

Tempering Universities' Marketing Rhetoric: A Strategic Protection against Litigation or an Admission of Failure?

by

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The changed dynamic between Tertiary students and universities has resulted in much discussion about consumer rights and obligations. Whilst some consider the change from students to clients to be simply an accurate reflection of changing times, others believe the trend to be a covert blue-print for radical change imposed by forces external to the academia. In either case, the discussion is more concerned with rights, responsibilities and obligations rather than pedagogic issues. With the shift in focus comes the possibility of consumer-based litigation based upon contractual obligations. To some extent, the success of such litigation will be based upon legalistic interpretations of the marketing rhetoric universities use to describe their product. As public statements, such rhetoric is part of the contract into which students enter with universities. This paper considers one of the ways in which universities have responded to the potential of being sued by unsatisfied customers: a tempering of hyperbole in their advertising. But how does the implication of such a strategy impact upon the perceived or actual standards of teaching? The paper begins with a brief overview of how universities have responded to students recasting themselves as customers, with the concomitant demands for satisfaction. It follows with a consideration of how these trends have become manifest in Australia. The focus narrows to consider how one university has responded to the changing environment, and then uses the example of one faculty within that university to exemplify the change in strategy. Finally, the paper considers the potential future relevance of that response.

Introduction

The commercialisation of tertiary education has perhaps been the greatest change to universities since the move from religious seminaries to secular research and teaching institutions. The relocation of universities from sequestered ivory towers to the vagaries of the marketplace has been driven by a number of factors, and has resulted in some unexpected changes in administrative approaches: having had their product challenged in terms of quality, universities have had to adopt a business model to facilitate their operations (Onsman, 2004). The notion of *quality* as something that might have a direct impact upon their funding from a generally decreasing public purse has also meant that their customers have a reference point for the product they are buying. Universities are increasingly obliged to specify and substantiate how well they do what they do in order to lay claim to public funding. To a significant degree that substantiation lies in the hands of their customers.

Customer satisfaction, the perception of service quality, is the key variable for any marketplace success. Whilst there may be some contention as to who the customers are (students, employers of the graduates, parents of students, government), students, both current and alumni, have a substantial voice in evaluating the institutions. First, they rate the university's performance formally by means of surveys and course experience questionnaires, the data gathered by which plays a major part in how well the university is funded from the public purse. Second, they rate the university informally, by means of word-of-mouth. Radosevich (2006) points out that the so-called grapevine can have a devastating effect upon commercial success. The writing has been on the wall for quite a while: the customers will have to be kept satisfied.

Regardless of who else is included, there is no doubt that students are amongst the most influential of all tertiary education stakeholders. However, there seems to be no resolution as yet to the dilemma that surrounds their status. How are universities expected to treat their students now that they are clients, customers and consumers? Some analysts (Townley, 2001; Rautopuro and Vaisanen, 2000) support the idea of students being customers and champion their rights to demand what they consider value for money, but others urge caution. Dunkin (2000) and Coaldrake (2000) argue that the risk a consumerist approach poses to the academy's educational integrity poses problems because, as well as a responsibility to its students, it has an unchallengeable responsibility to its mission. In general terms, universities must tread a fine line if they are to balance the two. Rather than provide what its customers want, each university has an obligation to provide what it says it will provide.

Conceptual and operational changes in universities

According to Middlemiss (2000), it was inevitable that as universities increased their financial demands on both local and international students, they, in turn, would demand more from the universities. To describe the situation in broad brush-strokes, during the last twenty years, a number of over-arching factors have led to major conceptual and practical changes in the manner in which universities do their business. First, the constitution of the student population has changed dramatically. Second, universities have changed in institutional terms. Third, the nature of knowledge has changed. Fourth, and as a consequence of the first three factors, the dynamics between students, universities and knowledge has changed.

The traditional universe from which universities draw their intake has undergone substantial changes over the last fifty years (Jensen, 1997; Armstrong, 2005). Some have simply increased their size, both locally and internationally. More importantly, the make-up of the intakes has changed. The proportion of full fee-paying students has increased, in some cases to the point that they are the preferred and, in some cases, the exclusive intake. Even subsidised and sponsored students are asked to contribute an increasing proportion of fees. Consequently, most are now more likely to be employed in part-time positions. Further, to gain corporate sponsorship, or to complete industry-essential qualifications, more students are likely to be mature-aged. Fully sponsored students are more likely to be from disadvantaged backgrounds than be academically gifted (Birrell and Dobson, 1998; McPherson and Shapiro, 1998). Long and Hayden (2001) argue that because the student base is more self-funding, it is also likely to be more outcomes focussed. In simple terms, fee-paying students are considering themselves customers and consequently are more likely to be assertive in what they want for their money.

At the same time, universities have also undergone institutional change. Many nowadays have international campuses; major partnerships with business; been created from other institutions such as polytechnics and colleges of advanced education. More importantly, as Rochford (2001) points out, universities are increasingly conceiving of themselves as international businesses rather than local seminaries for pedagogic endeavour. She argues that the commercialisation of universities makes them even more subject to the demands for accountability.

The third factor that has a major impact on the current context is that the nature of knowledge itself has changed. First, the actual quantity of knowledge has increased exponentially, to the point where its acquisition is now an untenable proposition. Bundy *et al.* (2004) argue that the single most important graduate attribute for any university course is the ability to retrieve knowledge rather than being able to demonstrate a sizable accumulation of data.

As the student base, the university and the nature of knowledge changed, the relationship between them also changed. It is this dynamic that is of interest to the current paper.

Rochford (2001) argued that the difficulty in establishing causation was likely to prove a significant disincentive for any student suing a university for “failure to teach”, but this position was shown to be wrong when in 2002 a student sued the University of Wolverhampton, England. Rather than for a generalised “failure to teach”, the student took the university to court for breach of contract. His grounds were that the University’s Prospectus had represented itself as providing “learning excellence.” The university had done so by means of a promotional CD-ROM that portrayed a student who stated that he had turned down Oxford and Cambridge in order to attend Wolverhampton.

The student argued that this was false advertising because in fact the lecture halls were overcrowded, materials were two weeks late, tutorial staff were harried, students were often turned away from tutorials and examination questions were so badly constructed that they were indecipherable even to the invigilators. Rather than make a judgement that could serve as a precedent, the Supreme Court of Great Britain ordered the matter to be settled out of court. The University of Wolverhampton complied and settled for more than AUD \$80,000.00.

A number of points fall out of this event. First, the student was a mature-aged student enrolled in the university’s Law faculty, and as such, much less inclined to unquestioningly accept whatever was made available to him. Second, the university itself is a so-called “New University” rather than a traditional, longer established institution: it changed from a polytechnic to a university in 1992. Third, according to the Guardian tables of 2002, the course he was enrolled in ranked 72nd out of the 88 Law programs on offer in the UK at that time. Fourth, and as suggested above, the relationship between the student and the university was more equal in terms of its power dynamic. This became manifest in the legal support the student engaged.

The student had guidance from Jaswinder Gill, a lawyer and author specializing in Education, who stated after the settlement that “students need to know that they have consumer rights and remedies if things go wrong.” The most striking aspect of the case was that a legal firm exists that advertises itself on its web-site as specialising in:

“...Higher Education and issues relating to Funding, Breach of Contract and Judicial Review. Gills offers expert legal advice in protecting and promoting student legal rights in the law of Higher Education. Jaswinder Gill has gained a nationwide reputation as the leading lawyer in the country in this area in challenging Local Authorities and Universities, previously being unfamiliar territory.”

The fact that nowadays legal firms can thrive by suing universities that in some way encroach on the rights of students as customers not only illustrates the changing dynamic between the institution and its customers, but also that universities will need to ensure that they deliver exactly what they promise when they advertise themselves as providing high quality education. They can do that one of two ways: either they can ensure that the education they provide is actually high quality or they can modify their advertising. Most have in fact chosen the latter option. Whilst this is most often simply pragmatic rather than an admission that their standards are not as high as they might be, it has resulted in interesting spin-

doctoring. To examine how that might happen, it is fruitful to narrow the focus of the discussion to a national level.

National trends in students as customers: the Australian context

Australia is clearly following the path of student as customer with concomitant rights. The Higher Education spokesperson for the extant Australian Democrats, Senator Natasha Stott Despoja believes that the difference between what students expect to get for their fees and what the university actually delivers, the so-called reality gap, is also evident in Australia. Universities in Australia compete very aggressively for students, especially for full fee-paying students. She also notes that, at the moment, students in Australia are limited in what they can do to hold universities accountable to the assertions made in their advertising. If a university advertises excellence and doesn't deliver, then if you are full fee-paying student you can use section 52 of the Trades Practices Act to sue the institution. If you are a Higher Education Contribution Scheme (HECS) paying student you can't. However, the Australian Competition and Consumer Commission is on record as saying that this ought to change so that HECS students also have the right to sue.

In either case, if a university advertises excellent teaching, it had better make sure that it delivers just that or else remove hyperbolic claims from its advertising rhetoric. Being shown to have a "reality gap" won't only be embarrassing; it may also end up being very costly. The notion of students as clients comes with a loaded corollary in terms of university obligations and responsibilities, which may have a significant impact on how the institution promotes itself in the marketplace. Of course, the line of thought pursued above is in no way meant to suggest that any faculty within any Australian university has recast its advertising materials specifically to minimize the potential for litigation. Nonetheless, it is noticeable that where in 2002 a leading Australian university was prepared to offer the ... *education of the highest quality*, three years later the superlatives have been qualified and become *highest possible quality*. Whilst every university in Australia is undoubtedly working hard to ensure that all of its teaching is of the highest quality, simple pragmatism is likely to be keeping an eye on what could become contentious or litigious in its public claims.

Monash University: a case study

In broad terms, Monash University exemplifies the changes in its marketing rhetoric. In 1999, the University advertised itself on its homepage thus:

"The University is committed to the highest quality outcomes in teaching, learning, research and a wide range of professional and community activities." (*Leading the Way: The Monash Plan 1999-2003*)

By 2006, the claims had become far less specific:

"Monash University seeks to improve the human condition by advancing knowledge and fostering creativity. It does so through research and education and a commitment to social justice, human rights and a sustainable environment." (Homepage)

The most noticeable change is the removal of the word "outcomes". Whilst at first glance the change may seem innocuous, in legal terms it removes deliverables from the contract. Contractually defined deliverables, in this sense, are the cornerstones of most litigation in the tertiary sector. This notion is based upon two arguments: first, that an enrolment can be interpreted as a contract; and second, that the terms of provision are restricted to what is specified in the contract/enrolment. The terms of the enrolment are usually stated in university policy. There is a third, less clear argument, that as an institution of learning, a university has a further obligation to provide all the facilities and support that a student might reasonably

expect a university to provide to facilitate his or her learning. Rather than claiming what a student will have gained by enrolling in the university, it now states what the university makes available. It has changed from “you will get ...” to “we will provide ...”.

The second noticeable change is the removal of the superlative “highest” in relation to quality outcomes. Elsewhere on the current Monash website, mention is made of the “highest possible” quality of the education on offer. Legal argumentation, based on the common notion that there are various factors that might influence highest possible quality, will dissipate the onus on the institution to be the sole provider of it. Arguably the most influential factor that contributes to such an outcome is the capabilities and performance of the customer.

Again, this is in no way meant to imply that the University has admitted that its teaching standards are not as high as previously claimed. Rather, Monash University’s recent change of focus in its advertising serves as an example of pragmatism. Even though it might still be drawing a long bow to suggest that its action could be interpreted as the result of a fear of litigation because it is acknowledged as a leading educational institution in the Southern Hemisphere, nonetheless the University now claims that it aims:

“... to be one of the best universities in the world, distinctive because our research-intensive, international focus enables us to address important theoretical and practical challenges, and develop graduates who will wish to do the same.” (Monash Website)

In fact, in its strategic planning document Monash states clearly the time line for achieving its aim: “by 2025 we will be one of the best universities in the world ...”.

It is interesting to note that there is nothing specific or definite about quality standards in that statement at all. In fact, it takes a bit of digging to find any kind of declarative statement anywhere on the Monash web-site, which these days surely ranks as one of any institution’s principal organs of communication. Even in the university’s main planning document, *Excellence and Diversity*, under the sub-heading *Excellence in Teaching* Monash University commits itself only to trying hard to provide it:

“Recognising the fundamental significance of high quality education to the future of Australia and the world, Monash will strive for the highest possible quality in teaching and learning.”

However, institutionally Monash University does make plain what it considers to be first class teaching. In its *Effective Teaching Policy* the university states that it has developed a definition of effective teaching that will govern the university’s planning and monitoring of its educational programs. At Monash University, first class teaching is a student-centred, research-driven, transparent, inclusive practice that will result in its graduates achieving a set of as yet un-stated graduate attributes. At the same time, should a student decide to refer to those adjectives as indicative of how Monash University defines first class teaching, a sort of legally binding check-list, if they find themselves dissatisfied with the product they have purchased, the university has recourse to this disclaimer that prefaces it:

“The following statement of broad principles embodies a Monash vision of teaching which the university will strive to realise.”

Most tellingly, there is no specification of how hard the university has to strive.

Marketing at the faculty level

This paper now becomes even more specific by delving down to the next level of administration. According to its website the Faculty of Business and Economics is the largest single faculty anywhere in Australia. It is recognised internationally as one of the best providers of the Masters of Business Administration in the world: *The Economist* Intelligence Unit's 2005 MBA international rankings placed it at number 5 for student quality and 59th overall. It is also the Faculty that generates the greatest amount of revenue for the university. Its size, quality and power allows the Faculty to advertise itself confidently (and probably justifiably so):

“The Faculty of Business and Economics is making a significant contribution to business and the professions through its teaching, research and connections with the business world. Through our extensive range of quality programs for undergraduate, postgraduate and research students, Monash Business and Economics is a leader in the broad discipline areas of Accounting and Finance, Business Law and Taxation, Econometrics and Business Statistics, Economics, Management and Marketing.”

Again, it is noticeable that there is little that is specific or contestable in terms of its standards of teaching. It is unarguable that the Faculty has, as an earlier site said, an extensive range of high quality programs on offer. Nonetheless, the Faculty has removed “high” as a qualifier to “quality”, which seems to indicate a more cautious approach. In the Dean's Message, Professor Gill Palmer mentions “first class teaching”, without specifying what that means. The potentially most provocative statement is “We can harness the many intellectual resources at Monash University to shape individual business education for students so they can prosper in an ever changing business environment” – and even there it says that they can, not necessarily that they will. Again, there is very little to work with there for the litigiously inclined.

It must be emphasised that whereas the Business and Economics Faculty of Monash University has been used as an example, this paper suggests that most, if not all, Australian universities are responding, to greater or lesser degrees, in the same manner to what is essentially an unforeseen consequence of recasting of tertiary students as customers with rights. This paper makes no comment about the standard of education the Faculty provides.

Conclusions – future trends

The fundamental result of recasting students as customers is that disputes about product satisfaction will need to be arbitrated by an evaluative mechanism, presumably a body of some sort, which is located somewhere external to the challenged institution. Whilst the Federal government has indicated that it is likely to demand a place within any such mechanism when it is eventually constituted, there are indications that major disputes in Australia are likely to be resolved through litigation because, as customers, students have legal rights. This is not without precedent, either in Australia or overseas. The interesting aspect of such litigation is that it isn't simply students suing universities for gross mismanagement, negligence or failing in duty of care. Students are now able to legally challenge universities that do not provide what they have indicated they will provide at the standard they have promised in terms of breach of contract.

Whilst no specific external arbiter exists as yet, a new body may yet be called upon as a provider of substantiation in legal argument. Through the Department of Education, Science and Training, Australia has recently established a Learning and Teaching Performance Fund. All Australian universities are ranked according to weighted scores provided in the main by student satisfaction surveys. The Minister for Education, Science and Training, the Honourable Julie Bishop MP, has stated quite categorically that, regardless of any other factors, it is principally student opinion that will decide whether or not a particular institution gets a slice of the pie:

“In cooperation with the sector, further work will be undertaken on the measurement of excellence. It is essential that we are able to assess the attitudes of all students to the quality of the education they receive.” (Australian Government, 2006)

Whilst the primary function of the Fund appears to be to distribute Federal funding according to how well the institution is performing, it may also serve to either support a university’s claim of excellence or support a litigating student’s claim that what it provides isn’t excellent. In simple terms, should a student sue a university for poor performance, substantial weight would be added to the claim if the university was ranked bottom. Alternatively, it would be difficult for the claim to succeed if the university involved was ranked first. The point of this is that the Learning and Teaching Performance Fund could conceivably act as a de facto external arbitration agency during litigation.

There are further areas to be considered. From the academic development point of view, what does the enterprise university require of its teaching staff in its pursuit of excellence in teaching? Elsewhere (Onsman, 2004) it has been argued that the current trend to measure teaching efficacy by means of student evaluations of teaching and learning is a fundamentally flawed, but ubiquitously enforced mechanism that has been endowed with singular importance by government-based funding agencies around the globe. If students are indeed to be judges of excellence in teaching and administrators are to be the regulators of excellence in teaching, what will be the impact upon the teachers? In fact, in the above-mentioned case where a student sued University of Wolverhampton, mention was made that the university ranked 125th out of 151 British universities.

This paper has argued that the suggestion that universities have been forced to temper their marketing rhetoric from absolutes to comparatives by the very real possibility of litigation. There is, therefore, an implication that previous claims of product excellence were incorrect. If universities are no longer confident enough to describe their product as being excellent, then it follows that they are no longer confident that their product is unquestionably excellent. This paper has argued that such is not necessarily the case. Rather, the notion of excellence in higher education is as yet without universally accepted defining characteristics. However, as is the case in the marketplace everywhere, product evaluation is done by the clientele who purchase it. Finally, because student evaluations of learning and teaching are the mechanism that drives external funding agencies, this paper has speculated they may be used as arbiters in legal disputes about the quality of the product a university provides.

In summary we might ask the following question: will the aims of successful teaching become unwarranted high grades, high student evaluation scores and a litigation free year?

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