

Foreword

Universities and the Law – A View from the Legal Profession

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Universities were once regarded as a societal opiate. Nowadays individual rights transgress the teaching machinery. The medieval university looked backwards; it claimed to be a library of old knowledge. The modern university looks forward, and is a factory of new knowledge. The relationships between students, staff and the university itself have grown to parallel those of the world of industry. Universities, however, have remained unique creatures with special problems not familiar to the rest of society or, for that matter, the courts.

(Robert J Sadler, 1981)

As lawyers with a close association with Australian universities, in one case, for over three decades, we are pleased to be able to contribute a foreword to this very timely publication.

Australia's universities have evolved from learning institutions with a charitable (public) purpose to international commercial enterprises; their nature as unique entities within a changing landscape spawns many and diverse aspects of their relationship with the law in practice. We welcome this valuable resource as the first comprehensive exploration of the law and higher education in Australia.

Since the establishment of the first Australian universities in the 1850s, universities have grown significantly in number, diversity and complexity. The changing nature of universities is evident in their structure and functions, governance, funding, the relationships they have with staff, students and external stakeholders, and the ever increasing influence of external regulatory regimes.

Perhaps nothing symbolises the legal and social change universities have undergone more than the changed role of the University Visitor. With its origins in ecclesiastical law, its exclusive function was essentially to settle internal disputes according to the statutes, by-laws and rules of the particular university. During the 1980s, uncertainties, particularly as to jurisdiction and remedies, led to reforms to confine the role to ceremonial only (with the exception of Western Australia) and for universities to strengthen their grievance procedures generally. While once representative of complete autonomy in terms of a university's responsibilities and accountability towards its members, the diminution in the role made university operations subject to external scrutiny and so, can be seen to epitomise the changes that have occurred generally in the legal environment in which universities operate. However, as Sadler observed in 1981, while things were changing, the Visitor remains in many universities, clearly

demonstrating that, as universities adapt to a modern environment and legal system, their links to tradition and the past remain.

Universities are now creatures of a body of legislation which is a mix of sector specific legislation (university or public) and non-specific legislation (enterprises generally). The chapters of this book are grouped into these two areas, referred to first as the Law **of** Higher Education, and secondly, the Law **and** Higher Education. They provide comprehensive coverage of many of the areas of operation upon which, from a practitioner's perspective, the law has substantial impact. Among these are: governance arrangements and the composition of governing bodies; commercial activities; methods of regulation and deregulation; the availability or otherwise of public law actions such as judicial review; and the many areas of both public and private law which govern relationships and responsibilities. These matters are of increasing importance as universities move further into a commercial, entrepreneurial scenario and are subject to the range of challenges created by global circumstances. Of the many recent examples are issues relating to the ownership of property created by a university's employees and students in the area of copyright, and in commercialisation of research as demonstrated by the well-known case of *UWA v Gray*. Legislation such as the *Defence Trade Controls Act 2012* (Cth) and its impact on the freedom of academics in relation to their research and dissemination of their findings is another example.

Underlying many of the legal issues facing universities today is the fundamental question as to the status of a university: is a university a public authority engaged in the provision of a public good, or is its nature now that of a private provider of educational services?

These days, it may be that a university can be a public authority for one purpose but not another, and there are increasing areas where the public (educational) versus private (commercial) capacity of the university comes to the fore. Surprisingly, this could be as seemingly trivial as how a university can control traffic and parking on its campus. This issue may have diminished in significance over the years, but it has posed considerable practical problems and raised the significant legal issue of whether the campus was a private or public place.

A modern university is involved in an often complex web of relationships, both internal and external. Many of the legal aspects relating to the relationships a modern university has with its students and student associations, and its academic and professional staff, are explored comprehensively here. Recent decades have seen a not insignificant amount of external complaint initiated by students against their universities, particularly in relation to equal opportunity and perceived discrimination. In terms of the relationship with collective student bodies, there was, in 2005 in New South Wales, a shift in approach with the introduction of voluntary student unionism. Universities had to provide more funding for student services which had greater legal and operational implications. While this involvement decreased again with the ability to charge student services and amenities fees under the amendments in the *Higher Education Legislation Amendment (Student Services and Amenities) Act 2011* (Cth) and the Guidelines made under that Act, its impact continues. It is evermore essential that both universities and students prioritise maintaining relationships built on respect and partnership, for however the relationship may be characterised, if it turns sour, it can have far-reaching consequences and affect the very fabric of a university.

Time has also seen a significant amount of litigation between universities and their staff, much of it involving former staff members bringing numerous legal actions against the relevant university. An extreme example is the litigious Dr Spautz, whose litigation against his university ranged from Local Court indictment proceedings for criminal defamation through to High Court habeas corpus and abuse of process proceedings. Dr Spautz was ultimately declared a vexatious litigant but he was, in the meantime, the catalyst for law reform in some areas.

In conclusion, this scholarly work provides both a theoretical and practical approach to the plethora of legislation and common law which increasingly governs the operation of universities, both internally and in their relationships with external stakeholders. While most areas of the law may be clear in their application, there are perennial issues which include:

- enabling statutes that have in some, but not all, respects evolved with the times;
- basic legal conundrums that remain unresolved in the university setting; and
- transcendent characteristics such as the public-private tension within a university and the special relationship between a university and its stakeholders.

Our conclusion is somewhat similar to Sadler's observations in 1981. Despite significant changes to the institutions themselves and to the legal and economic environment in which they operate, universities are still fundamentally creatures of statute. They have a public purpose and members and other stakeholders with diverse interests. As Sadler recognised, universities retain the marks of their medieval past while striding forward as factories of new knowledge. However, social, economic and political imperatives, combined with international variations and instabilities, mean that Australian universities operate in a constantly changing landscape. The legal challenge for universities today is balancing the tradition of learning with the modern realities they now face.

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