Knowing the destination before the journey starts – legal education and fitness for purpose

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Abstract

An undeniable movement in the past decade has been the corporatisation of the university and the commodification of education – the degree is now a positional good, just like any other chattel or service purchased in the marketplace. With the student viewed as a consumer, the University of Wolverhampton (without admission of liability) paid £30,000 to a student dissatisfied with the quality of the first year of their law degree. A more recent response has seen Oxford University introduce signed written contracts with students requiring her or him to abide by the regulations concerning study, residence, conduct and behaviour. If a contract does exist between the student and the university, then, in the Australian context, the implied warranty of fitness for purpose, as mandated by s74 of the Trade Practices Act 1974 must be met. This article examines whether, in the context of the student-university relationship, s74 is applicable. If so, what is the purpose of legal education? The suggestion is made that the governing principle is one of being legally competent. However, this is broad enough to encompass not only entry into the legal profession, but also the vast array of employment opportunities that are now routinely obtained by law graduates. Law schools who fail to articulate their purpose, or design their curriculum without this product in mind, do so at their litigious peril.

Introduction

Every academic has heard the catch-cry that the student is now a consumer. Universities are no longer community-based institutions. Instead, they are commercial enterprises providing educational services for the benefit of individuals.[1] Teaching, and the higher education system in general is not to be seen as providing some amorphous gain to society; rather it provides a specific benefit (the positional good[2]) to an individual who ought to pay for that privilege. The ivory tower is no longer a community of scholars merely attracted to the pursuit, dissemination and inspiration of new knowledge. Government and societal imperatives with its attendant economic rationalist motives have swept

[1] See the comments by Professor A. Fels, "The Impact of Competition Policy and Law on Higher Education in Australia", 24 November 1998, Australasian Association for Institutional Research, at 3.

[2] "Education produces positional goods in that it assigns people to social positions; it determines selection into the profession and increasingly, the upper echelons of management." S. Marginson, "Competition in higher education in the post Hilmer era", (1996) 68(4) *Australian Quarterly* 23 at 25.

across Australian campuses with the consequence that accountability, quality assurance, performance management, the research quality framework and teaching excellence are no longer isolated phrases within the halls of central administration, but inspire (haunt?) academics on a weekly, if not daily basis.[3] A series of government reports[4] made, assumed or reasoned that the quality of the learning experience and the limited fiscal resources available to the nation State, and higher education, would best be utilised by a competitive marketplace, and a redefining of the university's relationship with its key stakeholders.[5]

What arguably has been missing in this perception of students as consumers is an analysis of the relationship of the student vis-a-vis the university and the extent this relationship is to be found in contract. Flowing from this, and assuming for the moment that a contract does exist, the services supplied by the university and the materials provided in connection, must be fit for purpose. Section 74 of the *Trade Practices Act 1974* mandates this. Whilst the potential for this litigation may be seen to be small, (though the University of Wolverhampton reportedly made an out of court settlement of £30,000 to a student dissatisfied with the quality of the law degree,[6] and Oxford University have required students to sign written contracts that detail performance based obligations),[7] the indicative trend is that it will only be a matter of time before litigation of this nature becomes more common place.[8] As Matasar notes in the context of legal education in the United States (a comment which some would say has equal applicability to Australia):

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[3] This corporatisation of the university has been subject to severe criticism, see M. Thornton, "Gothic Horror in the Legal Academy", (2005) 14(2) *Social and Legal Studies* 267.

[4] R. Officer, (Chair of Committee), 'National Commission of Audit: Report to the Commonwealth Government', (AGPS)< Canberra, 1996); B. Scales (Chair), 'Report on Government Service Provisions: Steering Committee for the Review of Commonwealth State Services', (AGPS, Canberra, 1995); R. Clare and K. Johnston, 'Education and Training in the 1990's: Background Paper No. 31, Economic Planning Advisory Council, (AGPS, Canberra, 1993); F. Hilmer, (Chair), National Competition Policy: Report by the Independent Committee of Inquiry', (AGPS, Canberra, 1993).

[5] As noted by Fels, above n 1 at 4: "The increasingly competitive higher education environment has led, in tandem with moves by government, to ever-increasing attention to quality assurance mechanisms and the repositioning of the student as a customer or client; in short, the commodification of education."

[6] Noted at OxCheps Higher Education Online Casebook, see http://oxcheps.new.ox.ac.uk – accessed 13th September 2006. See also L. Lightfoot, 'University pays out £30,000 to dissatisfied law student', July 31 2002, accessible at http://www.btinternet.com, September 25, 2006. The students complaint centred on certain subjects not being offered, the cramming of 260 students into rooms designed for 150 and University exams being poorly organised. In settling, the University made no admission of liability.

[7] Clause 8 of the Oxford University contract states as follows: "You agree, as part of this contract, to abide by the University's Statutes and Regulations from time to time, and by the Statements and Codes of Policy, Practice and Procedure which from time to time are made under them. These include:

- regulations concerning your studies, residence, conduct and behaviour: examples are regulations relating to examinations, the ownership and exploitation of intellectual property, discipline, the use of IT and library facilities, and health and safety issues…"

Furthermore, the contract between the student and the college at Oxford may well include the following provision (this extracted from the contract for students attending Pembroke College (clause 11)): "You undertake to pursue satisfactorily such studies as are required of you by any tutor, fell or lecturer, or other qualified person, assigned by the College (or University as the case may be to teach you. For this purpose, studies include the reading of material, carrying out prescribed activities such as practicals, the completion of written work, attendance in tutorials and classes and lectures, and the sitting of University and internal College examinations."

[8] For an analysis of the American position see M. Zolandz, 'Storming the Ivory Towers: Renewing the Breach of Contact Claim by Students against Universities', (2000) 69 *Geo Wash. L. Rev.* 91.

> "For several years, I have seen increasing numbers of students who are dissatisfied with legal education – both its service and its content. The source of this dissatisfaction is less clear, other than an amorphous sense that something is not quite right. Moreover, it cause is even less certain. Some blame administrators; others blame staff; others blame faculty; others blame the students themselves."[9]

It will be this dissatisfaction, this unease felt by the student, particularly in the context of aggressive recruiting by Universities that will undoubtedly result in a mismatch of expectation and reality leading to the fundamental consumer complaint – that he or she has received a bad bargain. The questioning and reflecting that will occur in light of this may well see lack of fitness for purpose at the forefront of the complainant's thinking. With this background in mind, this article will be divided into two sections. First, it will analyse whether the *Trade Practices Act* 1974 can apply, with particular reference as to whether a contract between the student and University can be established. Second, it will establish whether it is possible to identify a purpose of legal education and how law faculties will need to meet this. The conclusion will be that a contract does exist and that every law school has a legal, let alone moral obligation to ensure that their curriculum is fit for purpose. Institutions that are unable to outline this at the beginning of a degree face the arguably unanswerable criticism that whilst they may be able to identify the student's journey, the university has failed to articulate the final destination.

The Trade Practices Act 1974

Section 74(2) states as follows (italics supplied):

> *"Where a corporation supplies services (other than services of a professional nature provided by a qualified architect or engineer) to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the corporation any particular purpose for which the services are required or the result that he or she desires the services to achieve, there is an implied warranty that the services supplied under the contract for the supply of the services and any materials supplied in connexion with those services will be reasonably fit for that purpose or are of such a nature and quality that might reasonably be expected to achieve that result, except where the circumstances show that the consumer does not rely, or that is unreasonable for him or her to rely, on the corporation's skill or judgment."*

This warranty is non-excludable.[10] Apart from the merits of any claim, the only bar to possible litigation by the student appears to be the existence of a

[9] RA Matasar, "The Two Professionalisms of Legal Education", (2001) 15 *ND J. L. Ethics & Pub Pol'y* 99.
[10] Ss68/68A *Trade Practices Act* 1974.

contract.[11] Can it be said that a domestic undergraduate or postgraduate student funded publicly through the Federal Government higher education support system[12] has a contractual relationship with her or his University? Are the critical elements relevant to the formation of a contract, such as offer, acceptance, intent to create legal relations and consideration present?[13]

Does a contract exist between the University and the student?

Australian authority on this point is sparse. Whilst contract has been pleaded in a small amount of litigation, claims have been resolved on other grounds, with the contractual basis fading into the background. For example, in *Fennell v Australian National University*[14] the applicant alleged that he was induced by false representations to enrol in a postgraduate course. The claim was based in contract and under the *Trade Practices Act* 1974. The court in dismissing the claim made no express criticism, nor did it provide unequivocal support of the matter having been based, at least partly, in contract.[15] Similarly, the High Court decision of *Griffith University v Tang*[16] also raised the possibility of a contractual relationship existing, but again, the course of proceedings did not require a detailed analysis of the issue. Gleeson CJ commenting as follows:

> "There was no finding in the Supreme Court of Queensland as to exactly what was involved, in terms of legal relation, in admission to, or exclusion from, the [PhD research] programme. There was no evidence of a contract between the parties. There may well have been such a contract, but, if there was one, we were not told about it, and it was not relied upon by either party. The silence in the evidence about this matter, which bears upon the legal nature and incidents of the relationship between the parties, is curious."[17]

By contrast to the Australian position, overseas courts have readily accepted a contractual relationship existing between the university and the student.[18] In the English authority of *Moran v University College Salford*[19] Moran applied to a number of universities to enter courses in physiotherapy. Due to a clerical error, he was made an unconditional offer when in fact he should have been rejected

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[11] A university would be a corporation to which the Act applies (*Quickenden v O'Connor & Others* (2001) 109 FCR 243; a university also comes within the definition of supplying services (see s4 *Trade Practices Act* 1974). Whilst there may be some debate about whether a student is a consumer, he or she appears to come within the definition of s4B *Trade Practices Act* 1974 – the services were supplied for personal use (see *E v Australian Red Cross Society* (1991) 27 FCR 310; 99 ALR 601). By virtue of s4B(3) a person will be presumed to be a consumer unless otherwise proven. The effect of this is that the university will have the obligation to prove that the student is not a consumer: *Seeley International Pty Ltd v Newtronics Pty Ltd* [2001] FCA1862; BC200108270.

[12] See *Higher Education Support Act* 2003. Fee-paying students would appear to have a strong claim that a contract exists between them and the University.

[13] The other formal elements such as capacity, consent and legal purpose would really be in issue.

[14] [1999] FCA 989.

[15] See also *Dudzinski v Kellow* [1999] FCA 390.

[16] [2005] HCA 7.

[17] [2005 HCA 7 at [12].

[18] It is, of course, easier to establish the contractual relationship where the student is fee-paying.

[19] [1994] ELR 187.

for any possible place. The court accepted that an unconditional offer had been made, with the intent to create a legal relationship between the parties. By Moran accepting this offer, he had given up the chance to enter another degree program. This detriment was sufficient to amount to consideration. A similar result was achieved in *Clark v University of Lincolnshire and Humberside*.[20] Clark, having been awarded a third-class degree was held entitled to sue the University for compensation after she lost most of her final year's work in a particular unit due to a computer failure. Clark's computer crashed the day before submission, and she had failed to make back-up copies of her work. On the due date, all that she was able to submit were some notes copied from a textbook. With this classified as plagiarism, the work was failed. Clark's action was based in contract, with the English Court of Appeal rejecting an application by the University to strike out the claim – the relationship between university and student was in contract. As Middlemiss comments, there is, in the United Kingdom, "a prevailing school of thought that believes the nature of the relationship between the university and its student/s is governed by contract."[21] Similar conclusions are reached in the United States,[22] though both the academy and the judiciary recognise that the content of such a contract may well be of some dispute.[23]

Rorke suggests that a different conclusion would exist in the Australian context.[24] In her view, universities are structured in such a way that the students become corporators and are thereby bound by the by-laws and policies enacted by the institution in light of its statutory powers.[25] Other academic support for this can be found in work of Bridge who considers that even if it were true that contract law could potentially govern the relationship the desirability of adopting such a course is open to question. It "may have the effect of exacerbating the strained relationships which exist in many universities between the students and those in authority."[26] Holland[27] and Wade,[28] both without detailed analysis, submit that the relationship is one of contract.

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[20] [2000] EWCA Civ 129 (14 April 2000); noted by J. Currie, 'Student can sue for low grade', *Times Higher Education Supplement,* April 28, 2000.

[21] S. Middlemiss, "Legal Liability of universities for students", (2000) 12(2) *Education and the Law* 69 at 69.

[22] *Zumbrun v University of Southern California* 101 Cal. Rptr. 499 at 504 (1972); *Ross v Creighton University* 957 F. 2d 410 (1992).

[23] See the comments by Middlemiss, above n 21 at 85. American courts have held that the terms of the contract have been held to include the rules obtained from student information manuals *Holert v University of Chicago* 751 F. Supp. 1294 at 1300 (1990), though rarely will be a university review the quality of education *Cavaliere v Duff's Bus. Inst.* 605 A. 2d 397 at 404 (1992).

[24] F. Rorke, 'The Application of the Consumer Protection Provisions of the *Trade Practices Act* 1974 (Cth) to Universities', (1996) 12 *QUTLJ* 176.

[25] Rorke, above n 24 at 197. "In the absence of clear judicial authority, it would appear that in the case of students enrolled on a [HECS/HELP] basis there is no clear contract for the provision of educational services." Rorke, above n 24 at 197.

[26] JW Bridge, "Keeping Peace in the Universities: The Role of the Visitor", [1970] 86 *LQR* 531 at 548.

[27] DC Holland, "The Student and the Law", (1969) 22 *Current Legal Problems* at 70 cited in JSW Bridge, above n 26 at 548.

[28] H Wade, "Judicial Control of Universities" (1969) 85 *LQR* 468.

With the dearth of precedent in this country, and the contrasting views from the academy, the matter is open to debate. In analysing this, the starting point for consideration is the *Higher Education Support Act* 1992. This establishes the quality and accountability requirements of higher education providers[29] with this feeding at every university, into a detailed admission process, prescriptive by-laws, policies, and codes of conduct governing all facets of campus, and in some instances, off-campus activity. As well, there exist detailed ordinances dealing with discipline, misconduct, academic progress and review. The function of this extensive prescription is to govern the increasingly complex relationship, and to provide a level of quality and consistency in decision-making, however this may have the arguably unintended consequence of leading to a high likelihood that the offer, acceptance and intent necessary to form contractual relationships are established. The university invites application from which offers are made to students, the acceptance by the consumer leads to consensus, with the contractual terms dictated by documentation that governs the student-university relationship. This conclusion of a contract is further supported by the inequality of bargaining power that exists between student and the university - the courts using the existence of disparity between the corporate entity and the consumer to find a jurisdictional basis to assist the weaker party.[30] Furthermore, and given the government funding of university places and the failure of the government to hypothecate the funds provided by, for example, law students for their legal education through the HECS/HELP system, consideration which now embodies a practical, less formalistic approach[31] may well be met by the detriment in foregoing other opportunities to enrol in law, or in undertaking other courses at the same institution. Support for this can be found in the decision of Moran where consideration was located in the detriment associated with being unable to seek alternative offerings once the person had accepted a specific place. The consideration may also be seen in meeting the burden or agreeing to comply with the burden imposed by university ordinances and by-laws.[32] A somewhat analogous example may be found in the decision of Cottee v Franklins Self-Serve Pty Ltd[33] where the use of a supermarket trolley following an implied request to do so (by invitation to shop) was sufficient consideration to support a warranty that the trolley would be fit for purpose.[34] In this context, the use of the universities facilities (such as its educational services) following the request or invite to do so may well be sufficient consideration to imply a warranty that legal education will be fit for purpose.

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[29] In particular, see Division 19 of the *Higher Education Support Act* 2003.

[30] With this leading a court to find ways to establish jurisdiction, see the comments by Middlemiss, above n 21 at 72.

[31] *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 at 19, *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895 at 904.

[32] *Longridge v Dorville* (1821) 5 B & Ald 117 at 122; 106 ER 1136 at 1138 – any labour, detriment or inconvenience suffered by the plaintiff is sufficient consideration.

[33] [1997] 1 Qd R 469.

[34] Consideration does not cease to be sufficient even though it is inadequate. As noted by Lord Somervell 'a peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn." *Chappell & Co Ltd v Nestlé Co Ltd* [1960] AC 87 at 114.

In summary, the weight of authority justifies the submission that the relationship between the student and the University is now one of contract. The client service focus of the higher education infrastructure, the re-branding of the student as consumer,[35] the redesigning of Federal Government policy to invoke the competitive marketplace and the consequential focus on applicability, utility and quality assurance all lead to a conviction that the relationship is based in contract. This also is supported by recognition that increasingly, contract law governs not only what parties intended, but as Atiyah notes, the obligations that arise from conduct.[36] Furthermore, the case law precedent from England and the United States is persuasive. Therefore, any university that believes its relationship lies outside the jurisdiction of the courts and contract law does so at its peril. This, however, only answers one part of the equation. Establishing the contract exists, and with a reasonable assumption that the other terms of s74 of the *Trade Practices Act* 1974 are met, simply leaves the inevitable question of what is the purpose of legal education. The next section of the paper examines this.

What is the Purpose of Legal Education?

At one time, the purpose of legal education was self-evident; its role was to train for entry into the legal profession. Law as a university discipline was outside the general academy. Research was to have a directed and applied context towards what the profession needed, the discipline itself scientific in nature and with little assistance to be drawn from the arts, social sciences or humanities. Those who were predominantly practitioners, rather than career academics often conducted teaching.[37] Of course, all readers would be aware of the dramatic changes in the last twenty years in legal education in Australia. The great bulk of students are now undertaking combined/double degrees with at least a third of graduates no longer seeking admission.[38] Staff profiles have noticeably altered, with a surge in career based academics, less reliance on the profession for teaching responsibilities and a significant cohort of the academy without any practical or applied legal training. Allied to this has been Federal Government dictates that all university graduates should possess certain generic skills irrespective of the discipline in which they study,[39] as well as a rising emphasis on skills based training such as dispute resolution, communication, legal writing, critical thinking, problem solving and drafting. The result of this is that the purpose(s) of legal

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[35] V. Brand, "Decline in the Reform of Law Teaching? The Impact of Policy Reforms in Tertiary Education", (1999) 10 *Leg. Ed. Rev.* 109.

[36] See PS Atiyah, *An Introduction to the Law of Contract,* (5th edition, Oxford University Press, Oxford, 1995 at 11 where he comments that: "the emphasis on intention and implied agreements often misled courts and writers who failed to see a good deal of the law of contract was concerned with obligations arising from what the parties id, and not merely from what they agreed or promised and in imposing obligations s on what the parties had done rather than because of what they intended, the judges were necessarily drawing on their ideas of fairness and justice.", cited in S. Middlemiss, "Liability of Universities for Students under the Law of Contract', (1999) 19(3) *Juridical Review,* 170 at 180.

[37] See the discussion in M. Keyes and R. Johnstone, "Legal Education: Rhetoric, Reality, and Prospects for the Future", (2004) 26 *Sydney L. Rev.* 537 at 540-542.

[38] See CALD, *Studying Law in Australia 2006,* at 25, available at http://www.cald.org.au – accessed September 20, 2006.

[39] The most notable of which was the West Committee, (Chair Roderick West), *The Review Committee on Higher Education Financing and Policy: Learning for Life,* 1998 at 47, suggested that every graduate should have critical thinking skills, technical competence, intellectual openness and curiosity, communication, research, problem solving, team work skills as well as high ethical standards.

education is/are not so clearly defined, innumerable, occasionally in conflict, and with the diverse reasons often competing for finite resources.[40] By contrast to this confusing morass, the legal imperatives are somewhat more generic, but much more easily stated. The services supplied must be fit the purpose for which they are commonly obtained.[41] If required for some special purpose, then that must be disclosed to the supplier.[42] For this reason, the comments of Webber[43] make eminent sense, despite the profile changes in the academy, the altered demographics (increased mature age and international students) and the varied employment prospects of law students, the purpose of undertaking legal studies is to at least have the option of professional legal admission. A significant number of students enrol in legal training for this one purpose – that of admission into the legal profession. Legally, this is the one common driver which sees a student (consumer) entering a law programme.

> "The administrators' argument appears to be that the law schools no longer need to be so concerned with training for practice. This is an utterly self-defeating argument. It may well be that many of our graduates go on to other careers (indeed some of them always did). It may also be that legal education prepares students for a wide range of careers (as it does). But it remains the case the vast majority of our students study law in order to satisfy the academic requirements to enter the profession, even if they do not exercise the option. We certify that we have so educated them. Indeed, ours are the only institutions that can so educate them, at least as they should be educated. We have a responsibility, then, to make sure that preparation for practice remains a sine qua non of our teaching… for law schools to imply that they are no longer concerned with the practice of law is plainly false."[44]

Despite the contemporary criticism that admission to practise is too narrow a view,[45] legally, it is suggested that it must remain the raison d'être of the law

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[40] The result of which has seen considerable discussion on this topic: some notable contributions include E. Clark, "Australian Legal Education a Decade after the Pearce Report", (1997) 8 *Legal Education Review* 121; Higher Education Group. Department of Education, Science and Training, *Learning Outcomes and Curriculum Development in Law* (January 2003); D. Pearce, E. Campbell and D. Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Commission* (1987); C. McInnis and S. Marginson, *Australian Law Schools after the Pearce Report* (1994); ALRC, *Managing Justice: A Review of the Federal Civil Justice System* (Report No.89), (2000); for overseas reports, see RC Cramton, *Lawyer Competency: The Role of the Law Schools: Report and Recommendations of the Task Force on Layers Competency* (1979) (the Cramton Report) (US); American Bar Association, Section on Legal Education and Admissions to the Bar, *Legal Education and Professional Development: Narrowing the Gap* (1992) (the MacCrate Report) (US); Lord Chancellor's Advisory Committee on Legal Education and Conduct (ACLEC), *First Report on Legal Education and Training* (1996) (UK).

[41] *Medtel Pty Ltd v Courtney* (2003) ATPR 41-939; [2003] FCAFC 151; *Ryan v Great Lakes Council* [1999] FCA 177; 102 LGERA 123; *Effem Foods Ltd v Nicholls* [2004] NSWCA 332; (2004) ATPR 42-034.

[42] *Griffiths v Conway Ltd* [1939] 1 All ER 685.

[43] J. Webber, "Legal Research, the Law Schools and the Profession", (2004) 26 *Sydney L. Rev.* 565.

[44] Webber, above n 43 at 570-571.

[45] For example, see Keyes and Johnstone, above n 37 at 588: "We certainly advocate and look forward to a more mature, consultative and respectful relationship, in which the function of the academy is regarded as significantly broader than the preparation of graduates for private practice, and the production of research of utility to practitioners and judges." Parashar and Nagarajan also comment that "[T]here remains widespread consensus among law academics that law schools should not return to their old-fashioned trade school origins creating legal professionals and instead should

degree. Further support for this can be seen in a 1995 study[46] that suggested that 78% of Australian law students intended to undertake studies leading to admission.[47] Nevertheless, the fact that many students do not, cannot or will not enter the profession is irrelevant to the legal standard of being fit for purpose. Given this, how does the legal standard stand against the broader aims of a body such as the Council of Australian Law Deans which suggests that most law degrees aim to:[48]

- teach fundamental principles of Australian law and the ability to apply these principles to client problems;
- equip the student with a knowledge of fundamental legal procedures – such as court procedures;
- give some introduction to practical skills such as legal research, legal writing, advocacy;
- appreciate the role of law in society;
- understand and respect the ethical standards of the profession; and,
- learn fundamental practice skills such as trust accounting.

What will be suggested is that the legal standard and the more generalist view of the degree are consistent with each other. In effect by refocusing on training for legal practice, the qualities necessary for the modern profession not only meet this common legal standard, but also provide the concrete foundation for imparting the skills for life-long learning, mobility and generic skills required of the modern workforce. However, by singularly focusing on legal education for the profession, the curriculum can be designed with this as its sole destination and negates the lack of coherency that can occur where the overarching view of the programme is lost against a backdrop of academics freely exploring their own esoteric interests without recourse to, or understanding of, a common destination. As noted in a submission from a major legal firm to the Australian Law Reform Commission report, Managing Justice:

> "There is a tendency for legal education to [be] merely reactive or haphazard. The competing demands for strictly legalistic education which concentrates on 'black letter' law training and for a theoretical

actively embrace a broad conception of legal knowledge." A. Parashar and V. Nagarajan, "An Empowering Experience: Repositioning Critical Thinking Skills in the Law Curriculum", (2006) 10 *Southern Cross University Law Review* 219 at 220.

[46] L. Armytage and S. Vignaendra, *Career Intentions of Australian Law Students,* Centre for Legal Education, Sydney, 1995

[47] ALRC, *Rethinking Legal Education and Training, Issues Paper No 21,* 1997 (see www.alrc.gov.au) did note that in contemporary times, legal education has become more generalist by nature.

[48] CALD, above n 38 at 27.

> and policy orientated approach which ignores the need for students to acquire practical skills and substratum of essential knowledge leads almost inexorably to mediocrity."[49]

In rejecting a unitised, atomised structure to legal education, a number of advantages can be obtained. First, learning can become student, rather than teacher-led.[50] Second, units will have a distinctive and necessary place within the curriculum, and as far as practicable, assessment will reflect and enhance learning.[51] In this context, learning needs to reflect how the student will interact with this material in an applied setting, and by doing this, the different markets that are served by law faculties (e.g. those faculties whose clientele is singularly directed towards the profession as against those where there is a broader reach) can be recognised and appreciated. Critically, there is empirical work that has shown that by:

> "[E]xpanding students' view of their future profession and their role within it [it is possible to] begin to change the manner in which students will engage with their learning…Effective learning and teaching policies need to address the whole curriculum, with the core [units] in the early years used as a platform on which later [units] can build."[52]

Furthermore, a recognition that admission to practise remains the primary purpose of the law degree, only serves to highlight that the contemporary, high quality legal practitioner will have an understanding of the plurality of influences, such as historical, economic, sociological influences that persuade and shape the matter in question. "There is an exceptionally strong argument that a broader approach to legal education – more theory, more sociological analysis and more legal history makes for better practitioners."[53] A quality practitioner does not merely have a doctrinal understanding but seeks to understand the context in which the dispute occurs. With increasingly reliance on what is often regarded as soft-law resolution (such as mediation), increasing awareness by the practitioner of these influences can only add value to their advice and ensure greater quality of service to the client. By recognising this, the long-standing division between teaching for professional competence and a liberal law degree may not be seen as in some form of eternal conflict, but coexisting with a mutually agreed destination.[54] In this sense, this plurality of the law degree will be its greatest

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[49] Submission of Freehill, Hollingdale and Page to Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report no. 89) (2000) at [2.72].

[50] See the comments by Keyes and Johnstone, above n 37 at 539-542.

[51] The benefits of which are explained generally by P. Ramsden, *Learning to Teach in Higher Education,* Routledge, London; J. Biggs, *Teaching for Quality Learning at University,* Open University Press, London, Rogers, "Improving the Quality of Learning in Law Schools by Improving Student Assessment", (1993) *Legal Education Review* 133.

[52] A. Reid, V Nagarajan and E. Dortins, "The experience of being a legal professional", (2006) 25(1) *Higher Education Research and Development* 85 at 97.

[53] Webber, above n 43 at 571. See also Reid, Nagarajan and Dortins, above n 52 at 97.

[54] See generally Parashar and Vagarajan, above n 45 at 228, where the conflict is discussed.

strength.[55] It has introduced a cohort of students to legal education who to this point, would not have been attracted by its singular goal of entry into law. It has allowed a far broader recognition understanding and discussion of what it means to be legally educated. Nevertheless, this plurality has, in the eyes of some, fragmented or diffused the singular purpose of undertaking law studies as preparation for practice. The question today is how we reconnect with this purpose but without alienating those who might otherwise be attracted to the study of law for reasons other than entry to the legal profession. In simple terms, the answer is that law schools now have to articulate (and some have already begun this process) what the graduating product of legal training will look like, and then to reverse engineer how this will be integrated within the curriculum.[56] From this it will be possible to sell the idea that whilst the degree has a destination of preparation for practice, this in no way denies the wider value of what is being achieved in the study of law. In doing this, the influence of professional skills such as those identified in the MacCrate report[57] will become apparent.[58] This report identified the following fundamental lawyering skills that should be obtained by any prospective practitioners (and as can easily be recognised, many are lifelong skills not solely the province of the profession):[59]

- Problem solving;
- Legal Analysis and Reasoning;
- Legal Research;
- Factual Investigation;
- Communication (oral and written);
- Counselling clients;
- Understanding litigation and alternative dispute resolution processes and consequences;

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[55] See the comments by Webb, above n 62 at 6.

[56] In this respect, some contrast can be noted with the Continental European law degree that routinely will have a greater emphasis on studies in other areas such as sociology, philosophy, logic or ethics. See J. Merryman, 'How Others do it: The French and German judiciaries', (1988) 61 *Southern California Law Review* 1865; R. Abel and P. Lewis (eds) *Lawyers in Society – The Civil Law World,* Berkeley, University of California Press, 1988, both cited in ALRC, *Managing Justice,* above n 49 at fn 10, chapter 2.

[57] MacCrate Report, above n 40. The Australasian Professional Legal Education Council (APLEC) also released in 2000 its Competency Standards for Entry Level Lawyers. In the area of skills, his required that each applicant, (at the point of admission would have the following skills: (Lawyer's Skills, Problem Solving, Work Management and Business Skills, Trust and Office Accounting); the following practice areas (Civil Litigation, Commercial and Corporate, Property Law and one of either Administrative Law, Criminal Law or Family Law, and one of either Consumer Law Practice, Employment and Industrial Relations Practice, Planning and Environmental Law or Wills and Estate), and the following Values (Ethics and Professional Responsibility).

[58] Though reform is ad hoc, see generally: S Christensen and S Kift, "Graduate Attributes and Legal Skills: Integration or disintegration", (2000) 11 *Legal Education Review* 207.

[59] Extracted from ALRC, *Managing Justice,* above n 49 at [2.20].

- Organisation and management of legal work; and,

- Recognising and resolving ethical dilemmas.

This report also indicated that a legally trained individual should possess certain values, such as a commitment to self-development, a desire to seek the removal of discriminatory biases and to promote the wider goals of justice.

> "Nearly everyone agrees… that the purpose of law school is to teach every student to 'think like a lawyer'. Few seem to recognize that we cannot really teach students how lawyers think without teaching them at the same time what lawyers do. Thinking like a lawyer is a much richer and more intricate process than collecting and manipulating doctrine...[O]ne dichotomy still prevalent in legal academic circles – 'skills' versus 'substance' - ought to be banished from our thinking."[60]

These concerns reflect an ideal that "legal education [does not deserve] its name unless law is taught in the frame of a univeritas iterarum or scientiarum, that is in conjunction with other disciplines…"[61] Webb[62] notes this difficulty:

> "Adopting a frequently, implicit, sometimes crude, objectivist epistemology,… black-letter law often pays scant regard to either grand theory or practice, though in its choice of tools it remains closer to the analytical framework of practice than to the more reflective methodologies of the social and human sciences. On the other hand, the more interdisciplinary approaches of contextualism and of Critical Legal Studies offer a sometimes bewildering display of ideas drawn from a variety of (anti)foundational disciplines. The theory is there, often in an eclectic form. …these approaches add up to the construction more of a variety of methods rather than a foundational theory of law – or an alternative thereto that is capable of escaping a frustrating deconstructivism. Added to this… there has been little attempt within these movements to assimilate practical knowledge into the legal canon. These, in essence, are core problems for legal epistemology."

Given this academic confusion, the divergent career paths of legal graduates, and the multitude of reports that ask for a broader vision of what legal education encompasses, it is suggested that the implied, if not express purpose that must be met by any law school is to prepare students for practice.[63] Not only must the

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[60] NL Schultz, 'How do Lawyers really think?" (1992) 47 *Journal of Legal Education* 57 at 57.

[61] Kahn-Freund, "Reflection of Legal Education", (1989) *Legal Service Bulletin,* 55, quoted in L. Taylor, 'Skills – Kind Inclusion and Learning in Law School' [2001] UTSLR 8 at 3 of online version (http://www.austlii.edu.au/au/journals/UTSLR/2001/8.html).

[62] J. Webb, 'Extending the Theory-Practice Spiral: Action Research as a Mechanism for crossing the Academic/Professional Divide', [1995] 2 Web JCLI at 8 of online version (http://www.ncl.ac.uk)

[63] For example, a number of Universities indicate that their focus is towards teaching a commercially based law degree.

journey be outlined, but also the destination identified. The debate should not be seen as skills versus substance, legal doctrine versus sociology, black-letter principles versus generic skills, but about meeting the core irreducible requirement of what a law degree should contain in contemporary Australian legal education. It is submitted that this can be simply phrased. The purpose is to be legally competent, rather than to have legal competencies,[64] and to be legally competent involves consideration and articulation of what preparation for legal practice involves.[65] In effect, to be legally competent is more than merely doctrine, more than a set of skills, but which somehow connects the underlying parts of the law degree to achieve a sense of gestalt. It allows the purpose to be considered holistically. It is much more than the Priestley 11,[66] much more than a coherent (or incoherent) skills program, and significantly more than meeting issues of, for example, legal theory and globalisation by merely mandating that students undertake one unit in those areas.[67] It is about viewing the result of legal training and asking what personal attributes are required within the contemporary legal practitioner. In an age of mistrust by our Government towards the academy that sees overbearing and narrowly defined quality assurance mechanisms, the application of a research quality framework and the increasing focus on teaching excellence leading to some level of standardisation,[68] the opportunity becomes rife for rationalism. The number of law faculties and their inability to articulate the destination required by students will leave them potentially exposed.

Conclusion

There is no doubt that the demands placed upon the higher education sector are far greater today than they were a generation ago. Students undertaking a particular qualification are no longer guaranteed of work in that particular sector and with the mobility of people today and the need for ever-changing skills, society demands an undergraduate that has the capacity to work in divergent ways.

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[64] This phrase is taken from A. Sherr, "Legal Education, Legal Competence and Little Bo Peep", *mimeo,* Institute of Advanced Legal Studies, - accessible at http://ials.sas.ac.uk/reasearch.woolf/inaugpub.htm - accessed September 4, 2006.

[65] In doing this, it is suggested that not everything within the law degree can be reduced to a statement of learning outcome. "There will be always be the ineffable, the indescribable, the uncapturable, that which is left to discretion. And such elements may not be capable of easy capture or easy reduction to a simplified objective statement." Sherr, above n 64 at 9.

[66] The Consultative Committee of State and Territory Law Admitting Authorities (chaired by Justice Priestley) prescribed 11 areas of knowledge that students were required to have before they could be admitted into the legal profession: Criminal Law and Procedure, Torts, Contracts, Property, Equity, Company Law, Administrative Law, Federal and State Constitutional Law, Civil Procedure, Evidence and Professional Conduct (including basic trust accounting).

[67] A common response to calls for these aspects to be part of the curriculum. See Keyes and Johnstone, above n 37 at 550.

[68] Funding constraints are arguably leading to greater standardisation in the methods of teaching legal education as well as forestalling reforms to teaching. See the comments by V. Brand, "Decline in the Reform of Law Teaching? The Impact of Policy Reforms in Tertiary Education", (1999) 10 *Leg. Ed. Rev.* 109 at 139-140.

For this reason, the implied purpose of legal education needs to be expressed to take notice of these trends. Universities, and through this institution, its discipline of law, must meet the implied purpose that commonly would apply to a person undertaking legal education. This mandate is dictated by s74 of the *Trade Practices Act* 1974, which implies this non-excludable warranty into every contract between a corporation and a consumer. This led to the second part of the debate, what is the implied purpose of someone entering legal education? It is suggested that it is to become legally competent, and that this is met by meeting the obligations of preparation for practice. Instruction in the content of professional admittance requirements (the Priestley 11) is not enough. The case for a broader understanding of what is required of a practitioner is self-evident. What is necessary is a reflective practitioner with an understanding of history and the context of how the law operates. In undertaking this, not only are the needs of the profession met, but also those that are disenfranchised (by either choice or circumstance) from entering the profession gain invaluable skills, knowledge and capacities.

> "Developing the curriculum to fulfil this goal is a challenge, and it requires commitment at every stage, including all the core and elective [units]. Within each [unit], the student should develop a sound knowledge of the legal complexities, reflect on the origin of the rules and the manner in which they operate, and critically assess the impact of the law and their role within it."[69]

Ultimately, each University should ask of its Faculty of Law to outline the destination reached by an undergraduate engaged in legal education. Once this is done, the map by which the student gets to that point should be reasonably easy to draw, with the consequence that the implied warranty that a consumer (student) will at the end of their degree be legally competent will be satisfied. Significantly, this does not demand homogeneity within the competing law degrees. Each can look to its strengths, its market, and create diversity within the curriculum,[70] or its teaching or research – but all with the goal of preparation for practice. Little will be achieved, apart from providing ammunition for law school rationalisation by duplicating what others are doing.[71] However, whether the law course be a traditional model, more closely aligned with commercial imperatives, a formal integration of the practical legal training course, or seek to inculcate multi-disciplinary considerations, the common purpose of being legally competent to enter the profession remains. This conclusion not only meets the needs of the legal profession, but also the government agenda of ensuring all undergraduates have the skills and qualities that will ensure a return on the taxpayer investment

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[69] Reid, Nagarajan and Dortins, above n 52 at 98.

[70] For example, Parashar and Vagarajan, above n 45 who argue for critical thinking skills as the overarching criterion within the law school curriculum.

[71] As noted by Sir Anthony Mason, there is no need to duplicate a standard law course throughout Australia, A Mason, 'Universities and the Role in Society', in J. Goldring, C Sampford and R Simmonds (eds) *New Foundations in Legal Education,* Cavendish Publishing, Sydney, 1999, xii, noted in N. Rees, "Legal education and training: An evolutionary approach" (2000) 76 *Reform* at fn 15.

in that individual's education. It also ensures that the contractual relationship between student and university has one underlying and mutually understood goal – to be legally fit for purpose.