

**DoC15**

**As at 6/1/15 (7017)**

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**SEND FOR THE DIRECTOR OF COMPLIANCE!**

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**How long before we see this job advert?**

***COKETOWN UNIVERSITY – Director of Compliance***

***CU is a dynamic and student-focussed leading university of 35,000 students who gave it an 86.3% rating in the latest annual National Student Satisfaction Survey. The University seeks to make an appointment to the new position of Director of Compliance who will be a Member of the Senior Leadership Team, reporting directly to the V-C/CEO while working closely with the Registrar as the COO, with the Director of Marketing, with the Director of Teaching & Learning, and with the Director of Quality. The salary will be not less than £200k plus a 25% pension allowance. Extensive previous experience in compliance within the financial services industry and/or with the statutory regulators for the utilities, communications, health care, or transport is essential; experience within a national consumer organisation would be an advantage.***

**Perhaps the ad will appear by early-2017 once the Higher Education Act 2016 has created OFTE – the Office for Tertiary Regulation – based on the standard model for the growth of the statutory**

**regulators over the thirty years since the privatisations of the 1980s and the creation of the Regulatory State as the replacement of the Welfare State (on such Regulators see Item 32 at the Updating Page for ‘Reshaping the University: The Rise of the Regulated Market in Higher Education’ (Palfreyman & Tapper, 2014, Oxford University Press) at the OxCHEPS website: [oxcheps.new.ox.ac.uk](http://oxcheps.new.ox.ac.uk) ). Possibly it will appear sooner as the pressure mounts for universities to ensure they are compliant with the application of consumer protection law to the student-university legal relationship – see the discussion of the student-as-consumer in Chapter 6 of the ‘Reshaping...’ book as already mentioned, and also Section J on ‘The student as consumer?’ in Chapter 12 (‘The Student-HEI Contract’) of Farrington & Palfreyman, ‘The Law of Higher Education’ (Oxford University Press, 2012 second edition): the third edition due 2017/18 will almost certainly remove the ? at the end of ‘The student as consumer?’...**

**And whence comes that pressure even before the predicted creation of an OFTE during 2017 arising from the likely passing of a new Higher Education Act in 2016? The shift from HE as a well-funded public good after the ending of Welfare State largesse and during 1980s austerity as the UK economy collapsed in the 1970s and more recently following the imposition of progressively higher tuition fees to a consumption private good is explored in ‘Reshaping the University...’ as a lengthy political process of massification, marketization, and managerialism, of corporatism, commercialisation, and competition. Throughout the Law applying to the relationship between the student and the university has remained unchanged (as detailed in ‘The Law of Higher Education’ and briefly outlined in ‘Reshaping...’). The Law simply sees a contract-to-admit that morphs into a contract-to-educate, and has done since case-law dating as far back as the end of the nineteenth-century – no matter how much the producer-interests in academe may like to witter on about a meaningful and mystical relationship between the Junior Members of the academic community sitting at the feet of their dedicated teachers as its Senior Members.**

**Moreover, the Law interprets that contract as a clear business-to-consumer (B2C) deal, the latter as the student paying tuition fees to access the former, the university, as the supplier delivering the service of teaching and assessment 'with reasonable care and skill' as demanded by s13 of the 1982 Sale of Goods and Services Act (SGSA). In Section J of Chapter 12 in Farrington & Palfreyman, as noted above, we detail the application also of the Unfair Contract Terms Act 1977 (UCTA), the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR), the Consumer Protection Regulations 2008 (CPR) – replacing the 1968 Trade Descriptions Act (TDA); and we discuss the shameful and unlawful abuse by some universities of whole-agreement terms and of exemption, disclaimer, and limitation clauses where a minority have an explicit Student Contract – Chapter 12 also covers the Misrepresentation Act 1967 and ends by offering the HE sector 'A Model Student Contract' that is both fair and legal.**

**This long-established consumer protection context for the operation of the student-university contract has very recently received wider recognition and new emphasis, and this is the source of the growing pressure upon institutions to get their managerial act together in terms of risk-assessment and risk-management of the delivery of the service to the student. The key three new items that HE managers need to digest are: the Consumer Rights Bill currently progressing through Parliament; the November 2014 document from the Competition & Markets Authority entitled 'UK higher education providers – draft advice on consumer protection law'; and the Which? Report of the same month, 'A degree of value: Value for money from the student perspective' (see the discussion below of the potential impact upon HE of these three items). And this B2C delivery of HE is the supply of a service that is uniquely complex, prolonged, and interactive between the business as the university and the student as the consumer: the marketing begins in year one via the prospectus, open-days, whatever; the formal UCAS application is made in year two; the student-to-be may disappear on a gap year during year three; the delivery happens in years four to**

**six (or even on into year seven) – thus, over a six or seven year duration there is plenty of time for the marketing hype of year one to fail to be matched by the operations delivery a long time later, giving rise to possible claims under the Misrepresentation Act 1967 (see discussion in Chapter 12 and also in Law Update 12.33 at the OxCHEPS website; interestingly the MRA reverses the burden of proof, making a claimant’s task rather easier).**

**The only concession the Law makes to this special B2C activity called HE is that there is a Get-Out-Of-Jail-Free-Card that still provides legal immunity for academics that has for other professional groups progressively disappeared – doctors, solicitors, barristers, and just recently expert witnesses. The student is unable to challenge in Court (nor via the OIA) the deployment of expert academic judgement in terms of what is taught, how it is taught, exam marking and assessment: there is judicial deference as the academic abstention doctrine or the doctrine of judicial restraint; and this is the case in all legal jurisdictions since courts everywhere do not want to have second-guess whether the quantum-mechanics delivered by Professor Pastit is up-to-snuff, nor whether Jocasta’s 2:2 in the History of Art should have been a 2:1. In Farrington & Palfreyman (Section D of Chapter 12) we query whether the UK Supreme Court would uphold this unique special privilege for academe in the context of the HE in the twenty-first century where it is no longer a free public service/good but now the punters are paying high fees and increasingly to for-profit HE businesses entering the HE market. In fact, of course, as discussed in ‘Reshaping...’, there has since the early-1980s been a competitive and lucrative market in international students, while more recently also in taught-masters courses; the fuss and furore of the public v private delivery of HE debate is more about the inventing of the fee-paying market in UK undergraduates since tuition fees began to be charged from the early-2000s (indeed, arguably, a re-inventing and so back to the norm of a fee-based functioning of an HE market as operated by UK universities prior to free HE emerging as part of the post-War Welfare State).**

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**So, for the management of universities what might the impact be of the three recent items referred to? – other than for them to scramble to get a Director of Compliance!**

**First, the November 2014 Which? Report ('A degree of value: Value for money from the student perspective') as the latest in a line of important interventions and commentaries from Which? fulfilling its Consumers' Association role as the UK's pre-eminent and powerful consumer interest group that has, understandably and rightly, developed an interest in HE since tuition fees surged to £9000 pa (see the discussion of this significant involvement in 'Reshaping...'). And note that under consumer protection legislation Which? has strong powers in its own right, as a recognised regulator under its Consumers' Association remit, to call for the Competition & Markets Authority (the CMA that has now replaced the Office for Fair Trading and the Competition Commission) to investigate an industry for possible breach of consumer protection laws and/or competition law – see the discussion at Law Update 2.18 on the OxCHEPS website and in 'Reshaping...' (as itself also updated online at the OxCHEPS website). Which? expresses 'concern' that the existing regulatory system for HE is not fit-for-purpose and that the HE market is not delivering value-for-money from the student perspective. It notes that 'three in ten undergraduates thought that their experience was poor value' and that 'poor course organisation or management' was also commonly complained of, while information about 'academic inputs' such as class/seminar sizes is rarely provided to potential customers. It calls for, inter alia, the HE industry to produce 'a standard format for higher education contracts' in order to ensure that 'students and their representative bodies can easily find and compare terms' (the Report duly notes the Model Contract offered in Farrington & Palfreyman, as mentioned above) and for the CMA to carry out 'a compliance check' with a view to it taking 'immediate action where providers are found to be breaching consumer legislation'; for the HE industry to explore how to put in place 'exit regimes' to protect the students where a**

**university fails financially (just as ABTA bonding flies you back home when a dodgy holiday company or airline goes bankrupt); for the Government 'to mandate in legislation' the information that universities should provide to prospective students, along the lines of a reformed KIS that the Report details (including data on class sizes, employment of graduates, number of student complaints, and where the fee income is spent within the University – just as one's Council Tax and now Income Tax correspondence declare how much is spent on policing, refuse collection, the NHS, schools, etc). The HE industry will not be keen to reveal such data; the KIS as developed under self-regulation being, of course, cynically designed to avoid causing universities embarrassment over their raking in of ever-higher tuition fees while under-resourcing undergraduate teaching at the chalk-face (hence their furtiveness about explaining just how much of the £9000 fee reaches the lecture/seminar room, allowing for so much teaching being done by zero-hours casual/adjunct academics).**

**Next the CMA November 2014 consultation document on how to advise universities about ensuring compliance with consumer protection law relating to both the student-university contract-to-admit and also the contract-to-educate (as well as any contract-to-accommodate): 'UK higher education – draft advice on consumer protection law: Helping you comply with your obligations' (CMA33con). This document builds on an earlier report from the OFT (March 2014) – see Law Update 2.18 referred to above – and notes 'the significant scope for clarifying HE providers' responsibilities under consumer protection law', warning that non-compliance 'could result in enforcement action by local authority Trading Standards Services' (the same folk who deal with dodgy used-car dealers!). The CMA stresses that it is for 'HE providers' to get their own specific legal advice, and doubtless many law firms are now offering 'compliance reviews' of the prospectus, of open-day speeches, of all student related documentation, at £XXX per hour – the university manager with a reading age of 16 should, however, save a great deal of money by becoming a better informed**

**consumer of such legal services after initially digesting this Paper, then reading parts of ‘Reshaping...’, followed by Chapter 12 of ‘The Law of Higher Education’ (both books are even available for the Kindle and hence can easily be taken on holiday for pool-side reading...).**

**Like the Which? Report the CMA stresses the need to provide information to prospective customers that must be ‘clear, timely, accurate and comprehensive’, remembering that what counts is both information provided in writing *and also* orally at open-days or in phone-calls (time, like the financial services industry, to record all such calls ‘for the purposes of staff training’ or rather as evidence for when the student sues!). Moreover, this information must be updated if there are changes between the marketing period and the time of admission. Significantly, the CMA reminds universities that they ‘should not omit important information that could affect students’ choices’. This idea of a duty of fairness under consumer law to not omit telling the student about anything that might reasonably be significant to his/her decision-making (‘material information’ that is needed for ‘the average consumer’ to be able ‘to take an informed transactional decision’) is crucial for university management to understand – and ‘a misleading omission’ (which can be also by way of inaccurate or unclear or inaccessible or uncoordinated information) under the Consumer Protection Regulations is potentially a major source of student-university disputes and intervention by Trading Services! At the end of this Paper a number of scenarios are set out where the ‘misleading omission’ might for universities lead to successful fee reduction claims by students, to adverse OIA adjudications, to losing litigation in the courts, or even to prosecution under what will soon be the Consumer Rights Act: Readers will be able to imagine more instances, since they will know what skeletons are buried where within their own institutional poor practices...**

**The CMA document goes on: the terms of the contract-to-educate should be ‘easily located and accessed’ and must not be ‘unfair’, with applicants having ‘the opportunity to review them before they**

**accept an offer' and with universities taking care to 'highlight any important or surprising terms'. The CMA specifically warns against the sort of whole-agreement terms, and of exclusion, limitation, and disclaimer clauses as mentioned above: it cites such examples as a blanket term giving the supplier 'an unreasonably wide discretion to vary course content and structure' (back to the issue of marketing in year one and still attempting to deliver up to six years later against the expectations and promises engendered by such marketing hype!). It warns against the use of any clause 'seeking to limit an HE provider's liability for non-performance or sub-standard performance of the educational service' (some current student-university contracts try to limit the compensation to the annual fees paid); or against a term 'allowing an HE provider to impose academic sanctions against students for non-payment of non-tuition fee debts' (denying a degree certificate if accommodation charges are owed – as advised against in the 2006 first edition of Farrington & Palfreyman, but, of course, unread/ignored by so many institutions). The terms of the contract should be grounded in 'good faith' as a key general 'principle of fair and open dealing' by the supplier with the consumer – the latter as a university, in the case of HE, must 'not take advantage of students' weaker bargaining position, such as a lack of experience or unfamiliarity with the contract'.**

**The institution should train its staff (and that includes academics) so as to guarantee 'a consistent approach' across all its 'departments and faculties', the employer being - it usefully reminds readers – vicariously liable in tort and also through the law of agency for all actions of employees, even those of the most disorganised academic (see Chapter 8 of Farrington & Palfreyman). And the University should ensure that its 'complaint handling processes and practices are accessible, clear and fair to students' as well as operated within 'clear and reasonable timescales'. One might add that it should perhaps also warn them that, compared with any other B2C purchase made in life, there is the issue of academic immunity/judgement as the University's Get-Out-Of-Jail-**



**Free-Card, leaving the consumer no redress over the key components of a £27-36k purchase if there is poor teaching or shoddy examining/assessment. Perhaps the ‘materials’ that the CMA ‘intends to produce’ so as ‘to raise undergraduate students’ awareness of their rights under consumer law’ will cover this major limitation upon those rights.**

**The CMA draft guidance is an excellent document (the flow-chart on p21 is especially clear) based on existing consumer protection legislation as detailed in Section J of Chapter 12 in Farrington & Palfreyman (2012), as described briefly in Chapter 6 of Palfreyman & Tapper (2014), and as listed above – and hence that anyway should be already being rigorously applied, and long-since! No surprises, then, here for the well-trained university manager, already well-versed in applying the SGSA82, the UCTA77, the UTCCR99, and the CPR08 to the student-university relationship. The Consumer Rights Act will consolidate, simplify, and update this legislation – but at this point (January 2015) in the Parliamentary process the Bill, as the third item that should now be triggering HE management into reviewing its grasp of the B2C nature of the contract-to-admit/educate, contains little of significant difference in terms of applying consumer protection to the student’s purchase of HE services. The Bill is all about anything which is ‘an agreement between a trader and a consumer for the trader to supply... services’, providing the agreement is by way of a contract; and it aims to protect the rights and interests of consumers. The universities-are-so-special brigade will not like to find the University reduced in the eyes of the Law to being mere ‘trader’, a term which sounds even lower than being a ‘supplier’ or a ‘business’: stalls in a market-place come to mind, which is perhaps what a campus open-day really is anyway with the Physics stall or the Engineering stall competing for the numerate sixth-former... The Act will also ‘make provision about investigatory powers for enforcing the regulation of traders’ – a Trading Services dawn-raid on Senate House?**

**The Act will replace the SGSA, the UCTA, the UTCCR, and the CPR by incorporating the familiar concepts from this old legislation:**

**thus, from the SGSA there carries over into CRA's Chapter 4 on Services the key phrase where we are told that 'the trader must perform the service with reasonable care and skill' - there being, of course, much case-law (the Bolam test) as to what is 'reasonable'; in essence, the level of skill of the reasonably competent member of whatever profession/trade is involved (doctor, dentist, architect, plumber, electrician, academic) needs to be deployed and there can be no assumption that there is an entitlement to the best and most experienced medic, plumber, or professor (unless the B2C contract specifies such, doubtless at an extra price). Interestingly, in New Zealand HE student-university contracts there is a term that the latter will use 'best endeavours' to deliver the service to the former; where a few UK universities actually have such a formal explicit contract-to-educate they invariably offer up only 'reasonable endeavours' – their lawyers would never them commit to the burden and take on the legal liability of promising always to do their best!**

**In addition, CRA Chapter 4 declares that 'anything that is said or written to the consumer, by or on behalf of the trader, about the trader or the service' will become a term within the contract (so, bang goes the egregious clause in some university student contracts that seeks to force the student to accept that only the terms set out in the one-sided contract prepared by the University are valid and that anything else said or written elsewhere does not count – these are the 'whole-agreement' clauses that Farrington & Palfreyman in their 2006 edition warned were likely to be thrown out by the court). Moreover, again from the SGSA, 'the trader must perform the service within a reasonable time' – will the University be able to get away with the line that a final-chance resit is not available until the next June if failed in early-September, and can it continue to take inordinate amounts of time to convene appeal boards or handle complaints? A few test cases in the County Court should clarify matters, or a strong hint from the CMA might do the trick. What is new is that the Act will give the consumer a right 'to a price reduction' or to 'to require repeat performance' over and above any usual rights within contract law such as claiming damages:**

**'Modules X,Y,Z have been discontinued, please refund 10% of my £9000. Module X clashed with module Y, please repeat it so I can attend.'**?

**The unfair terms concept is brought in from the UTCCR, along with the idea and ideal of the trader acting with good faith – 'A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.'. As with the UTCCR, a similar Schedule of potential unfair terms is supplied: university managers should check their explicit or implicit student contract terms against that list. The 'average consumer' is 'a consumer who is reasonably well-informed, observant and circumspect' – which should cover the Mums being fed open-day marketing hype if not their teenagers! The contract and its terms must be 'transparent' which means being 'expressed in plain and intelligible language' as well as being 'legible'. The Consumers' Association (aka Which?) is granted 'regulator' status for the purposes of the Act, along with such as the IC, the FCA, the Office of Rail Regulation, the Water Services Regulation Authority – one day an OFTE or OFHE may appear alongside once created by a Higher Education Act to replace HEFCE, the QAA, the OIA, etc? The CRA will need to be digested by university management in conjunction with updated CMA guidance and the 2014 Consumer Contracts (Information, Cancellation and Additional Charges) Regulations implementing the EU 2011 Consumer Rights Directive – the latter, for example, requires the trader before the consumer can be bound by the contract to provide certain items of information about the services to be provided. A good chunk of the Act then sets out the Investigatory and Enforcement Powers of the 'consumer law enforcers' as a tidying up process relating to such powers being currently spread over some sixty pieces of consumer legislation – power to enter premises, power to demand documents, etc. There is also extra legislation within the CRA supplementing or beefing up the Enterprise Act 2002 and the Competition Act 1998, both of which apply to universities as businesses, and their implementation via the CMA.**

**At the time of writing this Paper in early-January 2015, the provision of HE as covered by the Consumer Rights Bill has attracted little attention in the Bill's progress through Parliament. An Amendment (No.50 – originally 105, entitled 'Service contracts relating to students: complaints') was discussed in the Lords that would bring all students receiving SLC public money at commercial/for-profit HE traders (aka 'alternative providers') within the OIA remit – the Lords Hansard (5/11/14) has a Labour peer referring to the work of the OIA and telling the House that the Amendment is backed by the UUK as it 'would create a level playing field between public and private institutions', and also that it would be in line with the BIS 2011 White Paper 'Students at the heart of the system'. It remains to be seen whether the proposed new section will end up in the Act as the Bill shortly goes back to the Commons for the final stages of approval, but it seems likely that it will since the Government in the Lords accepted the gist of the Amendment according to the Report to the Commons on the Lord's part of the process (House of Commons Library, SN/HA/7064, 18/12/14). Otherwise, the passing of the CRA with this one clear reference to HE as a service covered definitively by the legislation explicitly confirms what has also been obvious from case-law (and OFT guidance) that the student-university contract-to-educate is a B2C agreement. It is perhaps unfortunate, however, that Parliament did not take time to consider whether it should have taken this opportunity to legislate away the arguably anachronistic element of academic immunity currently offered to HE providers within the courts (and as also barring the OIA from taking student complaints grounded matters of academic judgement) – it will need litigation to reach the UKSC, via the Court of Appeal and the High Court (possibly direct from the County Court) for the immunity to be ended, as the UKSC has terminated it in recent years for barristers and for expert witnesses (see para 12.42 of Farrington & Palfreyman (2012), as updated at the OxCHEPS website concerning Davies (OUP, 2014) on 'The Law of Professional Immunities').**

**It is, by the way, always (and tediously) pointed out by Farrington & Palfreyman when folk make this contrast between ‘public and private institutions’ within the HE industry that, in fact, nearly all UK universities are private corporations (a few being private legal entities under company law, and none being ‘public’ in the sense of a local authority school or refuse service, the NHS, the Police). These private corporations are either created as lay chartered eleemosynary charitable corporations aggregate (such as New College Oxford dating from 1379 or a 1900s uni such as Birmingham or a 1960s place such as Warwick or the later University of Buckingham, the last often misleadingly being labelled ‘private’ as if the others were not); or they are established as statutory charitable corporations under the 1988 Education Reform Act and awarded the University name under further legislation in 1992 (say, Oxford Brookes or UWE) – or, as noted above and rarely, they operate under the Companies Act as charitable companies such as LSE or as (in the case of the most recent entities) for-profit companies such as BPP University: all as, of course, explored in ‘The Law of Higher Education’ in legal terms and in ‘Reshaping the University...’ in political terms. Thus, the legal distinction is not between ‘public’ and ‘private’ universities (as would indeed be valid as a legal distinction in mainland Europe and in the USA where the State really does own and control most universities), but between ‘charitable’ and ‘for-profit’ universities. The distinction in management and operational terms may, however, in reality now be negligible as the behaviour of universities ‘public’ or ‘private’, ‘charitable’ or ‘for-profit’, merges in the context of their increased corporatism and commercialisation, managerialism and marketisation (see the discussion of for-profit HE providers in ‘Reshaping the University...’). Moreover, now all universities (whether Bristol, Aston, LSE, Buckingham, BPP, or the University of Law) receive public money in the form of their students drawing down fee-payments from the SLC (even if once upon a time some did not get HEFCE T-grant as public subsidy and in that sense may have been thought of as ‘private’).**

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**In conclusion, university managers are probably going to have to deploy more resources and effort into ensuring they better assess and manage the legal risks of failing to comply with consumer protection laws applying to the student-university relationship, since the CMA and Which? are significantly raising the game and institutions are now on notice that Trading Standards could yet descend upon the campus – as well as the fee-paying student behaving more as a consumer and also increasingly being aware of his/her consumer rights. Institutions have so far have made little provision to train such managers in the law generally as applied to running universities, let alone in thinking deeply about the B2C nature of the student-university contract (and indeed whether to have an explicit document, or, if not, where the key implicit terms are to be found amidst all the paperwork and website material supplied to applicants/students). Still less have universities instilled any awareness among faculty of the risk-points when individual academics deal with students, whether when teaching and examining/assessing or even just advising, as well as when acting collectively at department level in adjusting/restructuring courses as the years go by. And the HE sector has been collectively especially dozy on the crucial question of adopting a standard industry-wide student/university contract-to-educate. There is little excuse given that ‘The Law of Higher Education’ is offering a Model Student Agreement, is written in plain English, and is a bargain at a mere £150 a pop for 800 fun-packed pages; while ‘Reshaping the University...’ carefully sets in political and historical context the process of the (re-)marketization of HE.**

**In essence, the HE sector, and the individual institutions within it, seem, in relation to coming to terms with consumer protection issues and student consumerism, to be where other industries such as pension providers and banks have been over the last decade and where the package holiday or the used-car traders were back in the**

**1960s. The way forward will be via awareness-raising, staff training, and collective standard-setting, all driven by a combination of ahead-of-the-game self-regulation (is UUK fit-for-purpose?) and meeting requirements imposed by a new Regulator (OFTE) bringing to bear the experience of the regulation of other industries. As ever over the past thirty years and more, this process of change will depend on alert university administrators acquiring new skills and competencies, and will yet further leave behind the idea and ideal of the university as a self-governing community of scholars where the faculty lunatics are collegially in charge of the academic asylum. That said, the May 2015 General Election might be won by a political party promising to reduce (even eliminate) tuition fees and return HE to being a free(ish) public good as in France, Germany, Spain, or Italy, and thereby easing the student consumerism pressures upon universities to be responsive and accountable to their customers, to be economical and efficient, to be customer-oriented rather than producer-oriented... Or it may be won by a party willing to contemplate the uncapping of tuition fees...**

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***Some possible examples of ‘misleading omissions’ of ‘material information’ that might reasonably affect the ‘average consumer’ in making ‘an informed transactional decision’?***

- **The marketing around the MBA course offered by Coketown’s Business School notes the widely-publicised concept that getting an MBA leads inexorably to a significant hike in salary; MBAs as Masters of the Universe. In fact, data held by the University shows that very few of CU’s MBAs experience any such career/salary transformation. Is it a contravention of the CRA if this is indeed ‘material information’ that has constituted a ‘misleadingly omission’ by CU when marketing its MBA course and when the ‘average consumer’ is seeking to take ‘an**

**informed transactional decision’? Or would a court declare that the talk of salary hikes for MBAs is just marketing hype, a ‘mere puff’ (as case-law terms it) as the sort of exaggerated advertising to be expected, and that no sensible or suitable cynical consumer would be misled? – just as all universities vastly over-use the word ‘excellent’ in describing every aspect of their activities and performance.**

- **Similarly, the marketing around the idea of doing an undergraduate course in Law: well-paid exciting careers in London with fancy law firms await... Again, the University of Barsetshire knows that most of its LLBs do not just walk into training contracts with such firms, or indeed any firms at all; that some then drop Law, while others fund their own LPC year and then can’t get employment as practising solicitors or end up in low-paid legal auxiliary work. Should Barsetshire come clean for fear of the risk of prosecution under the CRA and of its disgruntled LLBs suing for compensation on the basis that their £27k in tuition fees could have been spent at another ‘better’ Law School – or even that the for-profit BPP University would have flogged them a Law degree with better prospects for only £6k pa?**
- **Coketown Met has made offers to 5000 students for the 2017 intake and will be seeking another 5000 via Clearing in September. By the end of July and just before A-level grades are announced as the basis upon which those holding offers will be confirmed for admission, and a few weeks before the phones glow hot during Clearing, CM receives a damning draft QAA review, which it is considering challenging by way of QAA’s internal procedures and if then needed also by way of judicial review in the High Court. Is the existence of the draft and yet-to-be-challenged QAA review ‘material information’ that should now be conveyed to CM’s potential students? If not, and presumably because the QAA assessment is not yet final, what if by early-August a QAA review was final after CM had by then unsuccessfully challenged it through the QAA appeal process and had decided not to seek JR? And what if,**



**CM electing to maintain silence on the existence of the QAA report (draft or not), a canny applicant asks a direct question on the phone or by email during Clearing about whether CM has an updated QAA review?**

- **What if the issue is not a QAA review but growing awareness within Goole University that its financial position is dire partly as a result of poor performance in the REF14 that is now translating into greatly reduced R money from HEFCE, and partly because the number of Chinese students has fallen away? Is this 'material information' that should be conveyed to applicants if the result will be during their time as students there will be academic redundancies, course closures/restructurings, and the decline in the University's brand value as measured in the global rankings by R output?**
- **At the University of Rutland there are well-advanced but still secret plans to close the subsidiary site that delivers HE to the deprived area of Peterborough some distance away, but that location is accessible for widening-participation students living at home nearby; they will be inconvenienced in terms of child-care and part-time work if they have to undertake a lengthy commute, at some expense on an infrequent bus-service, to the University's leafy lake-side campus. The sell-off of the site to a property developer is about to be signed in July – should potential student-consumers expecting to be mainly taught at the Peterborough site now be told of its impending closure at the end of what will be their first-year so that they can decide not to take up the place in September? And what duty under the CRA does the University have to compensate existing Peterborough students for their travel costs, or even refund their fees if they can't make the daily journey because of family/work commitments?**
- **It is a few years ago: Princess College London offers a Masters in the Comparative Literature of Africa and of Asia; there are two part-time students who reach the end of year one after doing all the Africa modules and not yet tackling Asia since Africa and Asia modules are offered every year and the Course**

**Handbook does not prescribe any specific order for doing modules, only then to find that Asia does not feature in what will be their second and final year. They query this situation and are told that it is a matter of ‘academic judgement’ – in fact, the one academic able to lecture on Asia literature has gone off on long-planned maternity leave, but the course organisers forgot to fund temporary cover. The two students leave the course in disgust, and begin a prolonged complaint process that eventually gets the OIA to accept that it is not an issue of academic judgement thereby excluding the OIA remit, but is a matter of traditional academic disorganisation and cock-up. The OIA rules in their favour, but PCL offers merely a refund of half the fees. How might PCL have to handle the problem differently under the CRA if all concerned are now more aware of the consumer protection available to students (even if technically the Law has not changed and the same protection/remedies were available all along)?**

- **St Jude’s College is part of the University of Stamford, an equally famous collegiate global R-uni rival to Oxford and Cambridge. Its marketing (ie prospectus) – although, of course, it never thinks of itself as doing anything as sordid as marketing – stresses the wonders of the Tutorials delivered by the College’s dons, whose pair in Astrology have duly interviewed and selected Jeremy. Alas, when Jeremy arrives the next academic year Dr C.A. Head has taken maternity leave while Dr S.E.L. Fish has still been allowed to take planned sabbatical leave – the new cohort of Fresher undergraduates will be taught by two inexperienced newly-recruited Stipendiary Lectures. Jeremy’s father, a QC specialising in consumer law, reminds the dons of St Jude’s that they are, as far as the Law is concerned, mere ‘traders’ supplying a service called HE teaching, and he asserts that they are in breach of the B2C contract by fobbing Old Etonian Jeremy off with a couple of kids rather than the seasoned Tutorial Fellows as advertised. The dons are bemused since undergraduates are Junior Members who should be grateful to**

**have been admitted and should not moan – they tell Jeremy’s pater that they are unable to communicate with him since to do so would breach Jeremy’s Data Protection Act rights. Was it ‘material information’ that should have been supplied to Jeremey once it was known that both dons in Astrology were going to be foreseeably absent for a whole academic year? Can Jeremey demand a partial refund of the fees his father has paid since all his year one ‘tuts’ are not being delivered by hoary old dons as advertised but by casual, adjunct, temporary staff?**

- **Dan Biggles is an airline pilot being made redundant; he decides to retrain as a lawyer specialising in aviation law. In a face-to-face meeting with the admissions academic for Law at Walsall University he is told that, yes, the optional Aviation Law module is popular and Dan will indeed be able to take it in his second or third year. But during year one Professor Ryan, the only academic interested in aviation law, spreads his wings and joins the in-house legal team at Easyjet, and WU decides that to replace Ryan with an academic capable of teaching a core module such as EU Law. Has WU made a binding representation to Dan and does it now risk breach of contract unless it finds some way for him to do that AL module? Or can WU simply tell Dan that anyway the admissions academic had no authority to pledge the University to always offer the AL module? Indeed, might WU plat the academic judgement card: it has simply decided that AL is no longer fitting for a WU LLB. And is WU also at risk of being found at fault under the CRA?**
- **Meanwhile Dan fails Contract Law, but discovers there is a wide gap between the two markers for his exam paper - while his CL assessed work and all his other modules have been passed at 65% or above. He complains and it takes 2 months for WU to decide that his CL paper will be marked by an independent third marker; arranging this takes a further 3 months. Can Dan, who by now is taking the optional module in Consumer Law, make a claim against WU under the CRA’s requirement that its service is**

**delivered within a reasonable time-scale? If the third mark is close to or better than that of marker two at 50% as opposed to marker one's mere 25%, will Dan have an additional claim under the CRA that WU has failed to deliver the examining aspect of its HE service 'with reasonable skill and care'? Or will WU be able to assert academic immunity and claim that Dan can't challenge academic judgement? Or will WU concede that the CRA applies, but argue that there is no negligence since reasonably competent markers can still range between 25% and 50%? – would WU's stance be weakened if the third marker awarded Dan his by now norm of 65%, perhaps even 75%?**

- **The University of Mosside is a top-ten R uni, and its Department of Economics is top-ranked in the REF14. Yet the Economics degree course is graded very low by its students in the NSS as being over-theoretical and based on arcane econometric and quantitative models. The students have tried to get curriculum changes, but have got nowhere – while at other universities, even at some highly-ranked R-focussed ones, there has been an element of change after the debacle of the financial collapse in 2007/08 (as not foretold by economists), change by way of conceding the (re-)introducing economic history and political economics. The Mosside undergraduates are now finding that they are interviewing badly for internships and jobs in City banks where interviewers are expecting students to show wider knowledge, understanding, and competence than just being able to solve the equations and number-crunching involved in tinkering with their professors' useless models; the reformed banks no longer want just nerds. The students are contemplating class-action litigation (an ambulance-chasing lawyer is offering to act on a no-win, no-fee deal), an action brought on the basis that, allegedly, the University has failed to teach them with reasonable skill and care in that it has delivered a supposedly outdated and discredited syllabus that seemingly ill-prepares them for the work-place: and these are, of course, the generation who have carefully selected their GCSEs, A-levels, and expensive degree course so as to maximise their employability, even if it means**

**studying dreary vocational subjects. Will they stand a chance? Or can Mosside simply deploy its Get-Out-Of-Jail-Free-Card, hiding behind judicial deference to the proper exercise of expert academic judgement (and/or might it even use the academic freedom gambit: only the University can decide what and how to teach) and relying on the understandable unwillingness of the County Court judge to spend time listening to expert witnesses by way of economics academics pontificating on what or is not a decent undergraduate education in that most dismal of all academic subjects?**

**(Some of the above hypotheticals are, sadly, semi-based on real scenarios in real universities, where the management has not only been remiss in understanding how the Law applies to their B2C activity but also then shamefully reluctant to speedily and properly deal with legitimate complaints once raised – one wishes one could be sure that the university's leadership in each case has now learned its lesson...)**