

LEGAL CHALLENGES TO UNIVERSITY DECISIONS AFFECTING STUDENTS IN AUSTRALIAN COURTS AND TRIBUNALS

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[In an era of increased accountability, decisions that adversely affect university students are more open to internal and judicial scrutiny. This article considers student challenges to university decisions in the context of universities as public bodies. It begins with extrajudicial processes such as the University Visitor, parliamentary Ombudsmen and internal university Ombudsmen. It then provides a comprehensive analysis of litigation in Australia between students and universities in which students have challenged decisions about admission, course content, assessment, academic progress and both academic and non-academic misconduct. Australian courts and tribunals have accepted jurisdiction in certain circumstances but student–university litigation has generally been unsuccessful for the students either on technical jurisdictional grounds or on the facts. Judicial consideration of university decisions and administrative processes has provided some guidance that may assist in the formulation of improved internal processes, particularly relating to the resolution of complaints and appeals. This article argues that the diverse range of courts and tribunals currently used by students are inappropriate and inefficient and considers whether the time is right for serious consideration to be given to the establishment of a dedicated dispute resolution body for the Australian higher education sector.]

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I INTRODUCTION

The question of how, where and to whom students may challenge university decisions is a vexed one. Ideally, all such matters should be resolved by internal processes and procedures but this is not always the case. Originally the function rested with the University Visitor.¹ Now, in the states where the office of the University Visitor survives, its role is ceremonial only. How then may this gap be filled? Are any of the paths currently taken by students effective, efficient or appropriate in light of the unique nature of the relationship between students and their universities? If they are not, what would be a solution? Historically, students rarely challenged adverse academic or disciplinary decisions outside their universities; however, recent empirical research has found that recourse to courts and tribunals by Australian university students is increasing and that students' main concerns are about the fairness of university decision-making.² Parliamentary Ombudsmen have also reported an increase in university students seeking their assistance.³ The previous lack of students seeking external recourse may have been due to the existence of the University Visitor and for other reasons including 'satisfaction with internal processes, an inclination to settle matters within the community, the costs of litigation, judicial deference to university decisions, and cultural attitude'.⁴

There can be no doubt that the higher education climate has changed markedly, particularly in the last decade, and that the resolution of student grievances has

¹ See below Part III(A) for discussion on the role of the University Visitor.

² See Hilary Astor, 'Australian Universities in Court: Causes, Costs and Consequences of Increasing Litigation' (2008) 19 *Australasian Dispute Resolution Journal* 156. Astor notes that, while it is significant that during the period of her research the number of higher education institutions doubled and the numbers of students increased threefold, the volume of litigation increased disproportionately (eight times): at 166. While outside the parameters of this paper, it is of interest to note that the offices of state Ombudsmen are also seeing an increasing number of complaints from students: Bronwyn Olliffe and Anita Stuhmcke, 'A National University Grievance Handler? Transporting the UK Office of the Independent Adjudicator for Higher Education (OIA) to Australia' (2007) 29 *Journal of Higher Education Policy and Management* 203. This was reflected also in a letter of concern written by a number of Ombudsmen to *The Australian*: Bruce Barbour et al, 'Complaints Give Rise to Concern', *Education, The Australian* (Sydney), 27 April 2005, 34.

³ See the discussion in Part III(B) below.

⁴ Fernand N Dutile, 'Law, Governance, and Academic and Disciplinary Decisions in Australian Universities: An American Perspective' (1996) 13 *Arizona Journal of International and Comparative Law* 69, 116.

become a key focus in Australia and elsewhere.⁵ As students increasingly seek external redress, questions such as the nature of the legal relationship between the university and the student are being explored.⁶ This article begins with a discussion of the jurisdictional issues arising from the public nature of Australian universities. It considers the demise of the function of the University Visitor and points to the current extrajudicial avenues for the resolution of student grievances — the parliamentary Ombudsmen and the internal university student Ombudsmen. What follows is a comprehensive review and analysis of recent student litigation in Australia. The focus is on legal proceedings in which students have challenged all manner of decisions, including those relating to admission, course content, assessment, academic progress and misconduct. This consideration encompasses the wide range of issues which have arisen in federal and state courts and tribunals, relating to the different types of university decisions and different types of allegations against the universities concerned.⁷ With the exception of only a few successes by students in gaining access to information affecting their academic progress, the case law in this area documents a series of failed proceedings for the students concerned. The almost universal lack of success is either on technical grounds or on the facts. It is clear that litigation is not working for students. Neither can it be working for universities in terms of time, money and energy expended on fighting such claims in the courts. Now is surely the time for serious consideration to be given to an alternative approach such as an Ombudsman with a function specially dedicated to the resolution of student–university grievances.

⁵ See Patty Kamvounias and Sally Varnham, 'In-House or in Court? Legal Challenges to University Decisions' (2006) 18 *Education and the Law* 1. For an overview of the situation in the United Kingdom, see, eg, Glyn Jones, "'I Wish to Register a Complaint': The Growing Complaints Culture in Higher Education" (2006) 10 *Perspectives: Policy and Practice in Higher Education* 69; Neville Harris, 'Resolution of Student Complaints in Higher Education Institutions' (2007) 27 *Legal Studies* 566.

⁶ See, eg, Clive B Lewis, 'The Legal Nature of a University and the Student–University Relationship' (1983) 15 *Ottawa Law Review* 249; Victoria J Dodd, 'The Non-Contractual Nature of the Student–University Contractual Relationship' (1985) 33 *Kansas Law Review* 701; Francine Rochford, 'The Relationship between the Student and the University' (1998) 3(1) *Australia & New Zealand Journal of Law & Education* 28; David Palfreyman, 'The HEI–Student Legal Relationship, with Special Reference to the USA Experience' (1999) 11 *Education and the Law* 5; Sam Middlemiss, 'Legal Liability of Universities for Students' (2000) 12 *Education and the Law* 69; Martin Davis, 'Students, Academic Institutions and Contracts — A Ticking Time Bomb?' (2001) 13 *Education and the Law* 9; William P Hoye and David Palfreyman, 'Plato vs Socrates: The Devolving Relationship between Higher Education Institutions and Their Students' (2004) 16 *Education and the Law* 97; Bruce Lindsay, 'Student Subjectivity and the Law' (2005) 10 *Deakin Law Review* 628; Bruce Lindsay, 'Complexity and Ambiguity in University Law: Negotiating the Legal Terrain of Student Challenges to University Decisions' (2007) 12(2) *Australia & New Zealand Journal of Law & Education* 7.

⁷ Although litigation involving universities and their staff raises similar issues, a discussion of staff challenges to university decisions is beyond the scope of this paper. However, see, eg, *Orr v The University of Tasmania* (1957) 100 CLR 526 (dismissal of professor for misconduct); *Williams v Spautz* (1992) 174 CLR 509 (criminal information laid against persons involved in dismissal of senior lecturer); *Rindos v University of Western Australia* [1995] WAComm 11 (21 February 1995) (refusal to grant tenure); *Bailey v Australian National University* [1995] HREOCA 27 (29 September 1995) (allegation of discrimination); *Whitehead v Griffith University* [2003] 1 Qd R 220 (decision to censure lecturer for misconduct); *Gauci v Kennedy* [2007] EOC ¶93-467 (allegation of sexual harassment).

II AUSTRALIAN UNIVERSITIES: STATUTORY FRAMEWORK AND JURISDICTIONAL ISSUES

Almost all of Australia's 39 universities are 'special purpose statutory corporation[s]'⁸ established under state or territory legislation⁹ to serve the traditional public functions of institutions of higher education. The University of Melbourne, for example, was created to 'serve the Victorian, Australian and international communities and the public interest'¹⁰ and the University of Western Australia was incorporated because it was 'desirable that provision should be made for further instruction in those practical arts and liberal studies which are needed to advance the prosperity and welfare of the people'.¹¹ The idea of universities as public institutions has been explained in the following terms in relation to The University of Sydney:¹²

The Senate's functions of providing instruction, conferring degrees, and so on, may be regarded as public functions ... [the University] is one which was established by a public Act, is largely supported by public funds, is open to all scholastically qualified residents of the State, and is *subject to some degree of public control*.¹³

Public control of public universities is extensive. In New South Wales, for example, universities are subject to privacy legislation that binds public sector agencies¹⁴ and anti-corruption legislation that applies to public authorities and

⁸ *University of Western Australia v Gray* (2009) 179 FCR 346, 365 [96] (Lindgren, Finn and Bennett JJ).

⁹ See, eg, *Charles Darwin University Act 2003* (NT); *Griffith University Act 1998* (Qld); *University of Adelaide Act 1971* (SA); *University of Canberra Act 1989* (ACT); *University of Melbourne Act 2009* (Vic); *University of Sydney Act 1989* (NSW); *University of Tasmania Act 1992* (Tas); *University of Western Australia Act 1911* (WA). Australia's two private universities are also regulated by state legislation, namely, *Bond University Act 1987* (Qld) and *University of Notre Dame Australia Act 1989* (WA). The Australian National University was established by *Australian National University Act 1991* (Cth).

¹⁰ *University of Melbourne Act 2009* (Vic) s 5(e). See the specific aims listed in ss 5(e)(i)–(iii).

¹¹ *University of Western Australia Act 1911* (WA) Preamble, cited in *University of Western Australia v Gray* (2009) 179 FCR 346, 365 [96] (Lindgren, Finn and Bennett JJ).

¹² The University of Sydney, established in 1850, was the first university to be established in Australia: The University of Sydney, *Origins & Early Years (1850–1900)* (9 April 2010) <http://www.usyd.edu.au/about/profile/history_origins.shtml>.

¹³ *Ex parte Forster; Re University of Sydney* [1963] SR 723, 727, 729 (Sugerman, Else-Mitchell and Moffitt JJ) (emphasis added).

¹⁴ *Privacy and Personal Information Protection Act 1998* (NSW) s 20 ('*PPIPA*'). Review jurisdiction is conferred on the New South Wales Administrative Decisions Tribunal by *PPIPA* s 55(1). Although a number of applications have been made by students pursuant to this legislation, they have all been dismissed. See *DO v University of New South Wales (GD)* [2003] NSWADTAP 9 (31 March 2003); *Vice-Chancellor Macquarie University v FM* [2005] NSWCA 192 (10 June 2005) involving the same student whose scholarship and PhD candidature were terminated when the University obtained information about the student's academic history that had not been disclosed on his enrolment application. Clearly the student wanted the University's decision to terminate his candidature to be reversed, but it is not clear that this relief is available either through the internal review procedures under *PPIPA* s 53(7) or when the conduct is reviewed by the New South Wales Administrative Decisions Tribunal pursuant to *PPIPA* s 55(2). See also *BE v University of Technology, Sydney* [2008] NSWADT 139 (14 May 2008); *VZ v University of Newcastle* [2008] NSWADT 178 (19 June 2008).

public officials in that State.¹⁵ Public universities are also subject to freedom of information ('FOI') legislation applicable in every Australian jurisdiction, which creates general rights of access to information (in documentary form) in the possession of public authorities.¹⁶ As they are public institutions, complaints about the administrative actions of universities are subject also to investigation and inquiry by the parliamentary Ombudsman's office of the relevant state or territory.¹⁷ In relation to internal university disputes, Australian parliaments previously followed the example of England by giving exclusive jurisdiction to the University Visitor. Visitorial jurisdiction was expressed in the enabling statutes of public universities¹⁸ as lying with the Governor of the relevant state.¹⁹ In time, a consensus emerged across almost all states and territories that visitorial

¹⁵ *Independent Commission against Corruption Act 1988* (NSW) s 3. See Independent Commission against Corruption, *Report on Investigation into the University of Newcastle's Handling of Plagiarism Allegations* (2005).

¹⁶ *Freedom of Information Act 1982* (Cth); *Freedom of Information Act 1989* (ACT); *Freedom of Information Act 1989* (NSW); *Information Act 2002* (NT); *Right to Information Act 2009* (Qld); *Freedom of Information Act 1991* (SA); *Freedom of Information Act 1991* (Tas); *Freedom of Information Act 1982* (Vic); *Freedom of Information Act 1992* (WA). Decisions made under the Commonwealth legislation are reviewable by the Administrative Appeals Tribunal ('AAT'): *Freedom of Information Act 1982* (Cth) s 55. In the Australian higher education sector, FOI applications can only be made and decisions reviewed in the AAT for the universities established under Commonwealth or Territory statutes. Requests to the AAT for access to information from universities established under Queensland statutes have therefore failed on jurisdictional grounds: see, eg, *Luck v University of Southern Queensland* (2009) 176 FCR 268, 271 [7] (North J); *Al-Hir v University of Queensland* [2009] AATA 530 (16 July 2009). Prior to the introduction of appeal rights to the Queensland Civil and Administrative Tribunal pursuant to s 119 of the *Right to Information Act 2009* (Qld), appellants under Queensland FOI legislation could seek judicial review before the Supreme Court of Queensland: *Al-Hir v University of Queensland* [2009] AATA 530 (16 July 2009) [3] (Senior Member McCabe). For the majority of Australia's universities incorporated under state statutes, access to information held by them is obtainable pursuant to the equivalent state legislation and decisions are reviewable in the appropriate state tribunal or forum. For example, decisions under the New South Wales FOI legislation are reviewable by the New South Wales Administrative Decisions Tribunal: *Freedom of Information Act 1989* (NSW) s 53; decisions under the Victorian FOI legislation are reviewable by the Victorian Civil and Administrative Tribunal: *Freedom of Information Act 1982* (Vic) s 50; decisions under the Western Australian FOI legislation are reviewable by the Western Australian Information Commissioner: *Freedom of Information Act 1992* (WA) s 63.

¹⁷ The Australian National University, having been established under Commonwealth legislation, is the only university subject to the jurisdiction of the Commonwealth Ombudsman pursuant to the *Ombudsman Act 1976* (Cth).

¹⁸ Except for those in the Australian Capital Territory, the Northern Territory and Queensland, where no such statutory provision was ever made: Peregrine W F Whalley and Gillian R Evans, 'The University Visitor — An Unwanted Legacy of Empire or a Model of University Governance for the Future?' (1998) 2 *Macarthur Law Review* 109, 121. Although it is a private university, Bond University may appoint a Visitor with all of the powers and functions possessed by Visitors under the law: *Bond University Act 1987* (Qld) s 14.

¹⁹ See, eg, *Flinders University of South Australia Act 1966* (SA) s 24, which stated: 'The Governor is the visitor of the University and has authority to do all things which appertain to visitors as often as the Governor thinks fit.' This section was repealed by *Statutes Amendment (Universities) Act 1999* (SA) s 4. In practice, the Visitor would usually appoint a Supreme Court judge as assessor to assist in the determination of petitions:

Paradoxically, what was seen by some as mere judicial excuses to avoid having to adjudicate university disputes was criticised by others as a privileged short-cut by university members to the senior judiciary, who were invariably called upon to advise the Governor (as Visitor).

Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 4th ed, 2009) 851.

jurisdiction was no longer appropriate and that internal university disputes that could not be resolved through internal mechanisms should be resolved through existing civil courts and tribunals.²⁰ This view coincides with a judicial view that, as public institutions established by Acts of Parliament for the public purpose of higher education, the decisions of universities, including those of relevant committees, should be subject to the scrutiny of the courts.²¹

Although the merits review jurisdiction of state tribunals is extensive,²² it has not been generally extended to administrative decisions of universities. For example, the argument that the New South Wales Administrative Decisions Tribunal has the jurisdiction once enjoyed by the University Visitor has been rejected.²³ Unless a decision is one that the relevant state or territory tribunal²⁴ has jurisdiction under an enactment to review,²⁵ it is not reviewable by that tribunal.²⁶ Accordingly, the main avenue to challenge university decisions remains judicial review in the courts, as discussed below in Part IV.

Although Australian universities are created by state and territory parliaments, it is the federal government that has primary responsibility for their funding.²⁷ Funding arrangements have allowed the Commonwealth to extend its control to universities despite the absence of constitutional power over higher education.²⁸

²⁰ In the United Kingdom, visitorial jurisdiction over staff disputes was ended by the *Education Reform Act 1988* (UK) c 40, s 206. The visitorial system for hearing student complaints and appeals in some universities in England and Wales was superseded by *Higher Education Act 2004* (UK) c 8, pt 2, which established the Office of the Independent Adjudicator for Higher Education.

²¹ *Harding v University of New South Wales* [2002] NSWSC 113 (1 March 2002) [16]–[17] (Wood CJ at CL), although his Honour also noted that the courts will only intervene in accordance with administrative law principles. See also *Norrie v Senate of the University of Auckland* [1984] 1 NZLR 129, 134–5 (Woodhouse P).

²² See, eg, *Administrative Decisions Tribunal Act 1997* (NSW) sch 2 and *State Administrative Tribunal Act 2004* (WA) sch 1 for a list of statutes conferring jurisdiction on the relevant tribunals.

²³ *Wilmshurst v Vice-Chancellor, Macquarie University* [2002] NSWADT 231 (13 November 2002) [52]–[54] (Member Britton).

²⁴ Note that general administrative review jurisdiction in South Australia lies with the Administrative and Disciplinary Division of the District Court of South Australia: *District Court Act 1991* (SA) s 8; and, in Tasmania, with the Magistrates Court of Tasmania: *Magistrates Court (Administrative Appeals Division) Act 2001* (Tas) s 10.

²⁵ *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 67A; *Administrative Decisions Tribunal Act 1997* (NSW) s 38; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 42; *State Administrative Tribunal Act 2004* (WA) s 17. See also Attorney-General (Qld), ‘Central Tribunal to Simplify Access to Civil and Administrative Justice’ (Ministerial Media Statement, 17 June 2009) <<http://www.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=64515>> announcing the passage of the Queensland Civil and Administrative Tribunal Bill 2009 (Qld) to establish the new Queensland Civil and Administrative Tribunal.

²⁶ For a discussion of the role of state administrative tribunals, see generally: Justice Murray Kellam, ‘Developments in Administrative Tribunals in the Last Two Years’ (2001) 29 *Federal Law Review* 427; Robin Creyke, ‘Tribunals: Divergence and Loss’ (2001) 29 *Federal Law Review* 403; Robin Creyke, ‘Tribunals and Access to Justice’ (2002) 2 *Queensland University of Technology Law and Justice Journal* 64; Naomi Sharp, ‘The Chameleon Tribunal: The Administrative Decisions Tribunal of New South Wales’ (2003) 10 *Australian Journal of Administrative Law* 181.

²⁷ Department of Education (Cth), Employment and Workplace Relations, *Higher Education Overview* (2010) <<http://www.deewr.gov.au/HigherEducation/Pages/Overview.aspx>>.

²⁸ For a discussion of the relevant constitutional issues, see Greg Craven, ‘Commonwealth Power over Higher Education: Implications and Realities’ (2006) 1 *Public Policy* 1; Jim Jackson,

For example, in return for Commonwealth financial support, universities are required by the Commonwealth to have rules and procedures to deal with student disputes and misconduct.²⁹ The change in character of Australia's universities over time has also been recognised by the courts. Modern universities may be characterised as 'trading corporations', even though they are not established for the purpose of trading, and even though that description could not have been applied at the time of their creation.³⁰ Consequently, Australian universities are also subject to federal legislation applicable to 'constitutional corporations'.³¹

The Federal Court of Australia undoubtedly has jurisdiction in student–university disputes involving federal matters but it may not be the most appropriate judicial forum to resolve student disputes that also involve non-federal matters. Some of the cases discussed below in Part IV illustrate the jurisdictional problems that have arisen when students have sought relief in the Federal Court.

Problems have also arisen when students have sought relief in the Administrative Appeals Tribunal ('AAT'), which was established by the Commonwealth to provide independent merits review of administrative decisions made by Australian government officials, authorities and other tribunals.³² Like its state counterparts, the AAT does not have a general power to review any decision made under Commonwealth legislation; it can only review a decision if an Act specifically provides that the decision is reviewable by the AAT.³³ Consequently, the AAT has no jurisdiction to hear students' general grievances about their courses if

'Commonwealth Controls over Australian Schools, TAFEs and Universities via Tied Funding: Time for Constitutional Reform?' (2008) 13(2) *Australia & New Zealand Journal of Law & Education* 101.

²⁹ Required by the *Higher Education Support Act 2003* (Cth) s 19-45 and the *Education Services for Overseas Students Act 2000* (Cth) s 38(b).

³⁰ *Quickenden v O'Connor* (2001) 109 FCR 243, 261 [51] (Black CJ and French J). However, it has also been held that engaging in commercial activities does not necessarily displace the traditional public functions of universities in favour of the pursuit of commercial purposes: *University of Western Australia v Gray* (2009) 179 FCR 346, 388 [184] (Lindgren, Finn and Bennett JJ). As noted above, a discussion of litigation involving universities and their staff is beyond the scope of this paper.

³¹ For example, *Workplace Relations Act 1996* (Cth), considered in *Quickenden v O'Connor* (2001) 109 FCR 243; *Trade Practices Act 1974* (Cth), considered in *Fennell v Australian National University* [1999] FCA 989 (22 July 1999). For a discussion of the application of the *Trade Practices Act 1974* (Cth) to universities, see, eg, Francine Rorke, 'The Application of the Consumer Protection Provisions of the *Trade Practices Act 1974* (Cth) to Universities' (1996) 12 *Queensland University of Technology Law Journal* 176; Jim Jackson, 'The Marketing of University Courses under Sections 52 and 53 of the *Trade Practices Act 1974* (Cth)' (2002) 6 *Southern Cross University Law Review* 106; Philip H Clarke, 'University Marketing and the Law: Applying the *Trade Practices Act* to Universities' Marketing and Promotional Activities' (2003) 8 *Deakin Law Review* 304; Judith Bessant, 'Legal Issues in Higher Education and the *Trade Practices Act*' (2004) 26 *Journal of Higher Education Policy and Management* 251; Lynden Griggs, 'Tertiary Education, the Market and Liability "in Trade or Commerce"' (2004) 12 *Competition & Consumer Law Journal* 64; Patty Kamvounias and Sally Varnham, 'Getting What They Paid for — Consumer Rights of Students in Higher Education' (2006) 15 *Griffith Law Review* 306.

³² See *Administrative Appeals Tribunal Act 1975* (Cth) s 5. The AAT was one element of the Commonwealth's administrative law 'package' that also included the *Ombudsman Act 1976* (Cth), the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('ADJR Act') and the *Freedom of Information Act 1982* (Cth).

³³ *Administrative Appeals Tribunal Act 1975* (Cth) s 25.

students cannot precisely identify the decision of which review is sought.³⁴ Even when a university decision can be identified, legislation must also be identified that provides for review by the AAT. For example, Marcia Pinheiro failed in her attempt to have the AAT review decisions of the University of Queensland regarding her academic transcript and the award made to her upon completion of her studies because she was unable to point to any provision in the *University of Queensland Act 1998* (Qld) or any other Queensland or Commonwealth legislation giving the AAT jurisdiction to review decisions of the University.³⁵ It is not surprising that the AAT had no review jurisdiction given that the University was constituted by state legislation, but, strangely, no such jurisdiction had been conferred on a state tribunal either.³⁶

The complexities inherent in a higher education sector that is subject to both state and Commonwealth regulation in a federal legal system are made manifest when disputes arise that are not able to be resolved internally. In the next section, an outline is given of the various means by which student–university disputes may currently be resolved without external recourse. This is followed by a detailed analysis of the student–university matters dealt with by various courts and tribunals.

III RESOLVING STUDENT DISPUTES WITHOUT RECOURSE TO COURTS AND TRIBUNALS

A *The University Visitor*

The office of the University Visitor ‘has a long tradition’,³⁷ with its origins in ecclesiastical law; it has evolved with the development of eleemosynary corporations, ‘particularly the colleges within the universities of Oxford and Cambridge in the twelfth and thirteenth centuries’.³⁸ In *Philips v Bury*, the Court referred to the exclusive role of the Visitor ‘to judge according to the statutes and rules of the college’.³⁹

Although all internal university disputes were once subject to visitorial jurisdiction,⁴⁰ the extent of this jurisdiction was often in dispute.⁴¹ A law student

³⁴ *Pineiro v Australian Catholic University Ltd* [2006] AATA 371 (28 April 2006) [23] (Deputy President Purvis). Sergio Pineiro’s grievances related to his failure of a subject, his claims that illness hindered his studies, that the University did not assist him, and also that he was refused credit for studies at other universities.

³⁵ *Pinheiro v University of Queensland* [2006] AATA 1053 (8 December 2006) [14] (Deputy President Forgie).

³⁶ The failure to confer jurisdiction with respect to universities on state and territory merits review bodies appears to be at odds with the growth of merits review in other areas. See above n 25 and accompanying text.

³⁷ *Re Petition to Dame Roma Mitchell AC DBE (Visitor of the Flinders University of South Australia)* (1992) 57 SASR 573, 573 (Debelle J).

³⁸ Peregrine Whalley and David Price, ‘The University Visitor in Western Australia’ (1995) 25 *University of Western Australia Law Review* 146, 147.

³⁹ (1694) Skin 447, 484; 90 ER 198, 217 (Holt CJ).

⁴⁰ Including, for example, student grievances about refused admission: *M v The University of Tasmania* [1986] Tas R 74; the failure to award an honours degree: *Re Petition to Dame Roma Mitchell AC DBE (Visitor of the Flinders University of South Australia)* (1992) 57 SASR 573; the revocation of a degree: *Re La Trobe University; Ex parte Hazan* [1993] 1 VR 7; staff disputes

suspended from The University of Melbourne in 1983 for unsatisfactory progress challenged the decision in the Supreme Court of Victoria but failed when the Court confirmed that the Visitor⁴² had exclusive jurisdiction in such matters.⁴³ In 1990, a PhD student successfully petitioned the Visitor at The University of Newcastle when her candidature was wrongfully terminated. The student then applied to the Supreme Court of New South Wales for an order quashing the compensation award made by the Visitor.⁴⁴ The Court accepted the exclusive jurisdiction of the Visitor; however, as an error of law had been made in the calculation of the amount to be awarded to the student, the Court exercised its supervisory function and remitted the matter to the Visitor to assess damages in accordance with general law principles.⁴⁵

Legislation was eventually passed to abolish all but the ceremonial functions of the Visitor in all university Acts in New South Wales.⁴⁶ The New South Wales government was concerned about ‘the undesirable consequences of the development ... of an alternate jurisdiction to that of the civil courts’, the ‘growing burden upon the office of the Governor’,⁴⁷ and the deficiencies in the jurisdiction described as follows in the second reading speech:

first, the jurisdiction is inappropriate when exercised in relation to a modern publicly funded university established by statute, rather than an historical institution established by a donor, charity or religious dignitary; second, the extent

concerning study leave: *Murdoch University v Bloom* [1980] WAR 193; termination for misconduct: *Re La Trobe University; Ex parte Wild* [1987] VR 447; and dismissal from the position of Head of School: *Re Macquarie University; Ex parte Ong* (1989) 17 NSWLR 113.

⁴¹ See T G Matthews, ‘The Office of the University Visitor’ (1980) 11 *University of Queensland Law Journal* 152; Robert J Sadler, ‘The University Visitor: Visitorial Precedent and Procedure in Australia’ (1981) 7 *University of Tasmania Law Review* 2; S Robinson, ‘The Office of Visitor of an Eleemosynary Corporation: Some Ancient and Modern Principles’ (1994) 18 *University of Queensland Law Journal* 106; Whalley and Evans, above n 18.

⁴² At the time, *Melbourne University Act 1958* (Vic) s 47 provided that the Governor was the Visitor of the University and ‘shall have authority to do all things which appertain to visitors as often as to him seems meet’: *Re University of Melbourne; Ex parte De Simone* [1981] VR 378, 385 (Sir Winneke).

⁴³ *Vujanovic v University of Melbourne* (Unreported, Supreme Court of Victoria, Beach J, 11 March 1983), referred to in Sean McLaughlin, ‘The University Visitor’ (1983) 8 *Legal Service Bulletin* 140. It is interesting to compare the approach taken by the New Zealand Court of Appeal, where Woodhouse P stated he had ‘great difficulty in understanding why it should be thought that wherever the Visitor is able to act the actual jurisdiction of the Courts has been ousted’, particularly when ‘[universities] have been established by act of Parliament as public institutions to promote public purposes, in this case higher education, and largely with public funds. And for that important reason alone ... should be subject to public scrutiny in the courts’: *Norrie v Senate of the University of Auckland* [1984] 1 NZLR 129, 134–5. The scope of the jurisdiction of the Visitor also raised some difficult issues for courts in the United Kingdom: see, eg, *Thorne v University of London* [1966] 2 QB 237; *Hines v Birkbeck College* [1986] Ch 524; *Thomas v University of Bradford* [1987] AC 795; *R v Lord President of the Privy Council; Ex parte Page* [1993] AC 682. See also Tim Kaye, ‘Academic Judgement, the University Visitor and the *Human Rights Act 1998*’ (1999) 11 *Education and the Law* 165.

⁴⁴ *Bayley-Jones v University of Newcastle* (1990) 22 NSWLR 424.

⁴⁵ *Ibid.*

⁴⁶ *University Legislation (Amendment) Act 1994* (NSW). See, eg, *University of Newcastle Act 1989* (NSW) s 13.

⁴⁷ New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 April 1994, 1545 (Kerry Chikarovski, Minister for Industrial Relations and Employment, and Minister for the Status of Women).

of the jurisdiction is unclear, not having been tested at law, particularly in relation to whether the jurisdiction is exclusive and the powers which may be exercised by the Visitor; third, the jurisdiction is incompatible with the general law applying to institutions and individuals in New South Wales and there are doubts and anomalies surrounding the question of appeals following a decision by the Visitor; fourth, exercise of the jurisdiction has led to unwelcome prominence being given to decisions of the Visitor; fifth, owing to the complexity of many of the cases brought to the Visitor, there has been a need for costly legal representation by both parties as well as the need for formal and informal legal advice and assistance for the Governor on the part of Crown law officers.⁴⁸

The Tasmanian government's concerns about the jurisdiction of the Visitor also resulted in legislation limiting the role of the Visitor to ceremonial functions only,⁴⁹ with the rationale being expressed in the following terms:

the jurisdiction of the Visitor ... has been causing concern ... to all State Governors and other States have removed similar provisions that did not necessarily add anything to the justice because there are still plenty of other opportunities of appeal for people, such as the Anti-discrimination Commissioner, the Ombudsman and a number of areas.⁵⁰

Similar legislation in Victoria was preceded by a review of university governance to which the government responded by recommending strengthening student grievance procedures⁵¹ and noting that:

[the Visitor] is rarely used and there is little evidence to suggest that this situation is likely to change. In actual fact students and staff with grievances at university decisions are usually satisfied by the university's own appeal mechanisms. Where this is not the case the aggrieved person has recourse to the Victorian Ombudsman, and where it has jurisdiction to the Victorian Civil Administrative Appeals Tribunal.⁵²

The *University of Melbourne Act 2009* (Vic) now provides that the office of the Visitor resides in the Governor,⁵³ but that the role is limited to 'ceremonial functions' only.⁵⁴

In South Australia, the Visitor came to be viewed as 'an archaic office ... [without] ... a place in modern universities ... [it being] more effective for disputes to be resolved by means such as the Ombudsman or other civil mechanisms'.⁵⁵ As it was not considered necessary to have legislation for universities

⁴⁸ Ibid.

⁴⁹ *University of Tasmania Act 1992* (Tas) s 17, as amended by *University of Tasmania Amendment Act 2001* (Tas) s 11.

⁵⁰ Tasmania, *Parliamentary Debates*, House of Assembly, 10 April 2001, 48 (Paula Wriedt, Minister for Education).

⁵¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 1 May 2003, 1320 (Lynne Kosky, Minister for Education and Training).

⁵² Ibid 1322.

⁵³ *University of Melbourne Act 2009* (Vic) s 22(1).

⁵⁴ Ibid s 22(3).

⁵⁵ South Australia, *Parliamentary Debates*, House of Assembly, 29 September 1999, 32 (Malcolm Bucky, Minister for Education, Children's Services and Training).

to continue to call on the Governor for ceremonial functions,⁵⁶ the sections in each university Act that provided for the Governor to be the Visitor were repealed.⁵⁷

Although doubts have also been expressed about the utility of the office of the University Visitor in Western Australia,⁵⁸ the traditional office still exists in that State.⁵⁹

With the demise of the dispute resolution jurisdiction of the University Visitor, students who do not wish to resort to courts or tribunals for the resolution of their grievances may request that the matter be investigated by parliamentary Ombudsmen. In addition, a number of universities now also have internal student Ombudsmen (which are generally based on the public administration model) with jurisdiction to investigate and make recommendations on student complaints relating to procedure.⁶⁰

B *Parliamentary Ombudsmen*

Each of the nine parliamentary Ombudsman offices across Australia has some involvement in student–university complaint handling. In four jurisdictions, the Ombudsman handles complaints from just one university⁶¹ so the relevant university effectively has its own dedicated external independent review body. In three jurisdictions, the Ombudsman has the authority to investigate and inquire into the actions of 25 universities⁶² so it is not surprising that the Ombudsmen in these states have been the most active in this area. All annual reports to parliaments from Ombudsman offices include some information about university complaints for the relevant year but this is usually limited to the number of matters lodged with the relevant office without any details about the source or type of complaint (apart from one or two case studies selected for inclusion in the annual report).⁶³ Significantly, the annual reports generally do not identify either the complainant or the university involved, so, as with visitorial jurisdiction, little information is publicly available about the resolution of these matters. Occasionally, Ombudsman offices have submitted special reports to Parliament

⁵⁶ *Ibid.*

⁵⁷ *Statutes Amendment (Universities) Act 1999* (SA) s 4.

⁵⁸ Sir Francis Burt, 'The University Visitor' (Speech delivered at the University of Western Australia Convocation, Perth, 18 March 1994), cited in David M Price and Peregrine W F Whalley, 'The University Visitor and University Governance' (1996) 18 *Journal of Higher Education Policy and Management* 45, 53.

⁵⁹ See *University of Western Australia Act 1911* (WA) s 7(1). For similar provisions, see also *Curtin University of Technology Act 1966* (WA) s 27; *Murdoch University Act 1973* (WA) s 9; *Edith Cowan University Act 1984* (WA) s 42.

⁶⁰ For example, University of Technology, Sydney; La Trobe University; Queensland University of Technology and Central Queensland University.

⁶¹ The Commonwealth, Australian Capital Territory, Northern Territory and Tasmania.

⁶² New South Wales, Queensland and Victoria.

⁶³ See, eg, Queensland Ombudsman, *Annual Report 2007–2008* (2008), which indicates that 130 complaints about universities were received in that year (an increase of 15 per cent since 2006–07), but details are provided for only one case study, which dealt with foreign student tuition fees: at 44–5.

about their investigations of universities⁶⁴ and have published ‘fact sheets’ of relevance to the higher education sector.⁶⁵

While a comprehensive analysis of matters which find their way to the offices of parliamentary Ombudsmen is outside the parameters of this article, it is significant that in April 2005, seven Ombudsmen wrote a joint letter to the Editor of Australia’s national newspaper expressing their concern about the increasing number of complaints involving universities coming to their offices, the complexity of those complaints and the standard of university dispute handling.⁶⁶ In addition, both the Victorian and the New South Wales Ombudsmen in 2005 and 2006 specifically reported concern at this trend, finding it necessary to review complaint handling at universities and, in the case of the New South Wales Ombudsman, to issue best practice guidelines.⁶⁷

The increase in recourse to these offices raises the question as to whether it is still appropriate for student complaint matters to be included within the current public administration model. If it is not, should a dedicated higher education Ombudsman be established in Australia along the lines of the Office of the Independent Adjudicator for Higher Education (‘OIA’), which resolves disputes between students and universities in England and Wales?⁶⁸

C *Student Ombudsmen within Universities*

A significant number of Australian universities now have internal Ombudsmen, variously known as Ombuds, Ombudsmen, Student Ombudsmen⁶⁹ and Deans of Students.⁷⁰ Generally the model follows that of the parliamentary Ombudsman, in that it is an avenue of ‘last resort’ and investigatory in function. The office is generally held by university academics whose function is to independently review university decision-making to ensure that there has been adherence to university processes and procedures. An alternative model, based more on an advisory and conciliatory function, is provided by the office of the Dean of Students at The Australian National University and the Australian Catholic University. Clearly, while students are advised of the existence of these offices,

⁶⁴ See, eg, Ombudsman Victoria, *An Investigation into a Complaint about Preferential Treatment of a Student by The University of Melbourne* (2002).

⁶⁵ See, eg, Ombudsman Victoria, *Fact Sheet 17 — Overseas Students and the Role of the Ombudsman* (2009).

⁶⁶ Barbour et al, above n 2.

⁶⁷ Ombudsman Victoria, *Review of Complaint Handling in Victorian Universities* (2005); New South Wales Ombudsman, *Complaint Handling at Universities: Best Practices Guidelines* (2006).

⁶⁸ See generally Olliffe and Stuhmcke, above n 2. The OIA was designated by the Secretary of State to be the responsible body pursuant to the *Higher Education Act 2004* (UK) c 8, ss (5)(b), 13(1). It is important to note, however, the case of *R (Siborurema) v Office of the Independent Adjudicator for Higher Education* [2007] EWCA Civ 1365 (20 December 2007), in which the Court of Appeal held that decisions of the OIA are subject to judicial review but that the scope of any such review should be limited. Although it is still early days for the OIA in the United Kingdom, there is much merit in the argument that this institution should be keenly watched.

⁶⁹ For example, the University of Technology, Sydney; Queensland University of Technology; The University of Newcastle and Monash University.

⁷⁰ For example, Australian Catholic University and The Australian National University.

there is no compulsion on them to request their assistance. While the annual reports of these Ombudsmen detail significant numbers of investigations conducted annually, without further research it serves little purpose to speculate as to the effectiveness of these offices in preventing litigation.⁷¹ The existence of Ombudsmen within universities could provide grounds for a court to refuse relief on discretionary grounds to those students who failed to first use such internal processes before seeking redress in the courts.⁷²

IV RESOLVING STUDENT DISPUTES IN COURTS AND TRIBUNALS

Having university policies and processes to deal with student complaints and having recourse to parliamentary Ombudsmen to review internal procedures does not prevent students from seeking relief in courts and tribunals.

This is clearly illustrated by the story of an international student, Megumi Ogawa. Ogawa was originally enrolled in a doctorate in the School of Law at The University of Queensland but subsequently transferred her candidature to The University of Melbourne. She encountered problems with the supervision arrangements at The University of Melbourne and when she was unable to complete her degree in the time allocated, the University refused to extend the time for completion. Ogawa sought relief pursuant to the University's internal grievance and appeals procedures but remained dissatisfied. She also brought the matter to the attention of the Victorian Ombudsman and complained that the University had not complied with the requirements of the *Educational Services for Overseas Students Act 2000* (Cth) in terms of support to complete her studies and resolve her complaints.⁷³ Again, she was dissatisfied with the outcome and commenced proceedings in the Federal Court of Australia alleging breach of contract, negligence and misleading or deceptive conduct on the part of the University with respect to her undertaking a PhD. Marshall J ordered that the proceedings be transferred to the Federal Magistrates Court of Australia⁷⁴ and an application to transfer the proceedings back to the Federal Court was dismissed.⁷⁵ The University's motion to have the amended statement of claim — that included additional allegations of unconscionable conduct, breach of natural justice and defamation — struck out was largely successful, but Ogawa was given leave to file and serve a further amended statement of claim with respect to

⁷¹ Further research in this area is being undertaken by the authors.

⁷² In *R (Peng Hu Shi) v King's College London* [2008] EWHC (Admin) 857 (9 April 2008) [45]–[46], Mitting J, in dismissing a student's application for judicial review of a disciplinary decision that resulted in the student's expulsion, stated that '[j]udicial review is a remedy of last not first resort ... [and as the claimant] did not, as she should have done, pursue her complaint to the Office of the Independent Adjudicator ... it is not appropriate, and was never appropriate, to bring this claim for judicial review'.

⁷³ See generally Megumi Ogawa, 'University Grievance Handling for Overseas Students: *ESOS Act* and the *National Code*' (2003) 10 *Australian Journal of Administrative Law* 162; A D Gilbert, 'Response from The University of Melbourne' (2003) 11 *Australian Journal of Administrative Law* 44.

⁷⁴ *Ogawa v University of Melbourne* [2004] FCA 491 (26 April 2004).

⁷⁵ *Ogawa v University of Melbourne* [2004] FMCA 515 (27 July 2004).

the allegations of breach of the *Trade Practices Act 1974* (Cth).⁷⁶ This she failed to do. She also failed to appear on the date fixed for hearing and so her application was dismissed⁷⁷ and costs were ordered against her.⁷⁸ Ogawa tried again in the Federal Court, but, although she raised some additional issues, the proceedings were essentially the same as in the Federal Magistrates Court action. Ryan J therefore stayed the proceedings until further order noting that it is

vexatious to require a respondent in the position of the University to fight simultaneously on two different fronts, each in a different court. It is no answer for an applicant who seeks to create that situation to point out that the battle lines have been drawn somewhat differently in each court.⁷⁹

Ogawa's experience also shows the seriousness of the consequences that may follow unsuccessful litigation regarding adverse university decisions.⁸⁰

Although Ogawa made a number of allegations against the University, she did not seek judicial review of the relevant decision-making process. Had she commenced proceedings in the appropriate state court, jurisdiction would not have been in issue.⁸¹ As the New South Wales Supreme Court has noted:

[the Court] does not sit as a Court of factual review over decisions of ... [university] committees ... [but] it can ... intervene in accordance with accepted administrative law principles, for example where the Committee has not been properly constituted, where it failed to follow proper procedure, where it acted in a way constituting a denial of natural justice, where it otherwise reached a decision which was contrary to law, or where its decision was such that no reasonable committee, acting with a due appreciation of its responsibility, could have arrived at it.⁸²

It is important to note that in Australia, judicial review is available both under the common law and pursuant to judicial review legislation.⁸³ Common law

⁷⁶ *Ogawa v University of Melbourne [No 3]* [2004] FMCA 536 (3 September 2004).

⁷⁷ *Ogawa v University of Melbourne* [2005] FMCA 1118 (8 August 2005).

⁷⁸ *Ogawa v University of Melbourne [No 2]* [2005] FMCA 1216 (18 August 2005).

⁷⁹ *Ogawa v University of Melbourne* (2005) 220 ALR 659, 677–8 [87].

⁸⁰ Ogawa was also involved in legal proceedings regarding her student visa: *Ogawa v Minister for Immigration and Multicultural Affairs* (2006) 156 FCR 246. Between 19 May and 28 July 2006, Ogawa was detained at the Villawood Immigration Detention Centre. Her failed application for waiver of expenses and fees incurred during her detention was subject to an unsuccessful claim for judicial review: *Ogawa v Colbeck [No 2]* [2007] FMCA 2127 (5 December 2007). In early 2008, Ogawa sought judicial review in the Supreme Court of Queensland of a decision relating to the grant of legal aid for her representation in criminal proceedings listed in the District Court. That application was also dismissed: *Ogawa v Briggs* [2008] QSC 18 (25 January 2008).

⁸¹ There were no jurisdictional issues, for example, where state supreme courts were asked to apply principles of natural justice to review university decisions to exclude students for academic misconduct: *Simjanoski v La Trobe University* [2004] VSC 180 (27 May 2004); or for failing course requirements: *Jenkins v Charles Sturt University* [2008] NSWSC 50 (13 February 2008). This is because of the unlimited jurisdiction of state supreme courts: see, eg, *Supreme Court Act 1970* (NSW) s 23; *Constitution Act 1975* (Vic) s 85(1).

⁸² *Harding v University of New South Wales* [2002] NSWSC 113 (1 March 2002) [17] (Wood CJ at CL).

⁸³ See, eg, *Administrative Decisions (Judicial Review) Act 1989* (ACT); *Judicial Review Act 1991* (Qld); *Judicial Review Act 2000* (Tas); *Administrative Law Act 1978* (Vic). State and territory judicial review legislation is modelled on the *ADJR Act*.

judicial review focuses on the legality of administrative action, whereas judicial review legislation applies more narrowly to administrative decisions. Nonetheless, judicial review statutes are

seen largely as conferring procedural advantages over the older powers exercised in the courts' inherent jurisdiction, which they supplement, rather than replace ... [and they] confer a right to reasons for administrative decisions where none exists at common law, and expand the grounds of judicial review, but not their essential characteristics.⁸⁴

Students challenging adverse university decisions in the courts have had no problem satisfying the courts that they have inherent jurisdiction to review such decisions, but they have had difficulties when relying on judicial review legislation. This is indicated in the discussion of the case law that follows.

A *Judicial Review under Statutory Regimes*

The *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*') allows 'a person aggrieved by a decision' to apply to the Federal Court or Federal Magistrates Court for an order of review in respect of the decision⁸⁵ and to request a written statement of reasons in relation to the decision.⁸⁶ In a similar way, the *Judicial Review Act 1991* (Qld) ('*QJR Act*') allows 'a person aggrieved by a decision'⁸⁷ to apply to the Supreme Court of Queensland for a statutory order of review in respect of the decision⁸⁸ and to request a written statement of reasons in relation to the decision.⁸⁹ However, the *ADJR Act* and the *QJR Act* only apply to certain types of decisions, namely, decisions of 'an administrative character' that were made 'under an enactment'.⁹⁰

A decision of the Board of Patent Attorneys that a candidate had failed examinations in two subjects was held to be a decision of 'an administrative character' within the meaning of the *ADJR Act*. Fox ACJ commented that:

The role of the Board of Examiners is one of carrying out a purpose of the *Patents Act* by ensuring that there are specially qualified people to deal with applications that arise under it. The process of arranging for, and promulgating the results of, examinations are, on any view, distinctly administrative, as are some aspects of conducting them.⁹¹

⁸⁴ Aronson, Dyer and Groves, above n 19, 22–3.

⁸⁵ *ADJR Act* s 5.

⁸⁶ *Ibid* s 13.

⁸⁷ *QJR Act* s 7.

⁸⁸ *Ibid* s 20.

⁸⁹ *Ibid* s 32.

⁹⁰ *Ibid* s 4; *ADJR Act* s 3 (definition of 'decision to which this Act applies'). The meaning of this phrase was also considered in litigation involving staff members requesting reasons for certain university decisions. See *Australian National University v Burns* (1982) 43 ALR 25 (request for reasons for decision to terminate professorial appointment); *Australian National University v Lewins* (1996) 68 FCR 87 (request for reasons for decision not to promote employee).

⁹¹ *Evans v Friemann* (1981) 35 ALR 428, 435.

Although matters concerning examinations by public bodies had not been subject to judicial review previously, Fox ACJ was not prepared to consider whether the court would decline jurisdiction in a university case.⁹²

Students may be persons aggrieved by adverse university decisions of ‘an administrative character’ but a series of cases illustrates the problems that have arisen when students have argued that the adverse university decision was made ‘under an enactment’. It is this requirement that has caused students the most difficulty.

A law student at the University of Tasmania failed in his attempt to have the Federal Court of Australia review a decision of the University’s Discipline Appeals Committee because, as the decision had been made by a committee established under the *University of Tasmania Act 1992* (Tas) and had not been made under federal legislation, it was not made ‘under an enactment’ for the purposes of the *ADJR Act*.⁹³ When a student applied under the *QJR Act* to the Supreme Court of Queensland to review a decision of Bond University, Dowsett J held that the *QJR Act* did not apply because the respondent university was not a public university. In a privately-owned university, the source of regulations and the relationship between the University and its students were to be found in the law of contract and not ‘under an enactment’.⁹⁴

The *QJR Act* has also been held not to apply to certain decisions of Griffith University, even though it is a public university established under the *Griffith University Act 1998* (Qld) (*Griffith University Act*). The Supreme Court of Queensland found, and the Court of Appeal agreed, that there was no basis for review under the *QJR Act* of a decision to fail a student in two subjects, because decisions about academic assessment are not decisions made ‘under an enactment’.⁹⁵ The same courts later considered that a decision to exclude a PhD student for academic misconduct was reviewable under the *QJR Act*.⁹⁶ An appeal to the High Court found otherwise when a majority of 4:1⁹⁷ held that the student was not entitled to review under the *QJR Act* because the relevant decision was not made under, nor did it take legal force or effect from, the *Griffith University*

⁹² *Ibid.*

⁹³ *Mazukov v University of Tasmania* [2000] FCA 1091 (4 August 2000); *Mazukov v University of Tasmania* [2002] FCAFC 166 (31 May 2002). The student then sought special leave to appeal to the High Court but abandoned that application and was subsequently involved in further litigation in relation to the costs orders associated with the proceedings: *Mazukov v University of Tasmania* [2003] FCA 253 (19 March 2003); *Mazukov v University of Tasmania* [2004] FCAFC 159 (17 June 2004). Having been unsuccessful in the Federal Court of Australia on jurisdictional grounds, the student then sought relief in the Anti-Discrimination Tribunal of Tasmania alleging discrimination on the basis of, inter alia, race and imputed disability. The student was again unsuccessful as he was unable to provide evidence of discriminatory conduct: *Mazukov v University of Tasmania* [2004] TASADT 8 (5 August 2004); *Mazukov v University of Tasmania* [2005] TASADT 5 (5 May 2005).

⁹⁴ *Orr v Bond University* (Unreported, Supreme Court of Queensland, Dowsett J, 3 April 1996).

⁹⁵ *Ivins v Griffith University* [2001] QSC 86 (29 March 2001); *Ivins v Griffith University* [2001] QCA 393 (19 September 2001).

⁹⁶ *Tang v Griffith University* [2003] QSC 22 (14 February 2003); *Tang v Griffith University* [2003] QCA 571 (19 December 2003).

⁹⁷ Gleeson CJ, Gummow, Callinan and Heydon JJ (Kirby J dissenting).

Act.⁹⁸ As a leading commentator has noted, '[w]hat sank her case was that the University's Code was soft law — it was neither primary nor subordinate legislation'⁹⁹ and so could not be said to be made 'under an enactment'.

The High Court noted that nothing in the *Griffith University Act* dealt specifically with admission to or exclusion from a research program, academic misconduct, or procedures dealing with such cases.¹⁰⁰ These powers flowed from a general description in the *Griffith University Act* of the University's functions, its general powers and the powers of the University Council, including the Council's powers of delegation.¹⁰¹ Consequently, in the view of the majority, the power to affect the student's rights and obligations derived, not from the enactment, but from the general law, and from such agreement as had been made between the parties.¹⁰² This case, one of the few involving students and universities to have reached the High Court of Australia,¹⁰³ has generated a huge amount of commentary and criticism in both academic and non-academic circles about the consequences of the majority view.¹⁰⁴

So what of applications made under the common law — do students fare better?

B Judicial Review under the Common Law

1 Student Challenges to Decisions about Admission

Judicial opinion confirms that universities may determine entry requirements and standards in their courses.¹⁰⁵ In exercising their functions, it has also been noted that universities:

⁹⁸ *Griffith University v Tang* (2005) 221 CLR 99.

⁹⁹ Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1, 12–13.

¹⁰⁰ *Griffith University v Tang* (2005) 221 CLR 99, 106 [8] (Gleeson CJ).

¹⁰¹ *Griffith University Act* ss 5–11.

¹⁰² *Griffith University v Tang* (2005) 221 CLR 99, 112 [23] (Gleeson CJ), 131 [99] (Gummow, Callinan and Heydon JJ). It has been noted that '[t]he same result would have been on the cards if the University rules which Ms Tang alleged were broken had been contractual': Aronson, above n 99, 13. This may explain why Tang did not plead a contractual relationship with the university but it does not explain why she did not seek common law judicial review.

¹⁰³ See also *R v The University of Sydney; Ex parte Drummond* (1943) 67 CLR 95 (on whether the defence power allowed the Commonwealth to regulate admission to universities); *The University of Wollongong v Metwally* (1984) 158 CLR 447 (on the inconsistency between Commonwealth and state laws relating to racial discrimination).

¹⁰⁴ See, eg, Aronson, Dyer and Groves, above n 19, 79–87; Melissa Gangemi, 'Griffith University v Tang: Review of University Decisions Made "under an Enactment"' (2005) 27 *Sydney Law Review* 567; Patty Kamvounias and Sally Varnham, 'Doctoral Dreams Destroyed: Does *Griffith University v Tang* Spell the End of Judicial Review of Australian University Decisions?' (2005) 10(1) *Australia & New Zealand Journal of Law & Education* 5; Daniel Stewart, 'Griffith University v Tang, "under an Enactment" and Limiting Access to Judicial Review' (2005) 33 *Federal Law Review* 525; Anthony E Cassimatis, 'Statutory Judicial Review and the Requirement of a Statutory Effect on Rights or Obligations: "Decisions under an Enactment"' (2006) 13 *Australian Journal of Administrative Law* 169; Aronson, above n 99; P A Keane, 'Judicial Review: The Courts and the Academy' (2008) 82 *Australian Law Journal* 623.

¹⁰⁵ *Griffith University v Tang* (2005) 221 CLR 99, 109 [15] (Gleeson CJ):

The functions of the ... [university] include providing education, providing facilities for study and research, and conferring higher education awards. Its powers include the power to do any-

must engage in processes of assessment to satisfy themselves that candidates for admission are qualified and reasonably capable of undertaking courses. Having passed that threshold, universities must then make (often hard) decisions about who among the candidates will be offered places and be the subject of the commitment of resources.¹⁰⁶

The courts are well aware that students may need to compete for a place in their desired course and that some students will fall short of the rank required for admission. In *Harding v University of New South Wales* judicial notice has been taken, for example, of the fact that:

competition for enrolment in the Faculty of Medicine is intense ... [as] reflected in the high admission standards ... [and the fact] that the study of medicine requires considerable dedication and academic ability [and] ... [f]or these reasons the competition for places is based on academic merit.¹⁰⁷

For many years, Kathleen Harding tried and failed to gain admission to a medical degree at The University of New South Wales. Her many attempts to use the law to gain admission were also ultimately unsuccessful. She first enrolled in the Faculty of Medicine in February 1983 but, due to ill health, was unable to complete her first year of studies. Over the next few years, although she passed some subjects, her academic record indicated that she had repeatedly discontinued and then re-enrolled in the course. In 1988, she was asked to show cause as to why she should be entitled to re-enrol. Her application was rejected and the University's Appeal Committee excluded her for two years.¹⁰⁸ In 1997, Harding applied to enrol once more but once again this application was unsuccessful, as was her Supreme Court challenge to this decision.¹⁰⁹ Her applications for admission in 2000 and 2001 were also refused. Harding went back to the Supreme Court seeking orders that the university enrol her in the Faculty of Medicine for 2002 but this action was dismissed.¹¹⁰ On 30 November 2001, Harding again applied for enrolment. She provided further documentation asserting that her failures in previous years were due to medical problems, which had finally been overcome, and alleging breaches by the University of principles of administrative law, particularly that the University had acted in a manner

thing necessary or convenient in connection with its functions. Subject to any other legal constraint, it may establish a PhD research programme, and decide who will participate in the programme and on what terms and conditions.

¹⁰⁶ *DO v University of New South Wales (GD)* [2003] NSWADTAP 9 (31 March 2003) [16] (O'Connor DCJ, Members Montgomery and Antonios).

¹⁰⁷ [2002] NSWSC 113 (1 March 2002) [47] (Wood CJ at CL).

¹⁰⁸ On 17 December 1993, the New South Wales Court of Appeal found that the Appeal Committee's decision was invalid as the Appeal Committee was improperly constituted when it excluded her. However, it declined to grant relief as it would be pointless to order the Appeal Committee to re-hear a 1989 application for enrolment: see the outline of circumstances in *Harding v University of New South Wales* [2002] NSWCA 325 (25 September 2002) [21] (Hodgson JA). In 1995, she commenced Supreme Court proceedings claiming damages in respect of the Appeal Committee's decision but these proceedings were summarily dismissed: *Harding v University of New South Wales* [2001] NSWSC 301 (12 April 2001).

¹⁰⁹ Bruce J dismissed these proceedings on 27 February 1998: see outline of circumstances in *Harding v University of New South Wales* [2002] NSWCA 325 (25 September 2002) [23] (Hodgson JA).

¹¹⁰ *Harding v University of New South Wales* [2001] NSWSC 1198 (29 November 2001).

which was procedurally irregular and that it had acted unreasonably. This legal action was also dismissed as Harding was unable to substantiate the allegations.¹¹¹ The New South Wales Court of Appeal confirmed that 'it is imperative that ... [a university] has power to select the best students so long as it does not contravene its statute as to discrimination.'¹¹²

A decade earlier, the Supreme Court of New South Wales was asked to consider whether The University of Sydney and The University of New South Wales had failed to comply with their own admission requirements that converted interstate matriculation marks into the 'equivalent' in terms of the New South Wales Higher School Certificate results. In *Sweeney v The University of Sydney*,¹¹³ the plaintiff, who had completed his secondary school education in Victoria and had gained entry to study law at a university in that State, argued that he should be given the same ranking in New South Wales as he had been given in Victoria. The plaintiff was denied enrolment in the combined law courses at the defendant universities as they had their own ranking system which resulted in the plaintiff receiving a ranking below that required for the relevant courses. The action was dismissed by Sully J as there had been no error of law and the plaintiff had not made out a case for the relief he sought.¹¹⁴

The courts have recognised that not only must a university determine the provision of educational and research facilities and uphold academic standards, but it must also necessarily do so 'within the limits of its resources.'¹¹⁵ *Orr v Bond University*¹¹⁶ resulted from a student's failed application to undertake supervised research leading to a Master of Arts. The sub-Dean of the School of Humanities and Social Sciences wrote to Orr telling him he could not undertake research in his chosen field because the School did not have permanent staff to supervise his research. Nonetheless, Orr commenced legal proceedings in the Supreme Court of Queensland seeking reasons be given for that decision pursuant to the *QJR Act*. As discussed above, that action failed because the respondent was a private university; however, had the *QJR Act* applied, Dowsett J doubted there was very much more that could have been said by way of reasons.¹¹⁷

¹¹¹ *Harding v University of New South Wales* [2002] NSWSC 113 (1 March 2002) [44]–[46] (Wood CJ at CL). The appeal was also dismissed: *Harding v University of New South Wales* [2002] NSWCA 325 (25 September 2002). The subsequent action in the Administrative Decisions Tribunal claiming 'indirect gender discrimination' (based on the contention that her problems arose from a thyroid condition which is more prevalent in women than in men) was also dismissed as it was held to be lacking in substance: *Harding v Vice-Chancellor, University of New South Wales* [2003] NSWADT 74 (15 April 2003) [47] (Magistrate Hennessy, Members McDonald and Weule).

¹¹² *Harding v University of New South Wales* [2002] NSWCA 325 (25 September 2002) [79] (Young CJ in Eq).

¹¹³ (1992) 27 ALD 214.

¹¹⁴ *Ibid* 220.

¹¹⁵ *Harding v University of New South Wales* [2002] NSWCA 325 (25 September 2002) [77] (Young CJ in Eq).

¹¹⁶ (Unreported, Supreme Court of Queensland, Dowsett J, 3 April 1996).

¹¹⁷ It is difficult to understand on the face of it why the student commenced legal proceedings in these circumstances.

2 *Student Challenges to Decisions Involving Academic Judgment and Assessment*

Many student challenges, while framed in a variety of ways, essentially question various aspects of the exercise of academic judgment. Courts may have jurisdiction to review administrative decisions but they are reluctant to revisit decisions involving academic judgment. Although, as noted above, Woodhouse P of the New Zealand Court of Appeal was of the view that universities ‘should be subject to public scrutiny in the courts’,¹¹⁸ he was careful to exclude matters of purely academic judgment from the Court’s jurisdiction:

It is easy enough to understand why it has been held that non-justiciable ‘in-house’ issues ought to be left as a matter of course to the domestic tribunal either because they could not sensibly be turned into suitable problems for adjudication by the courts or simply as a matter of discretion. The picture conjured up by Diplock LJ in *Thorne’s case* of judges invited to reassess the actual marking of exam papers may seem a good enough example of that — at least in the absence of fraud or malice on the part of the examiner or something of the sort.¹¹⁹

The key decision from the United Kingdom in this area is *Clark v University of Lincolnshire and Humberside* where the Court accepted that students had administrative law and contract law rights that are co-existent and not exclusive of each other.¹²⁰ Lord Woolf MR stated that the ‘court ... will not involve itself with issues that involve making academic judgments’,¹²¹ and Sedley LJ, in the leading judgment, noted that:

there are issues of academic or pastoral judgment which the university is equipped to consider in breadth and in depth, but on which any judgment of the courts would be jejune and inappropriate ... [and it] undoubtedly includes, in my view, such questions as what mark or class a student ought to be awarded or whether an aegrotat is justified.¹²²

Clark v University of Lincolnshire and Humberside has been considered by various Australian courts.¹²³ Kirby J has referred to matters of academic judgment in the following terms:

universities are in many ways peculiar public institutions. They have special responsibilities ... to uphold high academic standards about which members of the academic staff will often be more cognisant than judges. There are issues pertaining to the intimate life of every independent academic institution that, sensibly, courts decline to review: the marking of an examination paper; the

¹¹⁸ *Norrie v Senate of the University of Auckland* [1984] 1 NZLR 129, 134–5.

¹¹⁹ *Ibid.*

¹²⁰ [2000] 3 All ER 752.

¹²¹ *Ibid.* 759.

¹²² *Ibid.* 756. See also *R v The Queen; Ex parte Vijayatunga* [1990] 2 QB 444; *R v Cranfield University Senate; Ex parte Bashir* [1999] Ed CR 772, where the English courts have clearly disclaimed any desire to reconsider matters of academic judgment.

¹²³ *Griffith University v Tang* (2005) 221 CLR 99, 157 [165] (Kirby J); *Hanna v University of New England* [2006] NSWSC 122 (5 April 2006) [66] (Malpass AsJ); *Walsh v University of Technology, Sydney* [2007] FCA 880 (15 June 2007) [78] (Buchanan J).

academic merit of a thesis; the viability of a research project; the award of academic tenure; and internal budgets. Others might be added: the contents of a course; particular styles of teaching; and the organisation of course timetables.¹²⁴

A leading commentator in the United Kingdom has observed that '[t]his judicial deference to the sanctity of academic decision-making has long common law roots and may be seen as an integral part of the tradition of academic freedom.'¹²⁵

As outlined in the discussion of the cases below, students will therefore find it difficult to legally challenge pure academic decisions, for example, about credit for prior study, assessment and academic progress. Unless students can convince the court that the challenge is not to the actual decision but to improper procedures in reaching that decision, they will have little success in the courts.¹²⁶

(a) *Applications for Credit for Prior Study*

Waldemar Dudzinski had tertiary qualifications from Poland and a Bachelor of Applied Science in Geology from the Queensland University of Technology when he commenced the Master of Engineering Science in Waste Management course at Griffith University. He completed four subjects and, while still enrolled in that postgraduate program, also enrolled in a Bachelor of Laws/Bachelor of Science and Environmental Sciences combined degree. He sought and was denied exemption from certain subjects based on his previous studies, and subsequently brought proceedings in the Federal Court of Australia against Griffith University and nine members of its academic and administrative staff. Dudzinski claimed negligence, defamation, injurious falsehood, conspiracy, deceit, assault, racial and sex discrimination, undue influence and breaches of the *Trade Practices Act 1974* (Cth).¹²⁷ Drummond J confirmed that, even though the University had internal rules and procedures for resolving disputes, the Court had jurisdiction to determine the types of matters raised by the student.¹²⁸ Drummond J also noted that in seeking to terminate the action summarily, the respon-

¹²⁴ *Griffith University v Tang* (2005) 221 CLR 99, 156–7 [165]. Similarly, Ford and Strobe, analysing judicial responses to student challenges to academic judgment since the leading United States Supreme Court decisions on this issue, concluded that:

the lower courts in the fifty-nine cases since *Horowitz* and *Ewing* deferred to the expertise of educators when dealing with academic decisions. In the five instances where the lower courts ruled in favour of the students, the institutions appeared to be unfair. The courts will not interfere if, as required in *Horowitz*, students have notice of the academic rules, and as required in *Ewing*, postsecondary policies, processes, and practices are not substantial departures from accepted academic norms.

Deborah L Ford and John L Strobe Jr, 'Judicial Responses to Adverse Academic Decisions Affecting Public Post-Secondary Institution Students since *Horowitz* and *Ewing*' (1996) 110 *Education Law Reporter* 517, 542.

¹²⁵ Mark Davies, 'Challenges to "Academic Immunity" — The Beginning of a New Era?' (2004) 16 *Education and the Law* 75, 76. See also Kaye, above n 43.

¹²⁶ On this point, it is significant to note that a matter of academic judgment is specifically excluded from being a 'qualifying complaint' within the jurisdiction of the United Kingdom OIA for Higher Education: *Higher Education Act 2004* (UK) c 8, s 12(2).

¹²⁷ *Dudzinski v Kellow* (1999) 59 ALD 625.

¹²⁸ *Ibid* 626 [3].

dent University had ‘a heavy burden’.¹²⁹ He found this burden was met in respect of all the causes of action pleaded by the student, except in relation to the claims in negligence against two members of the academic staff and in assault against one of the staff members.¹³⁰ While being careful to state that his decision in no way indicated his belief or otherwise in whether the claims were well-founded, Drummond J declined to strike out the actions in negligence and assault.¹³¹ His view was that the Queensland District Court was the proper court in which these claims should be determined.¹³² As he had no power to transfer the claims to the District Court, Drummond J permanently stayed the further prosecution of the claims in the Federal Court.¹³³

Fayez Phillipe Hanna, a law student at the University of New England, applied for advanced standing for certain subjects based on courses he had taken at other universities, his membership of journalist and writers’ associations, and the fact that he had conducted his own defamation case.¹³⁴ When his application was rejected, he sought relief in the Supreme Court of New South Wales on the grounds of judicial review, discrimination, defamation, and breach of provisions of the *Trade Practices Act 1974* (Cth).¹³⁵ The proceedings were dismissed as there had been a ‘failure to demonstrate error in relation to any of the decisions (let alone error of law).’¹³⁶ Malpass AsJ also drew attention to the fact that the decisions challenged ‘involved academic assessment’,¹³⁷ and that the student had

¹²⁹ Ibid 626 [2], citing *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 129–30 (Barwick CJ).

¹³⁰ *Dudzinski v Kellow* (1999) 59 ALD 625, 641 [93]. The negligence claim was for economic loss resulting from the negligently made decision of the academic who allegedly did not have sufficient expertise to enable him to make a proper comparison of the relevant subjects when he applied the university’s exemption policy. The assault claim arose out of a conversation with a staff member who lost his temper and ordered the applicant out of his office.

¹³¹ Ibid 638 [72]–[73].

¹³² Ibid 642 [96].

¹³³ Ibid 642 [97]. The application for leave to appeal the decision of Drummond J was dismissed: *Dudzinski v Kellow* [1999] FCA 1264 (27 August 1999). The motion to stay the orders of the Full Court pending leave to the High Court was refused: *Dudzinski v Kellow* [1999] FCA 1665 (23 November 1999). It is not clear whether the student pursued the matter in the District Court; however, he did pursue the matter again in the Human Rights and Equal Opportunity Commission, which decided that it had jurisdiction to hear the complaint as Griffith University was a ‘trading corporation’ trading in educational services: *Dudzinski v Griffith University* [2000] HREOCA 7 (23 February 2000). The complaint was dismissed as ‘there [was] not the slightest basis for a conclusion that the complainant was refused credit because of his sex’: *Dudzinski v Griffith University [No 2]* [2000] HREOCA 22 (3 June 2000) (Inquiry Commissioner Carter). The saga continued when Dudzinski was involved in further litigation with the University following the issue of a bankruptcy notice against him claiming \$17 700, being the costs of his failed Federal Court proceedings: *Dudzinski v Kellow* [2002] FCA 266 (15 March 2002).

¹³⁴ The defamation case was struck out as an abuse of process of the court: *Hanna v Maks* [2003] NSWSC 158 (19 March 2003) [41]–[42] (Levine J). Malpass AsJ was of the view that ‘[i]t would be indisputable that such a matter would not be regarded as evidence of prior learning of law. Indeed, it might be thought to be powerful evidence of lack of learning’: *Hanna v University of New England* [2006] NSWSC 122 (5 April 2006) [69].

¹³⁵ *Hanna v University of New England* [2006] NSWSC 122 (5 April 2006).

¹³⁶ Ibid [70] (Malpass AsJ). The notice of appeal was declined by the Court registry as the student had not sought leave to appeal. His application to review the Registrar’s decision was dismissed: *Hanna v Registrar of the Court of Appeal of NSW* [2006] NSWSC 564 (8 May 2006).

¹³⁷ *Hanna v University of New England* [2006] NSWSC 122 (5 April 2006) [66].

chosen not to pursue a remedy through the University's internal procedures before embarking upon his claims before the Court, which 'should have been seen as a last resort'.¹³⁸

(b) *Applications Regarding Course Content and Assessment Standards*

It has been noted that it is for a university

to establish the course of study in which ... [students] enrolled and set the requirements to be satisfied, including the academic standard to be achieved as demonstrated by assignments or other coursework. *Decisions about such matters are inherently unsuited to judicial review.*¹³⁹

It was therefore not surprising that when Dr Gorman sought orders from the Supreme Court of New South Wales that the four defendant universities instruct various faculties of their respective universities 'to cogitate and teach, either as dogma or as controversy, the principles and practice of health care which have been potentially exposed by the discovery that vision improves, in appropriate patients, when the spine is manipulated',¹⁴⁰ the action was dismissed as 'frivolous and vexatious and an abuse.'¹⁴¹ James J was unable to find any reasonable cause of action or any legal basis to require others to 'espouse a particular teaching and to disseminate that treatment'.¹⁴²

Christine Joy Ivins, a first-year nursing student, made a written complaint to the Dean of the Faculty of Nursing at Griffith University about the conduct of one of her lecturers (concerning interactions in lectures and the assessment of her individual essay) and about the use of group assessment in two subjects.¹⁴³ A meeting with relevant staff and a mediation conference organised through the Department of Justice left her dissatisfied, as the assessment for the courses remained unchanged and the lecturer was not reprimanded for her conduct.¹⁴⁴ Ivins also complained about the decision to fail her in two subjects.¹⁴⁵ Her individual assessments were re-marked but the fail grades did not change. She unsuccessfully appealed pursuant to the University's policy on student grievances and appeals and then sought judicial review in the Supreme Court of Queensland.¹⁴⁶ As discussed above,¹⁴⁷ her action failed on jurisdictional grounds.

¹³⁸ Ibid [71].

¹³⁹ *Walsh v University of Technology, Sydney* [2007] FCA 880 (15 June 2007) [74] (Buchanan J) (emphasis added).

¹⁴⁰ *Gorman v University of Sydney* [1999] NSWSC 240 (15 March 1999) [1] (James J).

¹⁴¹ Ibid [9].

¹⁴² Ibid [8].

¹⁴³ *Ivins v Griffith University* [2001] QSC 86 (29 March 2001) [7] (Phillippides J).

¹⁴⁴ Ibid [16]–[18].

¹⁴⁵ Ibid [17]. Ivins passed the group work assessment and the use of group work assessment was not the reason for the 'fail' grades awarded. There was no evidence to support the allegation that she failed these subjects for making the complaint about the group assessment: *Ivins v Griffith University* [2001] QCA 393 (19 September 2001) (Williams JA).

¹⁴⁶ None of the decisions was 'a decision made under an enactment' as required by the *QJR Act*: *Ivins v Griffith University* [2001] QSC 86 (29 March 2001) [22] (Phillippides J).

¹⁴⁷ Part IV(A).

Nonetheless, the Court noted that Ivins had no legal right to be present when her work was re-marked as

the rules of natural justice were adequately met by the procedure set out in the University's policy and did not require that in addition to the written submissions of the applicant, the applicant should have been afforded an opportunity to be present and to have been heard orally.¹⁴⁸

Peter Walsh, a postgraduate student at the University of Technology, Sydney ('UTS') also had a number of complaints about various assessments in his course and subsequently commenced legal proceedings in the Federal Court of Australia.¹⁴⁹ Although he agreed he was asking the Court 'to strike out into new legal territory',¹⁵⁰ he was unable to draw the Court's attention to any statutory provision, authority or legal principle which might provide a starting point for this type of case.¹⁵¹ Essentially, Walsh was dissatisfied with the evaluation of two assignments by two lecturers in the course and their disapproval of the major project he pursued as a third assignment. He was given the opportunity to re-submit the third assignment but did not do so; instead he sought internal review within the University before seeking relief in the courts. Buchanan J noted that '[t]he Court is being asked not only to vindicate ... [the student's] choice of topic for his individual project but to substitute a different assessment of his work and directly enforce a passing grade'.¹⁵² The Court found that 'judgment[s] to be made by UTS with respect to requirements for the award of a degree are not matters susceptible to judicial review in the ordinary way.'¹⁵³

(c) Applications Concerning Academic Progress

Failure to meet course requirements has adverse consequences for students, who may be excluded from their universities and unable to complete their chosen degrees. There may also be adverse consequences beyond the university. Commonwealth supported students may, for example, find their 'Student Learning Entitlement' reduced,¹⁵⁴ and international students may find their student visas cancelled.¹⁵⁵ It is therefore imperative that universities act fairly in relation to the exclusion of students from coursework and research.

¹⁴⁸ *Ibid* [42]. In *Ivins v Griffith University* [2001] QCA 393 (19 September 2001), Williams JA noted that:

Clearly when it is purely a question of academic assessment or academic judgement the student has no right to be present on the marking of examination papers. It may well be different if the evaluation of the student's progress or the question of exclusion of a student from the university involves questions other than mere academic judgment.

¹⁴⁹ *Walsh v University of Technology, Sydney* [2007] FCA 880 (15 June 2007).

¹⁵⁰ *Ibid* [71] (Buchanan J).

¹⁵¹ *Ibid*.

¹⁵² *Ibid* [57].

¹⁵³ *Ibid* [86]. His application for an extension of time in which to seek leave to appeal was refused: *Walsh v University of Technology, Sydney* [2007] FCA 1308 (2 August 2007).

¹⁵⁴ See, eg, *Re Kanesbi and Secretary, Department of Education, Employment and Workplace Relations* [2008] AATA 277 (8 April 2008).

¹⁵⁵ See, eg, *Chen v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FMCA 576 (20 April 2005).

While the courts have demonstrated a reluctance to interfere in academic decisions, they will take care to determine whether the challenge is to a decision that involved academic judgment or to the process by which an academic decision was made. Substance is immune from review but process is not. This is clearly shown in *R (Persaud) v University of Cambridge*,¹⁵⁶ the leading UK case, which involved a PhD student who had a series of disagreements with successive supervisors and who had made little progress in her research. Her application for judicial review of the decision to discontinue her candidature was dismissed at first instance,¹⁵⁷ but her appeal was allowed in part.¹⁵⁸ The Court of Appeal stressed that the Board of Graduate Studies, in exercising its power under the University regulations to discontinue her PhD candidature, was under a duty to act fairly.¹⁵⁹ The Board's rejection of her account of events, without first putting their doubts about its accuracy to her, was in breach of that duty, as was the failure to make available to her various reports including those of an independent academic that appeared to raise a new issue about the potential value of her research.¹⁶⁰ Chadwick LJ, delivering the judgment of the Court, said:

there is no principle of fairness which requires, as a general rule, that a person should be entitled to challenge, or make representations with a view to changing, a purely academic judgment on his or her work or potential. But each case must be examined on its own facts. On a true analysis, this case is not, as it seems to me, a challenge to academic judgment; it is a challenge to the process by which it was determined that she should not be reinstated to the Register of Graduate Students because the course of research for which she had been admitted had ceased to be viable. I am satisfied that that process failed to measure up to the standard of fairness required of the University.¹⁶¹

Dean Jenkins was excluded from an Associate Degree of Policing at Charles Sturt University when he failed a key subject twice. When his appeals within the University failed, he commenced proceedings in the Supreme Court of New South Wales claiming denial of natural justice and error of law.¹⁶² The practice of the Faculty Appeals Committee was to decide appeals on the papers but, following his written submissions, Jenkins was granted an interview with the presence of a support person. The University's Academic Appeals Committee also dealt with appeals on the papers and Jenkins made written submissions

¹⁵⁶ [2001] EWCA Civ 534 (10 April 2001).

¹⁵⁷ *R (Persaud) v University of Cambridge* [2000] EWHC Admin 374 (21 July 2000).

¹⁵⁸ *R (Persaud) v University of Cambridge* [2001] EWCA Civ 534 (10 April 2001). The Court allowed the appeal insofar as it quashed the decision of the Board of Graduate Studies to remove her name from the Register of Graduate Students, but as she was now engaged in substantially different research (she had started work on a new research project with a new supervisor) the Court was of the view that an order of mandamus would be inappropriate and would serve no useful purpose: at [44] (Chadwick LJ).

¹⁵⁹ *Ibid* [33].

¹⁶⁰ *Ibid* [40].

¹⁶¹ *Ibid* [41].

¹⁶² *Jenkins v Charles Sturt University* [2008] NSWSC 50 (13 February 2008).

which had been drafted by his legal counsel. The proceedings were dismissed as there was no evidence of a denial of natural justice.¹⁶³

3 *Student Challenges to Decisions about Misconduct*

(a) *Academic Misconduct*

As with adverse decisions about academic progress, decisions involving academic misconduct can also have consequences beyond the university. A series of recent cases highlights the importance of full disclosure by those seeking admission to legal practice of allegations or findings of academic misconduct and plagiarism in relation to university assessments.¹⁶⁴

Courts in Australia and elsewhere have drawn a clear distinction between matters of academic judgment (which courts will generally not review) and matters of academic misconduct (which courts will generally review).¹⁶⁵

as Maurice Kay J explained in *R v University of Cambridge; Ex parte Persaud* ... it is entirely 'correct' of courts 'to distinguish between the disciplinary type of case and the situation where what is in issue is pure academic judgment' ... Academic judgment is one thing. But where an individual who has the requisite interest is affected by disciplinary decisions of an administrative nature made by a university body acting according to its powers under a statute, outside the few categories peculiar to 'pure academic judgment', such decisions are susceptible to judicial review. They are so elsewhere. They should likewise be so in Australia. An appeal to 'academic judgment' does not smother the duties of a university, like any other statutory body, to exhibit, in such cases, the basic requirements of procedural fairness implicit in their creation by public statute and receipt of public funds from the pockets of the people.¹⁶⁶

¹⁶³ The Court also commented on the utility of granting any relief in the circumstances, as the two-year exclusion period expired at the end of 2008: *ibid* [25] (Malpass AsJ).

¹⁶⁴ *Law Society of Tasmania v Richardson* [2003] TASSC 9 (18 March 2003); *Re AJG* [2004] QCA 88 (15 March 2004); *Re Liveri* [2006] QCA 152 (12 May 2006); *Re OG* [2007] VSC 197 (8 June 2007); *Re OG* (2007) 18 VR 164. In one case, disclosure was made of academic misconduct, but the Court was prepared to revisit the allegations of plagiarism and unauthorised collaboration and make findings in favour of the student applicant: *Re Humzy-Hancock* [2007] QSC 34 (26 February 2007). For a detailed discussion of this and other related cases, see J Joy Cumming, 'Where Courts and Academe Converge: Findings of Fact or Academic Judgment' (2007) 12(1) *Australia & New Zealand Journal of Law & Education* 97; Mary Wyburn, 'Disclosure of Prior Student Academic Misconduct in Admission to Legal Practice: Lessons for Universities and the Courts' (2008) 8 *Queensland University of Technology Law and Justice Journal* 314; Lillian Corbin and Justin Carter, 'Is Plagiarism Indicative of Prospective Legal Practice?' (2007) 17 *Legal Education Review* 53; Ralph D Mawdsley and J Joy Cumming, 'Plagiarism Litigation Trends in the USA and Australia' (2008) 20 *Education and the Law* 209.

¹⁶⁵ Cf *Whitehead v Griffith University* [2003] 1 Qd R 220 (a decision made under a contract of employment was not subject to judicial review); *Bird v Campbelltown Anglican Schools Council* [2007] NSWSC 1419 (the principles of natural justice were not implied in a contract with a private college). It has been held that plagiarism is a valid reason for termination of the employment of a member of general staff and, as the applicant had 'received a fair go all around', the termination of employment was not harsh, unjust or oppressive: *Quinn and Charles Sturt University* [2006] AIRC 96 (15 February 2006) [85] (Commissioner Roberts). For an interesting example of the type of legal action that may follow allegations of academic misconduct by an honours student, see *Rexha v Curtin University of Technology* [2002] WASC 152 (14 June 2002), where the supervisor considered bringing defamation proceedings against the university when it circulated minutes of a meeting at which his allegations were discussed.

¹⁶⁶ *Griffith University v Tang* (2005) 221 CLR 99, 157 [166] (Kirby J).

Because of the way matters had proceeded in *Griffith University v Tang*, no court had had the opportunity to examine the substance of Vivian Tang's complaint about the decision to exclude her from her PhD candidature for academic misconduct. In essence, her complaints were: that the Chair of the University's Assessment Board was not impartial as he was the person who had initially investigated the complaint against her; that she had been denied legal representation and adequate time to evaluate and respond to expert witnesses relied on by the University; that the University had breached its own policy; and that the decisions were not based on relevant material and evidence.¹⁶⁷ Tang may or may not have been able to substantiate any of these complaints, but the High Court ended any opportunity of her doing so by holding that the *QJR Act* did not apply in the circumstances.¹⁶⁸ Aronson has commented that 'there was undoubtedly a real dispute between the parties as to whether the University had adhered to its misconduct code. That would probably have been a sufficient basis for an application to a State Supreme Court for declaratory relief'.¹⁶⁹ Unfortunately, the question of whether Tang would be entitled to relief under the common law, pursuant to the powers of the Supreme Court of Queensland, or otherwise, did not arise because she had relied solely on the statutory procedures and sought only the statutory remedies provided by the *QJR Act*.

There have been cases, however, where the courts have had the opportunity to consider student complaints about decisions involving academic misconduct. In these cases the courts have consistently and universally insisted on strict adherence to accepted administrative law principles, for example, regarding the proper constitution of decision-making committees and the absence of bias, the need to follow proper procedure and comply with natural justice, and the need to reach decisions that take into account all relevant matters, and that are not contrary to law.¹⁷⁰

A recent case illustrates the requirements of procedural fairness in these circumstances. Sherrie Tadros was undertaking a Bachelor of Pharmacy at Charles Sturt University that she had anticipated completing by the end of 2008. In 2007, she enrolled in the pharmacy practice subject which required her to complete practical work experience. However, in October that year, she advised one of her professors that she had not done the placement and admitted that the documents she submitted as evidence of completion of this work were false. The matter was referred to the Head of School who conducted an inquiry and recommended that the Acting Dean recommend to the Deputy Vice-Chancellor (Academic) that

¹⁶⁷ Ibid 138–9 [115]–[116].

¹⁶⁸ Ibid. In the dissenting view of Kirby J, this result was 'surprising', at 139 [118]:

Given her enrolment in the University for the degree of Doctor of Philosophy, the nature of the complaints that the respondent wished to ventilate, the public character of the University as a statutory authority substantially supported by public funds, the devastating consequences of the University 'decision' on the immediate and long-term career and reputation of the respondent and the language and purpose of the *Review Act*.

¹⁶⁹ Aronson, above n 99, 23.

¹⁷⁰ For a recent study of the student disciplinary rules at a sample of Australian universities, see Bruce Lindsay, 'University Hearings: Student Discipline Rules and Fair Procedures' (2008) 15 *Australian Journal of Administrative Law* 146.

Tadros be failed in the subject and be excluded from the University for two years.¹⁷¹ The Acting Dean made the recommendation and the Deputy Vice-Chancellor (Academic) then wrote to Tadros in November 2007 stating that she had been found guilty of academic misconduct and consequently failed in the pharmacy practice subject and excluded from the University for two years, and, should she wish to resume her studies after the period of exclusion, she would have to apply for admission as if she were a new applicant. Tadros lodged an appeal against the severity of the penalty imposed under the University's policy on student academic misconduct, but she was initially advised that her appeal would not be heard because the policy only allowed appeals on procedural grounds. She then commenced legal proceedings, but before the matter was heard by the Court, the University arranged for her appeal to be heard by the Academic Misconduct Appeals Committee, which upheld the penalty, deciding it was lenient rather than severe.¹⁷²

There was no issue before the Court as to its jurisdiction to intervene or as to Tadros' guilt of serious academic misconduct. The key issues before the Court were the correct construction of the academic misconduct policy and the requirements of procedural fairness. The Court commented that: 'It would be of advantage to amend the Policy to make the procedure clearer where the academic misconduct has been admitted' as they were 'less than explicit and apt'¹⁷³ and '[c]ommon fairness required that the University take into account that the student admitted the misconduct alleged.'¹⁷⁴ The Court noted that after Tadros' conversation with her professor, she was not notified of any investigation or deliberation by the University and was not advised of the recommendations as to penalty made by the Head of School and the Dean.¹⁷⁵ In the circumstances, this was held to be a denial of procedural fairness because a penalty had been imposed without giving the applicant the opportunity to make submissions, and so the University decisions were declared void.¹⁷⁶

Having the University's decision declared void by a court does not prevent the University dealing further with the matter. If the University did revisit the decision, it would have to give Tadros the opportunity to make submissions as to penalty, but, in considering the matter afresh, it would be for the University to decide whether the same penalty or a lesser penalty should be imposed.¹⁷⁷

It is therefore clear that university rules and processes on student misconduct need to be carefully drafted to ensure procedural fairness in all situations, as the courts will insist on this and can declare decisions made pursuant to unfair processes void. The cases clearly illustrate that if decisions about academic

¹⁷¹ *Tadros v Charles Sturt University* [2008] NSWSC 1140 (30 October 2008) [4] (Smart AJ).

¹⁷² *Ibid* [17].

¹⁷³ *Ibid* [78].

¹⁷⁴ *Ibid* [80].

¹⁷⁵ *Ibid* [84].

¹⁷⁶ *Ibid* [154].

¹⁷⁷ *Ibid* [153].

misconduct are made in accordance with general administrative law principles and fairness, then students will find little comfort in the courts.

In *Lam v The University of Sydney*,¹⁷⁸ a student enrolled in the second academic year in the Faculty of Medicine came before a Student Proctorial Board on charges of misconduct under the University by-laws. It was alleged that he offered a sum of money to an administrative assistant employed by the University for information regarding the contents of the histology examination paper he was due to sit. The Board found the charges had been established and ordered that Lam be expelled from the University. However, it also recommended that he should be permitted to apply for readmission after four years, provided he satisfied the University that since his expulsion he had been a person of good character and was fit and proper to be readmitted.

Lam was legally represented before the Board and also before the Appeals Committee of the Senate, which dismissed his appeal from the Board's decision. Lam then made an application to the Vice-Chancellor seeking his recommendation to the University Senate that the adverse finding against him be quashed on the basis of fresh alibi evidence. The Vice-Chancellor declined to make this recommendation and it was this decision that Lam challenged in the courts on the basis of denial of natural justice. Gleeson CJ noted that by the time the matter had come to the Vice-Chancellor, there had already been a full hearing involving oral evidence and argument before the Board and a full appeal conducted on the basis of written submissions before the Appeals Committee.¹⁷⁹ There was no adequate explanation as to why the alibi evidence had not been presented at those times. Essentially, the Vice-Chancellor was being asked to exercise a discretion in favour of the student. The New South Wales Court of Appeal held that given the background of the matter, the nature of the function he was exercising and the grounds on which he was being asked to intervene, it had not been shown that the Vice-Chancellor had departed from the requirements of procedural fairness, and so the appeal was dismissed.¹⁸⁰

*Simjanoski v La Trobe University*¹⁸¹ arose because coordinators in a maths and an engineering subject alleged that several students had access to the solutions papers for the exams. This allegation was based on the students' examination answers and their past performances in the subjects and was supported by the fact that the students had reproduced the errors from the solutions paper. The chief examiner wrote to each of the students and invited them to respond to an allegation of academic misconduct. The students provided written responses and the matter was referred to the Academic Misconduct Committee of the Faculty of Science, Technology and Engineering as required by the University regulations on student discipline and misconduct. That Committee found that the students had committed an act of academic misconduct and each was given a zero grade for each subject and excluded from the University for a period of time. When the

¹⁷⁸ [1997] NSWSCA 184 (22 April 1997).

¹⁷⁹ *Ibid* [11].

¹⁸⁰ *Ibid* [14] (Gleeson CJ).

¹⁸¹ [2004] VSC 180 (27 May 2004).

students' internal appeal was heard and dismissed by the Reserve Proctorial Board, the students commenced proceedings in the Supreme Court of Victoria seeking judicial review of the decisions of the Committee and the Board.

Balmford J concentrated on whether the students' claims of lack of procedural fairness had been proven on the facts.¹⁸² Counsel for the student plaintiffs first argued that the Board's role was purely judicial and that it was improper for it to take on an inquisitorial role and treat the chief examiners as mere witnesses instead of prosecutors.¹⁸³ Secondly, it was argued that the presence on the Board of an expert in mathematics was inappropriate.¹⁸⁴ Thirdly, the decision was challenged on the ground of apprehended bias as a member of the Board and a person who was giving evidence obtained coffee together and engaged in conversation during a break in the hearing.¹⁸⁵ The Supreme Court found against the students on all these arguments. Her Honour noted that, according to the relevant University regulations, the Board could follow any procedure it considered appropriate, and found that it had acted fairly to all parties in the manner in which it had dealt with the claims, that its fairness was not compromised by the presence of an expert on the disciplinary tribunal, and that no imputation of bias could be drawn in the circumstances by the 'fair minded lay observer'.¹⁸⁶ Accordingly, the students' application for review was dismissed. Leave to appeal was refused by the Court of Appeal.¹⁸⁷

(b) *Non-Academic Misconduct*

When the courts have considered student complaints about decisions involving non-academic misconduct, again they have consistently and universally insisted on strict adherence to accepted administrative law principles, and they have made it clear that students have a right to a fair hearing. A court satisfied of this will not interfere with the decision.

When Katherine Bray and 57 other students at The University of Melbourne unlawfully entered and occupied one of the University's administration buildings, they were charged with breaches of discipline and good order under the University's student discipline statute. A hearing was conducted pursuant to the student discipline statute and Bray was suspended from her Bachelor of Arts course for one semester. Her appeal to the University's Appeal Committee was dismissed, so Bray subsequently commenced legal proceedings in the Supreme Court of Victoria seeking judicial review of the University decisions.¹⁸⁸

Byrne J found there was no substance to Bray's argument that the rules of natural justice had been breached at the University hearings because, in its handling of her appeal, the Appeal Committee had acted fairly and had given her

¹⁸² *Ibid* [45].

¹⁸³ *Ibid* [21].

¹⁸⁴ *Ibid* [25].

¹⁸⁵ *Ibid* [31]–[32].

¹⁸⁶ *Ibid* [22], [30], [39].

¹⁸⁷ *Simjanoski v La Trobe University* [2004] VSCA 125 (23 July 2004).

¹⁸⁸ *Bray v The University of Melbourne* [2001] VSC 391 (19 October 2001).

the opportunity to know the case she had to meet and to respond to it.¹⁸⁹ However, his Honour did set aside the decision of the Appeal Committee and ordered the matter be remitted to it for further consideration¹⁹⁰ on the ground that it had acted ultra vires: although the Committee had the power to *exclude* a student from the University, it did not have authority to *suspend* her from her course. Counsel for the University argued the Committee's use of the word 'suspended' in the penalty 'was an infelicity'¹⁹¹ and that it was 'an issue of semantics rather than one of substance.'¹⁹² After reviewing the University rules, his Honour disagreed: the suspension of a student's enrolment in a course was not a punitive course open to the Committee.¹⁹³ His Honour also rejected Counsel's argument to decline relief as a matter of discretion on the basis that the penalty imposed was less severe than that which would in all probability be imposed if the matter were remitted to the Appeal Committee as he was not prepared to assume the Committee would impose a more severe penalty on her.¹⁹⁴

At around the same time as Katherine Bray's legal action, Loc Tien Hoang, a Monash University student, was also involved in judicial review proceedings in the Supreme Court of Victoria.¹⁹⁵ In March 2000, Hoang had been found guilty of general misconduct by the discipline committee of the Faculty of Business and Economics and was excluded from the University from that date to the end of the 2001 academic year.¹⁹⁶ Allegations were made against Hoang that, despite a number of attempts that had been made to get him to desist from contacting a female staff member, he had not done so. Hoang admitted this conduct but argued it did not amount to harassment or intimidation. He also argued that the penalty was too severe and should be compared to a 'much lesser penalty imposed upon students at The University of Melbourne who had caused property damage in a rampage earlier this year.'¹⁹⁷

Although Hoang had a right of appeal under the provisions of the University statute, he did not avail himself of that right. Instead, he commenced legal proceedings in the Supreme Court of Victoria in which he appeared in person. It is not surprising that the Court had some difficulty understanding the precise nature of the proceedings and took care to explain its conclusions, particularly as at all times Hoang was unrepresented by legal counsel. Ashley J wanted to

make it clear to the plaintiff ... that the proceeding before me is not a proceeding which enables a re-hearing of the matter which was heard by the discipline committee. No such appeal is possible to this court or to any other court. ... This court is solely concerned with whether or not there was some procedural unfairness in the proceeding below, or whether the decision that was reached

¹⁸⁹ Ibid [23].

¹⁹⁰ Ibid [26].

¹⁹¹ Ibid [8].

¹⁹² Ibid.

¹⁹³ Ibid [12].

¹⁹⁴ Ibid [14].

¹⁹⁵ *Hoang v Monash University* [2001] VSC 376 (4 October 2001).

¹⁹⁶ Ibid [1] (Ashley J).

¹⁹⁷ Ibid [12].

was so far out of kilter with the material before the committee that it was shown to be quite unreasonable.¹⁹⁸

After reviewing the procedure deposed to in the affidavits proffered by the University, the Court held ‘that the plaintiff was afforded no less than procedural propriety.’¹⁹⁹ The Court also noted that it was open to the discipline committee to make a finding of harassment given that the staff member had obtained an intervention order from the Magistrates’ Court of Victoria which prohibited Hoang from contacting her or being within 400 metres of the University’s Caulfield campus.²⁰⁰ Furthermore, the Court confirmed that the reasonableness of a penalty in one case could not be measured by comparing penalties in a dissimilar case and held that the discipline committee was entitled to form the view that the student had persisted in making unwarranted advances to the staff member and that this had been distressing to her and merited a significant penalty.²⁰¹

When Taragh Wilde, a postgraduate student at The University of Sydney, was charged with misconduct under the University by-laws, she also challenged the University’s actions in the courts.²⁰² She had earlier complained of harassment by members of the security staff, but an internal inquiry by the University found her allegations to be unsubstantiated. The matter had come to the attention of the Vice-Chancellor, who determined that misconduct proceedings should be commenced against Wilde because she failed to respond to reasonable and lawful requests to identify herself and she had physically assaulted patrol officers by kicking and spitting on them.²⁰³ The essence of Wilde’s complaint was that the University allowed her allegations of harassment to be turned against her and be used to commence student misconduct proceedings.²⁰⁴ The Court refused to accept Wilde’s claim that she had been denied natural justice, because she was not informed of the possibility that the inquiry following her complaint might lead to allegations of student misconduct. In the view of Macready AJ:

I cannot see how in any way the University, in deciding whether or not to put in train such a process, is first obliged to give notice of the fact that it is considering doing so to the plaintiff. ... The withdrawal by the plaintiff of her allegations of harassment would have done nothing as the University was properly and lawfully in possession of her allegations, reports from its patrol officers and the results of the investigation, which they quite properly put in hand when the allegations were made. ... In the proper performance of its functions faced with such allegations it had to take some steps to investigate the claims. In my view there is no substance in this point.²⁰⁵

¹⁹⁸ Ibid [9].

¹⁹⁹ Ibid [14].

²⁰⁰ Ibid [4], [10].

²⁰¹ Ibid [13].

²⁰² *Wilde v University of Sydney* [2002] NSWSC 954 (15 October 2002).

²⁰³ Ibid [10] (Macready AJ).

²⁰⁴ Ibid [27].

²⁰⁵ Ibid [38]. The student’s subsequent complaint of transgender discrimination was also ultimately dismissed: *Wilde v University of Sydney (EOD)* [2004] NSWADTAP 32 (27 July 2004).

C Allegations of Discrimination

Some dissatisfied students have not alleged the university's failure to observe principles of natural justice as discussed above, but have alleged discrimination by the university. This alternative legal course has also generally been unsuccessful for the students involved.

A recent survey of litigation involving Australian universities found that '[c]omplaints of discrimination make up almost half of the total number of student cases, but few of these cases are actually about conduct prohibited by discrimination legislation'.²⁰⁶ In most cases, students have attempted to use discrimination legislation to remedy their dissatisfaction with an adverse university decision by alleging some form of discrimination on the part of the university in relation to enrolment, assessment, academic progress or disciplinary proceedings. This strategy has generally failed as students have been unable to substantiate their claims or prove that they were treated differently based on a reason proscribed by legislation.²⁰⁷

Prospective students have been unable to establish a causal link between the rejection of their applications and the alleged discriminatory actions by the universities.²⁰⁸ This has especially been the case where applications for enrolment in postgraduate courses have been rejected because of insufficient professional experience or level of prior study,²⁰⁹ or failure to meet the university's entry criteria.²¹⁰ Jennifer Jandruwanda alleged racial discrimination when she attempted to enrol in a postgraduate course at the University of South Australia, and, although there was evidence of unfair and inappropriate treatment, ultimately the Court found that, without more, this did not amount to discrimination simply because she was an Aboriginal person.²¹¹

Current students have challenged decisions involving academic assessment, alleging discrimination based on political beliefs,²¹² 'presumed' homosexuality,²¹³ and race.²¹⁴ Students have also challenged decisions to exclude them from

²⁰⁶ Astor, 'Australian Universities in Court', above n 2, 167.

²⁰⁷ Commonwealth and state laws operate concurrently in this area. See *Australian Human Rights Commission Act 1986* (Cth); *Age Discrimination Act 2004* (Cth); *Disability Discrimination Act 1992* (Cth); *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth). See also *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 1995* (Vic); *Equal Opportunity Act 1984* (WA). A university is an 'educational authority' as defined in *Disability Discrimination Act 1992* (Cth) s 4; *Anti-Discrimination Act 1977* (NSW) s 4. Specific provision is made regarding discrimination in education in *Disability Discrimination Act 1992* (Cth) s 22; *Sex Discrimination Act 1984* (Cth) s 21; *Anti-Discrimination Act 1997* (NSW) ss 17 and 31A.

²⁰⁸ See, eg, *Fainstein v University of New South Wales* [2004] NSWADT 26 (10 February 2004).

²⁰⁹ See, eg, *Abdulla v The University of Sydney [No 1]* [1997] NSWEO 130 (18 April 1997).

²¹⁰ See, eg, *Rana v The Flinders University of South Australia* [2005] FMCA 1473 (24 November 2005).

²¹¹ See *Jandruwanda v University of South Australia* [2004] FCA 219 (15 March 2004).

²¹² See, eg, *Loizou v University of Melbourne* [2000] VSC 1 (28 January 2000).

²¹³ *Z v University of A* [2001] NSWADT 110 (18 June 2001).

²¹⁴ See, eg, *Simundic v University of Newcastle* [2007] FCAFC 144 (31 August 2007); *Tu v University of Sydney [No 2] (EOD)* [2002] NSWADTAP 25 (13 August 2002).

their courses, alleging discrimination based on race²¹⁵ and disability²¹⁶ and have alleged discrimination when adverse decisions have been made in relation to plagiarism²¹⁷ and non-academic misconduct.²¹⁸ All these legal challenges have failed. Had these students framed their legal action based on administrative law principles, it is unlikely the outcome would have been any different from students challenging decisions involving academic judgment or decisions made pursuant to proper procedures.

D *FOI Applications*

The only area where students have had some success is with challenges to university decisions relating to what information will and will not be released to them.

Although it has been argued that the existence of FOI legislation ‘has had a major and positive impact on changing the culture of the public sector from being very inward looking to accepting a greater sense of openness’,²¹⁹ this epiphany may have taken longer to reach universities.

Rights under FOI legislation are limited only by ‘exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by ... public authorities’.²²⁰ Each of the FOI Acts contains exemption provisions which can only be relied upon to deny access to specific documents.²²¹

1 *Documents That Do Not Exist or Cannot Be Found*

Requests for access to documents may be refused if the documents do not exist or cannot be found.²²² Tony Redfern’s application for access to the marking guidelines for a law exam failed as the evidence was that written marking criteria did not and never existed.²²³ The AAT confirmed that the right of access con-

²¹⁵ See, eg, *Bahonko v Royal Melbourne Institute of Technology* [2006] FCA 1492 (24 November 2006); *Chung v University of Sydney* [2002] FCA 186 (21 February 2002); *Elmaraazey v University of New South Wales* [1996] HREOCA 17 (17 July 1996); *Huang v University of New South Wales* [2008] FCA 1930 (18 December 2008); *Sekhon v Ballarat University College* [1993] HREOCA 17 (30 July 1993); *Yonis v Vice-Chancellor, University of New South Wales* [2005] NSWADT 109 (17 May 2005).

²¹⁶ See, eg, *Huang v University of New South Wales* [2008] FCA 1930 (18 December 2008); *Yonis v Vice-Chancellor, University of New South Wales* [2005] NSWADT 109 (17 May 2005).

²¹⁷ See, eg, *Kunhi v University of New England* [2008] NSWADT 333 (16 December 2008).

²¹⁸ See, eg, *Wecker v University of Technology, Sydney* [2007] NSWSC 927 (23 August 2007).

²¹⁹ Ron McLeod, ‘Freedom of Information — An Ombudsman’s Perspective’ (2001) 29 *Federal Law Review* 359, 363. See also Rick Snell, ‘Freedom of Information: The Experience of the Australian States — An Epiphany?’ (2001) 29 *Federal Law Review* 343.

²²⁰ See, eg, *Freedom of Information Act 1982* (Cth) s 3(1)(b).

²²¹ *Freedom of Information Act 1982* (Cth) pt IV; *Freedom of Information Act 1989* (ACT) pt 4; *Freedom of Information Act 1989* (NSW) sch 1; *Information Act* (NT) pt 4; *Right to Information Act 2009* (Qld) sch 3; *Freedom of Information Act 1991* (SA) sch 1; *Freedom of Information Act 1991* (Tas) pt 3; *Freedom of Information Act 1982* (Vic) pt IV; *Freedom of Information Act 1992* (WA) sch 1.

²²² See, eg, *Freedom of Information Act 1982* (Cth) s 24A; *Freedom of Information Act 1992* (WA) s 26.

²²³ *Re Redfern and University of Canberra* (1995) 38 ALD 457, 461 [15] (Deputy President McMahon).

ferred by the legislation²²⁴ is a right to obtain access to documents, not information, and that there was no obligation on the University to collect information in its possession and then to create a new document so it could be provided when requested.²²⁵

When requested documents exist or should exist, inquiry is made as to the adequacy of the searches conducted to locate the documents. If all reasonable steps have been taken to find the documents and yet they still cannot be found, access may be rightly refused.²²⁶ This does not augur well for the administrative processes or record-keeping practices of an agency such as a university, particularly when the requested documents relate to Board of Examiners and Academic Appeals Committee decisions to exclude a student from doctoral studies.²²⁷ However,

[t]he question is simply whether the FOI request now under consideration was the subject of an adequate search and response. An agency is not bound by *FOIA* to keep documents in anticipation of a possible request or dispute. *FOIA* simply deals with the record system as it exists at the time a request is made.²²⁸

Accordingly, Robert Anderson's 2003 application seeking access to all relevant documents concerning a dispute he had with Charles Sturt University over the grade he was awarded in a subject in 1996 failed insofar as he wanted access to the exam answer booklet he submitted. The exam booklet had been marked and kept for four months after which it was destroyed in accordance with University policy.²²⁹

The second element of Anderson's claim was that the mark awarded to him for the relevant subject was incorrect. The Administrative Decisions Tribunal considered that although it was not permissible for a student disappointed by a mark to challenge the academic judgment involved in the assessment of academic work via FOI legislation, it was permissible for the student to examine the records to see if there were any errors.²³⁰ In the Tribunal's view it was 'a matter

²²⁴ *Freedom of Information Act 1982* (Cth) s 11.

²²⁵ *Re Redfern and University of Canberra* (1995) 38 ALD 457, 461 [17]–[19] (Deputy President McMahon).

²²⁶ *Re Mallet and Edith Cowan University* [2005] WAICmr 19 (7 November 2005).

²²⁷ *Ibid* [45]–[47], where the Western Australian Information Commissioner commented as follows:
I would have expected as a matter of good administrative practice that, if the meeting occurred, there would ... exist some documentation recording, at the least: the fact that a meeting of the Board of Examiners took place on 9 February 2001; what was discussed at that meeting; and the decisions taken at that meeting ... the dearth of documentation relating to it raises questions about the agency's record-keeping practices, as do the difficulties experienced by the agency in identifying and locating all relevant documents in response to the complainant's access application and in response to the complaint to my office ... This complaint highlights the fundamental importance of proper record keeping in terms of agencies' accountability for their processes, actions and decisions, particularly decisions that directly and significantly affect individuals.

²²⁸ *Anderson v The Pro-Vice Chancellor, Charles Sturt University* [2003] NSWADT 121 (23 May 2003) [20] (O'Connor DCJ).

²²⁹ *Ibid* [3].

²³⁰ *Ibid* [24].

to be regretted²³¹ that the mathematical error now conceded by the University had not been identified much earlier in the dispute.

It is ironic that decisions such as this, while identifying shortfalls in university practices regarding the preparation of documents such as marking guides, and meticulous record keeping, do not, on the face of it, encourage improvement. A university can simply respond to a FOI application by stating that the requested document does not exist.

2 *Documents Containing Material Obtained in Confidence or Affecting Personal Privacy*

Documents are also exempt under FOI legislation if disclosure would divulge information communicated in confidence,²³² or would involve the unreasonable disclosure of personal information.²³³

Having failed to access a non-existent marking guide, Tony Redfern also failed to get access to a random sample of other students' exam papers, the AAT holding that disclosure of exam responses subject to an obligation of confidentiality would be a misuse of information received in confidence.²³⁴

In another case, when Deakin University refused to release the name and contact details of an examiner of Ali Darwish's PhD thesis, arguing that disclosure would involve the unreasonable disclosure of information relating to the personal affairs of the examiner,²³⁵ the Victorian Civil and Administrative Tribunal ('VCAT') did not uphold the exemption asserted by the University, stating that:

The system for examination of PhD theses must be transparently fair ... Community attitudes to disclosure of the names of individuals has [sic] undergone significant change in the past decade. There is now greater emphasis on the protection of personal privacy, which tends towards non-disclosure. On the other hand, there is greater emphasis on accountability, which tends towards higher levels of disclosure. The case before the Tribunal falls into the second of those two categories ... a sufficient lack of transparency in the examination process has been demonstrated to tip the balance of reasonableness in favour of the applicant.²³⁶

VCAT was also not persuaded by the University's argument that disclosure of the name of the examiner would impair the ability of the University to secure examiners in the particular discipline in the future given the evidence that 95–97 per cent of the examiners employed each year by the University were not concerned about anonymity.²³⁷

²³¹ Ibid [31].

²³² See, eg, *Freedom of Information Act 1982* (Cth) s 45; *Freedom of Information Act 1982* (Vic) s 35.

²³³ See, eg, *Freedom of Information Act 1982* (Cth) s 41; *Freedom of Information Act 1982* (Vic) s 33.

²³⁴ *Re Redfern and University of Canberra* (1995) 38 ALD 457, 463 [29] (Deputy President McMahon).

²³⁵ See *Freedom of Information Act 1982* (Vic) s 33.

²³⁶ *Darwish v Deakin University* [2002] VCAT 87 (22 February 2002) [23]–[25] (Strong VP).

²³⁷ Ibid [31].

3 Exemptions in Relation to Tests, Examinations and Audits

(a) General Exemptions

Some exemptions under FOI legislation apply more generally to protect the aim and operation of tests, examinations or audits.²³⁸ A further reason the AAT denied Redfern access to a sample of students' exam responses and 'the most important ground for exemption'²³⁹ was that disclosure could reasonably be expected to prejudice the effectiveness of procedures for the conduct of examinations,²⁴⁰ and because there was no countervailing public interest to require disclosure.²⁴¹ The AAT accepted the evidence of the Vice-Chancellor and academics in the Faculty of Management and School of Law that disclosure would undermine the finality of the assessment and review process and the security and integrity of the exam system should exam responses be released.²⁴² In another case, the AAT was also unable to conclude that it would be in the public interest for copies of examination papers and marking sheets used in a training course at the Australian Federal Police College to be made available, even though it was 'of the opinion that there is a public interest that such training procedures and tests ... should be as open and as fair as possible'.²⁴³

However, there was one case in which the balance of public interest did favour the granting of the application.²⁴⁴ That case involved a group of history honours graduates who sought access to information on staff record sheets relating to the assessment of their performance. The Australian National University had denied access on the ground that disclosure would prejudice the assessment system. The AAT granted access because 'students have a legitimate interest in knowing what is said by their supervisor about their ... thesis'.²⁴⁵ The AAT also agreed with the evidence of some witnesses that, in assessing the work of a student, an academic

²³⁸ See *Freedom of Information Act 1982* (Cth) ss 40(1)–(2). See also *Freedom of Information Act 1989* (ACT) ss 40(1)(a)–(b); *Freedom of Information Act 1989* (NSW) sch 1 pt 3 cl 16(a)(i)–(ii); *Right to Information Act 2009* (Qld) sch 4 pt 3 cl 21; *Freedom of Information Act 1991* (SA) sch 1 pt 3 cl 16(1)(a)(i)–(ii); *Freedom of Information Act 1992* (WA) sch 1 cl 11(1)(a)–(b).

²³⁹ *Re Redfern and University of Canberra* (1995) 38 ALD 457, 464 [35] (Deputy President McMahan).

²⁴⁰ See *Freedom of Information Act 1982* (Cth) s 40(1)(a).

²⁴¹ See *ibid* s 40(2).

²⁴² *Re Redfern and University of Canberra* (1995) 38 ALD 457, 465–6 [38]–[39] (Deputy President McMahan). It is also interesting to note the following comment of the Tribunal in relation to the possibility of plagiarism in this context:

Highly marked essays are saleable items. There is reason to assume that annotated and marked examination responses would also be valuable. The evidence was that plagiarism is an increasing danger because of the spread of full fee paying courses. It is necessary in order to protect the integrity of the degrees awarded by the University and to preserve the recognition and high standing which those degrees have in Australia and other parts of the world, that high standards of integrity be observed and that plagiarism be detected and eliminated.

²⁴³ *Re Ascic and Australian Federal Police* [1986] AATA 108 (18 April 1986) [23] (Sir Prentice, Member Pascoe, Member Wilkins). The appeal to the Federal Court of Australia was dismissed: *Ascic v Australian Federal Police* (1986) 11 ALN N184.

²⁴⁴ *Re James and Australian National University* (1984) 6 ALD 687. Cf *Re Ascic and Australian Federal Police* [1986] AATA 108 (18 April 1986) [23] (Sir Prentice, Members Pascoe and Wilkins).

²⁴⁵ *Ibid* 704 [99] (Deputy President Hall).

must be prepared to make judgments honestly and impartially and be prepared to stand by those judgments. It stated:

The question is whether graduate students should be denied access to information about their undergraduate performance because of fears that open disclosure may prejudice the assessment system by exposing some members of academic staff to pressures with which they may be unable to cope. However, the pressures flowing from greater accountability are, in my view, an inescapable concomitant of more open government. To react too timorously to every anticipated situation of pressure could well negate the principles underlying the *Freedom of Information Act*. Whether those principles fit comfortably upon an academic institution such as the Australian National University may be another question. But it is not a question to which I need to address myself. Parliament has made the decision that the Act is to apply.²⁴⁶

The AAT also noted that there is

a public interest in such records being maintained accurately and fairly ... [and] if, as a consequence of the *Freedom of Information Act*, greater care is taken by academic staff as to the comments recorded, that will serve the public interest.²⁴⁷

(b) *Specific Exemptions*

Another category of exemption under some FOI legislation is the exemption that applies specifically to examination papers, reports or similar documents when the use for which the documents were prepared has not been completed.²⁴⁸ Victoria has 'what appears to be a much narrower provision in relation to examination material than the Commonwealth and other States',²⁴⁹ and it is also the only state that empowers its external review body to grant access to exempt documents where it is of the opinion that the public interest requires that access to the document should be granted.²⁵⁰

Zane McKean recently sought and was denied access to an exam paper and the exam marking guides that did in fact exist for finance and investments subjects at The University of Melbourne. When he commenced legal proceedings, he did not rely on the public interest override in the Victorian FOI legislation;²⁵¹ he

²⁴⁶ Ibid 703 [96].

²⁴⁷ Ibid 704 [98].

²⁴⁸ See, eg, *Information Act 2003* (NT) s 57(3)(d); *Freedom of Information Act 1991* (Tas) s 32(c); *Freedom of Information Act 1982* (Vic) s 34(4)(c).

²⁴⁹ *McKean v University of Melbourne (General)* [2007] VCAT 1310 (31 July 2007) [24] (Deputy President Dwyer).

²⁵⁰ *Freedom of Information Act 1982* (Vic) s 50(4). The Victorian public interest 'override' is unusual and allows for the release of documents that would otherwise have been exempt under the Victorian FOI legislation. If VCAT finds that documents are not exempt, it is unnecessary for it to decide whether s 50(4) applies. VCAT will only consider whether the 'public interest override' applies if it finds documents are exempt on other grounds: *Mees v University of Melbourne* [2009] VCAT 782 (6 May 2009) affd [2009] VSC 493 (5 November 2009).

²⁵¹ See *McKean v University of Melbourne* [2007] VCAT 1310 (31 July 2007) [31] where it was noted by Deputy President Dwyer 'for the record' that 'the applicant did not seek to avail himself of this provision and he did not argue that the public interest necessitated disclosure of documents in the public interest if they were otherwise exempt under either of the grounds claimed by the University.'

simply argued the documents were not exempt documents as the University claimed. This argument was ultimately successful.

The evidence of the head of the University's Department of Finance was that: there was a relatively narrow syllabus for these two subjects; the same syllabus had to be covered each time the subjects were offered; the subject matter of the examination was largely quantitative, rather than qualitative; there is a limited amount of information that can be examined, so questions are 'recycled' from year to year as it is impractical to set fresh questions each year; disclosure of marking guides from a particular semester would enable students in a future semester to 'learn by heart' answers to common questions without necessarily gaining the technical knowledge, giving them a false sense of their real level of knowledge; disclosure of marking guides would give a false sense that the material in the guides comprised 'model answers' rather than being guides to what might be a correct answer; and disclosure of marking guides would impact on the methods and procedures used by the University for the conduct of future examinations in these two subjects.²⁵²

This evidence was used by the University to contend that the marking guides were internal working documents and that their disclosure would be contrary to the public interest. VCAT was not satisfied that it would be contrary to the public interest (as opposed to being merely inconvenient) to disclose the marking guides.²⁵³ The University's concerns about a more open disclosure policy did not outweigh the principles of openness enshrined in the FOI legislation. VCAT also noted that

most positions of responsibility in the community involve pressures of some degree, and the community should expect from University examiners a reasonable level of transparency in the assessments of their students ... unless there is a clear case for exemption under the *FOI Act*, there is a public benefit in having a transparent assessment process.²⁵⁴

The University also argued that the marking guides and the examination paper came within the specific exemption relating to examination papers,²⁵⁵ and attempted to argue that the release of the documents in the context of subjects with a very narrow syllabus would prejudice the effectiveness of testing procedures or the attainment of the objects of the exams. However, in the view of Deputy President Dwyer:

Had I been considering the matter under this other legislation in other jurisdictions, it may have been possible for the University to argue, and for me to make a finding, along such lines. However, I cannot imply into the Victorian legislation something that is not there. If the use or uses for which the marking guides and examination papers were prepared has been completed, the exemption un-

²⁵² Ibid [9].

²⁵³ Ibid [18].

²⁵⁴ Ibid [15].

²⁵⁵ See *Freedom of Information Act 1982* (Vic) s 34(4).

der s 34(4)(c) of the Victorian *FOI Act* fails to apply, and the extent of any possible prejudice becomes irrelevant to this ground.²⁵⁶

The University also tried to use the evidence to imply a ‘public interest’ test into the examination paper exemption.²⁵⁷ This attempt also failed. In the view of Deputy President Dwyer, the only dispute under this provision was ‘whether the use or uses for which the documents were prepared had been completed.’²⁵⁸ As it was clear on the face of the documents that each of them was prepared solely for use in the particular exam in the particular subject in the particular semester, and since this use was completed at the end of the exam period when the results were published, none of the documents were exempt.²⁵⁹ The University’s appeal to the Supreme Court of Victoria was dismissed.²⁶⁰

V CONCLUSION

The increase in litigation involving universities and students tends to suggest that internal rules and processes are not achieving the desired outcomes as well as one would hope or expect.²⁶¹ This inference is reinforced by the reported increase in complaints to parliamentary Ombudsmen. The use of internal grievance procedures is generally simpler and less time-consuming than litigation. It is difficult to understand why some students bypass these procedures and student Ombudsmen entirely and go directly to a court or tribunal with their complaints about adverse decisions. Students are mostly self-represented before these external bodies, which may be a reason for the relatively large number of matters that fail simply on jurisdictional grounds and involve ‘an unwieldy bundle of claims’.²⁶² Courts and tribunals will assume jurisdiction in appropriate cases but, in matters involving academic judgment, they will be reluctant to intervene, deferring to the authority of the academy. Attempts to involve a court in adjudication upon questions of academic judgment and upon the content and standard required by a university for the award of its degrees have been unsuccessful. A fail grade on an assessment will not be sufficient on its own to ground a successful application for legal redress.²⁶³ It is clearly necessary for students to simply accept that their efforts do not always meet the standards set by the universities. Similarly, in the absence of evidence that they were treated differently, students will be hard pressed to use anti-discrimination laws to challenge university decisions.

The cases have shown the courts will sometimes require universities to make information about assessment available to students and will clearly distinguish

²⁵⁶ *McKean v University of Melbourne* [2007] VCAT 1310 (31 July 2007) [25].

²⁵⁷ *Ibid* [26].

²⁵⁸ *Ibid* [22].

²⁵⁹ *Ibid* [29]–[30].

²⁶⁰ *University of Melbourne v McKean* [2008] VSC 325 (28 August 2008).

²⁶¹ Hilary Astor, ‘Improving Dispute Resolution in Australian Universities: Options for the Future’ (2005) 27 *Journal of Higher Education Policy and Management* 49.

²⁶² *Hanna v University of New England* [2006] NSWSC 122 (5 April 2006) [2] (Malpass AsJ).

²⁶³ See, eg, *Ivins v Griffith University* [2001] QCA 393 (19 September 2001).

matters of academic judgment from disciplinary or procedural matters. Courts insist on high standards of procedural fairness and will intervene if this has been denied to a student, even if university decision-makers have followed internal rules. Even so, the only remedy available to a court is to declare a decision void and to remit it to the decision-maker, so this may ultimately be a pyrrhic victory for the student.

The apparent successes of university defendants comes at a cost in terms of time, money and adverse public attention incurred in responding to student challenges. Grievances that may once have been dealt with internally by the University Visitor are now being looked at externally in a very public setting. Although often unable to grant the remedies sought by students, in some instances, courts and tribunals have been critical of universities' administrative practices. It is clearly in the interests of universities to avoid legal challenges to their decisions affecting students. Ensuring that policies and practices are accessible, clear and fair is obviously good administrative practice and the most desirable course for all universities to follow. The establishment of university Ombudsmen who are available, independent and impartial could also lead to less litigation. While a focus on getting procedures absolutely right in their formulation and operation should be the priority, there can be no guarantee that there will never be external challenges.

The cases chronicled above provide a clear indication that courts and tribunals are not the most appropriate fora for the resolution of these challenges. What is the solution? The increase in complaints to parliamentary Ombudsmen suggests that more students are looking in that direction for assistance with their grievances. It is time for serious consideration to be given to what would best fill the void left by the demise of the University Visitor and to consolidate the various avenues for external review.