported contract between a student and a university is rarely, if ever, the result of freely conducted negotiations between the parties. In this he is supported by various other commentators:

On the debit side of the contractual theory of the student-university relationship are several significant points, which have analogies in commercial contracts. First, the bargaining position in a student-university 'contract' is very unequal. The student does not, of course, have to attend any specified institution. He may select any of several different kinds of colleges, the regulations of which are

known to him in advance. But should he wish to go to a particular school, he often has no choice but to accept the stated terms and no initial power to bargain about any of the conditions. It is a simple 'contract of adhesion' (Furay, 1970).

These comments, however, provide a reasonably dated perspective, and it is clear that the argument suggested by Goldman and Furay is not limited in its application to the relationship between the student and the university. There are many such relationships in the modern commercial context which suffer from the same defect, particularly the relationship between consumer and corporation in the modern one-off consumer transaction. That is one of the reasons for the enactment of statutes which imply protective conditions and warranties into consumer contracts - see, for instance, the *Trade Practices Act 1974* (Cth) and the *Goods Act (Vic) 1958* - and it is clear that Australian courts concede the fictional aspects of the presumption of equality of bargaining power.<sup>xvi</sup> One way in which the student-university relationship is not like a simple standard form consumer contract is the degree of negotiation which does go on to determine the rules which will govern entry into the institution. Although the negotiation is not in the hands of the individual student working on his or her own entry into the institution, it is in the hands of student union members, of governing bodies, committees and boards making representations on behalf of the entire existing and prospective student body. The resulting 'contract', if that is what it is called, looks more like an employment contract under an award structure than a one-off consumer transaction governed by a standard form. This is not to say that the mechanism is a particularly effective one from the point of view of protecting the individual rights of members, but it is an interesting comparison with the process of creation of a standard form contract in a straightforward commercial context.

From the foregoing discussion it can be seen that the contractual mechanism is not a straightforward device for the protection of the student against the impositions of the university. Further, it is arguable that the adoption of a contractual analysis will result in a material alteration and unwelcome cooling of the relationship. Bridge (1970) suggested something of the sort in his analysis of the distinction that:

even if the relationship between a university and its members can be analysed in terms of contract there is the question of the desirability of adopting such an analysis. It is submitted that this may be undesirable and may have the effect of exacerbating the strained relationships which exist in many universities between the students and those in authority. It might be otherwise if the parties to these alleged contracts were in an equal bargaining position but this is not so. The university is in an inherently stronger position than the student who must accept membership of the university on the university's own terms. This is much closer to the *contrat d'adhesion* than to the classic type of contract on a consensual basis (p. 548).

Wade (1969) extends this view and focusses more plainly on what Habermasians call the 'juridifying effects' of the change:

In the days when university discipline was a quasi-parental affair, it was administered without thought of legal consequence and students would accept it in the same spirit ... Natural justice, separation of powers, tribunals of appeal, court orders - the whole legal paraphernalia must now be imported into academic life (p. 469).

The undeniable effects of a shift from status towards contract as the defining characteristic of the relationship between the student and the university need not be entirely positive. Many academics and administrators suggest that the relationship would become more and more defined in terms of rights and less in terms of the common goal of the institution, and that universities would respond to the perceived threat of legal challenge by removing the element of discretion which has characterised the student/university relationship and which has frequently acted to the benefit of the student. This view may be a remnant of Newman's interpretation of the university's relationship with its students as 'an Alma Mater, knowing her children one by one, not a foundry, or a mint, or a treadmill' (Newman, 1925: 145). Still, Newman presents the attractive view that the relationship between the staff and students is historically supposed to be familial, and is accordingly difficult or dangerous to reduce to a legal classification.

In conformity with the family analogy, the relation between staff and students is regarded as being paternal on the one side and filial on the other. The student is under authority. He is subjected to rules and regulations, not many or burdensome but inescapable. He lives in a world of definite duties requiring of him some degree of self-restraint and self-regulation; and this is part of his preparation for life. On the other side the teacher's is, to some extent, a pastoral office. He has a responsibility towards his pupils as human beings which extends far beyond his formal obligations as an instructor (Moberley, 1949: 33).

Both comments emphasise the role of students as members of the university who share a common purpose. The students are not represented as contractors, with defined rights set in opposition to the institution. Although both comments are historical, and probably, to a certain extent, idealistic, they demonstrate the view that once obtained, one which, to many academics, still obtains.

### **An Habermasian Analysis**

What is the reason for the mismatch between the now common view that the relationship between the university and the student is contractual, and the authorities which have, until recently, eschewed that view? How did the shift towards the contractual view come about? The reason for a

prevailing tendency to identify the student as having a contractual relationship with the university lies, as I see it, in the preoccupation with accountability (in its various forms) which misconstrues the student as an external stakeholder, both in accounting, administrative and legal terms. The implications of this construction now inform much of current public discussion on the nature of the institution. Habermasian analyses of this trend have identified the influence of both accounting and law (they refer to this as a 'colonizing influence') which have resulted in the reinterpretation of social relations in this way. So, for instance, Power and Laughlin (1996) suggest that '[t]he colonizing potential of accounting consists not only in the instrumental reach of its information systems technology but also in its capacity to capture organizational self-understandings and reframe them in accounting terms' (p. 447). They add that accounting colonizes areas of social life (that is, the university and its relationship with the student), 'by creating newly internalized facts and vocabularies which potentially undermine the capability of actors to question its self-evident mission' (p. 447). This has the potential to result in the 'crisis of confidence' identified by, for instance, Stewart Sutherland (1996), who says, 'we often seem to dance to tunes wholly composed by others - and as I have suggested these tunes enervate because their power over us plays not simply on our evident lack of self-confidence, but also on our current failure to redefine our identity in a new diverse world of higher education'. Power and Laughlin (1996) extend this idea:

There is a much wider subscription to the view that practices like accounting increasingly control the language and categories within which social management can be conceived, In this way expertise generates new forms of conformity, normality, indifference and cynicism. For example, the categorical shift from citizens to clients, from persons to calculable individuals (p. 447).

It is, I submit, this influence which lies behind the current acceptance of the definition of students as clients, stakeholders, entities easily quantifiable in current accounting terms. It is a small matter then to, in consequence, redefine the legal relationship. This in itself is indicative of what Habermas refers to as the 'juridification' of the relationship; the law, which previously mediated between the Habermasian concepts of the system and the lifeworld, begins to impose its own normative values on the relationship, ushering in its own complexity of definition of the relationship. As White (1988) has stated:

Juridification ... exerts a *reifying* influence on the lifeworld which, when combined with the enhanced claims to *expertise* of social workers and other administrators in the newly redefined categories of life, produces an insidiously expanding domain of dependency. This domain comes to include the way we *define* and *norm* areas of life such as family relations, education, old age as well as physical and mental health and well-being (p. 113).

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

relationship. It ousts the jurisdiction of the visitor, removes the possibility of purely domestic governance. Habermasian analyses would assert that juridification would lead to dysfunctional consequences as a result of the loss of substantive justification. Further, in order to subsume the relationship under the law and to deal with it administratively, the relationship is transformed although the legal and administrative rationale do not create their own normative justification. It may, however, be entirely appropriate to regulate the relationship between the student and the university in that way. But if it could be shown that the objectives of the organisation are more appropriately obtained by an alternative conceptualisation of the organisation and its relationship with its students, the paucity of the current management approach could be made apparent. A conceptualisation of a university in these terms may be capable of answering the claims made for the contractual representation of the relationship, thus resisting the abandonment of the authorities which favour a corporate representation. Above all, it should prevent a shift in status dictated by the demand for a conceptual similarity between universities and other organisations to enable the application of managerial and accounting techniques.

### **The Hybrid Approach**

Consider, therefore, the idea that students are corporators; equal participants in an enterprise with an equal desire for the common goals of the institution. On this model, the level of student representation at all levels of management of the institution is explicable, as are the internal governance of the institution, the way in which students are identified in foundation instruments, the absence of any clear contract, and, not least, the precedents which suggest that students are corporators governed by the internal regulations of the institution. This does not exclude the possibility of calling upon a contractual analysis to explain certain aspects of the relationship. However, an overriding contractual analysis is an oversimplification of the entirety of the relationship.

In the case of a corporate relationship, the obligations and rights of the student and of the institution are contained in the foundation instrument, and the rules and regulations made pursuant to that instrument. The student is taken to be bound by those rules when he or she becomes a member of the institution. This includes any manner of procedure for determination of disputes between the parties.

In policy, as opposed to legal terms, the benefits of a corporate model are, firstly, that the presumptions of opposing interests attaching to a contractual analysis are avoided. Secondly, the limited interference of the judiciary in the functioning of the institution is explained and justified. Even if the role of the visitor is eventually abolished in all jurisdictions, a corporate model invites a more private settlement of disputes according to the rules of the organisation. This limitation on judicial intervention has several advantages:

- (a) strict judicial supervision of the internal affairs of the university interferes with the autonomy of the university. This could deprive the university of the ability to promote specific goals which it considers desirable, and are in the interests of the corporators. For

instance, if the power of the university to discipline students for plagiarism, cheating in an examination or purchasing essays was to be strictly construed by a court, it would seriously impair the ability of the university to carry out a program of assessment recognised as credible by employers and other institutions.

- (b) judicial enquiry has limitations when placed in the context of a set of commonly accepted rules and regulations.

In a case involving the internal affairs of an association, a court may find it proper to refer to the association's practices, rules, or purpose as standards for determining the legitimacy of rival claims. ... If a court undertakes to examine the group's rules or past usages, its inquiry may lead it into ... the 'dismal swamp', the area of its activity concerning which only the group can speak with competence. Rules and usages which have taken on a peculiar meaning over a period of time, when interpreted by a court which is unfamiliar with the group or unsympathetic to its practices, may be construed in a way which does not reflect the understanding of the members prior to the dispute (Note, 1968: 991).

Moreover, judicial attempts to substitute a legal interpretation for the understanding of members may interfere with the functioning of the group (Note, 1968: 992). This is unlikely to present a problem of massive proportions when the institutional goals are, to some extent, defined by statute, as they are in the case of a university. However, in cases where the court has been called upon to rule on the nature of a university, or to interfere with an academic judgment, it has been very reluctant to impose its view on the university. This is precisely the reason for the traditional jurisdiction of the visitor, who is supposed to be familiar with academic matters.

Against these advantages, in the university context, is the great power of a university, by whose means a person may have an education or may be denied one. In a case where the power of the organisation is great, the necessity for some external control, such as judicial intervention, may be felt. Since the provision of education is a virtual necessity, and individuals are more or less compelled to join, the argument for the preservation of autonomy as a reflection of freedom of association is less persuasive (Note, 1968: 994).

Another factor telling against the omission of the judiciary from overseeing the actions of an association again arises due to the nature of the compulsion to join the university. The power of the university can be felt both by the individual and by the society to which the university supplies or withholds its 'product'. The effect on the individual should the university withhold its 'product' may include a diminution of mental or physical well-being, social relations, development and

capacity to engage as a citizen, opportunities for productive employment and access to financial reward, reputation and intellectual development. As the actions affect the individual they affect the wider society. In addition the university is capable of exerting a stronger influence in the power of articulate lobbying in the legislative process, or in the network of useful acquaintance which may give rise to a disproportionate number of 'old boys' of similar political and social outlook obtaining positions of power and influence. Should the university exacerbate this tendency, for example, by random or improper use of its position to admit or exclude the possible effect of the lack of judicial oversight might be great.

However, these disadvantages are alleviated, in the case of the university, by the degree of external control exerted by Parliament, which restricts the formulation of socially harmful goals and practices, and the existence of other forms of external oversight, where a visitor exists. In addition, student representation occurs at most levels of decision-making in the modern university, and the likelihood of senior administrators 'having it all their own way' in debate is not great. Finally, the interests of the university are closely bound to the interests of the student and of society, and a university which ignored the legitimate claims of the student body, and of the society which provides funding, would do so at its own risk.

## **Conclusion**

On a superficial analysis, the contractual characterisation of the relationship between the student and the university appears attractive, and is certainly feasible. The respective rights and obligations of the parties are, in a contract, relatively easily determinable and capable of enforcement at the suit of the aggrieved party. For these reasons, the potential for judicial acceptance of a contractual model in all types of universities cannot be ignored, and universities should take action to ensure that their documentation includes notice of all matters upon which it may seek to rely.

A contractual analysis is also capable of reconciliation with a corporate analysis, by implying that the rules of the institution are incorporated into the contract and are thus contractually enforceable. However, the content of contractual terms implied by the rules of the institution are likely to be limited to the rights of the student as a member of the corporation. More substantive rights of the student are not supported by this expedient. A student asserting a breach of a general 'right to an education' or on the basis of a lack of facilities or sufficient lecturing staff faces a more difficult task in establishing the existence of a contract by traditional means.

There are factors which suggest that the contractual analysis is not necessarily the best analysis in a non-commercial relationship such as the relationship between a student and the university. The conditions within which the negotiations are carried out, the long-term and highly personal co-operative venture in which both student and university are engaged for their joint benefit, the lack of specificity in the alleged terms of the relationship, all point to a more complex and less easily definable set of duties between the student and the university. For these reasons, it

is suggested that the contractual analysis does not provide a definitive view of the university/student relationship.

### **Keywords**

Universities	Students
Contract	Visitor

### **Acknowledgements**

The author wishes to thank Professor Martin Davies for his patient comments on previous drafts of this paper. Errors remain the author's own.

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## Endnotes

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- i See also D C Holland, 'The Student and the Law' (1969) 22 *Current Legal Problems*, at 70, quoted in J W Bridge 'Keeping Peace in the Universities: the Role of the Visitor' (1970) 86 *LQR* 531, 548.
- ii All Australian universities are created by statute: *Australian National University Act* 1991 (Clth); *University of Canberra Act* 1989 (Clth); *Northern Territory University Act* 1988 (NT); *Charles Sturt University Act* 1989 (NSW); *Higher Education (Amalgamation) Act* 1989 (NSW); *University of Sydney Act* 1989 (NSW); *University of New England Act* 1989 (NSW); *University of New South Wales Act* 1989 (NSW); *University of Newcastle Act* 1989 (NSW); *University of Wollongong Act* 1989 (NSW); *University of Western Sydney Act* 1988 (NSW); *Macquarie University Act* 1989 (NSW); *University of Technology, Sydney, Act* 1989 (NSW); *University of Queensland Act* 1965 (Qld); *University of Queensland and Queensland Agricultural College Amalgamation Act* 1989 (Qld); *James Cook University of North Queensland Act* 1970 (Qld); *James Cook University of North Queensland and Townsville College of Advanced Education Amalgamation Act* 1981 (Qld); *Griffith University Act* 1971 (Qld); *Griffith University and Brisbane College of Advanced Education (Mount Gravatt Campus) Amalgamation Act* 1989 (Qld); *Griffith University and Gold Coast College of Advanced Education Amalgamation Act* 1990 (Qld); *Queensland University of Technology Act* 1988 (Qld); *Queensland University of Technology and Brisbane College of Advanced Education Amalgamation Act* 1990 (Qld); *University of Central Queensland Act* 1989 (Qld); *University of Southern Queensland Act* 1989 (Qld); *University of Adelaide Act* 1971 (SA); *Flinders University of South Australia Act* 1966 (SA); *Statutes Amendment and Repeal (Merger of Tertiary Institutions) Act* 1990 (SA); *University of South Australia Act* 1990 (SA); *University of Tasmania Act* 1992 (Tas); *Melbourne University Act* 1958 (Vic); *Melbourne College of Advanced Education (Amalgamation) Act* 1988 (Vic); *Melbourne University (Hawthorn) Act* 1991 (Vic); *Monash University Act* 1958 (Vic); *Monash University (Chisholm and Gippsland) Act* 1990 (Vic); *Monash University (Pharmacy College) Act* 1992; *La Trobe University Act* 1964 (Vic); *La Trobe University (Bendigo and Wodonga) Act* 1990 (Vic); *Deakin University Act* 1974 (Vic); *Deakin University (Warrnambool) Act* 1990 (Vic); *Deakin University (Victoria College) Act* 1991 (Vic); *Victoria University of Technology Act* 1990 (Vic); *Royal Melbourne Institute of Technology Act* 1992 (Vic); *Swinburne University of Technology Act* 1992 (Vic); *Melbourne University (VCAH) Act* 1992 (Vic); *University of Western Australia Act* 1911 (WA); *Curtin University of Technology Act* 1966 (WA); *Murdoch University Act* 1973 (WA); *Edith Cowan University Act* 1984 (WA); *Australian William E Simon University Act* 1988 (NSW); *Australian Catholic University Act* 1990 (NSW); *Bond University Act* 1987 (Qld); *Australian Catholic University (Victoria) Act* 1991 (Vic); *University of Notre Dame Australia Act* 1989 (WA). A university created in this way is a body politic and a body corporate and possesses the powers incidental thereto: *Halsbury's Laws of Australia* Volume 10, Sydney: Butterworths 1992 para 160-915 under footnote 1.
- iii The membership of a particular university is typically governed by the founding document - in Australia by the Statute. That the student is governed by the by-laws of the university see, for instance, *King -v- Chancellor of the University of Cambridge* (1724) 2 Ld. Raymond 1334; 92 Eng.

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- Rep. 370 KB, more recently in *University of Ceylon -v- Fernando* [1960] 1 WLR 223, in Australia in *Clark -v- University of Melbourne (No 2)* [1979] VR 66, and in the United States in *Commonwealth ex rel Hill -v- McCauley* 3 Pa. C. 77 (1877).
- iv See, for instance, *Melbourne University Act 1958* (Vic) s.4, *Monash University Act 1958* (Vic) s.3, *University of New South Wales Act 1989* (NSW) s.4, *Charles Sturt University Act 1989* s.4, *Flinders University of South Australia Act 1966* s.3.
- v See, for instance, the Charter of the University of Leeds, at XVIII, which lists *inter alia*, graduate, postgraduate and undergraduate students as amongst the members of the university. Obviously, this does not always obtain, even in chartered corporations: see *Oakes -v- Sidney Sussex College* Cambridge [1988] 1 All ER 1004. However the approach is explicable in the older universities, which did not make a clear distinction between academic staff and students: “All were ‘partners in the craft of scholarship and members of a single society’. The situation later at Oxford was described by M Pattison as akin to ‘a Lacaedaemonian regiment ... all were students alike, only differing in being at different stages of their progress ...’”. Farrington, D., *The Law of Higher Education* London: Butterworths 1994 326
- vi 130 Misc. 249, 223 N.Y. Supp. 796 (Sup. Ct 1927), *rev’d* 224, App. Div. 487, 231 N.Y. Supp. 435 (1928).
- vii *E.g. Deehan -v- Brandeis University* 150 F.Supp. 626 (D. Mass. 1957) (school refused to renew the registration of a student who had protested against the inadequacy of scholarship assistance); *Robinson -v- University of Miami* 100 So.2d 442 (Fla. 1958) (dismissed student from a teacher training program because he was an atheist); *Carr -v- St. John’s University* 12 N.Y.2d 802, 236 N.Y.S.2d 834, 187 N.E.2d 18 (1962) (students expelled for participating in a civil marriage ceremony). See A L Goldman, ‘The University and the Liberty of Its Students - A Fiduciary Theory’ (1966) 54 *Ky LJ* 643.
- viii [1994] ELR 187.
- ix (1864) 33 L.J.Ch 625.
- x (1990) 22 NSWLR 424.
- xi (1876) 1 Ex D 88.
- xii The University and Melbourne and The University of Sydney have both decided to introduce fees for local students. See, for instance, Sonya Voumard ‘From higher ed to buyer ed’ *The Republican* 14th March 1997, 5: ‘and most other universities contacted ... have full fees on their discussion agenda’; Luke Slattery, ‘Student anger over university fees is deep, broad and here to stay’ *The Australian* 11th April 1997, 13; Louise McDermott ‘Full fees in name of “pragmatism”’ *Campus Review* April 9 - 15 1997 1.
- xiii *Thomson -v- University of London* (1864) 33 LJCh 625, 671; *Ex parte Macfadyen* (1945) 45 SR (NSW) 200, 203.
- xiv Sadler says (at 3) that “[t]here is no doubt that all Australian universities are eleemosynary corporations” but c/f *Bridge and Ricquier* at 650-1.
- xv There are other possibilities which will not be canvassed here: some cases have suggested that the obligations of a university, if ignored, may give rise to an action for breach of statutory duty. See, for instance, *Ex Parte King; Re University of Sydney* (1943) 44 SR (NSW) 19; *Ex Parte Forster; Re University of Sydney* [1963] SR (NSW) 723. Some commentators have suggested that a fiduciary duty arises: see Goldman op cit fn 7, 653.
- xvi See, in particular, *Commercial Bank of Australia Ltd -v- Amadio* (1983) 151 CLR 447. Legislation in some jurisdictions has also underlined the fiction: see *Contracts Review Act 1980* (NSW).