Student Discipline: A Legal and Empirical Study of University Decision-Making

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Certification of originality

I hereby certify that the work undertaken and presented in this thesis is my original work.

Signed,
Bruce John Lindsay
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Abstract

This thesis argues that recurrent, if not systemic, shortcomings exist in university practice and procedure in the handling of student discipline. Such shortcomings especially (but not exclusively) relate to institutional adherence to norms of fair procedure. While these shortcomings may not be fatal to basic functioning of university discipline, the findings in this study advert to the need for serious, sustained and transparent attention to this area of quasi-judicial administration.

The thesis represents a legal and empirical investigation of student disciplinary decision-making in Australian public universities. It commences with contextual analysis of the history of the Australian university system and present public policy settings. The investigation then embarks on a study of the legal character of the student-university relationship, the nature of disciplinary action in respect of students in higher education (including its historical character), and reference to empirical literature on this subject-matter. Original findings on rates of student disciplinary action at selected Australian universities are also included.

The central part of the empirical research comprises analysis of institutions’ disciplinary measures and conduct as considered in respect of key legal standards applying to universities, notably the provision of procedural fairness to students. Additionally, the empirical analysis considers other issues of legality in disciplinary decision-making within the administrative law framework, as well as consideration of wider issues, such as the impact of university commercialisation on disciplinary systems.

The thesis concludes with an overview of findings and results, with proposals for reform to university disciplinary arrangements and to mechanisms for review of university decisions.
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Chapter 1

A ‘Peculiar Public Institution’: Issues of Legal Research into the Academy

1.1 A ‘Socio-Legal’ Study and its Meanings

This dissertation is a study of a particular type of decision-making (disciplinary action) in a particular type of public institution (university). The origins of this research project do not lie in the search for a subject-matter that might serve to further task of legal scholarship. I hope that it might do this in any case. Rather, its origins were more pragmatic, and did not necessarily begin with the discipline of law at all. For a number of years I had worked in the tertiary education sector (which, in Australia, encompasses both universities and Technical and Further Education (TAFE) colleges, or degree-granting and non-degree-granting institutions), primarily as a student advocate, assisting students with complaints and representing them in internal disputes, both academic and administrative. A great deal of problem-solving or dispute-resolution in the sector occurs informally, through negotiation, some form of conciliation, and/or advice and informal representations to internal decision-makers. As with any large and bureaucratic organization, high-volume and a diverse array of decisions are made on a daily basis, some reflecting solely internal rules or discretions (eg academic decisions), others affected by external obligations and/or pressures (eg fee-charging, admissions). My experiences with university decision-makers varied widely, and, over time, it struck me that little in the way of systemic analysis of university decision-making had ever been carried out. Hence, my emerging interest was in the university as a public institution and as an administrative entity. In this respect, the research problem was more akin to sociological study of large organizations and/or of public administration. Yet what particularly interested me also was that consideration and analysis of decision-making and internal practices were deeply affected, structured and focused on rules.  

Rule-making, rule-application, and rule-interpretation have become a profound preoccupation within higher education institutions, and, in this inscription of rules in institutional action, the

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1 Griffith University v Tang (2005) 221 CLR 99, 156 (Kirby J).
2 On the question of rules generally, see Robert Baldwin Rules and Government (Clarendon Press, 1995), chapter 2. Baldwin notes (7-8): A ‘rule’ may be defined as ‘a general norm mandating or guiding conduct or action in a given type of situation’... Governmental rules possess a number of properties or dimensions. Rule-makers, accordingly, have a number of variables to bear in mind when selecting rules and in assessing the appropriateness of rules for different purposes. Of special importance are the following rule dimensions:
- Legal form or status.
- Legal force or effect.
- Associated prescription or sanction.
- Specificity or precision.
- Accessibility and intelligibility.
- Scope or inclusiveness.
circumstances of universities are consistent with general governmental conditions.\(^3\) In the intersection of decision-making and rules, it seemed obvious that the disciplinary perspective of law and legal scholarship would be valuable and necessary to a more systematic understanding of what was going on within these institutions.

From the perspective of disciplinary and methodological approach, therefore, I was drawn toward law and that ‘sub-discipline’ (or sub-disciplines) termed ‘socio-legal studies.’ The parameters and criteria of socio-legal analysis are nebulous and the subject of some debate and controversy. As Banakar and Travers have remarked:\(^4\)

> We have so far used ‘socio-legal research’ as a general term for three types of research. Firstly, there is empirical research that addresses the questions asked about law by black-letter lawyers and practitioners. This often views social science instrumentally as something that can be used to address legal concerns… There is also the idea that one must acknowledge a wider context to law and legal institutions, but without engaging in the many theoretical and political debates in sociology about how to understand society. Secondly, there is the research conducted for government departments and agencies… finally, there is research that engages with central issues in social theory.

Further, a major part of the complexity or difficulty in synthesizing law and social research is that many of the presumptions, techniques and objectives of the two are different, if not, as Banakar and Travers additionally argue, incommensurable.\(^5\) As these writers note, there is a long history and ‘tradition’ (or various traditions) of establishing and expanding the intellectual and practical space in which precisely this synthesis operates and flourishes.

If part of the spectrum of socio-legal research includes those approaches applying social research methods in an instrumental fashion to legal issues and those approaches that seek a more genuine interdisciplinarity between law and social science, the approach I have taken to the present study spans this space. My emphasis is on that ‘tradition’ of socio-legal investigation concerned primarily with the inter-relationships of law (rules and norms) and *behaviour* (empirical practices and conduct). In the ‘synthetic’ space of socio-legal analysis, the first of these categories emphasises the legal character of the equation; the second, the sociological dimension.

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\(^3\) See Chapter 2, section 2.3, below.


\(^5\) Banaker and Travers ‘Law, Sociology and Method’ in Reza Banaker and Max Travers (eds) *Theory and Method in Socio-Legal Research* (Hart Publishing, 2005), 11-12: ‘In brief, law as a field of practice, and sociology as an academic discipline, relate themselves to society in fundamentally different ways and seek different ends… What does all this mean for sociological studies of law? It means that the field of the sociology of law is given the difficult (if not impossible) task of uniting two fundamentally different images of society…’
On the instrumental side, my approach has included the use of social research methods in analysis of the practical application of rules and powers, both legal and non-legal. In this respect, my approach is similar to those that seek to investigate, test or elucidate the operation of law through empirical research techniques. The principal domain of legal doctrine investigated in the present research is administrative law, and in particular (although not exclusively) procedural fairness. That doctrine supplies an underpinning measure for institutional rules and conduct.

Yet this is not a study of legal institutions, at least not directly. It is, if anything, a study of public administration, situated in higher education, from the perspective of legal and sociological content. It is an analysis of the university as an administrative-legal and sociological institution. In Banaker and Travers’ schema above, this might be understood as an integration of law and ‘its wider context’ (social phenomena), without extended and systematic regard to issues of social theory. Each of these disciplines contributes concepts, techniques and perspectives to the research project as a whole, and, in the final analysis, to a series of propositions on policy reform. Or to put this another way – and perhaps preferable way – this study is consistent with the investigation of law as normative and ‘routine structuring’ of social relations.

This is a very different outlook from that of some older sociolegal approaches treating law purely as a policy-instrument acting on society. A view of law as an aspect of social experience makes redundant sociolegal efforts to trace causal connections between law and society, as if law existed as an asocial instrument of technique, external to social life. Instead, law itself, rather than law’s effects or conditioning causes, becomes to centre of sociolegal attention: law as normative ideas embedded in social practices.

1.2 Subject-Matter: Discipline, Discretion and Decision-Making

Investigation of the university raises the key theme of discretion and, by extension, the exercise of authoritative and legitimate power. Practical limits on the investigation of discretion in this institutional context were obviously needed, and hence the subject-matter of the study was constrained to disciplinary action taken by the university against students. There were a number of compelling reasons for this choice. First, in the wide constellation of decision-making undertaken by universities, disciplinary action is among the most formal and structured. Second, disciplinary action does not constitute a form of ‘mass’ decision-making, in which scrutiny of individual decisions would be especially difficult. Third, disciplinary action against students is

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neither exceptional nor rare; it occurs regularly, even on consistent cycle according to the academic year (eg following examination or assessment periods). Fourth, although relatively formal in character, disciplinary action is individualized and applies to discrete cases, in contrast, for example, to the legislative action of universities, which is collective and relatively *ad hoc*. There was the possibility, therefore, that disciplinary decision-making might prove sufficiently manageable and transparent to facilitate investigation.

As Keith Hawkins has remarked, questions of discretion and decision-making are not necessarily the same and ought not necessarily to be conflated:

> Social scientists tend to see discretion not so much in terms of legal rules, as in terms of choices that may sometimes be made in circumstances where there are no discernable rules or standards. They think in terms of decision-making, rather than discretion, and this leads to differences in emphasis. Many social scientists share with lawyers a concern for how law can best be made to serve its purposes... But where lawyers think in terms of legal rules in achieving outcomes, social scientists tend to think rather in terms of decision goals or decision processes.

A similar observation has been made by Baldwin in his substantial study of governmental rule-making. While discretion encompasses a field of legitimated or effective action available to a legal actor, decision-making refers to a greater depth of field. It makes reference to sociological and political factors. Decision-making concerns social phenomena otherwise assumed or abstracted out of the field of analysis.

The nature of discretion in a legal context has been comprehensively covered by writers such as Galligan. In the dialectical relation of discretion and (legal) rules, discretion is a terrain on which empirical (official) conduct and decision-making can be scrutinized. Discretion, of course, may operate at a range of levels, from wide legislative discretion to relatively narrow discretion accorded to lower-level administrators. In the university, the range of discretionary decision-making is wide. In respect of disciplinary action the exercise of discretion is tied to quite stringent rules deriving from various (and sometimes complex) sources, such as secondary legislation, the common law and administrative policy.

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10 Robert Baldwin *Rules and Government*, 24: ‘A legalistic conception of decision-making underplays the complexity of decisions and tends to see the “decision” as existing at a particular point in the administrative process, as an isolated event logically separable from its surroundings. This conception in turn produces a particular rule-centred view about the control of discretionary powers. Decisions, in short, are seen as simple discrete, and unproblematic as opposed to complex, subtle and woven into a broader process.’
1.3 Hypothesis

My desire in this research project is not only to investigate rules but additionally to gain insight into how those rules – and the discretion of decision-makers responsible for the interpretation and application of those rules – actually operate in practice. This is not an easy task, and it had to be crafted with some precision, both theoretically and methodologically.

I refer above to the role of legal standards in formulation of the analytical approach to the research project. A key legal standard (or set of standards) available to analysis of university decision-making, especially in regards to the relatively formalized action of discipline, is the provision of natural justice to the student, or as is nowadays preferred, procedural fairness. The rules of procedural fairness thereby became a central standard in the research. The function and value of this standard, however, is not abstract, or solely for jurisprudential value, but rather its value is more pragmatic (and, ultimately, policy-focused): that is, as a standard, indicator or measure of the quality of decision-making undertaken in the university.

The hypothesis of this research project is that university decision-making, in respect of the general legal standard of fair procedure (as it applies to student disciplinary action), is, if not poor, affected by significant shortcomings. That hypothesis emerges from practical experience in the sector, reinforced by an apparent growth in student litigation and calls for improved university complaints-handling. To put this hypothesis in terms of key questions, the study asks: Is university decision-making in respect of student disciplinary decisionmaking of a satisfactory quality? If we equate quality with fairness, do universities as a general rule meet legal standards of fairness in their conduct, practice and procedure? Certain preliminary and ancillary questions arise in dealing with these issues: What standards of procedural fairness apply to disciplinary decision-making in respect of university students? What is the historical and policy context for disciplinary decision-making in the university setting? If universities meet standards of fairness, in what aspects of conduct, practice and procedure do they meet those standards? If not, where do the shortcomings in conduct, practice and procedure lie? Further, where limitations lie, what improvements or reforms might be made to university practice to bring it broadly into line with standards of fairness?

12 See eg Kioa v West (1985) 159 CLR 550, 583-585 (Mason J).
13 For extended discussion of the concept of law as ‘standard,’ and procedural fairness as establishing a ‘fair treatment’ standard, see Denis Galligan Due Process and Fair Procedures: A Study of Administrative Procedures (Clarendon Press, 1996), Chs 1, 2.
14 See Chapter 5, section 5.3, and Chapter 10, section 10.4, below.
1.4 Methodological Challenges

The analytic strategy I adopt considers both legal and empirical (sociological) issues. Beyond context, three main methodological challenges present themselves. The first of these is access to data. Decision-making in any large, diverse and bureaucratic institution is, no doubt, relatively opaque, and the university is no different in this regard. The problem of data sources is one reason why the research focuses on disciplinary decision-making. Available data sources are either publicly available (disciplinary rules) or access to them is negotiable with institutions. Other than published rules, the data sources ultimately available were statistical data on disciplinary action, discipline case file, and interviews with participants in the discipline process (student advocates). Access to one further source of information was attempted (interview with discipline panel members) but did not prove successful. The value of formality of disciplinary proceedings is evident in case-files. This data source contains considerable, if sometimes incomplete, information on the actual conduct of disciplinary proceedings, especially hearings. It is from this source, in particular, that further legal issues (ie questions of applicable legal standards) arise. Student advocate interviews are particularly valuable in gaining in-depth, indirect information on disciplinary action and also on the wider policy context in which decisions are being made.

Aside from access to sources, a second challenge is management of data. Most data sources are qualitative, and this facet requires considerable interpretation and organization of information. In anticipation of this issue, limits are placed on ‘sample sizes,’ such that the volume of data is manageable but at the same time a valid, representative sample is investigated. As may be seen from Table 1.1, the sample size in relevant cases is between 18% and 42% of those institutions conventionally considered to be ‘public’ universities (as represented by membership of Universities Australia (UA), the peak body). The scope of institutions surveyed for case files is much lower (2 universities), primarily for practical reasons: capacity to access to university files is difficult, the number of files obtained per institutions is relatively high and sufficient for research purposes, and the density of information available from case files is considerable. As a representative sample, it is felt that access to files, in the numbers available, at the two participating institutions is satisfactory and manageable.
Table 1.1: Data sources and sample sizes, analysis of disciplinary action in Australian public universities

<table>
<thead>
<tr>
<th>Data source</th>
<th>‘Sample size’</th>
<th>Proportion of total potential sample size (n=38 UA members)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discipline proceedings statistics (one set per university)</td>
<td>7</td>
<td>18.4%</td>
</tr>
<tr>
<td>Discipline rules (one set per university)</td>
<td>16</td>
<td>42.1%</td>
</tr>
<tr>
<td>Case files</td>
<td>38</td>
<td>NA</td>
</tr>
<tr>
<td>Student advocate interviews (one per university)</td>
<td>13</td>
<td>34.2%</td>
</tr>
</tbody>
</table>

1.5 The Empirical Research Strategy: ‘Triangulation’

As the above comments indicate, the research strategy in its totality employs a combination of empirical research methods and traditional doctrinal legal research. Doctrinal analysis especially focuses on study of the student-university relationship and on relevant principles of administrative law.

The main empirical research strategy seeks to accumulate, compare and contrast empirical data, collected by means of social-scientific methods: quantitative and qualitative surveys, interviews, and case analyses.

This strategy is comparable to what is referred to in the literature on social-scientific research methods as ‘triangulation.’ That methodological model is drawn, by analogy, from the method of identifying, observing and measuring position in mathematical and spatial sciences (trigonometry, surveying and cartography). The paradigmatic equivalence of observable and measurable position is assumed by some other form of objectifiable ‘variable.’ The ‘variable’ in the present case is institutional behaviour in respect of (disciplinary) decision-making. The ‘base-point’ around which investigative methodologies and empirical data-sources are organized is the relevant legal standard (primarily procedural fairness). The use of, or reference to, this type of methodological approach occurs in scholarly research in nursing, tourism and public policy research. It is also been employed in socio-legal investigation in fields such as

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family law, corporate law, and criminal law. While the scientific analogy ought not to be overstated it provides an analytical mechanism of considerable value.

The objective of triangulation in social research – as with the acquisition of greater precision, accuracy and validity of measurement in the spatial sciences – is validation of knowledge of (social) phenomena, through acquisition of discrete but comparable bodies of evidence. Green and McClintock remark on the objective of the strategy that

The goal of triangulating methods is to strengthen the validity of the overall findings through congruence and/or complementarity of the results from each method. Congruence here means similarity, consistency, or convergence of results, whereas complementarity refers to one set of results enriching, expanding upon, clarifying or illustrating the other. Thus, the essence of the triangulation logic is that the methods represent independent assessments of the same phenomenon and contain offsetting kinds of bias and measurement error.

Other authors argue that triangulation is more correctly understood as a constituent feature of a wider methodological phenomenon, a ‘mixed-methods research process,’ in which researchers seek to establish an ‘expansive and creative form of research, not a limiting form of research… [that] suggests that researchers take an eclectic approach to method selection and the thinking about and conduct of research.’ As well as ‘eclectic,’ these authors consider the approach ‘philosophically’ as a ‘pragmatic method,’ employing methodological and inquisitorial tools as appropriate and available. The prevailing function of triangulation to interrogate subject-matter complements, according to these authors, other aspects or functions of ‘mixed-methods’ research, such as refinement of earlier research findings.

Thurmond and Begley both note that the triangulation approach may actually proceed from three different types of research strategy: those employing multiple data sources, those employing multiple investigators, or those employing multiple research methodologies. For present purposes, the ‘triangulation strategy’ employs multiple data-sources and research

24 Johnson and Onwuegbuzie ‘Mixed Methods Research: A Research Paradigm Whose Time Has Come’.
25 Thurmond ‘The Point of Triangulation’.
26 Begley ‘Using Triangulation in Nursing Research’.
methods. Consistent with the triangulation model, this approach to the research problem allows scrutiny of disciplinary decision-making conduct from the point of view of:

- statistics on disciplinary action,
- official rules,
- recorded evidence of the conduct of disciplinary hearings (including certain pre- and post-hearing information, such as notice and provision of reasons for decisions), and
- information from indirect participant-observers in decision-making processes.

Mixed-methods approach in these circumstances is not without its limitations. The most obvious limitation – and indeed, a key reason for seeking multiple data-sources in the first place – is opacity of the decision-making process, or in other words difficulty in obtaining data in relation to proceedings, personnel, decisions, reasoning for decisions, application of discipline rules, and so forth. By way of comparison, other studies on student disciplinary decision-making generally limit analysis to one form of data (excluding reported judicial opinion): disciplinary rules.\(^{27}\) In this respect, knowledge of disciplinary decision-making by universities is expanded as a result of the current approach. Yet, that advantage needs to be balanced against that fact that research in this thesis does not extend to direct evidence from decision-makers (eg discipline tribunal/panel members), nor from students directly affected by disciplinary action. Further, within the design of the research methods that are used, technical limitations arise. For example, while data is obtained from a reasonable proportion of institutions (ie obtains a ‘statistical validity’), there is not necessarily straightforward overlap of investigated institutions in each ‘data-set.’ This question is more pertinent in regards to comparisons of qualitative data derived from analysis of discipline rules and the observations of advocates. In that instance, where 42% and 34% of all public universities were investigated respectively, overlap between investigated institutions occurs in respect of 7 institutions (or 18.4% of all public universities), out of 16 institutions in which rules were analysed and out of 13 institutions at which advocates worked.

Notwithstanding these limits in research methodology, the value of ‘triangulation,’ or a ‘mixed-methods’ approach tends to be supported by the process and results in the present study. As Bloch notes,\(^{28}\) disparate data sources can, by their cumulative illumination of a given subject-matter, establish trends that provide a basis for authentication of knowledge: ‘…the triangulation of data sources enabled the identification of patterns and trends within and between communities that acted as the basis for the selection of the case study groups.’\(^{29}\)

Identification of patterns and trends in respect of fairness and legality in student disciplinary

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\(^{27}\) See Chapter 5, section 5.1.2, below. More recently, complementary data on student complaints and litigation have been obtained and analysed: see Chapter 5, section 5.1.3, below.


decision-making – across the three qualitative data-sources (survey of rules, case analysis, advocates’ interviews) – likewise tends to validate the use of ‘triangulation’ strategies in the present study. Quantitative data is more valuable for elaboration of the context of decision-making, especially rates and nature of disciplinary action.

Finally, it is worth remarking that ‘triangulation’ in social research, including socio-legal research, is not without its critics. Criticism concerns use of positivistic notions of science in the investigation and analysis of social phenomena. It can be argued that reproduction of methods (in this case, trigonometry and surveying) and epistemological criteria (eg validity, bias, error, objectivity) from the natural sciences to social analysis is at best problematic, at worst misleading. Blaikie\textsuperscript{30} describes use of the triangulation metaphor in social sciences as ‘inappropriate,’ as it misunderstands the nature and organization of phenomena under investigation. In surveying or trigonometry, the method aims to identify, fix and measure the existence of the subject-matter (a spatial point); in social sciences, its purported aim is ‘concerned with reducing error or bias.’\textsuperscript{31} Additionally, he argues that importation of triangulation into social research also imports the problem of different, variable or incommensurate assumptions and perspectives, associated with discrete methods (for example, positivistic, hermeneutic or ethnological presuppositions), being conflated or ignored.\textsuperscript{32} ‘Triangulation’ does seek to construct a unified analytical-strategic model from discrete (even disparate) sources and/or methodologies, possibly including both qualitative and quantitative methods. Blaikie’s concern is not necessarily with ‘combinations of methods and data sources’ in research, but rather with uncritical and inappropriate integration of methods and data-sources, ‘in light of the incommensurability of ontological and epistemological assumptions of methodological perspectives.’\textsuperscript{33} He concedes therefore that ‘It is legitimate, and it may be useful, to use multiple methods within a particular methodological perspective… or different data sources, provided they are used consistently within one perspective…’

His concern for consistent theoretical assumptions in research methodologies is reasonable. In the present case the approach is consistent. Focus on one object (or ‘object-domain’), namely disciplinary decision-making, is achieved through various data-sources and technical methods but within the context of a singular set of methodological presuppositions: the positivistic, social-scientific paradigm of ‘orthodox’ sociological (socio-legal) research. Alternative approaches would be possible, such as ethno-methodological analysis of communications and/or miscommunications in decision-making as it applies to various socio-economic or cultural groups (eg poorer students, Aboriginal students or international students), or

\textsuperscript{30} Norman Blaikie ‘A Critique of the Use of Triangulation in Social Research’ (1991) 25 \textit{Quality and Quantity} 115.

\textsuperscript{31} Blaikie ‘A Critique of the Use of Triangulation in Social Research’, 122-123.

\textsuperscript{32} Blaikie ‘A Critique of the Use of Triangulation in Social Research’, 123-130.
psychological analysis of motivations, cognition or identity in the decision-making process. Such research would extend knowledge of this type of academic-administrative practice, and I would concur with Blaikie that integrating these methodologies into a single research strategy would be problematic, not least because to do so would confuse the subject-matter and the a priori theoretical principles of the study. In the present study, the subject-matter is institutional decision-making within the context of legal discretion.34

1.6 Outlining the Thesis and Chapter Contents

Given these remarks, the concept of a research strategy applying multiple methodologies/data-sources to an identified problem is an appropriate and valuable approach to socio-legal analysis. The university is a worthy recipient of such analytical attention. Sustained investigation of universities’ treatment of their students is sparse, notwithstanding that higher education has become a mass phenomenon and ‘credentialism’ central to the operation of the labour market.35 The ‘inflationary’ nature of university credentials is only reinforcing these trends.36 Additionally, it has recently been proposed that 40% of 25-34 year-olds should possess a higher education qualification by 2020 (up from 29% in 2008).37 The pressures on institutions and on those enrolled, or enrolling, in university programs will likely grow.

Students’ interests may be affected by universities’ decisions. Their interests may be seriously prejudiced by those decisions. In turn, it is imperative that universities can respond to actions that prejudice the institution’s basic mission, such as damage to academic standards, as well as safeguard persons and property within its sphere of operations. Capacity for ‘domestic’ discipline plays a role in the latter circumstances; obligations for fair conduct will be important to the former considerations. The research reported in this dissertation essentially deals with

34 I would differ with Blaikie, however, that the notion of ‘triangulation’ is an inappropriate metaphor for this ‘multiple-method’ strategy. The key issue would appear to be to distinguish between a ‘technical’ diversity or plurality in methodologies and/or data-sources (diversity in methodological content and procedure) and a wider ‘paradigmatic’ plurality (diversity in theoretical principles and analytical objects). The analogy to triangulation operates on the former plane, not the latter. The distinction may also be explained by reference to the (scientific) analogy of ‘constant’ and ‘variable’ as it operates in spatial science. Triangulation is possible by deriving the unknown, ‘variable’ point from the known, ‘constant’ points. In effect, as I have noted above, without two ‘known’ stable points the exercise is impossible. The content and procedure of investigative method may be ‘variable,’ but the objects of analysis (eg exercise of discretion and commensurate legal rules) and their theoretical presuppositions (appropriate jurisprudence of rules and discretion) cannot, ideally, at the same time, be ‘variable.’ This state of affairs appears to be where Blaikie’s concerns primarily lie. If, for instance, various theories or theoretical models of jurisprudence were additionally applied to the analysis, the situation would indeed become ‘confused,’ if not increasingly strained and chaotic. In that situation, a new methodological paradigm would have to be found, and a new research strategy established.
36 Marginson ‘The Decline in the Value of Educational Credentials in Australia’. 
individualized circumstances in which students’ and universities’ interests are affected. On occasion, systemic or structural issues pertaining to university operations or student conduct are considered, yet the scope of such discussions is inevitably limited by the constraints of space. In some instances, I have sought to elaborate on those points elsewhere.\textsuperscript{38}

The structure of this dissertation extends from contextual discussion and analysis, to analysis of empirical research, and finally to conclusions:

Chapter 2 establishes the historical and public-policy situation of Australian universities, from founding of the first such bodies in the 1850s through to the present ‘neoliberal’ university. Subsequently, I consider certain, important structural features that have arisen in the sector, namely the role of administration and ‘managerialism’ in the university, as well as key changes in the nature and characteristics of university students (or, as I term it, student subjectivity\textsuperscript{39}).

Chapter 3 outlines the nature of the student-university relationship at law, noting that this relationship is now founded on a range of legal bases, including contract, tort, administrative law, and, in some residual respects, the ancient common law of charities. Statutory regulation of the relationship has also grown significantly in recent years, especially in regards to ‘consumer protection’ treatment of students. In total, the legal ‘terrain’ of the relationship is complex and not clearly settled. Arguably, it is still in the midst of a process of evolutionary change.

Proceeding from the general to the particular, Chapter 4 seeks to expand the contextual investigation of the student-university relationship in a close analysis of the model of discipline as it applies to university students. Particular scrutiny is applied to academic misconduct, given that this issue has been identified as one of particular prevalence and concern in the contemporary university. I make reference especially to the issue of plagiarism. Not only is this issue important, if not notorious in the sector, but I argue it is actually quite problematic at a conceptual level, and legal research proves useful in resolving ambiguities surrounding this concept. Finally, I make reference to an additional problem in university discipline imported from law, variable evidentiary standards, which applies to select groups of students.

In Chapter 5, I review the literature on empirical research into student disciplinary decision-making, and additionally consider more recent literature on student complaints and disputes, in order to provide statistical information of relevance to disciplinary action. Previous empirical research into disciplinary decision-making has focused investigation on the operation of


\textsuperscript{38} Eg Bruce Lindsay ‘Breaking University Rules: Discipline and Indiscipline Past and Present’ (2008) 50 \textit{Australian Universities’ Review} 1 37.
disciplinary rules. This chapter expands the scope of statistical information by analysing original data on rates and nature of disciplinary action by universities against students.

In Chapter 6, I begin to move from contextual problems to qualitative findings on decision-making and fairness. Specifically, this chapter provides analysis and findings on a survey of student disciplinary rules at selected Australian universities, as measured against the legal standard of procedural fairness. In the course of the chapter comprehensive discussion and analysis of the rules of procedural fairness (and their content), as they are applicable to university disciplinary action, is undertaken.

Chapter 7 extends investigation and analysis of legal standards into decision-making practices in disciplinary cases. This insight is achieved by way of scrutiny of records on file at participating universities. Some statistical information is acquired, although the primary focus is qualitative review of legal standards, as far as is practicable, from the contents of administrative files. Issues and concerns in relation to the conduct of decision-making bodies involve not only questions of fair procedure but also other problems of legality, notably (but not exclusively) in respect of procedural conduct.

Empirical analysis culminates in the reporting in Chapter 8 on a series of interviews conducted with student advocates, who are typically involved in advising and/or representing students in disciplinary and other matters. Those discussions charted various procedural issues in respect of disciplinary proceedings, and especially key tenets of procedural fairness. Further, however, wider issues as to the impact of system-wide reforms (commercialization of the university sector) on the conduct of university discipline formed an important dimension of the interview data.

The final two chapters (Chapter 9 and 10) seek to provide broad, informed conclusions to the study. Chapter 9 summarizes the prevailing trends of the empirical research: trends in the quality of decision-making as measured against standards of fair procedure and legality generally. This assessment is placed within the wider context of ‘administrative justice’ and the applicability of the methods of individualized (‘judicial’) justice in the university system. Finally, Chapter 10 ventures a range of reforms to disciplinary rules and methods within the university, as well as engaging in an emerging debate over the value of, and preferred approach to, an ‘external’ disputes-handling or review jurisdiction in the higher education sector. The reform proposals are intended to contribute to the appropriate balance of good administration in public institutions and the relatively atypical nature of the university as an ‘administrative’ and public body.

2.1 The ‘Australian University’

The Australian university’s origins lie in small colonial institutions, developed under the auspices of the colonial governments, educating the sons (and later daughters) of the local, provincial elites, a situation expanded but largely unaltered until the Second World War. As with the comparable, ‘developed’ nations, rapid expansion of the university system after this War led to substantial changes in organisation, structure, size and functions of the university, and to change in the relationship of the university and society.

In Australia, government has played a leading role in the formation and development of the university sector. The universities have emerged as quasi-autonomous creatures of government, subject to growing state intervention and planning. In the post-Second World War environment, government has become responsible for policy direction and organisation. It might be said that this transition represented a passage from a colonial/post-colonial institution to an industrialised one, as well from an elite institution to one with a mass base.

The Australian university can be characterised as a product of local circumstances and world-historical trends in the organisation of higher education. Three periods emerge in an ‘institutional history.’ The first period includes the founding of the colonial universities until approximately the Second World War. The second period encompasses the Second World War and the long boom that followed it, including the period of subsequent economic and social crisis in the 1970s and 1980s. This was a period of rapid expansion and growth, and transition of the university to a more central place in economy and society. The final and contemporary period begins in the late 1980s and continues into the present, and may be classified as the period of the neoliberal university.

2.1.1 The Colonial/Postcolonial University

The Universities of Sydney and Melbourne were founded within three years of each other, in 1850 and 1853 respectively, as the first universities in the then Australian colonies. These

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40 ‘The Report (of the Royal Commission into establishing a university in Western Australia) recommends what is called the Australian system of university. We in Australia realise that perhaps it is not possible for us to establish a university on the lines of Oxford and Cambridge; we are rather leaning towards establishing a university which will assist us in commercial life and in establishing industries in this great State.’ Western Australia, Parliamentary Debates, Legislative Council, 2 February 1911, 3637 (R D McKenzie, Honorary Minister).
institutions were the forerunners of the other colonial (or immediately post-Federation) universities. South Australia established its university in 1874, Tasmania in 1890, Queensland in 1910, and Western Australia in 1913. In most cases, the founding of the university was preceded by a public inquiry. The first university, Sydney, was a product of compromises between the colonial establishment and a rising democratic and radical sentiment. A ‘colonial Oxbridge’ was viewed as a measure of conservative defence, although the outcome of political expediency was a model based on the less ancient University of London, a democratic and federal university founded in the early years of the nineteenth century. Like Oxford and Cambridge Universities, the University of London provided for autonomous teaching colleges. Examinations and conferral of degrees were the province of the University per se. Such a decentralised institution allowed for sectarian colleges within a secular institutional form. The University itself however would have no religious tests.

The fate of college-based university was short-lived. Eclipse of independent colleges as the sites of teaching was affected by the first professors appointed to the University. Under the auspices of arguing for a ‘central standard of teaching’ and misconstrued intention of the founders, the three inaugural academic staff successfully argued that they were Professors of the University, not the Colleges.

Whatever the internal configuration of these bodies, no dispute or confusion existed that they were being established by the state as self-governing institutions, and therefore somewhere between strictly governmental and civil structures. The emphasis on the status as a ‘body politic’ is established in the first article of Sydney University’s 1850 Act. University statutes acted as a form of constitution, within which the model of institutional government operated: management and administration under the Council, the advisory role of a Senate (or Professorial Board), and a ‘quasi-judicial’ authority invested in the Visitor (normally the Governor). The examples of the first two universities lay down the quasi-autonomous public character of the Australian university.

In the period from the middle of the 19th century to the pre-First World War years, three broad world-historical influences generally were brought to bear on the university. These were, first,
the British model. The second influence was the German university, which had been reformed under Humboldt. Finally, there was the emergence of the so-called ‘Land Grant’ universities in the United States from the Lincoln Administration onward, which became the large state university system and its stimulus to scientific, applied and technological knowledge.

A guiding sentiment of the early universities was provision of a ‘liberal course of education’ for the ‘better advancement of religion and morality and the promotion of useful knowledge.’\textsuperscript{47} The original curriculum would be in Arts, Law and Medicine. Other disciplines were added that reflected the scientific and commercial requirements of colonial societies. The cultural function of a ‘liberal course of education’ may have been important, but the reality on the ground in the colonies required the need for professional and scientific training. The curriculum of the new universities in each of the colonies (and then States) expanded to include law, engineering, science, and agriculture. With respect to Sydney University, Philp\textsuperscript{48} notes that ‘… the university was firmly associated with the middle class, city community of Sydney… By occupation they were essentially either professional men or men of business and industry.’ Into the British institution would be set a more instrumentalist and pragmatic approach to higher learning.\textsuperscript{49} The university in Australia evolved over a sixty-year period with a view to the British ‘motherland’ and local expediencies, heavily subsidised by government, and considered essential to advanced, progressive, and ‘civilised’ society.

2.1.2 A National University System

Emergence of a university system is synonymous with Federal Government expansion into the sector. Involvement of the Commonwealth in the university sector begins during the Second World War, first by regulation under the \textit{National Security Act 1939 (Cth)}\textsuperscript{50} and then under the

\textsuperscript{47} \textit{University of Sydney Act 1850 (NSW), s 1.}
\textsuperscript{48} Hugh Philp \textit{The University and its Community} (Ian Novak, 1964), 5. Compare the remarks of the West Australian Premier in the course of debate on the establishment of the University of Western Australia, in Western Australia, \textit{Parliamentary Debates}, Legislative Assembly, 24 January 1911, 3264 (Hon. Frank Wilson, Premier):

\begin{quote}
The old idea that a university was a place where the sons of the well-to-do citizens could spend a few years acquiring a knowledge of the classics and perhaps a great knowledge of sports, seems to have altogether disappeared… and it is recognised that the highest education is essential to the national welfare and to the State’s commercial prosperity.
\end{quote}

\textsuperscript{49} ‘The struggle’ within the university between a cultural (generally Newmanian) ‘conception’ and an instrumentalist one ‘was decided very early in the piece… in favour of the instrumental view’: Sol Encel ‘The Social Role of Higher Education’ in E L Wheelwright (ed) \textit{Higher Education in Australia} (Federation of Australian University Staff Associations, 1965), 5.

\textsuperscript{50} \textit{National Security (Universities Commission) Regulations 1943 (Cth).} These Regulations established the first Universities Commission, or central planning body, whose authority was the subject of dispute in \textit{R v The University of Sydney; Ex parte Drummond} (1943) 67 CLR 95, where a prospective student at Sydney University, John McPherson Drummond, sought a ruling (which was upheld) to have Commonwealth quotas on enrolments declared unconstitutional. The High Court described the function of the Regulations in these terms:

\begin{quote}
The objects of these Regulations are to provide, during the present war, for financial assistance to students at Universities and the supervision and control of their enrolment and studies, for the purpose of
Commonwealth Reconstruction Training Scheme (‘CRTS’) established under the Re-establishment and Employment Act 1945. With a view to the US experience, the CRTS was considered a ‘Bill of Rights’ for demobilised troops.\(^51\) The CRTS came to end at the end of the 1940s,\(^52\) but the pattern of Commonwealth support for the universities had become a permanent policy fixture. It was already 10% of recurrent funding by this time.\(^53\)

Prior to 1939, funding had been divided more or less equally between the State governments, student fees and endowments.\(^54\) By the early 1950s elements of a national university system were in place, supported by Commonwealth funding programs. Commonwealth funding under States Grants (Universities) Acts provided three-yearly funding cycles to scheduled institutions. This approach became accepted practice but it was not as yet accompanied by a machinery of planning, coordination and administration. Two initiatives that would lay the foundation of longer-term policy, planning and direction were the reports of the Murray Committee\(^55\) (1957) and the Martin Committee\(^56\) (1965).

The Murray Committee conducted an inquiry into Australia’s universities in 1957, concluding that the situation was ‘critical’.\(^57\) The Commonwealth was called on to provide the way out of an immediate crisis.\(^58\) The Commonwealth acceded to the Committee’s recommendations, conserving, organizing and directing man-power and woman-power in the best possible way to meet the requirements of the Defence Force and the maintenance of supplies and services essential to the life of the community, and these Regulations shall be administered and construed accordingly.

This initial period of Commonwealth involvement was authorised under the defence power granted to the Commonwealth Parliament under the Constitution.

\(^51\) Commonwealth of Australia Parliamentary Debates House of Representatives, 15 May 1945, 1693 (Mr. Halen, Member for Parkes).

\(^52\) ‘… the number of students, augmented by the Commonwealth Reconstruction Scheme for returned service men and women, rose from 15 586 in 1945 to 32 453 in 1948… The 1948 level of enrolments was not to be achieved again until 1956…’: Simon Marginson Educating Australia: Government, Economy and the Citizen Since 1960 (Cambridge University Press, 1997), 20.


\(^54\) Williams Systems of Higher Education: Australia, 13.

\(^55\) Committee on Australian Universities Report (1957) (‘Murray Committee Report’).

\(^56\) Committee on the Future of Tertiary Education in Australia : Report of the Committee on the Future of Tertiary Education in Australia to the Australian Universities Commission (1965) (‘Martin Committee Report’).

\(^57\) Committee on Australian Universities Report (1957), 29. Five years earlier the Vice-Chancellor’s Committee put out a statement entitled A Crisis in the Finances and Development of Australian Universities. It was an important impetus for the establishment of the (eventual) Murray inquiry. See Susan Davies The Martin Committee and the Binary Policy of Higher Education in Australia (Ashwood House, 1989), 13: ‘Its investigations revealed Australian universities to be short-staffed, poorly housed and equipped, with high student failure rates, and weak honours and post-graduate schools. It believed the principal single cause of these defects to be financial stringency.’

\(^58\) A financial malaise was directly related to an academic malaise in the institutions, bordering on dysfunction. In its conclusions the Committee would write (Committee on Australian Universities Report (1957), 35-41):

The most disturbing aspect of university education in its actual working is the high failure rate… of the students enrolled at six universities for the first time in 1951 showed that of every hundred students only sixty-one passed the first year examinations; only thirty-five graduated in the minimum period of time; and only fifty-eight have graduated or are expected to graduate at all. Such a high failure rate is a national extravagance and can be ill afforded.
including support for the establishment of a new university in Victoria (Monash University). The principal administrative outcome was establishment of the Australian Universities Commission. The underlying rationale of the Martin Committee Report was accommodation of the university system to the emerging policy paradigm of human capital formation. The solution was the so-called binary system: establishment of a second-tier of degree-granting institutions (Colleges of Advanced Education) under the universities. It brought various types of institutions (technological institutes, teachers colleges, agricultural colleges, etc) under a common model. Planning and policy-making for this new sector was therefore rationalised. In short, the Martin committee provided a plan for the higher education sector, as the Murray committee had provided the institutional/governmental means in the form of a standing commission with strong influence over resource allocation.\(^{59}\) Universities retained authority in the sphere of ‘academic affairs.’\(^{60}\)

In the forty year period from the Second World War until the 1980s, the higher education sector was subject to strong expansionary trends. Expansion had quantitative and qualitative dimensions. On the quantitative side, the number of institutions grew, as well as the numbers of students or other ‘outputs.’ Student numbers in higher education increased from around 30,000 in 1947 to over 270,000 in 1975 (including the CAEs).\(^{61}\) The apotheosis of the post-war phase of higher education (university and CAE) might be said to have occurred under the Whitlam Government of 1972-75. In this period the Federal Government assumed full financial control of the sector and abolished university fees. The role of the States became largely residual.\(^{62}\)

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\(^{59}\) It is perhaps more accurate to state that the Martin Committee provided a longer term plan for the system – centred on the binary policy – where the Murray Committee had been required in part, and delivered, a short-term plan for a critical situation in the university sector.

\(^{60}\) Of the universities response to planning, Williams writes Williams Systems of Higher Education: Australia, 53:

the bulk of funds come as recurrent grants, and there is very little of this that universities are not free to allocate as they see fit. Nevertheless the involvement of universities in the planning process and the control of building expenditure and major new developments by the commission ensured that the university system developed according to the commission’s general plan.

The Universities’ Commission (and its successors) would report generally on academic matters, such as student failure rates, but the administration of courses and content, the government of student (and a considerable portion of staff) matters, and the conduct of programs, continued to lie in the hands of the institutions.

\(^{61}\) Marginson Educating Australia, 22, Table 2.2. Generally, this occurred in two waves. From 1946 to the end of the 1960s a second wave of universities was founded, including the Australian National University (1946), the University of New South Wales (1949) (as the NSW University of Technology), Monash (1958), La Trobe (1967), Newcastle (1965), and Flinders (1966). In the 1970s a further wave of institutions emerged, including Deakin (1974), James Cook (1974), Wollongong (1975). The qualitative changes in the post-war expansion are also evident in the nature of those newer institutions, with a focus on scientific and technological education and knowledge, on decentralisation and regional location (including into the metropolitan suburbs), and in the case of ANU a postgraduate and research specialisation.

\(^{62}\) Most universities remain statutory creatures of the States. State funding of the sector had fallen to just over one-third, from nearly one-half between 1939 and 1971: Marginson Educating Australia, 29, Table 2.8.
2.1.3 The ‘Era of Reform’

The contemporary phase of the Australian university might be said to commence in the mid- to late-1980s. Writing on the impact of economic policy reforms on education, Marginson refers to this period as dominated by ‘economic government.’ Swept up in these changes, relationships within the university have substantially changed: from an intellectual ‘workshop’ to an industrialised, business model. The binary policy was abandoned, and under the so-called Unified National System (‘UNS’), 17 universities and more than 50 Colleges of Advanced Education were merged into 36 public universities in late 1980s and early 1990s. The outcome was a ‘comprehensive’ university. The universities were increasingly viewed as a policy instrument in the context of restructuring of the labour force and the perceived need for a ‘knowledge-based economy.’

The shift in university policy that occurred in the second half of the 1980s amounted to the absorption of this sector into the general project of ‘economic government.’ Intellectual autonomy of the university was overtaken by a form of economic autonomy: ‘Market liberal reform did not reduce university autonomy per se. Rather, it enhanced the freedom and autonomy of universities in the entrepreneurial sense, and diminished them in a collegial sense.’

Commonwealth governments achieved these ends by way of university financing arrangements and through the conditions attached to those funding regimes. The Higher Education Funding Act 1988 (Cth) replaced the States Grants Act system and introduced market elements into the system in the form of student fees, partial contestation for funding, triennial quasi-contractual negotiation over student load, and a substantial decline in government funding (fiscal austerity). At the same time, a new cycle of expansion was embarked on. The rate of increase

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64 Marginson Educating Australia, Ch 4; Simon Marginson Markets in Education (Allen and Unwin, 1997), Ch 3. In various texts, Marginson has extensively considered the history and rationale of neoliberal reform of the university/higher education sector.
67 See generally Marginson Educating Australia, Ch 9.
68 Marginson Markets in Education, 231.
69 See generally Marginson Markets in Education, Ch 8.
in student enrolments increased sharply. The expansion programs of the 1960s and 1970s were primarily based upon increased public funding, and increase in the proportion of government funding. This cycle was based on a new precondition: the raising of funds from private sources, by and large from students in the form of fees (including ‘deferred’ fees from the Higher Education Contribution Scheme (‘HECS’)).

Post-1988 universities found themselves with an urgent need to pursue ‘entrepreneurial’ activity, contain costs and ‘find efficiencies,’ deal with multiple and uncertain sources of revenue, a changing pedagogical and curricular landscape including technological changes, and assuming a leading role in reproducing a changing labour force.

Further measures aimed at ‘marketisation’ were introduced after election of a Coalition (Liberal-National Party) Government in 1996. Changes included increases in HECS and lowering repayment thresholds, cutting operating grants, providing for domestic undergraduate up-front fees and a subsidised loan scheme for full fee postgraduate courses. After various false starts, the new phase of market reform would lead to passage of the Higher Education Support Act 2003 (‘HESA’), which considerably advanced the ‘market order’ in the sector. The HESA established a purchaser-provider model for the delivery of higher education services, further deregulation in fee setting and levying from students, and growth of regulatory control and ‘steering’ of the universities. Government regulation became more proscriptive and pervasive. HESA has accentuated existing tendencies to stratification of institutions, with the prospect of a new cleavage emerging: between research-intensive, academically-prestigious institutions, and high-volume commercialised institutions. This trend proceeds from a post-1988 median of ‘high volume medium quality’ universities.

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70 For instance, enrolments increased from 393 734 in 1987 to 604 177 in 1995, or an increase of 53.4% over 8 years (or 6.68% increase per annum). Between 1979 and 1987 by comparison student enrolments increased from 320 286 to 393 734, an increase of 22.9% (2.87% per annum): Marginson Educating Australia, 187, Table 8.3.
71 For example, see then Federal Education Minister Kemp’s leaked 1999 Cabinet paper Proposals to Reform Higher Education, reproduced in Senate Employment, Workplace Relations and Eduction Committee Universities in Crisis: Report on Higher Education (2001), Appendix 4. The proposals, subsequently abandoned, included plans to deregulate further the higher education, including a student ‘voucher’ system. See also Department of Employment, Education, Training and Youth Affairs Review of Higher Education Financing and Policy (1998) (‘West Review’), which recommended greater deregulation but was largely not implemented.
73 See section 2.3 below.
74 See eg Simon Marginson and Mark Considine The Enterprise University: Power, Governance and Reinvention in Australia (Cambridge University Press, 2000),188-220.
75 Marginson ‘Mission Impossible or New Opportunities?’, 12; see also Marginson and Considine The Enterprise University, Ch 7.
2.2 Contemporary University Policy

2.2.1 The ‘Enterprise University’

University education is now viewed as an industry engaged in ‘service provision,’ specifically the provision of educational services at an academic or high order level, as well as related activities such as research and consultancy. In this guise, Australian universities are lauded as one of the largest export sectors in the national economy, by virtue of sale of full-fee paying places to foreign students.

Industrialisation of universities was acknowledged as far back as the late 1950s, as a major component of the ‘knowledge industries,’ and as intellectual and ‘immaterial’ labour became increasingly central to the advanced industrial economies. The university as service-provider is suggestive of that institution’s role in a larger economic ‘supply chain.’

Educational services are the range of educational activities associated with the university (or other educational institutions, such as schools) now subsumed to market exchange, where the market represents the dominant organising principle. Education services assume an abstracted and measurable quality that facilitates economic transaction and, in particular, is subject to the

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76 Marginson and Considine The Enterprise University.
77 See eg the Federal Minister’s Second Reading speech on introduction of new legislation to regulate the provision of international education: Commonwealth of Australia, Parliamentary Debates, House of Representatives, 30 August 2000, 19609 (Dr David Kemp, Minister for Education, Training and Youth Affairs):

    We are introducing these bills to provide a more effective regulatory framework for the education and training export industry, which we know to be of great value to Australia. The new ESOS Act will protect and enhance the industry's integrity and quality, and will assist in reducing abuse of the student visa program. The industry strengthens our relations with the region and with countries from which students come. It yields valuable revenue. It provides a cross-fertilisation of ideas and cultures, and the internationalization of education enhances the quality of education for all students. It is enjoying a record year, with over 180,000 international students enrolled with Australian institutions; fifteen per cent up on 1999. It now earns Australia $3.7 billion a year in export dollars, comparable to wool or wheat. The continuing value of the industry depends on the service it provides to overseas students and on public confidence in its integrity and quality.


    International education has made a significant contribution to Australia. It has grown to now be our third largest source of overseas earnings, generating $15.5 billion in 2008 and supporting more than 125,000 jobs. In 2008, nearly half a million students came to Australia. It is the lead sector in terms of export earnings in Victoria and the second largest in New South Wales.

78 Eg Clark Kerr The Uses of the University (Harvard University Press, 1963).
79 See eg C. Wright Mills White Collar: the American Middle Classes (Oxford University Press, 1956[1951]) with respect to ‘intellectual’ labour, especially Chs 6-7. On the concept of immaterial labour, see Maurizio Lazzarato ‘Immaterial labor’ in Paulo Virno and Michael Hardt (eds) Radical Thought in Italy: A Potential Politics (University of Minnesota Press, 1996), 133-146.
81 Marginson Markets in Education.
nexus of money and finance. In Australia, the formation of educational services in this manner has been led by internationalisation of access to university education and development of an international market. This has occurred via different formats, including international mobility of students (‘overseas students’) and investment by universities and education ‘providers’ in overseas campuses and delivery of academic programs elsewhere.82 Such a paradigm in education has been boosted by the initiatives of international economic organisations, such as the Organisation for Economic Co-operation and Development (‘OECD’) and the World Trade Organisation (‘WTO’). The WTO (and its predecessor, the General Agreement on Tariffs and Trade (‘GATT’)) has included education services on its agenda for more than a decade an agreement on trade in services including educational services. It appears nonetheless that ‘liberalisation’ of trade in education remains one of the more difficult achievements of the international economic system.83 In 2004, the ‘export’ of educational services (ie the sale of these services to non-Australian nationals and entities) was the sixth largest export sector in the economy as a whole, and revenues from ‘international education’ were estimated at $7.5 billion.84 The vast bulk of this revenue was from overseas students studying in Australia, and by far the largest sector involved was higher education.

The precondition of the neoliberal model of the university is an economics of education, especially in relation to the university’s principal object, knowledge. The philosophical origins of this tendency lay in neoclassical economics, and its equation of human rationality with economic rationality (‘homo economicus’), an approach to education inspired by the works of writers such as Hayek,85 Friedman86 and Becker.87 The ‘economisation’ of education is consistent with the notion of education generally (and higher education in particular) as cognisable in terms of ‘production functions,’ where education is conceived in terms of discrete inputs and outputs and to which can be applied the appropriate productive systems and processes of the university. Government funding represents a key input, and the accumulated mass of skills (and skilled workers) circulating in the economy represents a key output.88

http://www.oecd.org/document/14/0,2340,en_2649_201185_18333550_1_1_1_1,00.html (accessed 20 April 2008).
http://www.oecd.org/document/14/0,2340,en_2649_201185_18333550_1_1_1_1,00.html (accessed 20 April 2008).
85 See F A Hayek The Constitution of Liberty (Legal Classics Library, 1999 [1960]).
87 Gary Becker Human Capital: A Theoretical and Empirical Analysis, With Special Reference to Education University of Chicago Press, 1993 [1964]).
88 Marginson Markets in Education, Ch 4 and especially 118-130. With respect to the social-theoretical dimension of the ‘economics of education,’ and government educational policies and programs consistent
In human capital theory, the individual represents a vehicle for the acquisition, production and reproduction, of qualities and capacities valued in the market, specifically in this case, the labour market. These capacities may be attributed economic value, be the object of investment, and achieve a rate of return (for the individual and for wider social actors and forces):

As developed by the Chicago School [of neoclassical economics], human capital theory has two core hypotheses. First, education and training increase individual cognitive capacity and therefore augment productivity. Second, increased productivity leads to increased individual earnings, and these increased earnings are a measure of the value of human capital.89

This ‘cognitive capacity’ will be conceived generally as skill (or competence). Skill is fundamental to the discourse and operation of human capital policies. It is a representation of the economic character of knowledge. Embodied in the worker/individual, skill assumes the character of knowledge that is ‘performative’90 or ‘operative’91 and can contribute to the accumulation of value (‘economic growth’). Skill has become closely aligned with the concept of human resources: the individual subject is the sum of his/her skills and abilities, or his/her ‘portfolio’ of skills. The analogy is to human resources as a ‘raw material’ of the contemporary economy, and by extension the university as the supplier of human resources onto the market.

Marginson92 has also argued that the product of higher education is a ‘positional good,’ which is consistent with the economic paradigm. According to Marginson, the ‘positional good’ is aimed at socioeconomic advantage: ‘Positional goods in education are places which provide students with relative advantage in the competition for jobs, income, social standing and prestige. They are status places.’93 In seeking ‘positional advantage,’ the individual becomes a site of ‘self-investment.’ Every individual is conceived of as a type of ‘micro-enterprise;’ the self an atomistic site of expenditure, benefit and valorisation, looking toward the labour market. Credentials are a key mechanism in this situation of competitive standing. Hence, credentials are not simply a representation of skills, competencies and capabilities, but have a socio-political dimension as well.

with this paradigm, Marginson has elaborated, and constructed, a critical theory drawing heavily on the work of Michel Foucault and notions of the (discursive) production of economic subjects. Educational economics and educational markets represent a particular use of ‘power/knowledge’: see Simon Marginson ‘Subjects and Subjugation: The Economics of Education as Power-Knowledge’ (1997) 18 Discourse 2 215 This discursive production is in turn realised in the model form of the commodity (‘positional good’) in education and the formation of a political-economy of higher education.

89 Simon Marginson Education and Public Policy in Australia (Cambridge University Press, 1993), 38.
90 Jean-Francois Lyotard The Postmodern Condition: A Report on Knowledge (University of Minnesota Press, 1984), 41ff.
92 Marginson Markets in Education.
The enterprise university\textsuperscript{94} represents the university model based on primacy of the market and the logic of the firm (the corporate business model). Authority within this new system rests on executive power,\textsuperscript{95} centralised under the office of the Vice-Chancellor. In a body that may remain \textit{de jure} a ‘body politic,’ and possess a model of self-government, the concept of executive power properly reflects the political configuration of the university. Notably, the arrogation of power by the internal executive marginalises in practice the university’s collegial function, including the autonomy and authority held by academic staff, on bodies such as Academic Boards or Senates.\textsuperscript{96} Under pressure from Commonwealth Government policy, the universities have sought to maximise revenues and focus on the ‘bottom line.’ In addition, and as a result of the complex and ‘unpriced nature of many of its outputs,’\textsuperscript{97} universities have faced a range of other performance-based measures and implicit controls, such as graduate employment and salaries and employer satisfaction with graduates.

2.2.2 Austerity: The Development of Underdevelopment

Implementation of the market model in the university sector has been achieved by strategies of fiscal austerity. Primary evidence of austerity is the dramatic decline in government spending/public investment between the early 1980s and the present. In this time, government spending has fallen from around 90\% of university revenues in the early 1980s to approximately 40\% in 2004,\textsuperscript{98} within an intra-sectoral range of just under 50\% (at the University of the Sunshine Coast) to 29\% (at University of Western Australia).\textsuperscript{99} On a \textit{per capita} basis (per Equivalent Full-Time Student Unit (‘EFTSU’)), spending fell from a high of $12,580 in 1976-77 to $5518 by 1997-98.\textsuperscript{100} Relatively speaking this was a precipitous fall in government

\begin{thebibliography}
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\item \textsuperscript{93}Marginson \textit{Markets in Education}, 38.
\item \textsuperscript{94}Marginson and Considine \textit{The Enterprise University}.
\item \textsuperscript{95}Marginson and Considine \textit{The Enterprise University}, 62: ‘… in every case it is “executive centred governance” rather than a council or a professoriate that defines the character of the institution to the new world of markets and corporate mandates. Its priorities are expressed in budgets, planning doctrines and targets for income earning, rather than scholarship or the public interest. Executive dominance, explicitly corporate in form and substance, has become part and parcel of every university. The new systems of executive governance are focused also exclusively upon the office of vice-chancellor.’
\item \textsuperscript{96}See Bill Readings \textit{The University in Ruins} (Harvard University Press, 1996), 40: ‘The central figure of the university is no longer the professor who is both scholar and teacher but the provost to whom both (the) apparatchiks and professors are answerable’ (p. 8); ‘… the University is no longer primarily an ideological arms of the nation-state but an autonomous bureaucratic corporation.’.
\item \textsuperscript{97}R. Carrington, T Coelli and D S Prasada Rao ‘The Performance of Australian Universities: Conceptual Issues and Preliminary Results’ (2005) 24 \textit{Economic Papers} 2, 158. The authors note the conceptual difficulty in considering productivity in the university sector, given the ‘dearth of appropriate productivity measures….’ (146) The authors also note the universities are ‘relatively efficient and… productivity growth was superior to that of most other sectors of the economy for the period 1996-2000.’
\item \textsuperscript{100}Simon Marginson ‘Toward A Politics Of The Enterprise University’ in Simon Cooper, John Hinkson and Geoff Sharp (eds) \textit{Scholars and Entrepreneurs: Universities in Crisis} (Arena Publications, 2002), 115 (in 1989-90 dollars).
\end{thebibliography}
funding by more than half in twenty years. Government revenue decline has been accommodated through ‘private’ financing, principally in the form of student fees. Despite this trend, government funding has continued to play a key strategic role in the operation of the sector, notably as a mechanism of policy-setting and direction-setting. In the voluminous report of the Senate Employment, Workplace Relations and Education Committee, *Universities in Crisis*, the Committee (Opposition and minor party) majority stated of the austerity question that ‘… it heard evidence from across the sector… that current funding levels fell far short of the requirements for providing quality teaching and research and that, as a result, Australia’s universities were in a state of crisis.’\(^{101}\) In the Committee’s mind, the policy of austerity was calibrated with a policy of financially-induced crisis, especially after 1996 and the then Coalition government’s first budget.

The deterioration in the public funding position is linked to the practical change and transformation in conditions ‘on the ground’ in institutions. These changes may be identified with the achievement of ‘efficiencies’ and ‘productivity gains’ in the economy of higher education, or the extraction of greater output (eg graduates and research) for proportionately less input (expenditure). Perhaps the most cited figure in the deterioration of conditions is the growing student to staff ratio. Expansion of university ‘participation’ (ie student enrolments) in the system was a hallmark of the ALP Government reforms post-1988 and generally adopted by the Coalition Government after 1996. Staff numbers – in particular academic staff numbers – increased only marginally in the same time, and include a fall in academic staff of 6.4% between 1996 and 1999.\(^{102}\) Between 1990 and 2005 student to staff ratios for academic teaching staff rose from 14.3 to 20.9, or approximately 46%.\(^{103}\) With the growth of international students, this situation is made qualitatively more difficult with growth of poor English-language competence (the primary language of instruction) among the student population.\(^{104}\) A concurrent deterioration in the proportion of students to non-academic ‘support’ staff also occurred.\(^{105}\)

The fate of student-staff ratios is a signal development in a deterioration of campus conditions. Qualitatively, such indicators represent the overcrowding of classes (lectures, tutorials, labs), a

\(^{101}\) Senate Employment, Workplace Relations and Education Committee *Universities in Crisis*, [3.17].

\(^{102}\) Senate Employment, Workplace Relations and Education Committee *Universities in Crisis*, 170, Table 5.2.


decline in contact between academics and students, and between staff and students more broadly. The Senate Employment, Workplace Relations and Education Committee’s *Universities in Crisis* report remarked on the erosion of the ‘learning experience,’ including resources and infrastructure directly concerned with teaching and learning.\(^{106}\) For example, real expenditure on libraries (per full-time student) declined from $601 in 1991 to $565 in 1999; library student-staff ratios grew from 121 in 1991 to 159.4 in 1999; face-to-face teaching time has been reduced; student support services have declined by 13.8% between 1991-99.\(^{107}\) The Senate Committee itself reported ‘a large number of short submissions from students describing unsatisfactory aspects of their everyday student routines. These difficulties related mainly to overcrowded classrooms and lack of accommodation, and poor resources generally, especially library facilities.’\(^{108}\) Concurrent with these circumstances on campus, academic standards have been identified as under strain, if not also in crisis,\(^{109}\) as a general condition and, in specific cases, as a *cause celebre*, especially where corruption has occurred or has been alleged to have occurred.\(^{110}\)

Austerity also has an impact on the workforce. First, the academic workforce has confronted a long-term decline in real wages and a ‘substantial’ increase in workloads and working time,\(^{111}\) accompanied by growing job dissatisfaction and ‘psychological stress’ that is ‘disturbingly high.’\(^{112}\) Second, the workforce as a whole has been reorganised and polarised, toward a core-periphery arrangement.\(^{113}\) At the ‘core’ end, permanent staff generally experience expansion of working time and intensification of work; the ‘peripheral’ workforce coincides with the growth of casualization and ‘cost-saving’ modes of employment, in particular for teaching functions (and hence the emergence of a mass, precarious teaching-only workforce).\(^{114}\)

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\(^{106}\) Senate Employment, Workplace Relations and Education Committee *Universities in Crisis*, [5.55]-[5.68].


\(^{108}\) Senate Employment, Workplace Relations and Education Committee *Universities in Crisis*, [5.64].

\(^{109}\) In addition to the Senate Committee Report, see for example Peter Abelson ‘Surveying University Student Standards in Economics’ (2005) 24 *Economic Papers* 2 116.

\(^{110}\) See eg New South Wales Independent Commission Against Corruption Report on Investigation into the University of Newcastle’s Handling of Plagiarism Allegations June 2005.

\(^{111}\) Craig McInnis *The Work Role of Academics in Australian Universities* (Department of Education, Training and Youth Affairs, 1999).

\(^{112}\) Tony Winfield *The Higher Education Workplace Stress Survey* (University of South Australia, 2001)


this polarisation, the crisis in academic relationships is evidenced in declining personal contact between staff and university students.

The symptoms of austerity have also been inflationary. For instance, revenue growth has been based on cost-shifting from government to students through fee-charging, and price deregulation has led to the expansion fee-charging capacity and inflation within that system. ‘Informal’ cost-shifting to students has occurred through the levying of fees and charges for ‘ancillary’ goods and services or de facto charges for course materials, books, and so forth. Official ancillary fees\textsuperscript{115} constituted nearly 5\% of total university revenues in 1998, and paid on average $791 per year in such fees, a $278, or 54\%, increase over the previous three years. Approximately 300 different fees were charged at 23 universities in 1998.\textsuperscript{116}

Marginson has specified the austerity measures in higher education as the ‘declining resource commitment to teaching and learning.’\textsuperscript{117} Yet he notes that the general trend in resource allocation is not entirely one-way, and is not singly composed of austerity measures: rather the economic strategy in the universities is a \textit{selective} austerity. Investment and reinvestment in the sector have occurred, but as part of a substantial redistribution of resources toward ‘corporate’ functions, toward executive operations, toward market sensitive courses, and toward prestige or high-profile projects, such as overseas campuses or technology precincts. Imposition of long-term austerity therefore does not equate to a generalised malaise or deterioration in the higher education system, but of a strategic dynamic: underdevelopment and erosion of some elements of higher education on the one hand, and (re)development of and (re)investment in other factors. This may be read in a number of ways. Marginson suggests at least two: first, the shift of

\begin{footnotesize}
\begin{itemize}
\item The charging of ancillary fees is provided for under \textit{Higher Education Support Act 2003} (Cth) in the \textit{Commonwealth Grant Scheme Guidelines} (Cth), Ch 12, where these fees are termed ‘incidental fees’:
\begin{itemize}
\item A higher education provider may charge a student for a good or service related to the provision of their course if one of the following criteria apply:
\begin{itemize}
\item The charge is for a good or service that is not essential to a course of study.
\item The charge is for an alternative form or alternative forms of, access to a good or service that is an essential component of a course but is otherwise made readily available at no additional charge by the higher education provider.
\item The charge is for an essential good or service that the student has the choice of acquiring from a supplier other than the higher education provider and is for:
\begin{itemize}
\item equipment or items which become the physical property of the student and are not consumed during the course of study; or
\item food, transport and accommodation costs associated with the provision of field trips...
\end{itemize}
\end{itemize}
\end{itemize}
\begin{itemize}
\item A higher education provider may charge a student a fine or a penalty if the fine or penalty is imposed principally as a disincentive and not in order to raise revenue or cover administrative costs.
\end{itemize}
\item Results of a ‘National Ancillary Fee Survey’ conducted by the National Union of Students, and cited in National Union of Students ‘Submission No. 274 to the Senate Employment, Workplace Relations and Education Committee Inquiry into the Capacity of Public Universities to Meet Australia’s Higher Education Needs’ (Canberra, 21 March, 2001).
\item Simon Simon Marginson ‘Submission No. 81, Senate Employment, Workplace Relations and Education Committee Inquiry into the Capacity of Public Universities to Meet Australia’s Higher Education Needs’ (Canberra, 21 March, 2001), [22]-[26].
\end{itemize}
\end{footnotesize}
resources and control to the bureaucratic functions of the university; second, the realignment of disciplines toward high revenue, cheap, perceived high wage courses especially in Business Studies and Computer Sciences, which also tend to move away from ‘intensive’ academic formation. In respect of the latter trend, international students in particular have acted effectively as a ‘commercial vanguard,’ having a major effect on the reorganisation of university curriculum over the past 15 years. Key changes in curriculum over the nineties were the decline of education as a field of study (by 3%) and the growth of Business (up 43%) and Law (up 86%). Universities’ accommodation and development of the international student market have also arguably been at the expense of the domestic student population.

2.3 The Administrative Condition

2.3.1 Administration in Theory

The question of administration is central to the present study, albeit in the quite specific circumstances of higher education. Further, the neoliberal, market reforms to which the sector has been subjected are founded, to a considerable degree, on fundamental changes to public sector administration, and indeed intensification of administrative and regulatory forms. It is less the case that the administrative state of the twentieth century has declined that it has been reorganised or reconstituted. In relation to the university, as elsewhere in the ‘administered society,’ governmental rationality has been reorientated to the market, and there has arisen a new nomenclature of ‘state-forms.’ The model of the firm (enterprise), combined with

118 Marginson ‘Submission No. 81’; Senate Employment, Workplace Relations and Education Committee Universities in Crisis, [3.128]-[3.129], [3.146]-[3.158].
120 Scott Bayley, Rob Fearnside, John Arnol, John Misiano and Rocco Rottura (2002) ‘International Students in Victorian Universities’ 10 People and Place 2 45, 54: Direct displacement of domestic HECS students by fee-paying domestic or international students is both protected against and regulated by the Commonwealth’s higher education policies. However, over the last 15 years, changes to Commonwealth educational policy and funding arrangements have altered the financial incentives faced by universities. Universities have responded by reducing the relative proportion of over-enrolled (marginally-funded) domestic HECS students and increasing the proportion of fee-paying domestic and international students… A larger proportion of international undergraduate students enrol in the fields of Business and Information Technology.

121 Hence the important, if theoretical, critiques of new forms of government by writers such as Foucault and Deleuze: see Michel Foucault ‘Governmentality’ in Graham Burchill, Colin Gordon and Peter Miller (eds) The Foucault Effect: Studies in Governmentality (Harvester Wheatsheaf, 1991), 87-104; also Colin Gordon ‘Governmental rationality: an introduction’ in Graham Burchill, Colin Gordon and Peter Miller (eds) The Foucault Effect: Studies in Governmentality (Harvester Wheatsheaf, 1991), 1-51; Gilles Deleuze ‘Postscript on the Societies of Control’ (1992) 59 October 3. As Delueze remarks: ‘The operation of markets is now the instrument of social control and forms the impudent breed of our masters.’

internal corporate-political relations (managerialism) and the primacy of commodity forms ('outputs,' 'deliverables') constitute the central models and structures of public administration. For the university, these elements of administration have been thoroughly analysed in the forms of the ‘enterprise university,’ ‘executive’ (managerialist) ascendency, and human ('cognitive') capital or ‘positional goods.’

In their evolving synthesis, market and administration constitute the ‘market order’ of the university. Much of the focus in this term has been on market and quasi-market relations, especially in Simon Marginson’s studies. Bill Readings’ *The University in Ruins*\(^\text{123}\) shifts the focus onto the other side of this equation, the market *order* of the university. The university, as he puts it, is now ‘subsumed under administration.’\(^\text{124}\) In his ‘posthistorical’ university, administrative order is a precondition to economic transformation. The ontological ‘emptiness’ of the (corporate) ‘university of excellence’ is founded on collapse of the (national) cultural logic of the university (ie the ‘idea’ of the university), and subsequently the university’s purposes and operations tend to find their reason in economic calculus:

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\text{… the appeal to excellence marks the fact that there is no longer any idea of the University, or rather that the idea has now lost all content… All that the system requires is for activity to take place, and the empty notion of excellence refers to nothing other than the optimal input/output ratio in matters of information.}^{\text{125}}
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As these terms of the university’s contemporary development apply to the practical ‘activity’ of basic university tasks, he writes: ‘… I shall focus on how a general administrative logic of evaluation replaces the interplay of teaching and research as central to the functioning of the University.’\(^\text{126}\)

Readings argues that administration has come to prevail within the university, supplanting an historic pre-eminence of academic authority, and subordinating teaching and research functions

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\(^{\text{123}}\) Readings *The University In Ruins*.

\(^{\text{124}}\) Readings *The University In Ruins*, 125.

\(^{\text{125}}\) Readings *The University In Ruins*, 39. He continues (40): ‘Like the stock exchange, the University is a point of capital’s self-knowledge, of capital’s ability not just to manage risk or diversity but to extract a surplus value from that management. In the case of the University this extraction occurs as a result of speculation on differentials in information.’

\(^{\text{126}}\) Readings *The University In Ruins*, 126. There is not space or scope to consider Readings’ theory of the university’s crisis in any detail here. Suffice it to say, one of the enormous contributions of his assessment of the contemporary university is his conceptualization of the existential crisis, if not paralysis, of that institution (which he equates in particular with the disjuncture of the university’s cultural praxis and the nation-state, summed up in the notion of its ‘de-referentialization’). The university crisis is, in effect, its crisis as a *cultural subject*. Administration, in this context, becomes the primary force enlivening the *content* of university operations, in the vacuum left by the retreat of the ‘referent’ of cultural (especially national) identity. This tendency may perhaps be expressed in the notion of the rise of the professional manager (eg Vice-Chancellor) as the pre-eminent figure of the institution, as distinct from the historic model figure of the professor.
to administrative rationality and behaviour. Presuming Readings’ analysis to be correct, these are reasons why closer study of university administration is, indeed, warranted, as the present study endeavours to do.

2.3.2 Administration in Practice

Readings’ contentions are relatively abstract. Are his assertions supported empirically? Is there an actual and quantifiable growth in the machinery of the ‘administrative state’ governing the university and its internal relations? A first point to make is that these issues are not entirely new. The problem of university administration surfaced in the decades following the Second World War,127 and the ‘scientific management’ paradigm of the administrative state emerged, albeit slowly and unevenly, in university organisation.128 As a 1963 US study noted: ‘While having certain bureaucratic characteristics, large universities are probably less systematically bureaucratic than many business or governmental organisations of comparable size.’129

Notwithstanding limits on the dominance of administrative conduct in this period, it is worth recalling the susceptibility of the (US) academy to an administrative rationality. As C Wright Mills wrote, early in the post-war years: ‘The specialisation that is required for successful operation as a college professor is often deadening to the mind that would grasp for higher culture in the modern world. There now is… a celibacy of the intellect.’130

In the contemporary, ‘reform’ period, hegemony of administration over the operations of the university is indicated in several key developments. As an initial port of call, there has been a quantitative expansion of Commonwealth statutory controls over the university system. The quantum of direct131 Commonwealth legislative controls over higher education prior to 1988 was not vast, although wide in scope.132 In addition, further Commonwealth administrative

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130 Mills White Collar, 130. Mills continues in a manner entirely apposite to a sentiment of the professor giving effect to an administrative machine (136, emphasis added): ‘As a group, American professors have seldom if ever been politically engaged: the trend towards a technician’s role has, by strengthening their apolitical professional ideology, reduced whatever political involvement they may have had and often, by sheer atrophy, their ability even to grasp political problems.’
131 Universities are also affected by the growth of statutory regulation from other sources, both State and Federal, such as industrial relations, financial management, corporations law and even road safety Acts! For present purposes I will confine remarks to the key legislation bearing on ‘core’ university operations, ie teaching and research.
132 The primary legislation having a direct bearing on university operations were the States Grants Acts pertaining to university funding and Universities Commission (and its successor organisations) legislation. The States Grants (Universities) Act 1976 (Cth), for instance, contained 25 sections, notwithstanding that the Commonwealth had taken full operational responsibility for universities in 1974.
controls operated under the University Commission (and its successors). With the advent of the Higher Education Funding Act 1988 (‘HEFA’), and its successor Higher Education Support Act 2003 (‘HESA’), legislative controls grew markedly. Indeed, the 120 discrete provisions of the 1988 legislation grew to 293 sections in the 2003 statute. A range of subordinate legislation was promulgated under the authority of these primary Acts.\textsuperscript{133} The sphere of ‘international education’ is separately and additionally regulated by the Education Services for Overseas Student Act 2000 (‘ESOS Act’).\textsuperscript{134} A central objective of the total legislative program has been, of course, formation and regulation of market subjectivities and conditions, including fee-charging, funding conditions and programs, regulation of ‘providers’ and of the contractual space between ‘providers’ and students, including a form of ‘consumer protection.’

Further quantitative indicators of the rise of administration are, however, rather elusive.\textsuperscript{135} There is anecdotal evidence of the growth of internal rules, policies, procedures and regulations (distinct from delegated legislation), although seemingly no systematic study of this proliferation. Considerable effort appears to have been put into codification and prescription of areas of institutional activity that would once have been the subject of academic or administrative custom, convention and discretionary expertise (eg pedagogy, examination and assessment). Such formal (or semi-formal) codification of rules and powers is perhaps consistent with tendencies to ‘juridification’ of institutional norms and practices.\textsuperscript{136}

The Tertiary Education Commission Act 1977 (Cth) (replacing and updating legislation establishing Commonwealth advisory and administrative authority over the universities, Colleges of Advanced Education and Colleges of Technical and Further Education) contained 47 sections. In addition, legislation allowing charges of fees to international students under the Overseas Student Charges Act 1979 (Cth) extended to a mere 8 sections. Even the Student Assistance Act 1973 (Cth), which did not relate directly to the administration of institutions (but rather to student grants and scholarships) contained only 36 sections.


> On the basis of our count, we therefore conclude that the rule stock has increased by 8 to 14 percent annually. This means that the number of formal laws on higher education has doubled in less than ten years. We should also point out that the growth rate base is rising sharply: the period required to double the quantity of such legislation has decreased considerably over time.

\textsuperscript{134} Replacing the Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act 1991 (Cth). The ESOS Act 2000 adds a further 177 discrete provisions in the primary legislation, as well as the extensive regulatory regime applying to institutions (‘providers’) dealing with students under the National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007 and the Education Services for Overseas Students Regulations 2001 (Cth) (‘National Code’).

\textsuperscript{135} Although, see however Ase Gornitzka, Svein Kyvik and Ingvild Marheim Larsen ‘The Bureaucratization of Universities’ (1998) 36 Minerva 21, in the Norwegian context.

\textsuperscript{136} A cursory survey of policy instruments at various Australian universities indicates that accumulation of formal written rules or provisions is substantial. These statistics refer to all non-legislative instruments available at relevant sections of institutions’ websites (as at 25 May 2009). Typically they cover both academic and managerial (eg human resources, physical assets, information technology) areas of activity:

<table>
<thead>
<tr>
<th>Institution</th>
<th>Number of policies</th>
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<tbody>
<tr>
<td>University of Sydney</td>
<td>64</td>
</tr>
<tr>
<td>University of Technology, Sydney</td>
<td>104 (including Rules)</td>
</tr>
</tbody>
</table>
Statistical information on the overall labour effort dedicated to ‘non-academic’ (including administrative) work is mixed. Employment data on the balance of academic and non-academic staff in the university indicates the ratio has not changed significantly over decades. The majority of university employees (other than casual staff) have always tended to work in non-academic roles. It is reasonable to assume that this bloc of staff work across a range of institutional functions, including administration, professional-managerial roles, technicians, marketing, and student assistance. Yet, there is evidence to suggest that the functions and roles of academic and ‘non-academic’ staff are becoming less distinct (especially at the margins), with the work of ‘professional’ (non-academic) staff increasingly likely to ‘overlap’ with academic functions. Additionally, there is evidence of the growing administrative burden on academic staff, reinforcing a notion that teaching/research work is becoming more administrative in character. The latter factors are consistent with a shift in the general composition of university work toward work with an administrative content, and arguably a shift in the balance of ‘operational’ power away from academic authority.

In any case, quantitative indicators suggest major qualitative changes in higher education practices. Ideological dispositions in the universities – not only toward economic subjectivity and ‘managerialism’ as general conditions and more specifically as expressed in cultures of

<table>
<thead>
<tr>
<th>University</th>
<th>2007</th>
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<tbody>
<tr>
<td>University of Western Sydney</td>
<td>169</td>
</tr>
<tr>
<td>University of Newcastle</td>
<td>319</td>
</tr>
<tr>
<td>Deakin University</td>
<td>578 (including Faculty Rules)</td>
</tr>
<tr>
<td>Monash University</td>
<td>207</td>
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<tr>
<td>RMIT</td>
<td>433</td>
</tr>
<tr>
<td>University of Wollongong</td>
<td>148</td>
</tr>
<tr>
<td>University of Queensland</td>
<td>266 (including certain EBA provisions)</td>
</tr>
</tbody>
</table>

As at 2007, 56.3% of Full-Time Equivalent Staff, excluding casuals, were in ‘non-academic classifications’: Department of Education, Science and Training Selected Higher Education Statistics – Staff 2007 (2008), Table 1.2. Indeed, there is evidence that the proportion of staff in non-academic classifications have, in relations to those in academic classifications, declined since the 1960s. The Australian Universities Commission reported in 1972 that on average, the ratio of non-academic to academic staff was around two-to-one: Australian Universities Commission Fifth Report (1972), 84; see also Department of Employment, Education and Training National Report on Australia’s Higher Education Sector (1993), 137.


See Don Anderson, Richard Johnson and Lawrence Saha Changes in Academic Work: Implications for the Universities of the Changing Age, Distribution and Work Roles of Academic Staff (Department of Education, Science and Training, 2002), http://www.dest.gov.au/NR/rdonlyres/57E92071-C591-4E15-879C-468A9CDE80A1/910/academic_work.pdf (accessed 4 May 2009). This study of nearly 2000 respondents found that (at 75) ‘Over 80 per cent of our respondents thought that time given to (administration and committee work) had increased… Our respondents largely took a negative view regarding the increased time doing administration.’
'performance' and 'quality assurance' – produce new forms and models of administrative conduct in the universities, and these forms and models are widely adopted in institutional practice. 'Quality assurance' is one of the more prominent mutations of the administrative condition, being a key vehicle for introduction of highly prescriptive management technique and bureaucratic scrutiny, notably under rubrics of 'performance' and 'audit.'

Consistent with these trends, and facilitative of them, is formal codification of academic, as well as non-academic, practice. Academic pedagogy is subject to widespread trends toward codification of student behaviour qua performance based on (positive) categories of 'skill,' 'attribute,' 'standards,' 'criteria,' 'competence,' and so on. Reconstituted in these modes ('empty' codes, to appropriate Readings' term, and economistic signifiers), academic practices are susceptible to instrumental rationality: they are made the objects of educational administration. Instrumentality applies to organisation of internal order (eg grading and accumulation of 'credit,' research accounting), as well to the 'knowledge economy' more broadly (eg by way of credentiallism). The treatment of knowledge as an instrumental factor, subject to the administrative rationality and commodity production, is characteristic also of the

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141 See Grant Harman’s early remarks on the Quality Assurance ‘movement’: Grant Harman ‘Australian Higher Education Administration And The Quality Assurance Movement’ (1994) 16 Journal of Tertiary Education Administration 1 25, 26: ‘… at least some of the recent and proposed changes could led to increased bureaucratization and regulation of teaching activities, which in turn could adversely affect spontaneity and creativity in teaching, and autonomy of academic work.’
142 Andreas Hoecht ‘Quality Assurance in UK Higher Education: Issues of Trust, Control, Professional Autonomy and Accountability’ (2006) 51 Higher Education 4 541: He concludes (at 556): ‘Quality assurance was mostly perceived as a form of control and an encroachment on (academic') professional autonomy. Many but not all felt that they were less trusted and more controlled than they had been in the past, although they did not perceive this control as being voluntarily exercised by their immediate academic managers… but as the outcome of ‘the system’ and the central administrative core of their universities.’ Compare Lesley Vidovich ‘Quality Assurance in Australian Higher Education: Globalization and ‘Steering at a Distance’ (2002) 43 Higher Education 391; Lesley Vidovcvh and Paige Porter ‘Quality Policy in Australian Higher Education in the 1990s: University Perspectives’ (1999) 14 Journal of Education Policy 6 576. See also, Australian Universities Quality Agency Audit Manual, Version 5.0 (2008).
145 The production of objects and categories that may be administered, from the substance of academic experience and interaction, is, as Massimo De Angelis and David Harvey have argued, central to the economic project of measurement of that experience and interaction (and the behaviors correlated with this activity): Massimo De Angelis and David Harvey ‘Cognitive Capitalism and the Rat Race: How Capital Measures Ideas and Affects in UK Higher Education’ (Paper presented at the Conference on Immaterial Labour, Multitudes and New Social Subjects: Class Composition in Cognitive Capitalism, Cambridge, 29 April 2006), http://www.geocities.com/immateriallabour/angelisharviepaper2006.html (accessed 18 April 2007).
longer-term, historic decline of higher education as the ‘cultivation’ of the internal, or ‘interior,’ self (Bildung). As Lyotard has expressed it: 146

We may thus expect a thorough exteriorization of knowledge with respect to the ‘knower,’ at whatever point he or she may occupy in the knowledge process. The old principle that the acquisition of knowledge is indissociable from the training (Bildung) of minds, or even of individuals, is becoming obsolete and will become ever more so. The relationship of the suppliers and users of knowledge to the knowledge they supply and use is now tending, and will increasingly tend, to assume the form already taken by the relationship of commodity producers and consumers to the commodities they produce and consume—that is, the form of value.

If these are the general conditions by which administration of the university is unfolding, what are the general circumstances of the students, the other major subject in this study?

### 2.4 Trends in Student Composition and Behaviour

The present research is concerned with decisions affecting university students. Some initial exploration of the circumstances and conditions of the students in the university is therefore warranted. In the past thirty years, these circumstances have changed significantly, as the general policy conditions impacting on the university have changed and as social and cultural factors affecting and influencing young people have altered. There is a general perception that the pressures facing students are greater than they have been in the past, such as greater competitiveness in the labour market and a growing accumulation of responsibilities. There is also evidence to suggest that the distinction between ‘student life’ and the wider ‘world of work’ is eroding, if not collapsing.

The students are the single largest grouping in, and represent the ‘mass base’ of, the university. There has been a transition from a so-called ‘elite’ to ‘mass’ higher education system since the late 1980s. The student body may be put in the following, abbreviated terms.

- As at 2007, more than one million students (1,029,846) were enrolled by Australian higher education providers and hence in degree-level or comparable programs, 147 and of this number more than 976,000 (976,786), or 94.8%, were enrolled at public universities. This represents nearly 12% of the population aged 15-34. 148 DETYA reported in 2001 that ‘over 40% of today’s 18 year olds can expect to attend university at some stage in their lives.’ 149

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146 Lyotard *The Postmodern Condition*, 4.
147 Department of Education, Employment and Workplace Relations *Students 2007: Selected Higher Education Statistics* (2008). These figures include all higher education students, in public and private providers.
International students, paying full-fees at a commercial rate, comprise one-quarter of enrolments in the public universities (254,414, or 25.24%). This proportion has grown from 4.3% in 1988 and 13.7% of all students in 2000. As Marginson has noted, international students have, as a market, had a strategic, even disproportionate, impact on higher education. They have had the affect of altering both the ‘funding structure and funding trends’ and the ‘pattern of expenditure’ in the universities – funding shifts into new functions related to revenue-raising itself and corporate operations, and away from ‘core activities’ (teaching and learning). In addition, they have contributed to a pedagogical recomposition of the university.

By 2000, more than 40% of higher education students studied part-time or as external students. By 2001, 54% of students were entering the system other than on the basis of secondary school qualifications. By 2007, more than one-third (37.93%) of all higher education students were aged 25 or older, and almost one-quarter were aged over 30 years of age.

The numbers of students not completing courses they have enrolled in (attrition rate) was at just under 20% for both domestic (18.5%) and international students (17.7%) in 2002. This had been relatively stable for the preceding decade, although the rate for international students had declined. Students’ age appears to be a significant factor in attrition rates, with older students more susceptible to non-completion than younger students.

In a 1998 analysis of enrolments, Meek and Wood argued that ‘Australian higher education has assumed a more postgraduate character,’ notably as students are undertaking study for ‘professional and continuing education’ purposes, or in other words as specialisation and retraining within professional labour markets. The 1990s saw a decline in...
students studying education (-3%) and significant growth in Business (43%) and in Law/Legal studies (86%). Participation by most equity groups has been declining.

- Student participation has been increasingly on the basis of fee-paying, either up-front or deferred via debt mechanisms. Just a decade after introduction of ‘user-pays’ mechanisms, two-thirds of all domestic students had a HECS debt, and a considerable proportion of funds otherwise sourced to pay for university education came from families (34% in 1998).

The commercialisation of the university has had substantial impact upon the nature and character of this student subject (or subjects). A growing amount of commentary has been focused on the emergence of the student as consumer, or as user, of educational services. In this manifestation, the student is a market subject. This is seen as changing the relationship of the student to the university and it is contributing to a change in student practices and approaches to university education.

The commercialisation and consumer emphasis of the student-university relationship has not gone unnoticed in judicial opinion as well. In Fennell v Australian National University, a case of student litigation for misrepresentation under the Commonwealth Trade Practices Act 1974, Sackville J remarked: ‘This case might be said to be a by-product of a relatively new phenomenon in Australian tertiary education, namely competition among Universities for full fee-paying graduate students.’

This shift in subjectivity has prompted scrutiny of the ‘student experience.’ Correlating with the propensity for students to approach the university as consumers is the phenomenon referred to as ‘disengagement’ of students from the university and from ‘campus life.’ The student is

159 Meek and Wood Managing Higher Education Diversity.
162 [1999] FCA 989, [1]; also compare Kwan v University of Sydney Foundation Program [2002] NSWCTTT 83.
increasingly detached, or withdrawing, from the university, especially for economic reasons. Attention has been given to the role of other needs and responsibilities on students in the present era, in particular the effect of paid work. The combination of study with paid work is now almost the norm. Financial pressures also play an important role in this development. The AVCC-commissioned study *Paying Their Way* found that around 70% of students were in paid employment during the semester, that full-time students work an average of 14.5 hours a week and part-time students at least 30 hours a week. The incidence of paid work for full-time students increased 50% between 1984 and 2000, and students noted themselves the toll taken by work on their studies (over one-half stating that they are affected ‘somewhat or a great deal’ by work, and 28% missing classes ‘sometimes’ or ‘frequently’ because of work). The report states that the work-study nexus is impacting adversely upon student experience and retention in higher education. This picture is reinforced by the 2002 DEST-commissioned study *Managing Study and Work*, and the follow-up, Universities Australia-commissioned student finances study *Australian Student Finances 2006*.

Langridge’s assessment of the cultural content of student and youth experience is that the communication culture has changed – as have the rules governing it. It is hardly surprising, then, that the manner in which many students interact (communicate) with a tertiary institution has changed. Today students are just individual shells negotiating their life highway, obeying the traffic rules society has set before them, rather than fully engaged, integrated participants in the institution.

Langridge interrogates the notion of disengagement, especially in relation to pervasive technological mediation of student (youth) experience. She argues that the cultural practices of students represent an ‘instant’ fix’ approach to education, or what she terms the ‘backyard blitz syndrome,’ an approach that appears to accord with the input-output logic of consumption patterns and consumer behaviour:

> It seems safe to argue that it was inevitable that this ‘instant fix’ attitude would, for some students at least, find its way into the academic arena: a concentrated effort for a limited time span will see the task achieved – no matter how well or how badly the task is cobbled together, it is done.

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165 Long and Hayden *Paying Their Way*, Ch 8.
169 Langridge ‘The Backyard Blitz Syndrome’.
170 Langridge ‘The Backyard Blitz Syndrome’.
McInnis’ finds that not only do students face ‘an increasing number of activities and priorities that compete with the demands of university,’ but there is a general decline in ‘student effort’, and ‘Students appear to be getting higher grades for doing less, and a culture of entitlement is widely reported.’ He concludes that the ‘university experience’ is being relegated or rationalized in the context of life as a whole, especially for young people. He talks of a ‘negotiated engagement,’ which is part of a practice to maximize options, a skepticism with respect to commitment, and the dissolving of the hegemony (or at least exclusivity) of study over particular moments of life.

2.5 Conclusions

The university as an institution first emerged in the Australian colonies little more than half a century after British occupation of the continent, based invariably on UK models. In many ways, the development was typical of the transplantation of British culture generally to the Antipodes. In the intervening period, higher education and the university in Australia have proceeded through various phases of development, most recently culminating in the period of ‘deregulation,’ market reform and ‘commercialisation.’ By the time of the Martin Committee Review of 1965, clear trends were emerging of greater direct integration of the universities into the (capitalist) economic project. This trend became the dominant condition by the 1980s, especially from 1988 onwards.

Certain important trends have underpinned this contemporary reality in the universities. Not only have market (or ‘quasi-market’) and commercial models come to dominate policy and practice, these mechanisms are indissoluble from patterns of internal austerity, or ‘uneven development,’ with relative austerity being focused generally on ‘core’ activities, such as teaching and learning. Further, as the university has been reorganised primarily as an instrument and as a space of economic behaviour, the rationality of institutional practice has changed to accommodate administrative behaviours. Administration, rather than the (Enlightenment) ‘idea’ of the university, now prevails as the central organising force. This development coincides with greater legislative and administrative prescription of, and control over, higher education. Finally, these contemporary conditions unfold in the context of new forms of student subjectivity, notably the existence of a ‘mass’ but diverse student base, and a student far less distinguishable from other social and economic actors. In particular, the student is far less likely to identify solely, or even predominantly, with the campus, and far more likely to accommodate study, work and other responsibilities, than in earlier periods. No doubt, these factors are among the critical reasons why the relationship between then student and the university is more

171 McInnis ‘Signs of Disengagement?’, 6.
complex and diverse than ever before, and why the legal form of the relationship has come to play an increasingly important role in its organisation and government.
Chapter 3
Complexity and Ambiguity in University Law: Navigating the Legal Terrain of the University-Student Relationship

3.1 Introduction

Until the 1960s, universities in the English-speaking, common law, countries benefited from a high degree of judicial deference to university affairs and a broad discretion in decision-making. In essence, an ‘arm’s length’ policy prevailed. The rise of administrative law saw a willingness of courts to intervene directly into university affairs to guarantee administrative law rights, notably natural justice. Subsequently, the legal relationship has grown. This has occurred as a matter of ‘judicial control of universities,’ that is through the common law, as well as by way of statutory changes. More recently, we have seen reference to the ‘legalisation’ of the student-university relationship.

3.2 Contours of the Relationship in Public and Private Law

3.2.1 Public Law

The student-university relationship is legally complex and has been referred to as a ‘hybrid’ of private and public law elements. A first basis of the student-university relationship lies in the role of public law to establish and regulate the university sector, and to control universities as public institutions. Australian universities are statutory bodies, for the most part legally constructed through two types of instrument: the founding or establishing enactment, and legislation regulating of the provision of higher education, including restrictions on the use of

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174 Rochford ‘The Relationship Between the Student and University’. For the sake of space, and in order to focus on the more developed areas of ‘higher education law,’ I have largely left aside in this discussion the issue of the student-university relationship in tort. There is a growing body of opinion, judicial and academic, that educational bodies such owe a duty of care to students in respect of the provision of education. This nascent area of negligence law has been recently inspired by the House of Lords’ decision in Phelps v Hillingdon London Borough Council [2000] 3 WLR 776. See also Ralph Mawdsley and J. Joy Cumming ‘Educational Malpractice and Setting Damages for Ineffective Teaching: A Comparison of Legal Principles in the USA, England and Australia’ (2008) 20 Education and the Law 1 25. The authors conclude (at 38): ‘…judicial dicta in English decisions argue educational professionals could all have liability for ineffective provision of education. Professional standards in England and Australia may well provide for a successful cause of action for students subjected to ineffective teaching, something that seems a long way off in the USA.’ Other private law theories regarding the student-university relationship have been propounded over the years, such as a fiduciary theory of the relationship (see eg Alvin Goldman ‘The University and the Liberty of its Students – A Fiduciary Theory’ (1965) 54 Kentucky Law Journal 4 643), but have found little judicial favour.
the term ‘university.’ Common national protocols agreed to by State/Territory and Commonwealth governments now standardise the approvals process for higher education providers. University operations are also extensively regulated through federal funding legislation, and legislation governing international students in Australia.

Typically, public universities in Australia are incorporated under their founding statute, and this may include the variation that the university is a ‘body corporate and politic.’ In the public university the student is a ‘corporator,’ often alongside other classes of corporator established by statute (eg governing body, staff, alumni). The student is a corporator at common law in circumstances where their status is not otherwise provided for by statute. The student’s corporate relationship with the university is founded on the ancient concept of the eleemosynary corporation: a corporation founded for charitable purposes (or in this case for higher learning) and governed by a founding instrument (in this case, the University Act). Most Australian universities retain the character of an eleemosynary corporation. The student as corporator is the same as the concept of the student as a member of the university. Such a status gives rise to the domestic relationship between the student and university. In respect of the public university, therefore, the domestic relationship is a product of statute.

Not all universities in Australia are incorporated by statute. Where an institution is incorporated under the Commonwealth Corporations Act or other relevant legislation, they may have

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175 Tertiary Education Act 1993 (Vic); Higher Education Act 2001 (NSW); Higher Education (General Provisions) Act 2003 (Qld); Training and Skills Development Act 2003 (SA); Higher Education Act 2004 (WA); Tasmanian Qualifications Authority Act 2003 (Tas); Training and Tertiary Education Act 2003 (ACT); Higher Education Act 2004 (NT).
177 Higher Education Support Act 2003 (Cth).
178 Education Services for Overseas Students Act 2000 (Cth).
179 Eg Melbourne University Act 1958 (Vic), s4; Monash University Act 1958 (Vic), s3.
180 See eg Philips v Bury [1694] All ER 53, 58C. The issue of the eleemosynary character of the university and status of corporators as members has been affirmed in contemporary House of Lords’ cases concerning the jurisdiction of the Visitor: Thomas v University of Bradford (1987) 1 AC 795, 815; Page v Hull University Visitor (1993) 1 All ER 97, 102-105.
181 Hence, the typical absence of any reference to ‘membership’ of the University under institutions’ establishing enactments in, for example, Queensland would not fundamentally deprive students of the status of membership of those institutions insofar as it can be presumed that the student is an inherent class of member of such corporations. Inclusion of other classes of members, such as alumni, which may be established in governing enactments elsewhere, may be more contentious at common law.
183 See Robert Sadler ‘The University Visitor: Visitatorial Precedent and Procedure in Australia’ (1982) University of Tasmania Law Review 2; compare R v University of Sydney; ex parte Drummond (1943) 67 CLR 95, 110: ‘At all events the university has no purpose to serve but the advancement of learning, and in the achievement of that purpose it will no doubt do all that is proper and possible in the circumstances.’ (Starke J).
184 Thompson v University of London (1864) LJCh 625.
statutory support in the form of enabling legislation.\textsuperscript{185} In these instances, the relationship between the student and university does not find substantive effect in administrative law but rather in the private law of contract.\textsuperscript{186} The student is a corporator and, additionally, a party to the contract.\textsuperscript{187} This has been termed a ‘contract of membership.’\textsuperscript{188}

The character of ‘membership’ of the university as a corporation (or as it is often expressed in cases concerning Visitorial jurisdiction, the ‘foundation’) received recent consideration in the \textit{University of Western Australia v Gray} litigation in the Federal Court.\textsuperscript{189} Although this case concerned intellectual property rights and the contract of employment of academic staff, the Court’s consideration of the ‘distinctiveness’\textsuperscript{190} of the university and of the employment relationship in the university were material to the outcome of the case, and in substance the Court’s statements on the character of the university are not inconsistent with the more ancient principles of the eleemosynary corporation as applied to universities. \textit{Gray} affirms the notion that the academic staff member is not only an employee but a ‘member’ of the university,\textsuperscript{191} a status implied into the contract of employment\textsuperscript{192} and flowing from the nature of the university as a ‘special purpose statutory corporation’\textsuperscript{193} with a ‘traditional public function as an institution of higher education.’\textsuperscript{194} The notion of ‘tradition’ here is not subject to any great scrutiny. Although the content of the terms of membership will differ,\textsuperscript{195} there is no logical or practical reason to distinguish the fact of membership of the corporation enjoyed by the academic staff from that enjoyed by students.\textsuperscript{196} It would be fair to say, as a matter of legal interpretation, that

\begin{itemize}
\item \textsuperscript{185} Australian Catholic University (Victoria) Act 1991 (Vic), s 1(a); Bond University Act 1987 (Q), Preamble, s 2; Australian William E Simon University Act 1988 (NSW), s 3.
\item \textsuperscript{186} Generally on contract, see sub-section 3.2.2 below.
\item \textsuperscript{187} Herring and Templeman (1973) 3 All ER 569, 584-5; Clark v University of Lincolnshire and Humberside (2000) 1 WLR 1988, where in a statutory university the corporate relationship of the student and university is founded both in public (administrative) and private (contract) law.
\item \textsuperscript{188} Wade ‘Judicial Control of Universities’; Lee v Showmen’s Guild of Great Britain (1952) 2 QB 329; Casson v University of Aston [1983] 1 All ER 88.
\item \textsuperscript{189} University of Western Australia (No 20) [2008] FCA 498; the University’s appeal against the decision of French J at trial was dismissed: University of Western Australia v Gray [2009] FCAFC 116.
\item \textsuperscript{190} University of Western Australia v Gray [2009] FCAFC 116, [183].
\item \textsuperscript{191} University of Western Australia (No 20) [2008] FCA 498, [1361]: He was not merely an employee. He was, by virtue of the definition of the “university” in the UWA Act a member of it and linked historically by that definition to the idea of the University as a community of teachers and scholars. The statutory definition which incorporated that idea can be traced back at least to the 16th century statute by which Oxford University was incorporated.
\item \textsuperscript{192} University of Western Australia v Gray [2009] FCAFC 116, [185]: A further distinctive feature of many, but not all, universities (including UWA) is that their academic staff are part of the membership that constitutes the corporation and as such are bound by the statutes, regulations, etc of the university. Their membership is integral to their status and place in the university. To define the relationship of an academic staff member with a university simply in terms of a contract of employment is to ignore a distinctive dimension of that relationship.
\item \textsuperscript{193} University of Western Australia v Gray [2009] FCAFC 116, [183].
\item \textsuperscript{194} University of Western Australia v Gray [2009] FCAFC 116, [184].
\item \textsuperscript{195} The academic staff typically enjoy ‘academic freedoms,’ including to determine a course of research and undertake cross-institutional collaborations, which are quite central to the duties of those staff: see University of Western Australia v Gray [2009] FCAFC 116, [186]-[192]. The benefits enjoyed by students pertain, rather, to ‘freedoms’ to learn.
\item \textsuperscript{196} In respect of contract, this will merely represent differing forms of contract and differing (implied) contract terms.
\end{itemize}
continuity of purposes of ‘higher learning’ or ‘advancement or learning (cf R v University of Sydney; ex parte Drummond) represent a thread between the eleemosynary corporation and the ‘special purpose statutory corporation’ of Gray’s case.

Finally, one of the more significant differences in the statutory source of corporate membership, as against contractual membership, will lie in the form of relief available to students in the context of a dispute or a breach of the student’s rights arising from his/her membership. While breach of contract may provide relief in damages, prejudice to their corporate status (eg arbitrary expulsion) may enliven administrative law remedies, such as the common law remedies of certiorari, mandamus or prohibition, or their modified or statutory equivalents.

Australian administrative law finds two sources related to the control of governmental action: application of the common law prerogative writs, and the various statutory schemes in force in Australian jurisdictions. The result is that the application of judicial review to universities is complex and varies by jurisdiction. It has been said that judicial control of universities by way of judicial review at common law ‘reveals ambivalence’ and ‘[i]t is not always clear just what is the foundation of judicial intervention.’197

At common law, the susceptibility in principle of public universities to judicial review is well-established.198 The question as to the precise application of this sphere of administrative law to the student-university relationship must contend, as Francine Rochford has put it,199 with the substantial ‘confusion that surrounds the applicability of public law remedies to universities.’ Through the twentieth century, the test for application of the prerogative writs has evolved to the point where the jurisdictional issue is the use and identification of public power. Thus, as exemplified in R v Panel on Take-Overs and Mergers, ex parte Datafin Plc,200 this form of judicial review now effectively concerns institutional actions of a ‘public nature.’ Likewise for the university, the issue becomes one of identifying those actions or decisions that are of a public character or function.201

197 G Fridman ‘Judicial Intervention into University Affairs’ (1973) 21 Chitty’s Law Journal, cited in Re Polten and Governing Council of the University of Toronto et al (1975) 59 DLR (3d) 197, 210-211.
198 University of Ceylon v Fernando (1960) 1 All ER 631; R v University of Saskatchewan, ex parte King (1968) 1 DLR (3d) 721; ex parte King; Re The University of Sydney (1943) 44 SR(NSW) 19.
201 By way of comparison, it is worth noting Chief Justice James Spigelman ‘Foundations of Administrative Law: Toward General Principles Of Institutional Law’ (1999) 58 Australian Journal of Public Administration 1 3, in which his Honour points out not only that there are ‘characteristics of private bodies that render them of sufficient public character to attract judicial review’ (at 7), but that wider principles of ‘administrative responsibility’ have effectively emerged in law and governance applying across governmental, corporate and non-governmental sectors. Referring to these as ‘principles of institutional law’ he writes: ‘There are core principles, in all these areas, many of which are derived by way of analogy from equity and its control of fiduciary powers.’ (at 9)
Statutory schemes for judicial review have been in force since the 1970s, including the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (‘ADJR Act’). The jurisdictional test of the ADJR Act differs from the common law test, especially to the extent that the former applies to ‘a decision… of an administrative character made under an enactment’.

While these schemes were originally proposed to expand access to review of government action, it has been argued that the current trend is otherwise.

It has been held that the university, with regard to the ADJR Act, satisfies the test of being an ‘administrative’ body. The more troublesome issue concerns the extent to which university actions vis-a-vis students may or may not be a ‘decision… made under an enactment’ for the purposes of the ADJR Act. The key phrase ‘under an enactment’ was tested in the High Court in *Griffith University v Tang*, a case arising from a decision to exclude a student from a university for academic misconduct, and the subject of considerable commentary from education and administrative law academics. The facts in Tang have been restated a number of times in this literature. I only refer to the more pertinent elements here.

The decision in the Tang case concerned interpretation of the Queensland *Judicial Review Act 1998* (Q). Ms Tang had sought judicial review of Griffith University’s decision to expel her for a breach of the University’s Policy on Academic Misconduct. A majority of the Court held that the student could not apply for judicial review because the University decision had not been ‘made under an enactment.’ In this case, the ‘enactment’ at issue was the *Griffith University Act 1998* (Q). The majority reasoned *inter alia* that a ‘decision’ was only a ‘decision’ made for the purposes of the Judicial Review Act where legal rights and obligations were affected, and that this was not the case under the Griffith University Act 1998. The student had, in this instance, been expelled under a non-statutory instrument, an internal University ‘policy,’ or what Baldwin has referred to as ‘tertiary rules.’ It is not unusual for student disciplinary rules, or related measures, to be contained in non-statutory instruments.

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202 Section 5.
204 Burns v Australian National University (1982) 40 ALR 707, 714.
208 See eg Table 4.1 below, in respect of plagiarism rules.
The relevant provision to be tested (whether the decision was one to which the *Judicial Review Act* applied and specifically a ‘decision… made under an enactment’) effectively reproduces the jurisdictional formula available under the *ADJR Act*. The same formula is reproduced in the statutory review schemes in the ACT\(^{209}\) and Tasmania.\(^{210}\) Victoria’s statutory review scheme under the *Administrative Law Act 1978* (Vic) is distinguishable and the question of jurisdiction under that Act parallels the common law scope for review.\(^{211}\)

Kamvounias and Varnham\(^{212}\) have argued that universities’ ‘immunity’ from review as established in *Tang* would be limited. The *ADJR Act* formula regarding application of the review scheme does not operate outside of the Commonwealth, Queensland, the ACT and Tasmania. Even within those jurisdictions it is often the case that statutory review would apply where decisions are made under subordinate legislation and would be amenable to review under the relevant statutory review schemes.

The point here is that, notwithstanding the High Court’s narrow interpretation of certain judicial review mechanisms, the application of administrative law to Australian universities remains broad. By extension, where the student has a corporate status within the university, public law still generally applies to university decisions affecting them, especially where such decisions would have a serious, adverse impact on that status (eg exclusion). Courts may see fit to intervene in university decision-making where they find abuse of power or error of law.\(^{213}\) The main source of qualification to this principle is the Courts’ reluctance to intervene in matters of academic judgement.\(^{214}\)

3.2.2 Private Law

The student-university relationship also exists in private law (contract), and student litigation may arise as common law action in contract or under various statutory schemes constructed to protect the student as a consumer. These schemes include elements of the *Trade Practices Act 1974* (Cth), and the respective State and Territory *Fair Trading Acts*, and, with respect to international students, the *Education Services for Overseas Students Act 2000* (Cth).

\(^{209}\) *Administrative Decision (Judicial Review) Act 1989* (ACT).
\(^{210}\) *Judicial Review Act 2000* (Tas).
\(^{212}\) Kamvounias and Varnham ‘Doctoral Dreams Destroyed’, 11-14.
\(^{213}\) For example, in *Bray v University of Melbourne* [2001] VSC 391.
In commercialised settings such as the provision of full fee-paying courses, contract theory seems compelling. Contract is of increasing significance, and leading UK commentators submitted some time ago it is the prevailing basis of the relationship.\(^{215}\) In the US, contract is an entrenched basis of a student’s relationship with the university, particularly in view of the significance of private institutions.\(^{216}\) The more pertinent authorities are – for the sake of current argument and given the Australia universities’ origins – British. The question of contract, and its nature and structure, has been considered in depth in British,\(^{217}\) US,\(^{218}\) and Australian\(^{219}\) legal-academic literature.

In brief, application of the law of contract to university students was rejected in the 19th century.\(^{220}\) But by 1964, in *Sammy v Birkbeck College*,\(^{221}\) the English High Court held contract to apply and considered its implied terms. Upon payment of his fees, the student could expect the institution to provide facilities and expertise necessary for tuition appropriate to the examinations at the University of London in exchange for the student’s adherence to the university rules. Terms were held to be similar in the 1971 case of *D’Mello v Loughborough College of Technology*\(^{222}\). Nevertheless, the contract was held to provide considerable latitude and discretion to the institution, a dimension to the contract common to the US experience.\(^{223}\) The student litigants in both English cases were defeated.

Two more recent English cases are worthy of note. In *Clark v University of Lincolnshire and Humberside*,\(^{224}\) the UK Court of Appeal confirmed the contractual relationship while at the same time adding the conventional qualification of judicial deference to the university in

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\(^{215}\) Wade ‘Judicial Control of Universities’; Dennis Farrington *The Law of Higher Education* (Butterworths, 1994).


\(^{218}\) In particular, see Kaplan and Lee *The Law of Higher Education*.

\(^{219}\) Patty Kamvounias and Sally Varnham ‘In-House or in Court? Legal Challenges to University Decisions’ (2006) 18 *Education and the Law* 1 1, 11-12; Rochford ‘The Relationship Between the Student and University’.

\(^{220}\) *Thompson v University of London* (1864) LJCh 625.

\(^{221}\) (1964) The Times 3 November.


The Court of Appeal decision in *Clark* affirms that a contractual (private law) and public law relationship co-exist. Second, in *Moran v University College Salford*, the Court was effectively called to adjudicate on the structure of the contractual relations operating between the student and university and concluded that two contracts operate: one for admission, and one for matriculation or enrolment. The contract of enrolment is similar to a ‘contract of membership’ with a private organisation, where the student agrees to abide by the rules in exchange for the benefits of membership.

With respect to the Australian context, Rochford has remarked that the courts ‘have not adopted an exclusively contractual analysis with any enthusiasm.’ Instances where contract has been held to apply are scant and not particularly revealing of the nature and content of the contract. In *Bayley-Jones v University of Newcastle*, the New South Wales Supreme Court held contract to apply, in the relatively conventional manner of incorporating as terms the rules of the university, including the jurisdiction of the Visitor where a domestic matter was concerned: ‘One can have contractual rights which are a reflection of the rules of the university.’ Contract was affirmed in principle in *Harding v University of New South Wales*.

The subsequent question of relief or remedy afforded to a student who may successfully challenge their institution for breach of contract has been considered by Davis, Kamvounias and Varnham, and Rochford. The issue of common law challenge in contract poses two important hurdles for any student seeking remedial action against a university. First, it is unlikely a successful challenge would provide relief other than in the form of damages. For instance, the courts would be unlikely to compel specific performance of the contract as a remedy to a proven breach, or for that matter a mandatory injunction that may give a similar

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225 *Clark v University of Lincolnshire and Humberside* (2000) 1 WLR 1988, [12]: Unlike other contracts, however, disputes suitable for adjudication under [the University’s] procedures may be unsuitable for adjudication in the courts. This is because 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. This is not a consideration peculiar to academic matters: religious or aesthetic questions, for example, may also fall into this class. It is a class which undoubtedly includes, in my view, such questions as what mark or class a student ought to be awarded or whether an aegrotat is justified.


228 Francine Rochford ‘The Relationship Between the Student and University’, 32.

229 (1990) 22 NSWLR 424.

230 [2001] NSWSC 301, [18].

231 Davis ‘Students, Academic Institutions and Contracts – A Ticking Time Bomb?’.

232 Kamvounias and Varnham ‘In-House or in Court? Legal Challenges to University Decisions’, 11-12


234 In particular, given the nature of the contract as one of service: *J C Williamson v Lukey and Mulholland* (1931) 45 CLR 282, 297-8 (Dixon J): Specific performance is inapplicable when the continued supervision of the Court is necessary in order to ensure the fulfilment of the contract. It is not a form of relief which can be granted if the contract involves the performance by one party of services to the other or requires their continual co-operation.
The subsequent issue becomes the quantification of damages. There is an accumulating body of legal and academic opinion on this issue, indicating that award of damages is indeed possible where a direct loss (eg in the form of fees or income directly foregone) has been found, or even where a student suffers mental distress in the failed performance of the contract (‘disappointment damages’).

The ‘contract of membership’ that operates at common law may be said to be affected increasingly by the treatment of the student as a consumer of ‘education services.’ The contract is increasingly being viewed as a form of ‘consumer’ contract and therefore susceptible to consumer protection legislation. Consumer protection provisions of the Commonwealth Trade Practices Act 1974, in particular Sections 52 and 53 which concern deceptive or misleading conduct and misrepresentation, have been used (or sought to be used) by students on occasion to litigate against universities. The Trade Practices Act applies to public universities by virtue of those institutions being considered as trading and/or financial corporations for the purposes of s 4 of the Act. The question as to whether universities are trading or financial corporations was considered in Quickenden v O’Connor.

In that case, the Federal Court tested the phrase as it appeared in the Workplace Relations Act 1996 (Cth) (to determine whether an industrial agreement made under the latter Act applied to the University of Western Australia). In both legislative contexts, the term is derived from, and applies, s 51(xx) (the ‘corporations power’) of the Constitution. It has been accepted in trade practices cases that universities are susceptible to challenge as corporations under the Trade Practices Act. The Full Court in Quickenden held:}

For discussion, see J W Carter and D J Harland Contract Law in Australia (2nd ed., 1991), [2403]. However, by way of comparison, see Moran v University College Salford (1994) ELR 187 (‘Moran’), where it was held that if the impediment to an order of specific performance or mandatory interlocutory injunction were solely based on ‘administrative matters’ there may have been scope for such orders to issue in regards to a student’s contract of enrolment (as distinct from contract of matriculation, or education).

In Moran, the UK Court of Appeal was faced with the issue of ordering the defendant institution to enrol the plaintiff. It declined to do so. In the lead judgement, Glidewell LJ held that an order of mandatory injunction would place unreasonable resource pressures on the College.


The University was not established for the purpose of trading and at another time, closer to the time of its creation, it may not have been possible to describe it as a trading corporation. But at the time relevant to this case and at present, it does fall within that class.241

The more difficult, but pertinent, question is the scope of activities within the university to which consumer protection measures under the Trade Practices Act, or comparable State or Territory legislation, apply. Sections 52 and 53 of the Trade Practices Act will not apply to all conduct undertaken by the university in relation to a student as a consumer, but only that occurring, as relevant, ‘in trade or commerce.’242 In Quickenden, the Full Court identified a range of commercial, trading and investment activity in which UWA was involved. While the Court held that it was ‘doubtful’243 that fees charged for educational provision established and regulated by statute (in that case, HECS payments under the Higher Education Funding Act 1988244) could be considered as trading, it left open the notion that fee-charging outside of the scope of statutory control (eg in relation to international students) was a trading activity. Additionally, it has been argued that university marketing or promotional activities, now commonplace, will likely attract Section 52, as would communications aimed at inducing or offering services to students already enrolled.245 Alternatively, it has been argued that basic educational activities of the university, such as lectures, do not occur ‘in trade or commerce’ and therefore are not susceptible to trade practices legislation.246 But this ought to be considered in the context of a State fair trading case, Kwan v University of Sydney Foundation Program.247

Key relevant elements of the Commonwealth consumer protection scheme, such as protection against deceptive or misleading conduct and false representation, are generally reproduced in the State and Territory Fair Trading Acts.248 Some procedural variations aside,249 the statutory schemes contain a range of remedies, including damages, injunctions and in some instances criminal sanction. In Kwan, a tertiary student was held to be a consumer for the purposes of the NSW consumer protection law250 and in that case the educational relationship was seen to be

242 The most relevant sections being, as mentioned, those concerning misleading or deceptive conduct and false representations (sections 52 and 53 respectively).
244 Comparable schemes of statutory ‘pricing’ now operate under HESA, ss 19.85-19.105.
248 Fair Trading Act 1987 (NSW); Fair Trading Act 1989 (Q); Fair Trading Act 1987 (SA); Fair Trading Act 1999 (Vic); Fair Trading Act 1990 (Tas); Fair Trading Act 1992 (ACT); Fair Trading Act 1987 (WA).
249 Eg, under the South Australian Fair Trading Act 1987 civil action for damages may be taken directly by a consumer (s 84) or by the Commissioner of Consumer Affairs on their behalf (s 76), which is not replicated, say, in the NSW Act.
250 The dispute was brought under the Consumer Claims Act 1998 (NSW), and the Fair Trading Act 1987 (NSW), ss 42, 50. The course was not in fact an undergraduate course but ‘a program aimed at
reduceable to the ‘supply of education services.’ Challenge for misleading and deceptive conduct was available, although unsuccessful. The Tribunal in this case accepted for the purpose of relevant sections of the NSW Fair Trading Act that it had jurisdiction to hear the matter, that there was a contract between the student and the educational provider, and, by inference, that the totality of the relationship (ie including ‘core’ activities such as classes and lectures) operated ‘in trade or commerce.’ Kwan may be distinguished by the fact that the student-university relationship was entirely fee-for-service (there was no statutory control over fees or pricing) and supplied by a private entity. It may also be distinguished by the fact that ‘core’ educational provision possessed a substantial enough ‘relationship with trade or commerce’ to attract the Fair Trading Act. This may not be said of all educational or intellectual activity in the university sector.

Additionally, Victoria and NSW have enacted prohibitions on unjust and unfair terms in consumer contracts, a form of statutory unconscionability. As Whittaker has remarked, these forms of statutory control on the content of consumer contracts (and conduct of making contracts) represent the extension of judicial review to private law and ‘a conscious borrowing of the terminology of public law.’ The Victorian scheme borrows directly from UK and European Unfair Terms in Consumer Contracts legislation, and establishes grounds of substantive unfairness in contract terms as well as grounds of (procedural) unfairness in the making of contracts. The student-university contract has been subjected to academic analysis in light of the ‘unfair terms’ legislation. This analysis would apply directly to the Victorian situation. As yet, application of the ‘unfair terms’ elements of the Victorian legislation has not been tested in the university-student context.
Finally, a form of consumer protection legislation is specifically enacted for international students under the *ESOS Act*. This includes express prohibition on ‘registered providers’ engaging in misleading and deceptive conduct in recruiting overseas students and providing courses to them.\(^{260}\) It also regulates extensively the terms and conditions by which education may be provided to international students, under the *National Code*. Under the ‘consumer protection’ elements of *ESOS Act* and the *National Code*, however, universities are not susceptible to student challenge for alleged breaches. Action may only be taken by the Minister for such non-compliance, including placing conditions on a provider’s registration, or suspension or cancellation of registration.\(^{261}\) Students do have ‘complaints and appeals’ mechanisms available, by which decisions can be reviewed. I will consider those procedures below.

### 3.3 The University’s ‘Domestic’ Jurisdiction

#### 3.3.1 The Domestic Jurisdiction and the Visitor

The concept of the university’s domestic jurisdiction derives from its corporate character. It was an element of the British chartered universities until recently that their institutional architecture included the office of Visitor at common law.\(^{262}\) Domestic jurisdiction in this regard concerns adjudication of disputes and grievances arising under the internal laws of the university, and operation of that jurisdiction lies, where it is extant, in the Visitor:

The jurisdiction derives from the visitor’s position as judge of the internal laws of the foundation, and he has jurisdiction over questions of status because it is upon those laws that status depends.\(^{263}\)

The office and the law have historically been imported into the Australian public universities, with the office of Visitor normally residing with the relevant State Governor. The jurisdiction has been exercised on numerous occasions in Australia.\(^{264}\)

The jurisdiction of the Visitor is exclusive of the courts. This is famously elaborated in the dictum of Kindersley VC in *Thompson v University of London*.\(^{265}\)

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\(^{260}\) *ESOS Act*, s 15.

\(^{261}\) *ESOS Act*, s 83.

\(^{262}\) *Philips v Bury* [1694] All ER 53, 58G; *Page v Hull University Visitor* (1993) 1 All ER 97, 106d (Lord Browne-Wilkinson): ‘This special status of a visitor springs from the common law recognising the right of the founder to lay down such a special [internal] law subject to adjudication only by a special judge, the visitor.’

\(^{263}\) *Thomas v University of Bradford* (1987) 1 AC 795, 816B (Lord Griffiths).

\(^{264}\) *Re University of Melbourne; ex parte De Simone* (1981) VR 378; *Re La Trobe University; ex parte Hazan* (1993) 1 VR 7; *University of Melbourne; ex parte McGurk* (1987) VR 586. See also Sadler ‘The University Visitor’, 8.

\(^{265}\) *Thompson v University of London* (1864) LJCh 625.
whatever relates to the internal arrangements and dealings with regard to the government and management of the house, of the domus, of the institution, is properly within the jurisdiction of the Visitor, and this Court will not interfere in those matters; but when it comes to a question of rights of property, or rights as between the University and a third person dehors the University, or with regard, it may be, to any breach of trust committed by the corporation… or any contracts by the corporation, not being matters relating to the mere management and arrangement and details of the domus, then, indeed, this Court will interfere.\textsuperscript{266}

Thompson represented a high watermark in judicial treatment of the Visitor. The House of Lords affirmed the role of the University Visitor in \textit{Thomas v University of Bradford}.\textsuperscript{267} Decisions of the Visitor may be reviewed for jurisdictional error and for breaches of natural justice.\textsuperscript{268} It has been held that appeals on academic decisions do not form part of the Visitor’s jurisdiction,\textsuperscript{269} although it may be that where a Visitor declines to intervene against a decision that is ‘plainly irrational or fraught with bias or some other obvious irregularity’ the (non)action may be reviewed for error of law.\textsuperscript{270} Other principles have arisen in the exercise of the Visitor’s discretion, such as the award of damages,\textsuperscript{271} declining relief where it is in the ‘best interest’ of the university to do so,\textsuperscript{272} declining to act against a discretion exercised in good faith,\textsuperscript{273} and adjudicating on disputes over membership.\textsuperscript{274} However, the office is an extension of the founding instrument (eg Act of Parliament) and its exercise is discretionary and not bound by the common law.\textsuperscript{275} While the jurisdiction may be statutory, it can also be invoked in contract.\textsuperscript{276}

3.3.2 The Fate of the Visitor

Reform of universities’ legislation has led to the abolition of the visitorial jurisdiction, where it had previously existed, in all Australian jurisdictions other than Western Australia.\textsuperscript{277} Where the

\begin{itemize}
\item \textit{Thompson v University of London} (1864) LJCh 625, 634.
\item \textit{R v Aston University Senate, ex parte Roffey} (1969) 2 QB 538; \textit{Glynn v Keele University} (1971) 1 WLR 487; \textit{University of Ceylon v Fernando} (1960) 1 All ER 631.
\item \textit{R v Judicial Committee of the Privy Council Acting for the Visitor of the University of London; ex parte Vijayatunga} (1988) 1 QB 322.
\item \textit{R v Judicial Committee of the Privy Council Acting for the Visitor of the University of London; ex parte Vijayatunga} (1988) 1 QB 322, 334.
\item \textit{Bayley-Jones v University of Newcastle} (1990) 22 NSWLR 424.
\item \textit{Bayley-Jones v University of Newcastle} (1990) 22 NSWLR 424; \textit{Re Macquarie University, ex parte Ong} [1989] 17 NSWLR 113.
\item \textit{Re University of Melbourne, ex parte De Simone} (1981) VR 378, 387.
\item \textit{Patel v University of Bradford Senate} (1978) 1 WLR 1488.
\item \textit{Page v Hull University Visitor} (1993) 1 All ER 97, 106d: ‘This inability of the court to intervene is founded on the fact that the applicable law is not the common law of England but a peculiar or domestic law of which the visitor is the sole judge.’ See Sadler ‘The University Visitor’, 8.
\item \textit{Bayley-Jones v University of Newcastle} (1990) 22 NSWLR 424, 436B; \textit{Casson v University of Aston in Birmingham} (1983) 1 All ER 88.
\item \textit{Eg University Acts (Amendment) Act 2003} (Vic); \textit{University Legislation (Amendment) Act 1994} (NSW).
\end{itemize}
office remains it is entirely ceremonial. Abolition has proceeded on the grounds that the jurisdiction is rarely used and other internal appeal mechanisms are adequate.\textsuperscript{278}

The office is indeed archaic, especially when scrutinised as a relic of the medieval organisation of charity and alms. It has tended to sit uncomfortably alongside the statutory university established in Commonwealth countries, such as Australia, New Zealand and Canada, based on the British model. This has led in certain instances to judicial reluctance to sanction an exclusive jurisdiction.\textsuperscript{279} In the 1940s, the idea that a student should turn to the Visitor to deal with a dispute with a public university was derided from the NSW Supreme Court Bench: ‘I think also that probably nobody, until Ex parte King; Re University of Sydney\textsuperscript{280} even though that there was any possibility of intervention by the Visitor.’\textsuperscript{281} In the UK, the Blair Government enacted the Higher Education Act 2004 (UK), which also took the step of abolishing the University Visitor’s jurisdiction as it applied to institutions of higher education in England and Wales.\textsuperscript{282}

The office of Visitor was held in Thomas as having the ‘advantage of cheapness, lack of formality and flexibility,’\textsuperscript{283} or in other words it represents a form (or potential form) of domestic tribunal, with scope for affecting a system of dispute resolution alternative to the courts.\textsuperscript{284} It has been advocated that the jurisdiction may be suitably reformed for contemporary circumstances: ‘If properly constituted and qualified the visitoriall forum offers all the advantages inherent in suitably constituted specialist tribunals.’\textsuperscript{285} The trend in public policy has not been, however, to reform the Visitor but to dispense with it. In the UK, human rights law provided the legal and constitutional framework upon which this decision was made. As Kaye has put it, in relation to European human rights standards, ‘the determination of disputes by a university Visitor simply does not pass muster.’\textsuperscript{286} Comparatively unfettered, the Visitor’s discretion is also a ‘relic’ of redundant models of administration. It is unstructured, and despite attempts to discern them,\textsuperscript{287} possesses no established rules of procedure. Although by convention in Australia visitorial judgements have been reported, proceedings before a Visitor are not public. In contrast to the assertions of expediency in Thomas, it has been argued in UK

\begin{itemize}
\item \textsuperscript{278} Eg Victoria, Parliamentary Debates, Legislative Assembly, 1 May 2003, 1322 (Lyn Kosky, Minister for Education).
\item \textsuperscript{279} Eg Norrie v Senate of the University of Auckland (1984) 1 NZLR 129.
\item \textsuperscript{280} (1943) 44 SR (NSW) 19.
\item \textsuperscript{281} Ex parte McFadyen (1945) SR (NSW) 200, 205 (Halse Rogers J).
\item \textsuperscript{282} Ss 20, 46.
\item \textsuperscript{283} Thomas v University of Bradford (1987) 1 AC 795, 824.
\item \textsuperscript{284} Anwar Khan and Alan Davison ‘University Visitor and Judicial Review in the British Commonwealth (Old) Countries’ (1995) 24 Journal of Law and Education 457; Sadler ‘The University Visitor’.
\item \textsuperscript{285} Sadler ‘The University Visitor’, 32
\item \textsuperscript{286} Tim Kaye ‘Academic Judgement, the University Visitor and the Human Rights Act 1998’ (1999) 11 Education and the Law 3 165, 178.
\item \textsuperscript{287} Sadler ‘The University Visitor’.
\end{itemize}
and Australian legal commentary that the Visitor is ‘neither necessarily cheap, speedy nor
final.’

Removal of the Visitor’s jurisdiction appears to leave a gap in the legal architecture governing
the domestic student-university relationship: the body corporate has lost its (penultimate)
judicial arm. Admittedly, universities possess an apparatus of internal appeals and quasi-judicial
decision-making (e.g. for discipline proceedings, unsatisfactory performance, and complaints).
The arguable significance of the office of the Visitor is its standing in law, independent of and
‗superior’ to the organs of internal government and management, whether by common law or
statute. This status derives from the office’s function as a ‘delegate’ of the founder. Notwithstanding legal and procedural shortcomings, the jurisdiction gives quasi-judicial effect
to the student’s corporate status in the eventuality of a major dispute. Abolition of the
jurisdiction removes a statutory mechanism of challenge to internal university decisions (albeit
rarely used), but more significantly it poses the question: on what basis can supervision of
domestic relations and adjudication of domestic disputes occur? Bearing in mind that internal
disputes may have major consequences for students (including financial loss or even expulsion),
two responses may be adverted to: establishment in the UK of the Office of the Independent
Adjudicator for Higher Education (‘OIA’), and Australian regulation for dispute-settling and
grievance procedures.

3.3.3 UK Renovation of the Domestic Jurisdiction

Under Part 2 of the UK Higher Education Act, the UK Government established a statutory basis
for the review of student complaints in higher education institutions in England and Wales. The
OIA, a company limited by guarantee, receives statutory support under the Act as the designated
operator of the student complaints scheme. It is an independent body charged with investigating
and ruling on student complaints. The OIA issues Rules governing the handling of
complaints.

The Higher Education Act has been described as having the effect of ‘translating’ the
jurisdiction of the Visitor ‘into the authority of the Office of the Independent Adjudicator for
higher education’. This has been an important step in ‘modernizing’ the student-university
relationship in that country. A participating institution is obliged to comply with the OIA’s

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288 David Price and Peregrine Whalley ‘The University Visitor and University Governance’ (1996) 18
Higher Education Policy and Management 1 45, 53; also Kaye ‘Academic Judgement, the University
289 Office of the Independent Adjudicator for Higher Education Rules of the Student Complaint Scheme,
290 Gajree v Open University [2006] EWCA Civ 831, [29].
rules, which include an ‘expectation’ that its decisions will be complied with and implemented. The effect of the OIA’s decisions on institutions may therefore have weight but are not legally binding on institutions. The OIA may issue relief to student complainants, including in 2005 over £250,000 in compensation. Redress may include remitting a decision to a higher education institution to be made afresh, identifying a different course of action, or payment of compensation. The OIA may recommend changes to internal rules and complaint-handling. Recommendations are not limited to identified forms of redress, and hence the scope of review and action by the OIA is wide-ranging. Matters of academic judgement and student admissions can not be dealt with under the Scheme. A student who takes a matter to the courts cannot subsequently seek to have it heard by the OIA, and a student must exhaust internal complaints procedures before seeking to refer a matter to the OIA.

The OIA’s procedure is typically to adjudicate matters on the papers. Under the Rules, oral hearings, although anticipated, are not the norm. Parallels have been drawn between the OIA and statutory ombudsmen. There is merit in this argument, although the comparison needs to be weighed against the powers invested in the ombudsman in any particular scheme. The distinction ought to be made in the meaning of the adjudicative function of the OIA in relation to its powers. OIA ‘recommendations,’ if not binding, may be compelling because of the ‘expectation’ they are implemented, by the fact that all higher education institutions in England Wales must make payments to it, and by the ‘perceived risk of external exposure’ attendant in the OIA’s actions. The reforms introduced with the Higher Education Act are a significant

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291 Higher Education Act 2004 (UK), s 15.
293 This situation was confirmed by the UK Court of Appeal in R (on the application of Siborurema) v Office of the Independent Adjudicator [2007] EWCA Civ 1365. Although this case primarily tested the scope of the OIA’s powers and discretion, which the Court held to be wide, the Court also described the OIA’s proceedings as ‘not necessarily determinative…’ although having the weight of statutory support: Siborurema, 49(a).
296 Office of the Independent Adjudicator for Higher Education Rules of the Student Complaint Scheme, rr 3.1, 3.2. Precluding matters of academic judgement from the Scheme follows the accepted judicial policy of not intervening in academic decision-making. The scope of academic judgement is not defined in the legislation or the Scheme, and it is in fact arguably more restrictive than the current common law position, in which the courts may upset an academic decision on grounds of procedural unfairness or unreasonableness: R v Universities Funding Council; ex parte the Institute of Dental Surgery (1994) 1 All ER 651; R v University of Portsmouth; ex parte Lakareber [1998] EWCA Civ 1553.
297 Higher Education Act 2004 (UK), Schedule 2, subs 3(2)(b).
298 Higher Education Act 2004 (UK), Schedule 2, subs 3(2)(c).
301 Harris ‘Resolution of Student Complaints in Higher Education Institutions’, 599.
improvement in cheap, expedient access to justice for students and ‘quality assurance’ for higher education institutions.\textsuperscript{302} There remains, nonetheless, an ambiguity in the OIA’s powers, which is reflected in remarks by the OIA itself:

… higher education is not a commodity for purchase and money is no substitute for what may have gone wrong… the OIA is still finding its rightful place in the spectrum of legal and informal methods of settling disputes in English public law…\textsuperscript{303}

The universities are not easily reducible to other forms of public services, in which the public are consumers. The OIA would appear to be self-consciously distinguishing itself from the traditional models of ombudsman and judiciary in an attempt to navigate this complex legal and policy terrain.

\textit{3.3.4 Regulation of the Domestic Jurisdiction in Australia}

Australian governments have established for universities no comparable scheme to the OIA. Importation of the OIA model has been advocated.\textsuperscript{304} Western Australian universities maintain the Visitor’s jurisdiction,\textsuperscript{305} which remains exclusive in relation to internal disputes.\textsuperscript{306} Bond University has the capacity to appoint a Visitor.\textsuperscript{307} Elsewhere, as has been noted, there is no visitatorial jurisdiction in Australia. The Australian response to these developments has generally been to resist a judicial or adjudicative model of student-university dispute-handling. It is submitted that this has occurred with a view to treating students primarily as consumers of ‘education services.’ For instance, relevant provisions of the National Code made pursuant to the \textit{ESOS Act} are constructed as ‘consumer protection’ measures for international students.\textsuperscript{308} Consequently, the prevailing policy and legislative approach has been to require institutions to establish grievance and dispute-settling procedures. External review of student complaints, in the manner comparable to adjudication by the OIA, is not available, whether by an OIA-like body or by the established generalist or specialist merits review schemes operating in Australian jurisdictions. At the same time, student complaints being handled by statutory Ombudsman have been reported as increasing.\textsuperscript{309} The Victorian Ombudsman found in 2005 that universities in that jurisdiction ‘do not have effective complaint systems and procedures and lack

\begin{itemize}
\item \textsuperscript{302} Harris ‘Resolution of Student Complaints in Higher Education Institutions’, 579-587.
\item \textsuperscript{303} Office of the Independent Adjudicator for Higher Education \textit{Annual Report} (2005), 12.
\item \textsuperscript{304} Olliffe and Stuhmcke ‘A National University Grievance Handler?'; Kamvounias And Varnham ‘Getting What They Paid For’.
\item \textsuperscript{305} University of Western Australia Act 1911 (WA), s 7; Curtin University of Technology Act 1966 (WA), s 27; Edith Cowan University Act 1984 (WA), s 42; Murdoch University Act 1973 (WA), s 9.
\item \textsuperscript{306} Murdoch University v Bloom and Kyle (1980) WAR 193.
\item \textsuperscript{307} Bond University Act 1987, s 14. No such appointment has been made.
\item \textsuperscript{308} National Code, Standards 7, 8.
\item \textsuperscript{309} Olliffe and Stuhmcke ‘A National University Grievance Handler?’; Victorian Ombudsman \textit{Review Of Complaint Handling In Victorian Universities}, Parl paper No 131 (2005). The Ombudsman noted that complaints against universities had doubled between 2001-2004. See also Chapter 5, section 5.3, below.
\end{itemize}
comprehensive centralised record keeping. I expect to see similar reports from other
Ombudsmen in the coming months. The NSW Ombudsman issued complaint-handling
guidelines for universities in 2006, following an investigation into the issue at NSW
universities. Those guidelines included the recommendation that universities establish an
independent ‘complaints centre’ as part of their internal institutional architecture. This
recommendation is not reiterated in the statutory requirements referred to below.

Two principal legislative schemes apply to student disputes in Australian universities, with
the effect of regulating internal challenge to university decisions. The Higher Education
Support Act provides that all ‘higher education providers’ shall have grievance and review
procedures to deal with academic and non-academic complaints by students. In turn, the
nature of those procedures is prescribed by legislative instrument. It is a requirement of the
ESOS National Code that ‘registered providers’ of educational services to international students
(including universities) have ‘complaints and appeals processes.’ These requirements are
intended to ‘protect the interests of overseas students,’ although they are obligations on
‘providers’ and hence available in effect to all students.

Complaints and review procedures as required under HESA and the ESOS Act are similar. Both
the National Code and Higher Education Provider Guidelines have been amended since
inception of the primary legislation with the effect of strengthening review schemes available
to students. The amended schemes move review procedures closer in effect to those operating in
the UK context, although without the institutional architecture of the OIA and the same
legislative coherence of the (UK) Higher Education Act.

311 NSW Ombudsman Complaint Handling at Universities: Best Practice Guidelines (2006). See also
Brendan O’Keefe ‘New Standards for Complaints’ The Australian (Sydney), 19 October 2005:
‘Complaint-handling by universities has become a nation-wide problem. In April [2005], ombudsman
offices from five states, the Commonwealth and the Northern Territory wrote to the HES [The Australian
Higher Education Section] to warn universities that “failure to address this issue could be damaging to
to their reputations and capacity to attract quality staff and students, both locally and internationally.”’
312 NSW Ombudsman Complaint Handling at Universities: Best Practice Guidelines, Ch 11.
313 Reference may be made to one further scheme. The South Australian Training and Skills Development
Act 2003 (SA) enacts ‘grievances and disputes mediation’ measures under ss 19 and 28 of that Act. A
Grievances and Disputes Mediation Committee is invested with wide review powers relating to any
grievance referred to it. The grievance may relate to higher education delivered by a registered training
provider. I will leave aside this legislation for the purposes of the present discussion.
314 S 19-45.
315 Higher Education Provider Guidelines 2007 (Cth) (‘HEP Guidelines’), Ch 4 (as made under Higher
Education Support Act 2003, s 238.10).
316 National Code, Standard 8.
317 National Code, s 3.1(c).
318 HEP Guidelines, Amendment No. 3, 29 October 2007; National Code 2001 was amended and superseded by the National Code 2007 (entered into force 1 July 2007).
Prior to amendment, both HESA and the ESOS Act schemes required providers to have procedures for dispute or grievance resolution. This did not amount to a requirement for an adjudicative procedure or judicial approach. Leaving aside the question of visitorial jurisdiction, domestic challenge to a university decision need not be resolved at that point by adjudication or arbitration. This was confirmed by the Federal Court in Ogawa v Secretary, Department of Education, Science and Training.\footnote{\[2005\] FCA 1472.} In that case, the Court considered the effect of the requirement on the University of Melbourne under (the then) Paragraph 45 the National Code to have ‘independent’ grievance and dispute resolution procedures available to Ogawa as an international student. In his judgement, Dowsett J stated:

> It is difficult to attribute precise meaning to the requirements of par 45 in so far as they concern grievance handling and dispute resolution. Paragraph 45 does not require that the university have in place a system of arbitration or other extra-judicial decision-making. However, in argument, it seemed that the applicant believed she was entitled to demand a cheap, non-judicial procedure for enforcing legal rights. That is not grievance handling or dispute resolution. Those terms imply resolution rather than arbitration. Thus it must be accepted that any such arrangements might, in a particular case, not resolve the dispute.\footnote{Ogawa v Secretary, Department of Education, Science and Training \[2005\] FCA 1472, 62.}

Subsequent amendments have given greater ‘precision’ to the procedures and what would appear to be greater adjudicative effect to the procedural arrangements. Under the revised National Code, a ‘provider’ must have arrangements in place for review by a ‘person or body independent of and external to’\footnote{National Code, s 8.3.} the provider. This provision is similar to that considered by Dowsett J in Ogawa. However, the revised scheme additionally provides that:

> If the internal or any external complaint handling or appeal process results in a decision that supports the student, the registered provider must immediately implement any decision and/or corrective and preventative action required and advise the student of the outcome.\footnote{National Code, s 8.5.}

The key procedural development is that a provider is compelled to give effect to any form of redress advantageous to the (international) student as a condition of registration. The language is similar in the HEP Guidelines, the provisions of which are generally applicable to higher education providers and their students. Means of external review of decisions arising from student grievances are mandatory,\footnote{HEP Guidelines, s 4.5.2.} and in addition the provider must ‘have a mechanism in place to implement the grievance procedures, including implementation of recommendations arising from any external review.’\footnote{HEP Guidelines, s 4.5.5(a).} The requirement under the HEP Guidelines is less prescriptive and it may be that having a mechanism to implement ‘recommendations’ does not mean ‘recommendations’ must be implemented. In this respect, the character of the provision has similar ambiguities to the Rules governing the OIA scheme. Arguably, the requirements

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\footnotesize{\begin{itemize}
\item[319] [2005] FCA 1472.
\item[320] Ogawa v Secretary, Department of Education, Science and Training [2005] FCA 1472, 62.
\item[321] National Code, s 8.3.
\item[322] National Code, s 8.5.
\item[323] HEP Guidelines, s 4.5.2.
\item[324] HEP Guidelines, s 4.5.5(a).
\end{itemize}}
under the *ESOS National Code* are less ambiguous and remove the loophole identified by Dowsett J: in effect, a form of arbitration is possible under the revised *National Code* scheme, as a provider is now required to implement a decision advantageous to a student.\(^{325}\)

Improvements to both *HESA* and the *ESOS Act* schemes effectively give students greater rights in regards to review of domestic decisions. As distinct from the OIA framework, decisions relating to academic judgement may also be reviewed.\(^{326}\) Neither establishes (nor prescribes) a body for dispute-handling or review. The *HESA* framework does not establish procedural requirements for the handling of grievances or review, for example, in relation to how a matter must be heard. Procedure for external review may or may not be judicial in style on the basis of these rules, although the general obligation on providers to treat students fairly\(^{327}\) would tend to incorporate the general law of procedural fairness into the conduct of both complaints-handling and review schemes.\(^{328}\) The requirements on providers under the *National Code* are more prescriptive. Internal and external schemes applying to international students require an opportunity for a student ‗to formally present his or her case,’ allows a student to be ‗accompanied and assisted’ by a ‗support person,’ and requires reasons to be given for a decision.\(^{329}\)

Finally, in those jurisdictions that have introduced human rights legislation, such as the ACT and Victoria, the nature and standards of hearing may have an impact on how schemes for review of decisions affecting students unfold.\(^{330}\) This has been the subject of some debate in the UK following introduction of the *Human Rights Act* and its application to UK universities.\(^{331}\)

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\(^{325}\) Should a provider refuse to do so, however, the student would not subsequently have recourse to the courts, or other authority, to compel implementation of the decision. Effectively, such as refusal would be a breach of the National Code and the provider’s obligations. Action for breach of the National Code may only be taken by the Minister under s 83 of the *ESOS Act*.

\(^{326}\) There is no restriction on review of academic decisions under the *ESOS Act* framework. Grievance procedures established under the *HESA* framework must be able to deal with academic decisions: s 19-45(1)(b), *HEP Guidelines*, s 4.5.1(b).

\(^{327}\) *HESA*, s 19-30.

\(^{328}\) In which case, the standard of hearing would likely vary on the circumstances and/or subject-matter of the dispute. At one end of the spectrum, the courts have tended not to require oral hearings for instance in relation to academic disputes (including disputes over academic progress): see, eg., *R v Aston University Senate; ex parte Roffey* (1969) 2 QB 538; and *Ivins v Griffith University* [2001] QSC 86, [42]. At the other end of the spectrum, a stricter judicial approach, including a requirement for oral argument, has been held as necessary in university discipline disputes: see, eg., *Flanagan v University College Dublin* (1988) IR 724, *Kane v Board of Governors of the University of British Columbia* (1980) 110 DLR (3d) 311, 321. See also Chapter 6, sub-section 6.6.1, below.

\(^{329}\) *National Code*, s 8.1.

\(^{330}\) For example, under the *Charter of Rights and Responsibilities Act 2006* (Vic), the entitlement to a fair hearing will apply to universities as ‗public authorities’ from 2008. S 24 of the Act, providing for a fair hearing, applies to civil proceedings, which may beg the question as to whether external review of university decisions as required under *HESA* and *ESOS* schemes would be civil proceedings: see discussion of this point in the UK context in Harris ‘Resolution Of Student Complaints In Higher Education Institutions’.
3.4 Conclusion

The legal relationship between the student and university is complex. The student cannot be easily reduced to a consumer of public (or private) services, and there is a strong basis on which the student’s relationship to the university remains a question of status and the student therefore a member, or ‘corporator,’ of the university. Disputes that spill over internal systems of grievance and review find their way to the courts in applications for judicial review, actions in contract, and actions for consumer protection. Given the ‘hybrid’ character of the student-university relationship, it is not surprising that the relationship is founded on public and private law. This situation produces a level of peculiarity in the systems of legal review and redress available to students. Adjudication of contractual or consumer protection disputes is likely to face the sequential difficulties of identifying the contractual terms at issue and their effect, and quantifying appropriate damages (and determining what loss has been suffered). In administrative law, universities are distinguishable from ‘mainstream’ public sector decision-making in that their decision-making overwhelmingly lies outside of the merits review system. It may be expressly stated in university enabling legislation that the institution is not an ‘instrumentality of the Crown.’

Historically, the legal basis of the student-university relationship has grown. Where once the Visitor held pre-eminence in adjudication on domestic affairs, this office is in decline. Student challenge to university decisions is, however, unlikely to decline. There is evidence that UK reforms establishing the OIA have been successful in dealing with disputes before they get to the courts and therefore providing an intermediary institution between ‘internal’ review and resolution and adjudication before the courts. These arrangements, however, have their limitations, including potential ambiguity over the authority of OIA decisions, adequacy of adjudicative procedure, and removal of academic decisions from the scope of review.

In respect of external recourse, the Australian approach has been more ad hoc and piecemeal. Abolition of the Visitor’s jurisdiction in most universities may have been warranted because of the arcane and uncertain rules of visitorial action. But the policy rationale that internal appeals mechanisms or resort to the law and courts would suffice appeared to be accompanied by

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332 With the exception of ‘reviewable decisions’ under the HESA, which, for students, concern decisions relating to the student learning entitlement established under the Act: s 206.1.
333 Eg University of Adelaide Act 1971 (SA), s 4(6).
334 See eg Chapter 5, section 5.3, below.
335 Harris ‘Resolution of Student Complaints in Higher Education Institutions’, 583.
336 See eg Victoria, Parliamentary Debates, Legislative Assembly, 1 May 2003, 1322 (Lyn Kosky, Minister for Education).
little or no evidence. The Commonwealth has filled the policy vacuum through requirements on universities for student complaints and review mechanisms. The Australian regulatory approach has required important revisions to the original statutory rules, most notably in compelling stronger systems of external review.

It is only relatively recently that a regulatory or legislative attempt has been made to craft special mechanisms for the resolution of student-university disputes. UK and Australian (Commonwealth) reforms of dispute handling are noteworthy for their efforts to carve out a ‘place in the spectrum of legal and informal methods of settling disputes’ in public law. On balance the British approach is more coherent, organised and accountable. It possesses an institutional architecture, funding base, statutory support in primary legislation, and demonstrated (if short-run) effectiveness. All four elements are absent from the Australian schemes required under Federal legislation. On the other hand, the Australian statutory conditions do encompass disputes relating to academic judgement, thereby widening the capacity for review beyond what is possible in the UK. Yet, if Australia is to move down the route of a single national disputes-handling body for the university sector (or for the wider tertiary education sector, for that matter), as has been mooted, lessons may be learnt from the UK experience – for instance, that the scheme should be adjudicative, although under a more precise model of adjudication, and that the model should be inspired by the public law tradition.339

337 See eg New South Wales, Parliamentary Debates, Legislative Assembly, 21 April 1994 (Mr Aquilina, Member for Riverstone).
338 See eg Oliffe and Stuhmcke ‘A National University Grievance Handler?’.
339 Generally, see Chapter 10 below.
Chapter 4

Discipline

4.1 Introduction

Disciplinary regimes codify conduct, and, by extension, proscribe transgressive behaviours or misconduct. It is aimed at the order of a collectivity, and the effectiveness and legitimacy of that body within the general community. In respect of law, the ‘community’ at issue may be entirely private or ‘domestic,’ and regulated by contract or trust. It may be a private association with some form of statutory regulation or ‘underpinning,’\(^3\) as with clubs. It may be a body primarily operating with respect to statutory regulation and licensing, as in the context of professional associations, or the ‘community’ may be an institution of the state itself, as in the case of police and military forces or the prison system.

4.2 The Professions

In consideration of university discipline, the question of professional discipline is an instructive point of comparison. The model of the professions, as with the model of the university, is a community dedicated to a given sphere of practice and provided with an ‘machinery’ of self-government to that end. The university is arguably distinguishable by its larger ‘cultural’ project,\(^3\) and the scope and diversity of its intellectual (and physical) ‘territory.’\(^3\) Moreover, in respect of discipline, the university is distinguishable by the specific nature of the scholarly relationship at its heart, the fact that the majority of that body’s membership possesses a unique status: what is termed historically, *in statu pupillari.*

Yet, as with older professions, such as law, theology or medicine, the university has an ancient corporate existence and this implies the capacity (indeed necessity) of such bodies to control their members, including admission to membership and circumstances of removal from membership. It has been remarked of the professions:

\[\text{It is far from a novelty that members of a profession should be formed into a corporation, that corporate membership should form a condition of practice in that profession, and that the corporation should have the power to discipline its members, even to the point of expulsion. Such corporations and their enforcement of discipline have been familiar for centuries.}\(^3\)

Since the middle of the nineteenth century, the professions – the ‘spontaneous coming together of practitioners in associations, [under the] regulative intervention of the State… organised on a
craft basis” have faced two developments bearing on the question of discipline. First, they have come under statutory control. Second, the range of bodies identifying as professions (and regulated as such) has grown significantly. Statutory controls in the UK originate in the Medical Act 1858 (UK). In Australia, legislation to regulate professions, or aspects of professional practice, also emerged in the nineteenth century. Until recently, the general formulation of misconduct to which sanction could apply followed, or was comparable to, that expressed in the original UK Medical Act 1858, namely that disciplinary sanction might apply to a person guilty of ‘infamous conduct in a professional respect.’ The construction of jurisdiction in these terms conferred upon the appropriate authorities disciplinary power over ‘infamous’ or ‘disgraceful’ conduct by a professional person but only ‘bearing in mind his [sic] special position and responsibilities.’ In addition, the scope of conduct liable to disciplinary action was not limited to that carried out in the direct course of professional practice but may include conduct considered as impugning the standing of the profession, inappropriate to the profession, or as morally reprehensible.

In the past two decades in Australian jurisdictions, the formulation of misconduct in the professions has been overhauled and updated, although a general distinction between professional competence on the one hand and wider misconduct on the other hand still tends to operate. Evolution of the grounds of professional discipline has occurred as part of wider reforms to professional regulation, bearing in mind a greater ‘consumerist’ approach to markets for ‘professional services’ and in the eclipse of a ‘peer-review’ model of professional regulation. That is to say, the disciplinary model in the professions has changed in the context of a changing relationship between the professions and their clients.

It is important to note that, in the context of the ‘special skill’ possessed by the professional, discipline functions as a system of protective controls. Disciplinary controls, although they

345 J Gareth Miller ‘The Disciplinary Jurisdiction of Professional Tribunals’ (1962) Modern Law Review 532, 538. The classic judicial statement regarding this phrase is Allinson v General Council of Medical Education and Registration (1894) 1 QB 750, 763 (Lord Esher MR): ‘If it is shown that a medical man, in the pursuit of his profession, had done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to the General Council to say that he has been guilty of infamous conduct in a professional respect.’
346 See eg Yelds v Nurses Tribunal (2000) 49 NSWLR 491, 500; Childs v Walton (unreported, NSW Court of Appeal, Samuels JA, 13 November 1990), 9.
347 See eg Legal Profession Act 2004 (Vic), subs 4.4.3, which defines professional misconduct as including ‘unprofessional conduct’ (going to the question of competence) and conduct concerning a practitioner’s claim to be a ‘fit and proper person,’ which may extend beyond the practice of law.
349 Compare Hedley Byrne & Co v Heller & Partners [1964] AC 465, 502. Although that case deals with the issue of negligent misstatements by a bank, the principle of conduct reliant on (or purporting to be reliant on) specialist or expert knowledge attracting duties (and potentially liabilities) has a broader resonance, including in relation to professional regulation.
may have quasi-criminal overtones, are not criminal penalties. As Forbes remarks, ‘…
disciplinary “sanctions” are not penal. They are not intended to punish, but to protect
the community or members of the organisation concerned.’

This rationale applies even where
sanction ‘may involve a great deprivation to the person disciplined…”

4.3 University Discipline

In the university, the precise function and role of discipline in respect of students, has not been
as stable or as apparent as it is in the case of the professions. I suggest this is because of the
enormous transformation in the higher education system, especially in the post-war period. The
changing functions of university discipline in respect of those in statu pupillari has led to
change in the jurisdiction of disciplinary authorities and in the scope and emphasis of
disciplinary powers.

4.3.1 In Loco Parentis and Beyond

Prior to the sixties’ upheavals, university discipline as it applied to students primarily concerned
itself with moral as well as educational tutelage of students. The standing of the institution in
loco parentis was widely adopted in US jurisdictions. ‘The university has two bases for
exercising disciplinary powers,’ wrote one author in the late 1960s, ‘“one in connection with
safeguarding the University’s ideals of scholarship, and the other in connection with
safeguarding the University’s moral atmosphere.”’ The same tenor and principle arose in
English cases, such as Glynn v Keele University, where a ‘magisterial’ authority applied ‘in
certain circumstances’:

The context of educational societies involves a special factor which is not present in other
contexts, namely the relation of tutor and pupil; that is to say the society is charged with the
upbringing and supervision of the pupil under tuition, be the society a university or college, or a
school.

Until the latter part of the nineteenth century, magisterial powers were literally vested in
university authorities at the ancient universities, such as Oxford and Cambridge. Authority
dating back to the late medieval period vested in the University regulatory powers over the town

350 New South Wales Bar Association v Evatt (1968) 117 CLR 177; Ziems v Prothonotary of the Supreme
Court of New South Wales (1957) 97 CLR 279.
351 JR Forbes Justice in Tribunals (Federation Press, 2002), [12.24].
352 New South Wales Bar Association v Evatt (1968) 117 CLR 177, 184.
Anthony v Syracuse University 224 App Div 487, 491, 231 NYS 435, 440 (4th Dept 1928).
354 (1971) 1 WLR 487.
355 Glynn v Keele University (1971) 1 WLR 487, 494.
as well as the University’s own members. This included a ‘special criminal jurisdiction,’ where (at Cambridge at least) the Vice-Chancellor was ex officio a local magistrate. These powers came to some notoriety in Daisy Hopkins’ Case, in which a woman was convicted by the University for what amounted to prostitution, a conviction later overturned. Cambridge University’s ‘special’ jurisdiction was shortly afterwards abolished.

Disciplinary jurisdiction consonant with moral supervision of students came under sustained attack in the sixties’ revolution. In the US, the in loco parentis doctrine went into sharp decline with the extension of Constitutional rights to students in publicly-funded educational institutions. As a Yale University Professor remarked:

In recent years, higher education has been experiencing an identity crisis… Time was when higher education was a self-governing community, a law unto itself. Recently, all of this has changed. It develops, almost suddenly, that conceptions of fair treatment on this campus are not altogether consistent with those off the campus. Consequently, the courts are second-guessing the campus in order to make it more accountable to traditional conceptions of justice.

Among other things, the student movements of the period rejected paternalism. Struggles against disciplinary regimes were part of the wider campus upheavals. Farrington notes: ‘Universities’ disciplinary procedures had been drawn up as a cross between the rules which might apply in loco parentis and the rules of a gentleman’s club. Neither was suited to the revolution of the late 1960s.’ Student repudiation of the internal order combined with judicial

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358 Ex Parte Daisy Hopkins (1891) 61 LJQB 240.
359 She was convicted of ‘walking with an undergraduate,’ by the University of Cambridge Court of Discipline. The tribunal stills operates, although with only domestic jurisdiction: see R v Cambridge University, ex parte Beg [1998] EWHC Admin 423. Forbes discusses the case in respect of the failure to provide a clear statement of an offence: Justice in Tribunals, [10.1].
360 The magisterial powers of the University authorities over local towns and districts had an ostensible moral as well as criminal content, typically concerned with regulation under Vagrancy Acts or of the theatre and public performances: see James Williams ‘The Law of Universities’ (1908-1909) 34 Law Magazine and Review Quarterly 1 136, 136-141.
361 Dixon v Alabama State Board of Education 294 F. 2nd 150 (5th Cir 1961).
363 In the Australian context, see Graham Hastings It Can’t Happen Here: A Political History of Australian Student Activism (The Students’ Association of Flinders University, 2003), 80-89, which included experiments with student appropriation of internal discipline over their own number. See also President’s Commission on Campus Unrest Report (1970), http://dept.kent.edu/may4/Campus_Unrest/campus_unrest_recommendations.htm (accessed 24 May 2007): ‘The roots of student activism lie in unresolved conflicts in our national life, but the many defects of the universities have also fuelled campus unrest… The university’s own house must be put in order.’ In Australia, any notion that in loco parentis rules applied to universities’ relationships with students would have been dealt an additional blow with changes in the age of majority from 21 to 18 in the early 1970s, in which case most university students would have been adults at law when they arrived at university.
intervention into university affairs prompted a rethinking of the ‘scope of university discipline.’

Inevitably, this process involved a retraction of the domain of disciplinary action, ‘limited to student misconduct which distinctly and adversely affects the university community’s pursuit of its proper educational purposes.’ The function of discipline was reformulated as a broadly pedagogical one, with the university giving regard also to its public circumstances. Discursively, the student would less be considered the supervised and instructed ‘pupil’ than a citizen subject to certain domestic conditions: ‘Students are not only dependents in a paternalistic society. They are also citizens of a republic...’

Absent the moral and quasi-familial imperative, the form of the disciplinary model also changed:

It is... no longer possible to think of university discipline as an aspect of family law and relations; it has become necessary to find a new intellectual underpinning and corresponding new institutions to deal with problems formerly handled in a family manner. The new conception which seems to have filled the void left by the decline of in loco parentis is one that views university discipline as quasi-criminal.

As far as the student was concerned, the language of (quasi) criminality, coextensive with the language of legal right and obligation, tended to dissolve discursive and legal boundaries between the university and the general public domain. It also imported a sentiment of

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365 In the academic literature, see eg Phillip Moneypenny ‘University Purpose, Discipline and Due Process’ (1967) 43 North Dakota Law Review 739; Robert McKay ‘The Student as Private Citizen’ (1968) 45 Denver Law Journal 558; Brubacher ‘The Impact of the Court on Higher Education’; Arthur Marinelli ‘Student Conduct Regulations’ (1973) 22 Cleveland State Law Review 125; Pollack ‘The Scope of University Discipline’.
366 McKay ‘The Student as Private Citizen’, 560-561. Other authors have argued the in loco parentis doctrine is not entirely dead but has crept back into judicial treatment of university authority via contract: see Brian Jackson ‘The Lingering Legacy of In Loco Parentis: An Historical Survey and Proposal for Reform’ (1991) 44 Vanderbilt Law Review 1102.
367 Moneypenny makes the point that universities (by the late 1960s) had to contend with a ‘baffling variety of roles and functions,’ and that these may be in conflict. He remarks: ‘Where there is a conflict of obligations, it is the university’s obligation to prepare people for the independent pursuit of knowledge which must have first claim on energy and resources.’ Moneypenny ‘University Purpose, Discipline and Due Process’, 740.
369 See McKay ‘The Student as Private Citizen’.
370 Moneypenny ‘University Purpose, Discipline and Due Process’, 746-747.
372 With the entry of public law standards into the institutions, notably by way of judicial intervention in the US and in UK/Commonwealth jurisdictions flowing in particular from key cases such as Dixon v Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961) and University of Ceylon v Fernando (1960) 1 WLR 223.
institutional anxiety, in particular the need for discipline to affect a ‘protective’ ethic for the university itself: ‘Undoubtedly an academic community is a delicate organism, largely dependent for its existence and well-being on the self-restraint of all its members.’ Consequently, the ‘protective’ function of discipline in this context differed from the use of sanction in the professions, at least to the extent that the object of protection in the university was the ‘internal community’ (primarily from students); in the latter situation it was, and remains, the ‘external’ public at large.

4.3.2 Contemporary Construction of Disciplinary Schema

In the wake of ‘the sixties,’ disciplinary schema ordinarily distinguish between academic and ‘non-academic’ misconduct. This approach is consistent with decline of a strict in statu pupillari model of the student, and renovation of the ‘domestic’ model of university relations, analogous to a self-regulating association, in which the student possesses a type of membership contract, with a ‘public law dimension.’ The ‘academic-nonacademic’ disciplinary structure is articulated in a 1991 Canadian case, Healey v Memorial University of Newfoundland:

First, there is no question that the University has the legal authority to protect persons and property… Second, there is no question that the University has the authority to take into account professional, as well as academic factors, in deciding whether to permit a student to continue studies… Third, the courts should respect the intention of the Legislature that internal problems be resolved by the University itself.

In the US, this structure of arrangements has also tended to derive from distinctions made by the courts between university decisions with an academic content and those without. At one pole, ‘disciplinary’ decisions strictly speaking (ie ‘non-academic’ discipline) attract relatively stronger procedural safeguards and greater ‘quasi-criminal’ treatment. At another pole, ‘academic dismissal’ decisions, or academic disputes, receive far fewer protections, on the basis of judicial deference to university expertise in academic matters. ‘Academic discipline,’ or

374 Compare Russell Smith Medical Discipline: The Professional Conduct Jurisdiction of the General Medical Council 1858-1990 (Clarendon Press, 1994), 551: ‘It is widely recognised that the aims of the [General Medical Council’s] professional conduct jurisdiction are two-fold: the protection of members of the public and maintenance of standards of conduct within the profession. A third function which some see for the jurisdiction is the deterrence of future misconduct the punishment of practitioners.’
375 Institutions now ‘customarily’ commit discipline rules and codes to writing. While there is arguable US judicial authority to the effect that there is an inherent disciplinary power in universities, this may be insufficient to safeguard an ‘institution’s vulnerability where it has no written rules at all or where the rule provides no standard to guide conduct’: Kaplin and Lee The Law of Higher Education, 462-463.
376 Such a turning point is acknowledged, albeit critically, by Wade ‘Judicial Control of Universities’.
377 Clark v University of Lincolnshire and Humberside (2000) 1 WLR 1988, [16].
379 Eg Horowitz v Board of Curators of the University of Missouri, 538 F2nd 1317 (8th Cir. 1976).
sanction for academic misconduct, falls in between the two.\textsuperscript{380} In the US cases, judicial approach to the construction of ‘academic discipline’ has been to view it as an extension of proper academic performance.\textsuperscript{381} While the approach to procedural safeguards has been contrary in other jurisdictions,\textsuperscript{382} the US situation nevertheless highlights a general juridical spectrum, if not clear distinction, of academic and disciplinary decision-making. Disciplinary decision-making may be characterised with regard to academic content in the decision being made, which will fall more or less to the expertise or discretion of the disciplinary body. Where ‘academic’ content comes into play the (functional) focus of discipline is less the protection of persons or property interests and more the protection of an institution’s academic standards. With the eclipse of large-scale campus rebellion on Western university campuses through the 1980s and 1990s, disciplinary preoccupations by university administrators were less the issue of campus ‘disorder’ and public disruption of the university’s activities. The disciplinary preoccupation and anxiety appear not \textit{per se} to have been resolved, but rather recast ‘closer to home,’ as a problem of academic standards and specifically as a problem of academic misconduct.

4.4 The Rise of Academic Misconduct

Codes of academic conduct include prohibitions on plagiarism, cheating on examinations, falsification of data, and ‘collusion’ (or unauthorised collaboration among students). Actions such as falsification of academic records, grades or ‘special consideration’ documents may fall on the margins of this category. These forms of misconduct are viewed in some quarters as forms of moral and/or intellectual failure on the part of students.\textsuperscript{383} They may be viewed as the product of a malaise within the universities, facilitated by new communications technologies.\textsuperscript{384} These measures are closely related to concerns over academic standards.\textsuperscript{385} In one study,\textsuperscript{386} the authors draw the rather severe analogy between action on plagiarism and prosecuting war:

\textsuperscript{381} \textit{Napolitano v Trustees of Princeton University} 453 A. 2d 263 (N. J. Super. Ct., App. Div. 1982), 567: ‘We have noted heretofore that we regard the problem before the court as one involving academic standards and not a case of violation of rules of conduct.’ Also, see Kaplin and Lee \textit{The Law of Higher Education}, 499.
\textsuperscript{382} Eg Flanagan v University College Dublin (1988) IR 724.
\textsuperscript{385} Senate Employment, Workplace Relations, Small Business and Education References Committee \textit{Universities in Crisis}, [5.26]-[5.54]; Ronald Standler ‘Plagiarism In Colleges In The USA’ (2000), www.rbs2.com/plag.htm (accessed 28 June 2005) ‘Academic degrees represent a college’s public certification that a former student possesses at least some minimum amount of knowledge and intellectual skill… If academic degrees are to have any meaningful significance, then they must not be awarded to
These statistics [showing high rates of cheating] show that cybercheating is endemic in Universities around the world, and that academic and administrators have to wage a war to both stop and prevent such cheating… In such a climate [including student litigation and corruption investigations], the issue of plagiarism can rightly be described as a battleground, where a war is being waged between students and institutions, and played out using all of the means afforded by contemporary digital technologies.

There is a growing body of empirical evidence on rates, or prevalence, of student misconduct in tertiary education, accompanied by research on motivations for such behaviours. Through surveys of students on a range of academic behaviours (or misbehaviours), significant rates of academic misconduct have been reported, despite the fact that these appear to dramatically contrast with rates of identification or ‘prosecution’ of students for misconduct by way of disciplinary action.

A 2005 Australian study has put ‘baseline’ rates of ‘dishonest academic behaviours’ at 41% for exam cheating, 81% for plagiarism, and 25% for falsification of records or dishonest excuses. A contemporaneous UK survey in a post-1992, statutory university found that ‘it is likely that up to 80% of students plagiarise to some extent.’ An earlier UK study found the occurrence of a range of ‘cheating behaviours’ among students at between 54 and 72% of respondents. In a New Zealand study, 88% of students responded to having engaged in serious or minor incidents of cheating (65% reported as having engaged in ‘serious cheating’).

These figures do need to be treated with caution. In particular, the UK study notes an inverse correlation between the seriousness of misconduct and its frequency (ie the more serious misconduct is the less frequent it is), and declining incidents of misconduct as students get older. These studies affirm a trend by students not necessarily to engage serially in cheating or misconduct but rather engaging in transgressive conduct at some time in their studies. It is also

students who plagiarize material, cheat on examinations, commit fraud in reporting research results, and other kinds of serious misconduct. Plagiarizing, cheating, or fraud must not be an alternate route to a diploma.’


Kelly De Lambert, Nicky Ellen and Louise Taylor ‘Chalkface Challenges: A Study of Academic Dishonesty Amongst Students in New Zealand Tertiary Institutions’ (2006) 31 Assessment and Evaluation in Higher Education 5 485. The authors’ literature search puts the rate of reported academic dishonesty at 67-86%. This includes US, UK and Australian studies. The study was not limited to university institutions.
necessary to consider that ‘dishonest’ academic conduct lies on a spectrum of tactical behaviours, legitimate and prohibited, employed by students to ‘cope… with the demands of assessment.’\(^{391}\) It is arguable that a tactical approach to education is itself, whether or not it falls into the domain of proscribed action, counter-productive, if not corrosive, of higher learning.\(^{392}\)

The New Zealand study above collected data on the rate of formal disciplinary action against students (0.2% of enrolled students), and the rate of students actually caught cheating (5.8% of enrolled students). The NZ data suggests not only that most ‘detected’ misconduct is dealt with informally but that the formal disciplinary system is ineffective from the point of view of ‘prosecution’ or deterrence.

Literature on academic dishonesty has found important motivating forces to include: pressures of assessment;\(^{393}\) time pressures and desire to improve grades;\(^{394}\) student inexperience and/or an instrumental approach to education;\(^{395}\) and assessment of the likelihood of detection.\(^{396}\) Staff reluctance to engage with the issue, especially its formal procedural dimensions, is reported to be based on lack of institutional support and/or the workload involved.\(^{397}\) In the US context, McCabe and Trevino\(^{398}\) found that a key variable in academic honesty/dishonesty was peer attitudes, approval and disapproval. They also found, counter-intuitively, that rates of cheating were higher where they perceived the penalties more severe. Marsden et al’s\(^{399}\) Australian study correlated propensity to academic dishonesty with attitudes to learning, gender (male students more likely to engage in dishonesty than female students), year level (later years students more likely to engage in dishonesty than first-year students), and information about rules and penalties regarding dishonesty (information did not have a major impact on propensity to act honestly).

A third body of analysis considers structural and institutional factors linked to academic misconduct. The Senate Employment, Workplace Relations and Education Committee’s

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\(^{393}\) Norton, et al ‘The Pressures of Assessment in Undergraduate Courses’.

\(^{394}\) Franklyn-Stokes and Newstead ‘Undergraduate Cheating’.

\(^{395}\) Marsden, et al ‘Who Cheats at University?’, 7: ‘… less learning orientation and more goal orientation were associated with higher rates of cheating.’

\(^{396}\) de Lambert, et al ‘Chalkface Challenges’, 500: ‘Current detection rates are unlikely to impede students’ academic progress in the medium or long term. Indeed some students may consider such risks to be part of the standard management of a tertiary learning career.’


\(^{399}\) Marsden, et al ‘Who Cheats at University?’
Universities in Crisis report linked decline in government funding and commercialisation of the sector to deterioration in academic standards and the ability of universities to perform their principal functions.\textsuperscript{400} Indirectly, objective conditions of resources and funding may be linked to academic behaviours, for instance with regard to workload pressures on students and staff. Sutherland-Smith\textsuperscript{401} makes the point that management and policing of student academic dishonesty impacts on academic staff, often adversely, and they are constructing unofficial strategies to deal with it: ‘… a growing form of underground disciplinary proceedings is emerging in which teachers allege and condemn students for plagiarism by summary trial.’ To the extent that this empirical observation can be verified or generalised, the capacity for students to receive fair treatment at the hands of local decision-makers is surely compromised. Williams\textsuperscript{402} also looks to the function of objective conditions on students’ propensity to engage in academic misconduct. Criticising increased surveillance and deterrence as ‘essentially a reactionary approach that is unlikely to yield lasting benefits,’ he argues that the ‘source of the problem is systemic.’ In particular, he raises concerns with the pedagogical conditions faced by university students: ‘The prevention of plagiarism through innovative pedagogy is more likely to produce lasting results for the simple reason that such an approach provides students with an incentive to learn.’ Pendleton\textsuperscript{403} raises the growing dissonance between academic cultures of the Australian (western) university and the learning methods and traditions of international students, notably those from east and south Asia. This issue is made pressing by the fact of the dramatic growth in international students (and reliance in international student fee income). For Pendleton, emergence of the “problem” of plagiarism not only highlights a moral or behavioural crisis among students but a conceptual problem in the model of misconduct, associated with concepts of originality and ownership of knowledge. Brian Martin\textsuperscript{404} also undertakes a thorough critique of the concept of plagiarism.

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{400} Senate Employment, Workplace Relations and Education Committee \textit{Universities in Crisis}, Ch 5.
\item\textsuperscript{401} Sutherland-Smith ‘Hiding in the Shadows’
\item\textsuperscript{403} Mark Pendleton ‘Academic Integrity, Originality Detection and the “Problem” of Plagiarism’ (Paper presented to Research and Education Staff of Student Organisations (RESSOs) Conference, RMIT, Melbourne, 2004) (copy on file with the author).
\end{enumerate}
\end{footnotesize}
4.5 Plagiarism

At certain times, a veritable hysteria has emerged over the issue of plagiarism (and other academic misconduct) by students in Australia universities. As a form of scholarly rule-breaking, plagiarism by students comes in for special attention and scrutiny. One reason for this is that acts of plagiarism tend to constitute a significant proportion of reported rates of academic misconduct. A further reason is that plagiarism may represent a particularly heinous form of misconduct in the academic community: ‘Clearly, the charge of plagiarism is a charge of cheating and as such the most serious academic breach of discipline possible. It is also criminal in its nature.’ It is consistent with (and extends) the ethical violation exhibited in scientific or intellectual misconduct, ‘when the intention is to deceive or demonstrate a serious disregard for the truth. As such, misconduct involves… in some instances, a serious erosion of the rights of scholars and other to have the intellectual debt that others owe them acknowledged.’ Finally, plagiarism rather awkwardly straddles the issue of disciplinary action and academic judgement. To that end, academic plagiarism in respect of students is not necessarily a straightforward, transparent concept. It is, at its margins, ambiguous and unsettled.

Several recent cases in the courts have highlighted academic plagiarism (and related concepts, such as ‘collusion’) as a legal and conceptual problem. Most of these cases have involved disputes over ‘good character’ for admitted lawyers, or individuals seeking admissions.

4.5.1 Origins of Plagiarism

Academic analysis of the ‘plagiarism problem’ will, on occasion, provide useful, even extensive, philological discussion of the origins of the concept, which owes its etymological roots to the Latin term plagium, referring to the enslavement of a freeman or theft of a slave. The parallel to misappropriation lies in the reference to a form of ‘piracy,’ the analogy eventually acquiring the character of a dead metaphor and employed to refer to the appropriation of ideas or language without acknowledgment or deference to the author. Its modern origins lie in literature and concepts of literary novelty, including where these issues

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406 See also Chapter 5, section 5.4, below.
intersect with copyright. The relationship of plagiarism and copyright has been the subject of ongoing academic concern,\textsuperscript{410} however academic opinion cautions against conflating the two:

In short, plagiarism and copyright infringement do share important characteristics, but for the most part remain distinct from one another. All cases of plagiarism are not cases of copyright infringement, and vice versa. And while all cases of copyright infringement may be legally actionable if monetary damages are proven, many cases of academic plagiarism offer no cause of action or private remedy whatsoever.\textsuperscript{411}

Although there is academic and judicial opinion assimilating plagiarism to criminality,\textsuperscript{412} it is more arguable that, where it is legally actionable (as arising, for instance, from economic interests), plagiarism is a form of wrong,\textsuperscript{413} whose content may be intentional or negligent transgression of rules of originality or authority.\textsuperscript{414} It is a consequence of intellectual authority, in its broadest sense. In the academic context, plagiarism essentially represents an ethical prohibition against misattribution or misappropriation of the intellectual endeavours of other authors, notwithstanding that it may find expression in quasi-criminal or quasi-tortious language. Papy-Carder makes the important point that academic plagiarism is also (and principally) distinguishable from literary or other forms of plagiarism on policy grounds: ‘Plagiarism… goes beyond [economic] interests and protects a third set of interests – those associated with scholarly institutions.’\textsuperscript{415} The prohibition against plagiarism, in the educational context, is aimed at protecting the standing and standards of the institution.

\textbf{4.5.2 Scope of the Concept}

In the academic setting, it is my submission, a central point of contention in respect of plagiarism arises in its delineation as a disciplinary concept, that is as a disciplinary subject as distinct from, for example, a question of academic assessment or procedure.


\textsuperscript{411} Papy-Carder ‘Plagiarism in Legal Scholarship’, 241-2.

\textsuperscript{412} Flanagan \textit{v} University College Dublin (1988) IR 724; Green ‘Plagiarism, Norms and the Limits of Theft Law’.

\textsuperscript{413} See eg \textit{Carleton v ABC} [2002] ACTSC 127, [110]-[113]; Billings ‘Plagiarism in Academia and Beyond’ places plagiarism directly in the sphere of tort (392): ‘Plagiarism is an ancient tort that has managed to remain independent of the [US] Federal Copyright Act.’


\textsuperscript{415} Papy-Carder ‘Plagiarism in Legal Scholarship’, 241.
The distinction is important because once a decision goes beyond the limits of academic judgement into the field of disciplinary action the consequences, subject-matter and nature of the decision-making become more serious. How decisions are handled also differ. There may be considerable academic content to disciplinary decision-making, and, as US judicial opinion exemplifies, this fact may have considerable impact on how the decision-making proceeds and the protections afforded a student. *Napolitano v Trustees of Princeton University*\(^{416}\) demonstrates that US courts are reluctant to intervene in any decision in which academic judgement plays a role, other than where capricious or arbitrary decision-making can be proven. The issue of deference to academic discretion also applies, if more narrowly, in the UK or Australian jurisdictions. For instance, academic judgements may be reviewable at law for unfairness or bad faith, where ‘extraneous’ factors enter into decision-making.\(^{417}\) There also now appears ‘circumstances where courts will intervene and make judgements of an academic nature,’\(^{418}\) notably where decisions of academic judgement affect admission to professional practice.\(^{419}\) Reluctance to intervene in strictly academic decisions remains the norm in judicial review of university decisions.\(^{420}\)

Fact-finding in respect of academic plagiarism will inherently require academic assessment and knowledge. Student disciplinary bodies may apply their own academic expertise and knowledge to the proceedings. This may include expertise in a particular academic field.\(^{421}\) Additionally, this fact-finding is an issue of understanding the pedagogical process, or possessing knowledge of academic convention and procedure, as this applies to university students in the course of their development in the institution. This knowledge is significant in consideration of the scope and limits of plagiarism as a disciplinary offence.

4.5.2.1. Intention and ‘Wrong’

There are two circumstances in which academic plagiarism equates to misconduct (and is therefore subject to disciplinary action). The first, most renowned, category is where misappropriation of ideas, text or other intellectual content occurs as a matter of dishonesty, or

\(^{417}\) See *R v Higher Education Funding Council, ex parte Institute of Dental Surgery* (1994) 1 WLR 242.
\(^{419}\) Cumming is discussing the decision of the Queensland Supreme Court in *Re Humzy-Hancock [2007]* QSC 34, where an applicant for admission to practice as a solicitor in that State challenged an earlier decision of Griffith University to find him guilty of academic misconduct (plagiarism and collusion). The admission authorities had refused to admit him to practice on the grounds of this earlier finding of misconduct. The student successfully challenged the refusal on the grounds that his conduct had not actually constituted misconduct under the University’s rules. The University was not a party to the proceedings.
\(^{421}\) *Simjanoski v La Trobe University* [2004] VSC 180, [25]-[30].
in other words, where the conduct includes an element of intention. In this case, it is an intention by a student to misrepresent his/her ideas, work, or expression as his/her own in order to gain some benefit or advantage, such as higher grades or passing a course of study. As Bills has noted: ‘The role of “intent” may be the central issue to a student charged with plagiarism.’ He found that in a survey of US law schools approximately 64% included ‘intent’ in the formulation of their plagiarism policy. By contrast, LeClerq found (only eight years later) only 28% (42 out of 152) law schools surveyed required intent to be found in cases of plagiarism.

In Australian universities, express requirement in disciplinary rules, or relevant policy or guidelines, for intent to be proved in plagiarism cases is the exception rather than the rule. Table 4.1 refers to elements of plagiarism rules in selected Australian universities. It can see that all the investigated universities do provide a specific definition of plagiarism, either in statutory rules or (more commonly) in accompanying guidelines or policy. The large majority of institutions do not require intent as the test or threshold in the definition of plagiarism. To that end, the concept of plagiarism has wider effect. In both instances where intent is required (Griffith University and Curtin University), the formulation of plagiarism is in terms of a student ‘knowingly’ engaging in the practice.

Table 4.1: Construction of the concept of plagiarism in university rules, selected Australian universities

<table>
<thead>
<tr>
<th>Institution</th>
<th>Specific defn</th>
<th>Statutory rule (s) or other guideline (g)</th>
<th>Intention required?</th>
<th>Plagiarism threshold other than intention (if expressly stated)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sydney</td>
<td>Y</td>
<td>G</td>
<td>N</td>
<td>‘negligent’</td>
</tr>
<tr>
<td>UTS</td>
<td>Y</td>
<td>S</td>
<td>N</td>
<td></td>
</tr>
<tr>
<td>UWS</td>
<td>Y</td>
<td>G</td>
<td>N</td>
<td>‘inadvertent’</td>
</tr>
<tr>
<td>Newcastle</td>
<td>Y</td>
<td>G</td>
<td>N</td>
<td></td>
</tr>
<tr>
<td>Monash</td>
<td>Y</td>
<td>G</td>
<td>N</td>
<td>‘unintentional’</td>
</tr>
<tr>
<td>Deakin</td>
<td>Y</td>
<td>S</td>
<td>N</td>
<td>‘has the effect of’ being misleading</td>
</tr>
<tr>
<td>RMIT</td>
<td>Y</td>
<td>S</td>
<td>N</td>
<td></td>
</tr>
<tr>
<td>Swin</td>
<td>Y</td>
<td>G</td>
<td>N</td>
<td></td>
</tr>
<tr>
<td>Wollongong</td>
<td>Y</td>
<td>G</td>
<td>N</td>
<td>‘unintentional’</td>
</tr>
<tr>
<td>Queensland</td>
<td>Y</td>
<td>G</td>
<td>N</td>
<td>‘carelessness’</td>
</tr>
<tr>
<td>Tas</td>
<td>Y</td>
<td>G</td>
<td>N</td>
<td></td>
</tr>
<tr>
<td>Griffith</td>
<td>Y</td>
<td>G</td>
<td>Y</td>
<td>NA</td>
</tr>
<tr>
<td>Curtin</td>
<td>Y</td>
<td>G</td>
<td>Y</td>
<td>NA</td>
</tr>
<tr>
<td>Sunshine Coast</td>
<td>Y</td>
<td>G</td>
<td>N</td>
<td>‘unintentional’</td>
</tr>
<tr>
<td>JCU</td>
<td>Y</td>
<td>G</td>
<td>N</td>
<td></td>
</tr>
<tr>
<td><strong>Total (N) = 15</strong></td>
<td><strong>15</strong></td>
<td><strong>G=12, S=3</strong></td>
<td><strong>Y=2 (13.3%)</strong></td>
<td><strong>Other threshold = 7</strong></td>
</tr>
</tbody>
</table>

The question of intent imports a student’s state of mind into the decision-making process, and effectively narrows the scope of the concept and hence the scope of misconduct falling under

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422 Bills ‘Plagiarism in Law School: Close Resemblance of The Worst Kind?’, 111.
this head. Intention proved a critical factor in a review of findings of academic misconduct in *Re Humzy-Hancock*. In that case, Griffith University Law School’s Assessment Policy and Procedures defined plagiarism as including ‘knowing presentation’ of others’ work as a student’s own. Intent became the ‘critical question.’ At trial, McMurdo J found, in review of the University’s disciplinary action against Humzy-Hancock, an absence of intent in the (former) student’s conduct, and distinguished his ‘poor work’ from plagiarism. The review of Humzy-Hancock’s actions in this case arose in the course of resolution of matters of fact in his application for admission to legal practice in Queensland.

If plagiarism is not limited to circumstances where intent can be proven, then what are the proper limits of that form of action? How far-reaching is the model of behaviour? How wide ought the reach of disciplinary action to be in these cases?

Patten AJ remarked in *Nguyen v Nguyen & Vu Publishers Pty Ltd and Van Thang Nguyen and Thien Huu Nguyen*, a defamation case:

> It was [the respondent’s] extensive use of the means of expression employed by others without their acknowledgment or permission which constituted plagiarism, not the circumstances that he, quite legitimately, wrote about the same subject matter. His intentions, which may or may not have been reprehensible, are I think irrelevant.

In this opinion, plagiarism was found, regardless of intent. Academic opinion has sought to make similar points. Yet, beyond the question of intent, plagiarism *qua* misconduct has its limits. In particular, those limits are expressed in the notion of plagiarism as a wrong. For instance, it was remarked in *Carleton v ABC*, also a defamation case: ‘It follows that not every copying or imitation of the work of another without attribution will be plagiarism. It must also be wrongful.’ It has been argued that plagiarism is in fact an ‘ancient tort’ at law. But it is more accurate to state that, in distinguishing scholarly plagiarism from an economic wrong (copyright), academic plagiarism applies a model of wrong. It is strictly speaking an ethical

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424 The sample of institutions is the same as for the investigation into disciplinary rules and procedures in Chapter 6.
425 [2007] QSC 34.
426 *Re Humzy-Hancock* [2007] QSC 34, [14].
427 *Re Humzy-Hancock* [2007] QSC 34, [41], [42].
428 [2006] NSWSC 550, [79].
429 Bills ‘Plagiarism in Law School: Close Resemblance of the Worst Kind?’, 112: ‘An intent to deceive the evaluation process may characterize the worst form of plagiary, but it is not essential for the wrong to exist.’ LeClerq ‘Failure To Teach’, 245: ‘The most important choice in creating a definition [of plagiarism] is whether or not to define plagiarism as an intentional act – whether a student can be guilty of “accidental” or “good faith” plagiarism. If the law school does not require intent as a factor, then any student who is found to have used another literary property without attribution for academic credit is automatically guilty of plagiarism.’
430 *Carleton v ABC* [2002] ACTSC 127, [110].
431 Billings ‘Plagiarism in Academia and Beyond’.
‘wrong.’ The analogy of tort is perhaps extended in the idea that, as a matter of policy, damage arising from academic plagiarism is to the integrity of educational institutions.

The nature of plagiarism as a wrong is discussed in Re La Trobe University; ex parte Wild, \(^{432}\) a visatorial case concerning findings of plagiarism against a professor at La Trobe University. In Ex parte Wild, ‘plagiarism committed entirely as a result of carelessness or negligence might be held to amount to gross misconduct in a professor’\(^{433}\) and that ‘It is sufficient to say that it does not necessarily contain an element of moral culpability or an intention to deceive.’\(^{434}\) The threshold and content of the wrong are extended, beyond intention, to encompass ‘carelessness or negligence.’ By implication, such a framework incorporates into the threshold of misconduct what a person in the academy ought reasonably to know, and be able to apply, in the preparation and production of scholarly/academic work. As Higgins J stated in Carleton v ABC, plagiarism does not apply to any form of copying or reproduction. The practice, conduct or action must be put in a context: ‘The notion of “copying” is always a matter of degree… The issue of “copying,” for example, house plans often revolves around breach of copyright. That breach is what imparts wrongfulness or impropriety.’ Citing Flanagan v University College Dublin in respect of the scholarly context, his Honour remarks “the charge of plagiarism is a charge of cheating.”… Again, however, there is a distinction between the appropriation of ideas through research and the copying of the expression of those ideas by others without attribution.\(^{435}\)

4.5.2.2 Beyond Dishonesty and Carelessness: The Limits of Misconduct and Consideration of Educational Problems in Plagiarism Cases

There is a further distinction to be made in the debate over plagiarism. Misappropriation of text or ideas may occur (for example, through copying of material without satisfactory attribution) as a result of ordinary ignorance or inexperience of the student, or for other relevant reasons outside of the scope of intention, ‘carelessness or negligence.’ This may be the sort of conduct referred to by McMurdo J in Re Humzy-Hancock as ‘poor referencing’ or ‘poor work.’\(^{436}\) It is submitted that misappropriation arising from ignorance, inexperience or socio-cultural dislocation – which may technically be termed plagiarism – is distinguishable from conduct

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\(^{432}\) (1987) VR 447.
\(^{433}\) Re La Trobe University; ex parte Wild (1987) VR 447, 455.
\(^{434}\) Re La Trobe University; ex parte Wild (1987) VR 447, 458.
\(^{435}\) Cited in Carleton v ABC [2002] ACTSC 127, [122].
\(^{436}\) See also the valuable critique of plagiarism and Australian international education by Helen Song-Turner ‘Plagiarism: Academic Dishonesty or “Blind Spot” Of Multicultural Education?’ (2008) 50 Australian Universities Review 2. Song-Turner, at 46, argues that resort to misappropriation by international students, arising from social and cultural dislocation (as well as academic and linguistic difficulties) as distinguishable from misconduct properly speaking: ‘This comment and many other like it attest to a certain lack of confidence on the part of students. Lost in a sea of a new environment, language issues, cross cultural misunderstandings, and other problems, sometimes copying from a written text
exhibiting ‘wrongfulness or impropriety.’ The latter may fall within the scope of misconduct, while the former appears to me correctly to constitute an academic or educational problem, a problem of inadequate or incomplete competence rather than a ‘violation of the rules of conduct.’ On balance, it falls within the sphere of academic, rather than disciplinary, decision-making. Such a construction of academic misconduct needs to have regard to the (presumed) knowledge base acquired by the person facing the allegation. Regarding the circumstances in *Ex parte Wild* for instance, are the standards for misconduct ‘in a professor’ comparable to the standards applying to a student? The implication of the phrase ‘in a professor’ in that case would tend to suggest an appropriately variable standard. Such variability might also extend to students at different levels of ‘development’ or progression in their course.

The variable standard implied in *Ex parte Wild* means regard needs to be had to the pedagogical procedure and the academic model of the university; that is, the threshold of plagiarism ought reasonably to consider the developmental assumptions applied. The (quasi-criminal) model of dishonesty and the (quasi-tortious) model of wrong on which academic plagiarism unfolds in the reported cases establishes a space outside of the scope of misconduct where ‘copying,’ ‘misattribution’ or ‘misappropriation’ do not breach rules of conduct but advert to pedagogical issues foreseeable in the ‘formation’ of the student. Plagiarism needs to give regard formally to the nature of student experience.

### 4.5.2.3 The Nature of Student Experience

The model of undergraduate education extends the process of ‘formation,’ in which a student acquires academic ‘literacy,’ ‘lifelong learning attributes,’ intellectual and human ‘capabilities,’ or intellectual and personal autonomy. According to these principles, the educational process includes acquisition of competence and technique. This includes the ‘cultivation’ of academic methods, as well as knowledge of principles, assumptions and reasons underpinning them. It assumes maturation of the student as much as the cognitive accumulation of skills. It might be anticipated from this model that in the course of the educational process...
experience, ‘plagiarism’ might reasonably arise from inexperience, or insufficient inculcation in academic methods and techniques, or limits to the student’s confidence or other psychological factors.

Empirical study of the student experience, especially the ‘first year experience,’ including those regarding plagiarism, reinforces this proposition. In his substantial 1970 study of university students, Little concludes: ‘The major finding of this study is that there are severe limits to students’ intellectual autonomy.’ This early insight into student experience is reiterated in more recent research. In a 2000 report, surveying over 2600 first-year students, McInnis, James and Hartley found that a substantial minority of students experienced a ‘very uncertain start at university.’ Twenty-three per cent of students would have preferred a generalist, introductory first-year program, and more than one-third (34%) stated they were not prepared to choose a course when they left school. The problem of the ‘transition’ to university (notably for school-leavers), and adaptation to academic rules and styles, has been prominent in this ‘first year experience’ literature. ‘Uncertainties’ are consistent with the model of ‘formation,’ in which students not only acquire knowledge of content in an intellectual discipline but also the methods and (cultural) rules underpinning the discipline. The latter methods and rules may be considerably more subtle, contradictory and complex than university authorities (and teachers) perceive. In ethnographic research on students’ experience with the ‘social, cultural and literary

educational sense) with the Wilhelm von Humboldt and the founding of the University of Berlin, advert to the Idealist ‘cultivation’ of the self, especially in the image of (and striving for) an ideal national and/or rationalist figure: the model of the ‘educated Man’ (see eg Sven Erik Nordenbro ‘Bildung and the Thinking of Bildung’ (2002) 36 Journal of Philosophy of Education 3 341). This pedagogical foundation is reproduced across other theories and contexts of liberal education: see Lars Lovlie and Paul Standish ‘Introduction: Bildung and the Idea of a Liberal Education’ (2002) 36 Journal of Philosophy of Education 3 317. Lyotard’s reference to the eclipse of Bildung identified in particular with Humboldt’s ‘neo-humanism’ and an individualistic ‘self-transformation.’ The content of this Bildung – with its teleological figure of egoistic (and ‘interior’) freedom – has no doubt been displaced by a new content, characterised by the accumulator of pragmatic (ie operative and ‘exterior’) knowledge, including ‘generic’ knowledge, and where the (transformative) experience of education is not teleological, or revelatory, but mutable and always provisional. I would argue it is possible to retain the skeletal concept of Bildung/formation while recognising that it has been ‘hollowed out’ (‘ruined,’ to use Readings’ metaphor), and its humanist narrative of maturation/freedom replaced by the technocratic one of competence.

443 Graham Little The University Experience: An Australian Study (Melbourne University Press, 1970), 171.
444 Craig McInnis, Richard James and Robyn Hartley Trends in the First Year Experience in Australian Universities (Department of Education Training and Youth Affairs, 2000).
445 McInnis, et al Trends in the First Year Experience, xi; see also 14-18.
practices of introductory level economics,’ Richardson finds anxiety and tension over the plagiarism question among students derives from contradictory early experiences with pedagogical practice in the academy. In particular, students are confronted with both the ‘canonical’ authority of the ‘introductory textbook’ and ‘exhortations’ to write and think critically and originally. For Richardson, plagiarism by new students may be viewed in the context of this tension: ‘When it came to writing answers to assignment questions, students felt themselves wedged between a rock and a hard place. How could they express in their own words that which was more effectively expressed in the textbook?’ Further, tensions over plagiarism also arise from disjuncture between academic assumptions and expectations, and realities of developing or unformed academic literacy:

While academics gave careful consideration to the setting of assignment and examination questions, they nonetheless anticipated that students would already know how to write before coming into the course. The processes of learning new discourses, learning new content knowledge and being able to express these “in their own words,” as if they are indeed their own, was not seen as problematic, complex or particular difficult.

Generally, assumptions regarding ‘literary’ and intellectual development ought not to be overstated, especially in early year students. In this context, construction of plagiarism as a disciplinary problem, rather than as a pedagogical issue, may be inappropriate, and the scope of the concept ought to be refined accordingly. Ellery emphasises the need for a pedagogical approach to plagiarism at the early stages of university education:

With regard to addressing plagiarism in its overall context at a tertiary level, it seems logical to assume that there comes a point where institutional disciplinary procedures must be brought into play. The findings in this study indicate that the first year may be too early for such drastic measures. However, the lack of real engagement in plagiarism and referencing issues by some students in this study also point towards a combined carrot (using pedagogical processes with ongoing feedback and support) and stick (threat of discipline) approach being necessary from the outset if we are to address plagiarism in any meaningful way.

Song-Turner’s study of international students identifies important issues specific to that ‘cohort’ of students, notably cultural dislocation and unfamiliarity with relevant academic traditions, which have a comparable effect to inexperience or academic ‘illiteracy.’ Revision of the concept of plagiarism within university rules, according to schema that account for problems in academic practice (and implicitly accommodate a model of ‘formation’ in university students), has not gone entirely unheeded. Of the institutions noted above, the University of Queensland has produced guidelines expressly recognising the issue of ‘poor academic practice,’

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448 Richardson ‘Introductory Textbooks and Plagiarism in Higher Education’, 17.
considering it in the context of plagiarism but additionally *distinguishing it from misconduct* strictly speaking:

2.1 Plagiarism defined

Plagiarism is the act of misrepresenting as one's own original work the ideas, interpretations, words or creative works of another. These include published and unpublished documents, designs, music, sounds, images, photographs, computer codes and ideas gained through working in a group. These ideas, interpretations, words or works may be found in print and/or electronic media.

Academic staff have a responsibility to students to explain clearly academic expectations and what constitutes plagiarism and to cultivate, with their students, a climate of mutual respect for original work.

Plagiarism can be divided into careless plagiarism and intentional plagiarism. The former is discussed in more detail in section 2.3 of this policy. Intentional plagiarism is likely to be treated as misconduct as explained in section 4.

2.2 Examples of plagiarism

The following are examples of plagiarism where appropriate acknowledgement or referencing of the author or source does not occur:

- Direct copying of paragraphs, sentences, a single sentence or significant parts of a sentence;
- Direct copying of paragraphs, sentences, a single sentence or significant parts of a sentence with an end reference but without quotation marks around the copied text;
- Copying ideas, concepts, research results, computer codes, statistical tables, designs, images, sounds or text or any combination of these;
- Paraphrasing, summarising or simply rearranging another person's words, ideas, etc without changing the basic structure and/or meaning of the text;
- Offering an idea or interpretation that is not one's own without identifying whose idea or interpretation it is;
- A 'cut and paste' of statements from multiple sources;
- Presenting as independent, work done in collaboration with others;
- Copying or adapting another student's original work into a submitted assessment item.

2.3 Poor academic practice

There will be instances when a student unintentionally fails to cite sources or to do so adequately. For example, a student

- may clearly recognise the need for referencing but references carelessly or inadequately for the context of the relevant discipline;
- has undertaken extensive research but, in the process, loses track of the source of some material;
- is ignorant of western academic conventions.

Careless or inadequate referencing or failure to reference will be considered poor academic practice and a demonstration of carelessness in research and presentation of evidence. The student may be required to correct the error or may lose marks.

Academic staff have a responsibility to educate students about appropriate citation practices in the context of their discipline and provide clear examples of what is acceptable.\textsuperscript{452}

4.6 Standards of Persuasion in Plagiarism and Academic Misconduct Cases

\textsuperscript{451} Song-Turner ‘Plagiarism: Academic Dishonesty or “Blind Spot” of Multicultural Education?’.

\textsuperscript{452} University of Queensland *Policy 3.40.12 – Academic Integrity and Plagiarism.*
It is worth also considering a final issue affecting decision-making in disciplinary cases, and academic misconduct cases in particular: what standard or standards of proof, in the legal sense, are required to be applied in the fact-finding process? The significance of this question in university discipline is that for different groups of students the nature and/or consequences of the disciplinary decision may differ. In turn, the obligations resting on disciplinary decision-makers regarding how they come to their decision may also vary. Within the university the standards applying to proof of misconduct by students will, in certain circumstances, differ. The task will not always be the same. This premise is an extension of the law of evidence and application of that law to non-court tribunals.453

As a form of administrative tribunal, student disciplinary proceedings apply the civil standard of proof to the fact-finding and decision-making process. The persuasive burden in respect of an allegation of fact against a student is that a decision-making body must be ‘reasonably satisfied’ of its occurrence on the ‘balance of probabilities,’ or the ‘preponderance of probability.’ It is established law that in forming a view on the civil standard a decision-maker is required to take into account the gravity of the situation and consequences.454 The standard of proof is a variable standard. The so-called ‘Briginshaw test’ affects how such decisions are to be reasoned:

‘Reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of the allegation made, the inherent unlikelihood of an occurrence of the given description, or gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters, “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences…’455

Gravity of consequences and seriousness of allegations are key considerations that may affect decision-making in university discipline. Circumstances in which those considerations apply would in particular be where findings of misconduct affect professional registration or where they affect residency status. As prime examples, law students fall into the former category, and international students (where they are susceptible to suspension or exclusion from the university, or restrictions on their enrolment) fall into the latter category.

453 See generally J D Heydon Cross on Evidence (Butterworths, 2004), [1050]-[1070].
454 Briginshaw v Briginshaw (1938) 60 CLR 336.
455 Briginshaw v Briginshaw (1938) 60 CLR 336, 362.
4.6.1 Law Students

The breadth of sanctions that may follow from a finding of misconduct by university authorities may have serious ramifications for other persons, including graduates or alumni. For example, university powers to revoke degrees may imperil a person’s continuing practice in their profession or trade once they have graduated and been admitted to practice. Revocation of degrees is an exceptional event, however. For law students, the significance of disciplinary action lies in the potential for findings of misconduct to preclude them from gaining admission to practice in the legal profession, or alternatively having the right to practice withdrawn. The issue for prospective lawyers is not so much status of their (future) degree. Rather, the issue is that a finding of misconduct is relevant to the ‘character review of intending lawyers,’ or in other words, the test as to whether they are a ‘fit and proper’ (or ‘suitable’) person to practice in the profession. The grounds for that test were authoritatively stated by Kitto J in Ziem v Prothonotary of the Supreme Court of NSW:

The issue is whether the appellant is shown not to be a fit and proper person to be a member of the Bar of New South Wales. It is not capable of more precise statement. The answer must depend upon one’s conception of the minimum standards demanded by a due recognition of the peculiar position and functions of a barrister in a system which treats the Bar as in fact, whether or not it is also in law, a separate and distinct branch of the legal profession. It has been said before, and in this case the Chief Justice of the Supreme Court has said again, that the Bar is no ordinary profession or occupation. These are not empty words, nor is it their purpose to express or encourage professional pretensions. They should be understood as a reminder that a barrister is more than his client's confidant, adviser and advocate, and must therefore possess more than honesty, learning and forensic ability. He is, by virtue of a long tradition, in a relationship of intimate collaboration with the judges, as well as with his fellow-members of the Bar, in the high task of endeavouring to make successful the service of the law to the community. That is a delicate relationship, and it carries exceptional privileges and exceptional obligations. If a barrister is found to be, for any reason, an unsuitable person to share in the enjoyment of those privileges and in the effective discharge of those responsibilities, he is not a fit and proper person to remain at the Bar.

In more recent times, findings of academic misconduct at university have led to admitted lawyers consequently being ‘disbarred,’ or graduates seeking admission facing the prospect of denial to be admitted. The consequences, therefore, of disciplinary action at university can be a ruined career as well as the lost costs of the course undertaken. Application of Briginshaw principles to disbarment proceedings recently occurred before the Victoria Supreme Court.

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456 Graduates and alumni commonly retain a status as ‘members’ of the university under university legislation in Australia.
457 Such a power may be expressly incorporated into sanctions available to disciplinary bodies, although in any case, universities possess an inherent power to do so: R v the Chancellor, Masters and Scholars of the University of Cambridge; ex parte Bentley [1723] 93 ER 698; Re La Trobe University; ex Parte Hazan [1993] 1 VR 7.
459 (1957) 97 CLR 279, 298.
where findings of fact in respect of academic misconduct (plagiarism and collusion) at
university were the central issues before the Court. In *Re OG*, the Court held:

In coming to those conclusions [that the practitioner had committed academic misconduct as a
student] we bear in mind that these are in effect professional disciplinary proceedings and that,
while the standard of proof is the civil standard, the degree of satisfaction for which that standard
calls in this context is proportionate to the gravity of the facts to be proved. We have also given
weight to the presumption of innocence and the exactness of proof expected in matters of this
kind.462

While this rule of law applies to a practising lawyer (hence reference to professional
disciplinary proceedings), the same rule arguably applies to a graduate applying for
admission.463 The requisite gravity of consequences for law students in academic misconduct
cases is reinforced by moves in various jurisdictions to include in Supreme Court admission
rules requirement for express disclosure of academic misconduct.464 That misconduct will not
per se lead to disbarment or denial or admission, and in that respect university proceedings are
not directly ‘in effect professional disciplinary proceedings.’ Supervising courts will review
cases for findings of fact as part of their inherent supervisory jurisdiction, and, like criminal
convictions, there are circumstance where incidents of academic misconduct do not impugn
the prospective lawyer’s character sufficiently or irredeemably to prohibit them from being
admitted.465 Decisions of a university tribunal may in effect be overturned.466 However, these
factors do not diminish the ‘seriousness’ of the allegation,467 or the gravity of the consequence
that, at best, findings of misconduct may be scrutinised by a superior court. Those courts are
unlikely to look on questions of academic misconduct lightly.468

4.6.2 International Students

For different reasons, the gravity of consequences for international students of findings of
misconduct is relevant to the fact-finding process and the standard of persuasion brought to that
process. That situation tends to go beyond questions of academic conduct, to any circumstances
where disciplinary action (or indeed action for unsatisfactory academic performance) may place
a student in breach of obligations imposed by visa conditions. As a result of disciplinary action,
academic penalties, restrictions on enrolment, suspension, exclusion or expulsion from an

462 Re Legal Profession Act 2004; Re OG, A Lawyer [2007] VSC 520, [99].
463 See Re Liveri [2006] QCA 152, [13], [19], [21].
464 Eg Legal Profession (Admission) Rules 2008 (Vic), r 5.02(c)(v); Rules of Legal Practitioners
Education and Admission Council 2004 (SA), r 7.6(b).
466 As in, eg, Re Hunzy-Hancock [2007] QSC 34.
468 See the remarks from the Chief Justice of Queensland in *Re AJG* [2004] QCA 88: ‘Over the last
couple of years, the Court has, in strong terms, emphasised the unacceptable of this conduct on the part
institution may imperil a student’s right to stay in Australia, require them to leave the country, or lead to their removal from Australia. Such an occurrence may impose considerable costs on a student, effectively mean they are unable to complete their studies, or affect future applications to enter or stay in Australia. Subject to Standard 13 of the National Code of Practice for Registration Authorities and Providers of Education and training to Overseas Students 2007, a provider (including a registered university) may ‘defer or temporarily suspend’ a student’s enrolment, including for ‘misbehaviour’. Subject to Standard 10, a provider must monitor a student’s course progress, and a student is required to make ‘satisfactory course progress’ as a condition of holding a student visa. Where a provider terminates a student’s ‘studies,’ or where a student breaches their visa conditions, the provider is obliged to inform the Secretary of the Department of Immigration. Students found not to be complying with visa conditions may have their visa cancelled, leading them to be treated as an unlawful non-citizen and ‘removed’ from Australia.

An international student’s right to stay and study in Australia would be affected by disciplinary action in a number of circumstances. If a student is excluded or expelled for disciplinary reasons, they will no longer be meeting the conditions of their visa, which include requirements to be enrolled with an education provider and attend courses. A student may have their enrolment ‘temporarily suspended’ as a result of disciplinary action, under Standard 13, but that action would also place a student in breach of the requirement that they be enrolled in a full-time course of study. In this case, a student would also be liable to have their visa cancelled. In addition, suspension of a student from all or part of their course would likely place them in breach of visa conditions relating to course progress and/or attendance (Condition 8202). Even where sanctions for misconduct are solely in the form of academic penalties, such as awarding
reduced or failed grades, such action may represent, or contribute to, a breach of the student’s obligations under the Migration Regulations regarding satisfactory course progress.

Disciplinary action against an international student might, therefore, cause, by varying routes, the student’s right to stay and study in Australia to be cancelled. The student may be removed from Australia, and a substantial investment in a full fee-paying course is effectively lost. The question as to whether a student visa-holder is compliant or not with their obligations under relevant legislation is one that will be determined ultimately by the Minister (or his/her delegate), subject to any process of tribunal or judicial review. In that context, it has been held that the Briginshaw standard of persuasion applies to fact-finding, in migration cases generally and in student cases in particular. The scope for discretion in respect of either reporting (on the part of providers) or decision-making (on the part of the Minister or review tribunal) in student misconduct cases, once disciplinary action has been given effect and a student’s enrolment, progress or attendance status is affected, is limited, arguably more limited than in law students’ ‘character’ cases. Where disciplinary action would likely, or inevitably, lead to visa cancellation, high standards of persuasion and fact-finding would be, it is submitted, equally applicable to disciplinary decision-makers. The chain of consequences is, arguably, more straightforward in ‘in-house’ misconduct cases concerning international students, than in comparable cases dealing with potential lawyers.

4.7 Conclusions

University discipline of students has evolved in the context of the unique circumstances of the academic institution. The operation of the university in this respect reflects the nature of the functions it is required to discharge, notably education, research and intellectual ‘formation.’ Students represent a particular class of member of the university, with a role and with characteristics distinguishable from those of other major constituencies, such as the staff and the administration. This distinction was historically captured in the status of the student (in statu pupillari), although the situation is affected by incremental changes at law toward a rather more complex mixture of public and private law.

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477 Jasreer Singh v Minister of Immigration and Ethnic Affairs (1994) 127 ALR 383, [16].
478 071 497 780 [2007] MRTA 637, [38]-[43]. At [42], Member Ellis remarks (emphasis added): The Tribunal is aware of the distinction which was drawn between the cancellation powers set out in s 116 of the Act and those more rigorous provisions in Part 2, Division 3 Subdivision C of the Act which were drawn by Smith FM in SZEEM v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FMCA 27, however the Tribunal considers that the same principle applies: the serious consequences of a visa cancellation require that the Tribunal should be satisfied to a high degree that the information upon which the visa was cancelled was correct.
The university must also contend with an exceptionally long *institutional* history, in which the role, subjectivity and standing of students have not been static. The question of discipline has changed, as its objects have changed. I have noted that, in academic literature and commentary, university discipline has come to be preoccupied with issues of academic misbehaviour or transgression. This is consistent with historical shifts in the primary purposes of university discipline, beginning with concerns for the ‘moral upbringing’ of students and then subsequently quelling challenges to the internal order of the university associated with social and political struggles on campus. The rise of academic misconduct in higher education – or what might be termed a creeping academic ‘disorder’ – arguably goes quite directly to the heart of university life, that is, to issues of academic authority and indeed to the validity of the academic project. It is hardly surprising in this context that issues such as plagiarism have achieved prominence. As an important manifestation of contemporary ‘indiscipline,’ I have sought to subject this form of rule-breaking to particularly rigorous scrutiny. It is not an uncontroversial concept. Given the consequences of disciplinary action can be severe for students – as I have considered at length, for law students and international students in particular – interrogation of key disciplinary concepts is an important exercise, with potential ramifications on questions of jurisdiction for decision-makers acting against student misconduct.

Given clarification of the history, concepts and meaning of discipline in the university context, it is worth considering what investigations may have been undertaken into disciplinary schema and into the use of disciplinary action. The subsequent chapter reviews empirical and quantitative literature. Additionally, it includes data and analysis on the incidents of disciplinary action at Australian universities. Combined with the foregoing qualitative or conceptual analysis of university discipline, the next chapter seeks to provide a quantitative context to the issue of disciplinary decision-making.
Chapter 5
Quantitative Analysis of University Discipline: Rules, Complaints, Proceedings

5.1 Empirical Research on University Discipline

Analysis of university discipline has largely been restricted to developments in the case law, especially in the US,\(^{479}\) but also Canada\(^{480}\) and the UK.\(^{481}\) There are few Australian studies. Forbes produced a study in the heady days of student militancy and under the early influence of judicial controls.\(^{482}\) His conclusion was to caution against ‘legalism’ and ‘judicialisation’ of university procedures:

… some existing university discipline rules may already extend, procedurally, about as far as is wise to go without further prompting from the courts or general law… Technical sophistication is not necessarily so good in domestic as in criminal law… Here legalism helps only up to a point. That point is more quickly reached in domestic than in higher public tribunals.\(^{483}\)

In a 1996 study, Dutile\(^{484}\) examined internal disciplinary procedures at several Australian universities, as well as student litigation in Australia. He found a ‘paucity of litigation’ by Australian students, at least in comparison to their US counterparts. Significant in explaining this situation, he concludes, is an ‘atmosphere of accommodation’\(^{485}\) to students, relatively ‘lenient treatment,’\(^{486}\) and the tendency of Australian universities to ‘take jurisdiction over relatively few disciplinary incidents.’\(^{487}\) On the operation of university discipline, he found that disciplinary processes ‘(seem) invulnerable to charges of unfairness.’\(^{488}\) Two and half decades


\(^{482}\) Forbes ‘University Discipline: A New Province for Natural Justice?’.


\(^{486}\) Dutile ‘Law, Governance and Academic and Disciplinary Decision in Australian Universities: An American Perspective’, 103.

\(^{487}\) Dutile ‘Law, Governance and Academic and Disciplinary Decision in Australian Universities: An American Perspective’, 99.

\(^{488}\) Dutile ‘Law, Governance and Academic and Disciplinary Decision in Australian Universities: An American Perspective’, 93.
after Forbes flagged wholesale entry of legal machinery into the university, his fears appear to have gone unfounded.

In this chapter I consider the available statistical evidence on university discipline. Until very recently, this body of research was exclusively confined to analysis of disciplinary rules, and, in particular, confined to the question of their consistency with requirements of fairness. I adopt this method of analysis in Chapter 6 below. A cross-institutional study into student complaints and discipline at Australian universities since 2008 has expanded this research base, at least to the extent of providing data on university disciplinary as a source of litigation and internal grievance. Finally, there is an absence of evidence or evaluation of rates of disciplinary action, or proceedings, against students by university authorities. A survey instrument seeking quantitative data on university disciplinary actions was developed as part of the present research project. This chapter reports on, and analyses, data on rates of disciplinary action at Australian universities, supplied by institutions who participated in that survey.

5.2 Disciplinary Procedures

Empirical investigation of student disciplinary rules and procedures is rare. Nonetheless, there are studies of US higher education institutions, ranging from the period of 1960s campus unrest to relatively recently.\textsuperscript{489} The common method to this research is investigation of university rules and assessment of those rules against relevant standards provided by Constitutional safeguards of fair procedure (‗due process' requirements).

\textit{Duke Law Journal} undertook a substantial 1970 study of over 500 institutions, based on a detailed survey of rules and practices, during the period of ‗campus-wide civil disorder.'\textsuperscript{490} The survey was remarkably comprehensive, going to all aspects of procedural safeguards viewed as protected by Constitutional standards.\textsuperscript{491} The Journal’s assessment was that ‘Though many schools have kept pace with legal developments in the student disorder area or even advanced ahead of such developments, results of the questionnaire reveal that many existing procedures fail to satisfy even the minimal requirements of due process.’\textsuperscript{492} A smaller contemporaneous (1971) study into six New Mexico universities found that ‘for the most part, these universities


\textsuperscript{491} The survey questions run to 8 pages and 51 questions dealing with inter alia pre-hearing procedure, hearing procedures, post-hearing outcomes and actions, and the composition of disciplinary tribunals.

do follow the minimum requirements (of procedural due process).\textsuperscript{493} While this study may repudiate the claim to excessive ‘legalism’ or ‘over-judicialisation,’ noting however various ‘recurrent problems,’\textsuperscript{494} the \textit{Duke Law Journal} investigation tended, rather, to assert that the situation across the US – a large, diverse and complex higher education sector – was highly uneven at that point in time. In a rapidly changing social, administrative and legal \textit{milieu}, such a result was hardly surprising.

Once the sixties’ upheavals had passed, how had the student disciplinary situation settled? In a 1980 study, Golden\textsuperscript{495} undertook an analysis of published material supplied to students facing disciplinary action at 83 US public institutions, although he did not make an overall assessment of practices against Constitutional (‘due process’) standards. That material concerned both disciplinary actions and ‘academic dismissal’ actions (generally, dismissal for unsatisfactory academic performance). Glaring differences were found in the procedural standards applied to disciplinary action as against academic dismissals, with, for instance, a much higher rate of published procedures for the former as against the latter (93\% versus 31\%) and a higher rate in the provision of written notice including particulars (82\% versus 25\% for academic dismissal). Further: ‘few institutions (10.7\%) take a sophisticated or legalistic approach to evidence or level of proof in disciplinary dismissal proceedings.’\textsuperscript{496} Most (86\%) provided an appeal mechanism for disciplinary action. Nearly all disciplinary rules provided for a formal hearing, almost 40\% provided for legal representation, half provided for an ‘open hearing,’ and over 20\% allowed a student to have no inference of guilt drawn from their silence in a hearing.

The findings in Berger and Berger’s\textsuperscript{497} assessment appear to be more favourable to an historic improvement in procedural standards in US student disciplinary practices. This (1999) study represents a further temporal leap in comparable data. In surveying the rules of 159 US higher education institutions, they found that ‘the level of protection enjoyed by students at many, albeit not all, schools is surprisingly high’\textsuperscript{498} and that procedural rights enjoyed by students are often greater than those required by law.

\begin{footnotesize}
\textsuperscript{493} Branch ‘Student Discipline Cases at State Universities In New Mexico – Procedural Due Process’, 261.
\textsuperscript{494} Specifically, with ‘catchall’ rules, inadequate appeals mechanisms, and failure to meet ‘one or more’ due process duties: Branch ‘Student Discipline Cases at State Universities in New Mexico – Procedural Due Process’, 257.
\textsuperscript{495} Golden ‘Procedural Due Process for Students at Public Colleges and Universities’. This study investigated categories of procedural practice and rights at pre-hearing (eg notice), hearing, and post-hearing (eg written decisions) stages, comparable to the Duke University Journal Project, if somewhat less comprehensively. In contradistinction to the Duke study, the response rate for Golden was nearly three times as high (73\% as against 27\% for Duke).
\textsuperscript{496} Golden ‘Procedural Due Process for Students at Public Colleges and Universities’, 359.
\textsuperscript{497} Berger and Berger ‘Academic Discipline: A Guide to Fair Process for the University Student’.
\end{footnotesize}
What may be more revealing is how the results across these studies, and the space of thirty years, compare.\textsuperscript{499}

As can be seen from Table 5.1, in so far as the data is comparable, standards found between 1970 and 1999 have tended generally to be stable, although exhibiting notable, even dramatic, variation in respect of some categories. This assessment is perhaps more cautious than that presented by Berger and Berger.\textsuperscript{500}

Where trends to higher procedural standards appear, they occur in relation to: greater provision of an impartial tribunal, extension of rights to cross-examination, and greater provision of written decisions. A converse trend has appeared in the right to legal representation, with a tendency to a decline in this entitlement.

Certain other procedural standards have tended to remain stable, including the right to present witnesses in one’s defence, provision of an ‘open’ hearing, and provision of a record of proceedings.

Fluctuating results are evident in relation to the issue of representation, the right to remain silent without an inference being made against the student, express standards as to the burden of proof, and provision of written findings of fact. While the right to legal representation appears to be in decline (or in relation to non-legal representation, stable), Golden’s findings in respect of this point appear anomalous, as do his results in relation the issue of inferences to be drawn from silence.

\textsuperscript{499} There is some variation in the questions asked and consequently in the data collected. The figures noted here may be considered comparable as far as the content of questions is concerned.

Table 5.1: Rates of application of selected procedural standards in student disciplinary proceedings, various studies of US higher education institutions, 1970-1999 (% of institutions according with standard)

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>Impartial tribunal</td>
<td>‘majority’</td>
<td>35</td>
<td>&gt;90</td>
</tr>
<tr>
<td>Right to legal representation</td>
<td>74</td>
<td>40</td>
<td>58</td>
</tr>
<tr>
<td>Adviser representation</td>
<td>91</td>
<td>40</td>
<td>90</td>
</tr>
<tr>
<td>Right to cross-examination</td>
<td>44</td>
<td>64</td>
<td>NA</td>
</tr>
<tr>
<td>Right to present witnesses</td>
<td>81</td>
<td>83</td>
<td>&gt;80</td>
</tr>
<tr>
<td>Right to silence without inference</td>
<td>71</td>
<td>22</td>
<td>c. 90</td>
</tr>
<tr>
<td>Burden of proof</td>
<td>‘substantial majority’</td>
<td>14</td>
<td>NA</td>
</tr>
<tr>
<td>Open hearing</td>
<td>49</td>
<td>50</td>
<td>NA</td>
</tr>
<tr>
<td>Adequate record</td>
<td>53</td>
<td>66</td>
<td>57</td>
</tr>
<tr>
<td>Written finding of facts</td>
<td>58</td>
<td>24</td>
<td>NA</td>
</tr>
<tr>
<td>Written decisions</td>
<td>36</td>
<td>62</td>
<td>78</td>
</tr>
</tbody>
</table>

Comparisons between US ‘due process’ standards and Australian standards of fair procedures ought to be treated cautiously, consistent with the different legal and constitutional regimes and historical developments. Notwithstanding this qualification, the US literature is instructive, if not for the reason that it adverts to a gap in Australian research. Limited direct comparison may be made about procedural standards prevailing across the Pacific, other than perhaps the interesting, concurrent conclusions draw by Forbes and Berger and Berger (thirty years apart): that the standards applied are, in most cases, satisfactory, and even in excess of what the law requires. The law in Australia has developed significantly beyond what Forbes was dealing with in 1970, and the Berger and Berger study (as with all the US studies) also points to areas of notable shortcoming, or in other words, unevenness, in disciplinary practice.

5.3 Student Litigation and Complaints

A yet smaller body of evidence exists on the proportion of student complaints and/or legal litigation that concerns disciplinary action by universities. Data regarding student complaints and/or litigation is minimal. Astor has investigated reported cases of litigation involving universities, in courts or tribunals, between 1985 and 2006. This data was not restricted to student cases. She found a considerable growth in hearings in which universities were involved.

\[\text{Categories as per Golden ‘Procedural Due Process for Students at Public Colleges and Universities’, 345. These are a selection of categories only, where comparable data tended to exist. Thus these figures may be considered as indicative only of comparisons of procedural standards generally.}\]

\[\text{Berger and Berger have the benefit of comparison themselves, of their research and that of the other cited papers. They remark ‘Because each of these surveys asked questions rather different from ours, we lack a reliable basis for comparison. Yet, insofar as the inquiries are comparable, their results are quite similar to ours in some key respects’: Berger and Berger ‘Academic Discipline: A Guide to Fair Process for the University Student’, 299. It would have to be said that this 1999 study survey is not all that different from the approach (as to content) of the earlier studies. The reporting of data in the Berger and Berger study, however, is neither as systematic nor as lucid as the earlier studies.}\]
ranging from ‘three to five hearings a year to a peak of 92 hearings [in 2005]… over 20

years.’ As far as student cases are concerned, Astor’s study provides no breakdown of the

nature of those cases, although student cases generally have grown as disputes generally have
grown, to between 2 and 15 a year in the period 1995-2006.

In the UK context, the Office of the Independent Adjudicator for Higher Education (‘OIA’)
supplies data on enquiries to, and disputes heard by, that body. These data include information
on disciplinary matters, providing a useful and comparable source of data on rates of actions
concerning discipline. In this context, enquiries and complaints are external to institutions
participating in the scheme and do not necessarily give an indication of rates of disciplinary
action within universities. Disciplinary matters here refer solely to the source of complaint.

Rates of disciplinary action as a source of enquiry and complaint under the OIA scheme are set
out in Table 5.2 for the 2004-2007 period. Complaints concerning disciplinary decisions by
universities represent between 7.53% and 11.33% of all complaints handled by the OIA. This
figure is approximately 26-114% greater than the rate of student enquiries to the OIA
concerning disciplinary matters. For present purposes, it appears that complaints related to
discipline at UK universities are relatively constant, constituting around one in ten complaints
that are actually heard. A former Independent Adjudicator has stated recently, in respect of
plagiarism particularly, that most cases concern penalties and inconsistency within or between
institutions.

By comparison to the OIA data, recent research on ‘student grievances and discipline’ at
Australian universities has also found that university authorities had approached around one in
ten students with a complaint or problem, such as discipline, although this figure may under-
report the propensity of universities to raise issues, including disciplinary issues, with
students.

503 Hilary Astor ‘Australian Universities in Court: Causes, Costs and Consequences of Increasing

Litigation’ (2008) 19 Australasian Dispute Resolution Journal 156, 160. In respect of the numbers of
cases, as distinct from hearings, the numbers increase from less than five in the mid-1980s to over 40 per
year in the mid-2000s (160-161). She pre-empts this remark by pointing out (160) that ‘In the 1960s, four
reported cases of litigation involving universities were found, and in the 1970s, a total of nine cases were
found.’

504 Astor ‘Australian Universities in Court’, 162.

505 Baroness Ruth Deech ‘Adjudicating Student Complaints’ (Keynote Speech To It’s Academic – A

National Student Ombudsman For Australian Universities? Conference, 5 December 2008, Byron Bay),
8-9.

506 Jim Jackson, Helen Fleming, Patty Kamvounias and Sally Varnham Student Grievances and

Discipline Matters Project: Final Report to Australian Learning and Teaching Council (Australian
Learning and Teaching Council, 2009), 25: in this study 10.7% of respondents to a survey on complaints
and appeals stated that the university had ‘raised a problem with them about their studies or behaviour.

507 The Student Grievance and Discipline Matters study also notes a further 11.2% of surveyed students
had both raised a matter with the university and had the university raise a matter with them: Jackson et al
Student Grievances and Discipline Matters Project, 25.
Table 5.2: Disciplinary Enquiries and Complaints, UK Office of Independent Adjudicator, 2004-07

<table>
<thead>
<tr>
<th>Year</th>
<th>Student enquiries by type</th>
<th>Complaints received by category</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Discipline and plagiarism</td>
<td>Total enquiries</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Discipline, plagiarism/total</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Discipline and plagiarism</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Total complaints</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Discipline, plagiarism/total</td>
</tr>
<tr>
<td>2004</td>
<td>508</td>
<td>308</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4.87%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>9</td>
</tr>
<tr>
<td></td>
<td></td>
<td>86</td>
</tr>
<tr>
<td></td>
<td></td>
<td>10.46%</td>
</tr>
<tr>
<td>2005</td>
<td>58</td>
<td>942</td>
</tr>
<tr>
<td></td>
<td></td>
<td>6.16%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>32</td>
</tr>
<tr>
<td></td>
<td></td>
<td>322</td>
</tr>
<tr>
<td></td>
<td></td>
<td>9.94%</td>
</tr>
<tr>
<td>2006</td>
<td>55</td>
<td>897</td>
</tr>
<tr>
<td></td>
<td></td>
<td>6.13%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>35</td>
</tr>
<tr>
<td></td>
<td></td>
<td>465</td>
</tr>
<tr>
<td></td>
<td></td>
<td>7.53%</td>
</tr>
<tr>
<td>2007</td>
<td>89</td>
<td>1374</td>
</tr>
<tr>
<td></td>
<td></td>
<td>6.48%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>68</td>
</tr>
<tr>
<td></td>
<td></td>
<td>600</td>
</tr>
<tr>
<td></td>
<td></td>
<td>11.33%</td>
</tr>
</tbody>
</table>


5.4 Rates of Disciplinary Action in Australian Universities

As part of the present research project, a brief survey instrument was developed and sent to 27 Australian public universities. The survey sought statistical information on incidents and rates of disciplinary action against students. The information sought included data on academic and ‘general’ (non-academic) misconduct, whether proceedings were conducted at a ‘local’ (ie Faculty of School) level or ‘centrally’ (by a body or person acting under a University-wide jurisdiction) and numbers of appeals, as well as incidents of summary action. In respect of academic misconduct cases, information was also sought on whether cases concerned plagiarism, misconduct in examinations, or ‘other’ misconduct.

Of the universities to which the survey was sent, seven institutions ultimately responded, from four States or Territories. Although a limited response rate, the data supplied is sufficient to provide a useful sample of misconduct data. A range of institutions was represented in the sample, including metropolitan and regional, and larger, established (eg ‘sandstone’) universities and newer ones (eg post-war or post-UNS). The data collected concerned discipline proceedings in the 2006 academic year.

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508 Data for ‘discipline’ and ‘plagiarism and IP’ are separately reported in OIA statistics. Data from both categories are included here. Elsewhere in OIA Annual Reports cases concerning plagiarism are included in discussions of disciplinary matters: eg OIA Annual Report (2005), 25-26.

509 Data from 29 March -31 December 2004 only.

510 See Appendix 1.

511 It should be noted that one institution supplied results relatively late, and as a consequence these were not reported in earlier references to this survey data in Bruce Lindsay ‘University Hearings: Student Discipline Rules and Fair Procedures’ (2008) 15 Australian Journal of Administrative Law 3 146, 148. The results in the present sample therefore vary from the results reported in the Australian Journal of Administrative Law article.
Results from the survey are summarised in Tables 5.3 and 5.4. Each respondent university is identified by letter, from University A to G. Broad types of misconduct – academic or general – are distinguished, and rates of disciplinary proceedings at individual institutions as well as across all respondents institutions are provided. Rates of proceedings are determined as a proportion of student enrolments (ie as a proportion of individual students), and also as a proportion of Effective Full-Time Student Units (EFTSU), the standard sectoral measure for ‘student load,’ or student enrolment giving regard to fractional (or part-time) enrolments. EFTSU is intended to provide a more accurate measure of student demand in the system. A greater disparity between enrolments and EFTSU measures indicates a higher rate of part-time enrolments.
Table 5.3: Numbers and rates of discipline proceedings, selected Australian universities, 2006

<table>
<thead>
<tr>
<th>University</th>
<th>Academic misconduct (local)</th>
<th>Academic misconduct (central)</th>
<th>Total academic misconduct</th>
<th>General misconduct (local)</th>
<th>General misconduct (central)</th>
<th>Total general misconduct</th>
<th>Total misconduct</th>
<th>Academic misconduct /onshore enrolments (%)</th>
<th>Academic misconduct/ EFTSU (%)</th>
<th>Total misconduct/ onshore enrolments (%)</th>
<th>Total misconduct/ EFTSU (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>188</td>
<td>17</td>
<td>205</td>
<td>NA</td>
<td>9</td>
<td>9</td>
<td>214</td>
<td>1.17</td>
<td>2.23</td>
<td>1.22</td>
<td>2.63</td>
</tr>
<tr>
<td>B</td>
<td>139</td>
<td>5</td>
<td>144</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>146</td>
<td>0.38</td>
<td>0.50</td>
<td>0.39</td>
<td>0.5</td>
</tr>
<tr>
<td>C</td>
<td>425</td>
<td>16</td>
<td>441</td>
<td>27</td>
<td>3</td>
<td>30</td>
<td>471</td>
<td>2.52</td>
<td>3.32</td>
<td>2.70</td>
<td>3.55</td>
</tr>
<tr>
<td>D (512)</td>
<td>157</td>
<td>24</td>
<td>181</td>
<td>NA</td>
<td>5</td>
<td>5</td>
<td>186</td>
<td>1.30</td>
<td>1.85</td>
<td>1.34</td>
<td>1.90</td>
</tr>
<tr>
<td>E</td>
<td>174</td>
<td>0</td>
<td>174</td>
<td>1</td>
<td>7</td>
<td>8</td>
<td>182</td>
<td>0.44</td>
<td>0.64</td>
<td>0.46</td>
<td>0.67</td>
</tr>
<tr>
<td>F</td>
<td>112</td>
<td>49</td>
<td>161</td>
<td>4</td>
<td>0</td>
<td>4</td>
<td>165</td>
<td>0.42</td>
<td>0.58</td>
<td>0.43</td>
<td>0.6</td>
</tr>
<tr>
<td>G</td>
<td>190</td>
<td>28</td>
<td>218</td>
<td>0</td>
<td>20</td>
<td>20</td>
<td>238</td>
<td>0.67</td>
<td>0.94</td>
<td>0.73</td>
<td>1.03</td>
</tr>
<tr>
<td>All</td>
<td>1385</td>
<td>139</td>
<td>1524</td>
<td>33</td>
<td>45</td>
<td>78</td>
<td>1602</td>
<td>0.77</td>
<td>1.09</td>
<td>0.97</td>
<td>1.38</td>
</tr>
</tbody>
</table>

Table 5.4: Grounds for disciplinary action and rates of appeal, selected Australian universities, 2006

<table>
<thead>
<tr>
<th>University</th>
<th>Plagiarism</th>
<th>Plagiarism/all misconduct (%)</th>
<th>Exam misconduct</th>
<th>Other</th>
<th>Total academic misconduct</th>
<th>Appeals (academic misconduct)</th>
<th>Summary action</th>
<th>Total general misconduct</th>
<th>Appeals (general misconduct)</th>
<th>Total appeals</th>
<th>Appeals/original proceedings (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>193</td>
<td>90.19</td>
<td>12</td>
<td>0</td>
<td>205</td>
<td>NA</td>
<td>NA</td>
<td>9</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
</tr>
<tr>
<td>B</td>
<td>114</td>
<td>78.08</td>
<td>4</td>
<td>26</td>
<td>144</td>
<td>1</td>
<td>4</td>
<td>2</td>
<td>2</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>C</td>
<td>393</td>
<td>83.44</td>
<td>38</td>
<td>10</td>
<td>441</td>
<td>9</td>
<td>NA</td>
<td>30</td>
<td>3</td>
<td>12</td>
<td>2.55</td>
</tr>
<tr>
<td>D</td>
<td>118</td>
<td>63.44</td>
<td>8</td>
<td>55</td>
<td>181</td>
<td>NA</td>
<td>NA</td>
<td>5</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
</tr>
<tr>
<td>E</td>
<td>123</td>
<td>67.58</td>
<td>46</td>
<td>5</td>
<td>174</td>
<td>0</td>
<td>8</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>F</td>
<td>93</td>
<td>56.36</td>
<td>61</td>
<td>7</td>
<td>161</td>
<td>12</td>
<td>0</td>
<td>4</td>
<td>0</td>
<td>12</td>
<td>7.27</td>
</tr>
<tr>
<td>G</td>
<td>123</td>
<td>51.68</td>
<td>28</td>
<td>67</td>
<td>218</td>
<td>7</td>
<td>0</td>
<td>20</td>
<td>0</td>
<td>7</td>
<td>2.94</td>
</tr>
<tr>
<td>All</td>
<td>1157</td>
<td>72.22</td>
<td>197</td>
<td>170</td>
<td>1524</td>
<td>29</td>
<td>4</td>
<td>78</td>
<td>5</td>
<td>34</td>
<td>2.12</td>
</tr>
</tbody>
</table>

512 Data provided from University D includes patent double counting. Figures supplied for academic misconduct appear to have been reproduced in reporting for general misconduct. In addition, data supplied on ‘appeals’ patently included data relating to any form of dispute locally termed ‘appeal’, such as appeals against grades. For these reasons, data on general misconduct, summary action and appeals from University has been discounted for the sake of reliability.

513 May include available data for summary action.
In 2006, therefore, over 1600 (1602) students in the seven respondent institutions were the subject of disciplinary action, equating to slightly under 1% of all student enrolments at those institutions. This figure refers to students dealt with by hearing at first instance, or (a much smaller number) dealt with by summary action. By comparison with de Lambert et al’s New Zealand study – which quantified rates of formal disciplinary action at New Zealand tertiary institutions at just 0.2% of enrolled students – the situation inferred from the present data-set is that the rate of incidents of formal disciplinary action in Australian universities is several times higher than across the Tasman. If the proportion of students subject to initial disciplinary action were extrapolated to all student enrolments in publicly-funded higher education institutions in 2006, it may be estimated that nearly 10,000 (9546) students Australia-wide were the subject of disciplinary action in that academic year.

Clearly, this is not an insignificant number of students being investigated and/or sanctioned for misconduct. Additionally it represents a substantial administrative effort on the part of higher education authorities. In particular, it is a substantial administrative effort on the part of University Faculties and Schools. As can be gleaned from the data, the far greater proportion of disciplinary action occurred in respect of (alleged) academic misconduct, and the overwhelming effort in handling misconduct issues occurred at a ‘local’ – Faculty or School – level. If we leave aside accounting for summary action, nearly nine out of ten allegations of misconduct are handled at the Faculty/School level (88.5%). This amount of proceedings does not account for appeal proceedings that, while relatively small in proportion to all proceedings, are generally conducted at a ‘central,’ university-wide level rather than at a Faculty/School level. If disciplinary action conducted at the ‘central’ level and appeals are taken together, 218 hearings out of a total of 1636 hearings (ie central and local hearings, whether at first instance or on appeal, excluding summary action) were carried out at that level. That is, 13.32% of all hearings were carried out ‘centrally,’ and conversely more than four-fifths of all hearings (86.68%) were carried out by Faculties/Schools.

While this data-set indicates overall numbers and proportions of disciplinary action, as well as the preponderant site of the administration of university discipline, it also provides a general indication of the nature of misconduct being handled by institutions. As Table 5.3 identifies,

514 It is conceded that there may be some overlap or double-counting between students subject to summary action and those heard before disciplinary authorities, given that summary action may represent a ‘holding position’ in ‘emergency cases’ prior to a student proceeding to a hearing of some description. It is not known what proportion of summary cases proceeded to hearing and what proportion were resolved by other means (eg student withdrawal, suspension of disciplinary action).


516 As based on ‘higher education providers’ reported in Department of Education, Science and Training Students 2006 – Full Year (2007).

517 Only one institution supplied reliable data for summary action – Universities B. The location (‘local’ or ‘central’) of the summary authority was not requested in the survey.
academic misconduct is far more likely to be at issue in disciplinary proceedings, a figure consistent with the literature on student misconduct. Again discounting for summary action and appeals, greater than nine out of ten (95.13%) discipline proceedings concern academic misconduct. Table 5.4 seeks to break the incidence of academic discipline down still further. In distinguishing cases of plagiarism and examination misconduct from ‘other’ possible forms of misconduct (eg ‘collusion’, fraudulent application for ‘special consideration’), it can be seen that plagiarism is the largest single source of disciplinary action. Nearly three-quarters (72.22%) of all cases at first instance involve allegations and/or findings of plagiarism. An overwhelming majority (75.92%) of cases of academic misconduct involve questions of plagiarism. The rate of plagiarism as a proportion of disciplinary action, however, varies considerably across institutions, from around 50% of cases to over 90% of cases. Reasons for this disparity may be complex and/or cyclical. For instance, regard may be had to the construction of the meaning of plagiarism under the disciplinary rules, such as whether it incorporates the question of intent (tending to diminish the propensity of plagiarism cases by narrowing the scope of concept) or whether issues of poor academic practice and citation are dealt without outside of the disciplinary framework.518 Additionally, the impact of public or institutional concern over the issue of plagiarism at a particular point in time may increase the likelihood and/or propensity for plagiarism to be the subject of internal investigation or ‘policing.’519 These factors may be present at some institutions and not at others (or to a lesser degree). No dis-aggregated data was requested on general misconduct cases, therefore it is not possible to determine precise reasons for the particular composition of disciplinary issues at that university.

Appeal statistics are reported in Table 5.4, and these figures are in addition to first instance proceedings. Few students (2.12%) appeal from a finding of misconduct. Just under 2% (1.9%) of students found to have breached academic conduct rules takes the matter on appeal internally. The volume of appeals from general misconduct cases is negligible. The availability of internal appeals or review is commonplace in Australian universities, and it is not unusual for review procedures to require a re-hearing of the original case on the merits.520

The seeming low rate of appeal may be considered in relation to several factors. In the first place, rates of use of internal review mechanisms in other administrative contexts suggest that these forms of appeal are not heavily used. In the context of housing decisions in the UK, Cowan and Halliday have remarked that ‘the level of reviewing activity seems much less than it might be.’521 Their study investigated internal review applications received by housing authorities, and found that 71% of those authorities have received less than 5 requests in the

518 See Chapter 4, section 4.5, above.
519 Compare Chapter 8, sub-section 8.8.7, below.
520 See Ch 6, subsection 6.6.7, below.
preceding six months (11% had received no requests), and only 16% had received more than 16 requests. Given the high volume of unsuccessful applications to housing authorities, they hypothesised, ‘the general take-up rate of rights to internal review seems very low.’ They propose various reasons why review rates are low, including poor communication of appeal rights, doubts about the integrity of the review process on the part of applicants, and the length and complexity of the bureaucratic process.

It may be, however, that the rate of appeals against university disciplinary decisions is not, in fact, all that low. When compared to rates of administrative appeals to external bodies, either by merits review or on judicial review, the university appeal rate is relatively high. For instance, Wikely and Young have noted that tribunal appeals in UK social security cases are ‘fewer than 1 percent of decisions by adjudication officers.’ Cowan and Halliday found a further significant drop-off in applications for recourse, by way of judicial review, in housing cases: 75% of housing authorities surveyed had no experience of disputes reaching the courts. Appeals from student misconduct decisions at Australian universities who provided data in this study range from around 2% to over 7%.

A further factor in the university context may be the construction of appeal rights. In some institutions, recourse is limited to prescribed grounds of appeal. These may be relatively narrow. Finally, it may be that, where there is a basis for a disputed finding and/or sanction, disciplinary decision-makers at first instance are capable of, and experienced in, making the reasons for the adverse decision explicable to the student. That is to say, following Galligan, that the original decision-maker demonstrates to the student that the decision is reasonable, even worthy and/or educational, and that his/her ‘case has been dealt with properly according to authoritative standards.’

522 Cowan and Halliday The Appeal of Internal Review.
523 Cowan and Halliday The Appeal of Internal Review, generally see chapter 8.
525 Notwithstanding the fact that housing and immigration disputes represent the two largest sources of applications for judicial review in the UK: see M Sunkin, L Bridges, and G Mazeros ‘Changing Patterns in the Use of Judicial Review’ in Galligan (ed) A Reader on Administrative Law (Oxford University Press, 1996), 477-495.
526 Galligan Due Process and Fair Procedures, 433.
5.5 Conclusions

An overview of the available empirical (statistical) research relating to university discipline exposes a paucity of information. Published, or at least publicly available data and analysis, falls into two main categories: studies on the quality of disciplinary rules and procedures as measured against appropriate legal standards, and information on student complaints and litigation, generating some indirect data on rates of disciplinary action. In respect of the former category of (primarily US) research, university adherence to basic legal standards is arguably ‘adequate,’ but variable over time. The latter category of research is in part suggestive of the quality of disciplinary action at least to the extent of identifying rates of complaint arising from it (although not necessarily rates of those complaints being upheld in disciplinary complaint cases). Complaints arising from disciplinary action appear to generate around one in ten of all student complaints about university action.

The original survey data produced in the course of the present study contributes to the overall picture of university discipline, in supplying direct information on rates of disciplinary action against students. The picture portrayed by that data is sobering. Significant numbers of students are subject to disciplinary action: around 1% of all enrolled students at the investigated institutions, and an estimated 10,000 across the country based on this 2006 data. Overwhelmingly, their impugned conduct concerns academic misconduct generally and plagiarism in particular. While only around 10% of students subsequently have (or need) recourse to an internal appeal or review, that rate appears greater than review and appeals in other administrative jurisdictions.

In short, there is evidence that disciplinary action is not uncommon, is part of a growing volume of disputation, and may be the subject of inadequate procedure and practice. This is ground for greater scrutiny of this sphere of university affairs, which is the task of the next three chapters.
Chapter 6
Student Discipline Rules and Fair Procedures

6.1 University Discipline

Design of university discipline rules, in modern times, has evolved from two organising principles: the functional imperative for order in the university and standards in academic qualifications, and the administrative-legal requirement to apply fair procedures in disciplinary decision-making. Those rules typically are embodied in one or more (statutory or non-statutory) instruments, proscribing certain behaviours or conduct, and normally organised into classes of academic and non-academic (‘general’) misconduct.

Increasingly, indiscipline is viewed as an ethical, or alternatively, as an educational problem. It is focused on academic misconduct. In this guise, it concerns various forms of transgression of academic rules, whether intentional or not: plagiarism, cheating in exams, unauthorised collusion on assessments or falsifying data. These are typically reproduced in university rules.

This chapter considers student disciplinary rules at a selection of Australian public universities, considering their content and procedures in relation to standards of procedural fairness operating at common law. This method of investigation reproduces generally the methodology of similar studies undertaken in US universities.

6.2 The Legal Requirement to Proceed Fairly

For those students who have the seeming misfortune to be caught up in disciplinary action, they will generally face a well-established domestic machinery for adjudication of allegations of misconduct. Students in public universities will be subject to actions and proceedings that fall within the ambit of administrative law. In private institutions, even those in receipt of public funding, where the relationship of the student and university lies in contract, provision of higher education is regulated by law and requires statutory approval. Students in those institutions

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527 It may be noted that more ancient cases concerning fair treatment of university members by domestic authorities also exist, eg R v the Chancellor, Masters and Scholars of the University of Cambridge; ex parte Bentley [1723] 93 ER 698.
528 See Chapter 5, section 5.2, above.
529 University of Ceylon v Fernando (1960) 1 All ER 631; R v University of Saskatchewan, ex parte King (1968) 1 DLR (3rd) 721; Ex parte King; Re The University of Sydney (1943) 44 SR(NSW) 19; Rochford ‘Claims against a University’. The issue of susceptibility to statutory administrative law remedies is more complicated since, in some jurisdictions, since Griffith University v Tang (2005) 221 CLR 99: see, for example, Kamvounias and Varnham ‘Doctoral Dreams Destroyed’.
530 See generally Chapter 3, sub-section 3.2.1. The nature of statutory backing for higher education providers may include enabling statutes (eg Bond University Act 1987 (Q), Australian Catholic University Act 1990 (NSW)) as well as registration and accreditation under relevant higher education legislation.
may also expect fair treatment in decision-making affecting their interests.\footnote{Herring v Templeman [1973] 3 All E R 569; Clark v University of Lincolnshire and Humberside [2000] 1 WLR 1988; Hall v University of New South Wales (2003) NSWSC 669, [114]-[115]; R v Wadley; ex parte Burton [1976] Qd R 286.} For the purposes of this thesis, the investigation solely concerns public universities.

It is a general tenet of law that a decision-maker must proceed fairly, and specifically that no-one should be condemned without being heard and that they should be heard by an impartial decision-maker.\footnote{See, generally, Geoffrey Flick Natural Justice: Principles and Practical Application (2nd ed, Butterworths, 1984), 26: ‘It is a firmly established principle of both English and Commonwealth law that no man [sic] should be condemned unheard… [and] the opportunity to be heard involves not only an opportunity to be heard and present evidence and submissions in favour of one’s own cause, but also an opportunity to be heard by an impartial adjudicator.’ Primarily, I will be concerned with the law as it has developed and applies in British, Australian and Commonwealth law, as distinguished from the constitutional ’due process’ doctrine deriving from US law.} The present chapter primarily concerns application of the hearing rule, rather than the rule against bias.

The doctrine of natural justice has an ancient genealogy,\footnote{See, eg, S De Smith, Lord Woolf and Jeffrey Jowell Judicial Review of Administrative Action (5th ed 1995), [7-007]-[7-008].} and commentary on it need not be rehearsed here.\footnote{Generally, on natural justice/procedural fairness, see Flick Natural Justice: Principles and Practical Application; Galligan Due Process and Fair Procedures; Forbes Justice in Tribunals.} In English (and imperial) law until the middle part of the twentieth century, the notion that no person could be deprived of liberty or property by judicial or quasi-judicial action other than by a fair hearing was well-entrenched in civil law as well as criminal law.\footnote{The principle also extended to voluntary associations and professional bodies: Wood v Woad (1874) LR 9 Ex 190, 196.} In the course of the twentieth century, the doctrine of natural justice evolved into a general obligation on administrative decision-makers to proceed fairly.\footnote{The ‘twin pillars’ of natural justice – the hearing rule and the rule against bias – are said to be supplemented by a third rule of fairness, the rationality principle: see Forbes Justice in Tribunals, [7.4]. But compare Geoffrey Airo-Farulla ‘Rationality and Judicial Review of Administrative Action’ (2000) 24 Melbourne University Law Review 3 543.} It has been well-settled since the House of Lords decision in Ridge v Baldwin\footnote{(1964) AC 40.} that a decision-maker, upon whom there is a statutory duty to undertake a course of action, additionally is under a duty to proceed fairly. That is, a decision-maker in an administrative setting is obliged to consider how a decision is to be made, not solely what it is that needs to be decided or acted upon. It has elsewhere been stated that the duty is attracted where the decision has ‘civil consequences’ to the individual,\footnote{Wood v Woad (1874) LR 9 Ex 190.} and there is a ‘presumption’ that the duty applies.\footnote{Forbes Justice in Tribunals, [7.13]-[7.15].} The ‘threshold’ at which the duty to accord procedural fairness arises in the ‘making of administrative decisions’ has been held to be where rights, interests and legitimate expectations are affected ‘subject only to the clear manifestation
of a contrary statutory intent." As Galligan has noted: ‘An obvious strength of this approach is that all areas of administration are now, in principle, subject to the requirements of procedural fairness.’

It is also fundamental to the principle of procedural fairness that the content of the rule is not rigidly determined: ‘no general rule can be laid down.’ As a matter of principle, the courts are at pains to emphasise the need for flexibility in application of the rules. What is required as a matter of fairness may vary and will depend on the circumstances of a particular case. It has been argued however that there remains a tension between the flexibility principle and a need to ‘maximise certainty and predictability’ in administrative decision-making. The courts have seen fit therefore to provide further guiding principles in the application of procedural fairness. For instance, a distinction may be made between decisions of an ‘operational’ nature, to which the doctrine will generally apply, and those of a ‘policy’ or political type, to which it generally will not. Alternatively, not all ‘interests’ in administrative action are comparable. Some, such as property and liberty, will attract stronger protection than others.

6.3 Universities and Procedural Fairness

The student holds an interest in their status as a member of the university, with the benefits that this implies, including the ability to proceed through a program of studies and, upon successful completion, award of a qualification. This interest has been held to be analogous to a proprietary interest in a club or society.

Even prior to *Ridge v Baldwin*, a student’s entitlement to be afforded natural justice in the course of disciplinary action was held to arise from the quasi-judicial nature of the action in

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540 *Kioa v West* (1985) 159 CLR 550, 585 (Mason J); Galligan *Due Process and Fair Procedure*, 318-319
541 Galligan *Due Process and Fair Procedures*, 329.
542 *Durayappah v Fernando* (1967) 2 AC 337, 349. ‘There is no rule which can provide in every case an answer by its mechanical application’: *Twist v Randwick Municipal Council* (1976) 136 CLR 106, 111.
543 *Russell v Duke of Norfolk* (1949) 1 All ER 109, 118 (Tucker LJ): ‘There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.’ *Kioa v West* (1985) 159 CLR 550, 585 (Mason J): ‘The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?’
546 *Kioa v West* (1985) 159 CLR 550, 618-619; *FAI Insurances v Winneke* (1982) 151 CLR 342; See Chris Enright *Federal Administrative Law* (Federation Press, 2001), [33.28]: ‘The distinction between the old and new property arises in the application of natural justice in a fundamental way. Basically, the stronger the interest the stronger the claim to natural justice. Old property based on rights generally confers a stronger interest than new property based on discretion.’
547 *R v Aston University Senate; ex parte Roffey* (1969) 2 WLR 1418, 1430.
University of Ceylon v Fernando. In that case, the Privy Council held the actions of a Vice-Chancellor to expel a student on disciplinary grounds to be constrained by the duty to observe natural justice. This was also held to be the case in Glynn v Keele University, a general misconduct rather than academic misconduct case.

By the late 1960s, student political upheavals, and the requirement on university authorities to contend with ‘collective indiscipline,’ coincided with the emerging, general duty on statutory and domestic bodies to act fairly. The duty to act fairly also extended to other types of decisions affecting students. This was confirmed in the controversial decision in R v Aston University Senate; ex parte Roffey, and subsequently Herring v Templeman. These judgements established that the duty applies not only to disciplinary action but also to a decision to expel a student or compel his/her withdrawal from the university on grounds of unsatisfactory academic performance. In an earlier university case, it was held that the duty applies to a decision to revoke degrees. More recently, the requirement to proceed fairly has been applied to decisions of academic judgement. A general statement on the application of natural justice was made in Re Macquarie University; Ex Parte Ong:

It should first be said that it was conceded for the University that both the committee and the Council were required to afford Dr Ong natural justice or procedural fairness, though it was not conceded that this general obligation required the doing of things contended for by Dr Ong. I have no doubt the general concession is correct.

6.4 Methodology

Analysis was undertaken of student disciplinary rules at sixteen Australian public universities. All institutions possess written rules and procedures in publicly available documents.

548 (1960) 1 All ER 631.
549 (1971) 1 WLR 487: the so-called ‘naked sunbather’ case.
550 Here the distinction was between quasi-judicial and ‘magisterial’ action.
551 (1969) 2 WLR 1418. The controversy concerned the source of power (whether public or contractual) and thereby whether the prerogative writs were available: See Wade ‘Judicial Control Of Universities’; Farrington The Law Of Higher Education.
552 (1973) 3 All ER 569, 585b (Russell LJ).
553 R v the Chancellor, Masters and Scholars of the University of Cambridge; ex parte Bentley [1723] 93 ER 698.
554 R v University of Portsmouth; ex parte Lakereber (1998) EWCA Civ 1553; R v Higher Education Funding Council, ex parte Institute of Dental Surgery (1994) 1 WLR 242; see also Davies ‘Challenges to “Academic Immunity” – The Beginning of a New Era?; Kamvounias and Varnham ‘In-House or in Court? Legal Challenges to University Decisions’; see further, Chapter 9, subsection 9.2.1, below.
555 (1989) 17 NSWR 113, 129. A staff, not a student, disciplinary case: Ong was removed from the post of Head of School as a result of an investigation carried out under the auspices of the University Council. This decision was held to be void for breach of natural justice on the grounds inter alia that Ong had not been given the opportunity to address adverse material and on grounds of actual bias. The decision was visitorial, not curial.
The analysis requires some standardisation and generalisation of data. Typically, each institution possesses several instruments – either statutory or non-statutory (‗policy‘) instruments – giving effect to the disciplinary powers of the university.

In the discussion below, these findings are assessed in relation to the case law on procedural fairness, with a view to investigating particular procedural elements: the standards of hearing, notice, cross-examination, representation, reasons, and appeal.

In so far as discipline rules provide evidence of hearing procedures, they will nonetheless lack insight into the state of mind or conduct of decision-makers implementing those procedures.

6.5 The Student Discipline Scheme

Summary data on provisions in university discipline procedures at the sixteen public universities are contained in Table 6.3. Evidence accumulated from student discipline rules reveals common themes, principles and structures in the organisation of student discipline schemes. Consequently, a generalised model of the discipline scheme operating for students in Australian public universities may be articulated with the following elements.

6.5.1 Proscribed Behaviours

The rules establish a disciplinary code, based on proscribed behaviours or actions – that is, conduct to which disciplinary powers and/or sanction may be applied. On average the surveyed institutions possess 15 discrete categories of proscribed behaviour, although this ranged from 5 (University of Wollongong) to 28 (University of Technology Sydney). The language adopted to articulate misconduct tends to quasi-penal (‗offences‘) or administrative (‗breaches‘) forms of expression.

The rules distinguish between academic misconduct and non-academic (general) misconduct. A majority of surveyed institutions (12 out of 18) articulate academic and non-academic misconduct rules in separate disciplinary instruments.

Academic misconduct is particularly associated with plagiarism and cheating on exams or other forms of assessment.556 Added to this may be ‗offences‘ such as ‗collusion.‘557

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556 Eg ‘Academic misconduct’ includes, but is not limited to, cheating, plagiarism and any other conduct by which a student seeks to gain advantage for himself or herself, or for any other person, any academic advantage or advancement to which he or she or that other person is not entitled…’ University of Melbourne Statute 13.1 – Student Discipline, subs. 13.1.1(1).

557 See, eg, Flinders University of South Australia Policy on Academic Integrity subs 2.2.2: ‘Collusion occurs when a student submits work as if it has been done individually when it has been done jointly with
General misconduct typically pertains to behaviour affecting persons or property. This category may include moral or ‘political’ actions, such as offensive behaviour on the one hand and student demonstrations on the other hand. Student disciplinary actions in relation to political unrest have not disappeared entirely and have, more recently, found their way to the courts. ‘Offences’ against property and persons may overlap with criminal actions, including damage to property, assault or harassment.

6.5.2 A Primary Decision-Maker

Primary decision-makers may be authorised officers of the university or internal tribunals. The identity of a primary decision-maker tends to correlate to the severity of the penalty that may be imposed and hence the seriousness of the proceedings. At one end of the spectrum, a decision-maker may wield authority of negligible adverse effect, ‘hearings’ may be highly informal, and matters dealt with by an authorised officer. Alternatively, in serious misconduct cases, a prospective outcome may be exclusion or expulsion. In the latter case, the primary decision-maker will likely be a disciplinary tribunal. In respect of general misconduct a senior official responsible for student affairs or other functional area of the university may be responsible at first instance. Universities may establish a dedicated class of university officer with responsibility for the primary decision-making process, or part of it. There is a commonly a wide ambit for a matter or allegation to be referred to a disciplinary authority.

6.5.3 Student Disciplinary Tribunals

Student disciplinary tribunals exist at all the surveyed institutions. Discretion may lie with a prescribed university officer to refer a matter to a student disciplinary tribunal, giving regard to the seriousness of the charge and severity of the consequences.

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558 The University of Western Australia includes a category of ‘professional misconduct’ applying to students, which seeks to reproduce standards of professional-ethical behaviours and attitudes among students: University of Western Australia Regulation for Student conduct and Discipline, s. 1(1)(d).
559 Bray v University of Melbourne (2001) VSC 391: judicial review under the Administrative Law Act 1978 (Vic) of a disciplinary decision arising out of a student occupation of the main administration building at the University of Melbourne.
560 Or indeed, decision-making not intended to penalise at all, but rather provide an educative approach to disciplinary problems, especially in academic misconduct situations.
561 For example, Director of Student Affairs, University Registrar, Director of ITS, Deputy Vice-Chancellor, or Dean.
562 See University of Newcastle Policy on Student Academic Integrity, which establishes a Student Academic Conduct Officer (‘SACO’). The SACO is an appointee of the relevant Head of School. University of Wollongong Rules for Student Conduct and Discipline 2006, ss 2, 6, which establishes a Primary Investigation Officer (‘PIO’).
The concept of disciplinary tribunal requires some clarification. Forbes associates a disciplinary tribunal with an authority exercising ‘quasi-penal functions outside the regular court system.’

This model is expansive and would encompass almost all decision-makers established under university discipline rules. An alternative, although equally broad definition, may be a decision-making body required to apply the rules of natural justice. For the sake of clarity, I will associate the term with those disciplinary bodies expressly constituted by the university rules as tribunals. It is necessary to accept that there are circumstances where senior officers (e.g., Heads of School or Deans) are required, by virtue of their office, to act judicially and perform the functions of tribunals.

The composition of student disciplinary tribunals tends to follow a common architecture: distinct bodies for general as against academic misconduct, and establishment of ‘local’ (i.e., School or Faculty) as against ‘central’ (i.e., University) level bodies.

Local tribunals deal in particular with allegations of academic misconduct. Central, university-wide bodies commonly hear matters of general misconduct. These authorities may be described as a ‘hybrid tribunal,’ with the character of a specialist adjudicative body:

… it is neither inappropriate nor unusual for committees such as this to possess some knowledge of the discipline from the accusations of academic misconduct arise. In our view, it is appropriate for the Board to consider the material of the parties that is presented to it in the light of that knowledge and expertise… provided that it is done in a way that is fair to all parties.

Composition of tribunals may include academic staff, senior officers, non-academic staff and/or student members, depending on the nature of proceedings. Student membership is not a universal phenomenon in student disciplinary tribunals. Student appointments to disciplinary bodies occur by various means, such as appointment of or by the Student Union President.

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563 For example, ‘any person who considers that a student may have engaged in misconduct’ may report an allegation (Australian National University Discipline Statute 2005, subs 4.1).
564 Forbes Justice in Tribunals, [1.1].
565 See eg Administrative Law Act 1978 (Vic), s 2, which defines a tribunal as ‘a person or body of persons… required…to act in a judicial manner to the extent of observing one or more of the rules of natural justice.’
566 By whatever precise name: eg board, tribunal, panel, or committee.
567 Forbes Justice in Tribunals, [2.16].
568 Simjanoski v La Trobe University [2004] VSC 180, [27]. In that case, Balmford J rejected counsel’s submission (at [25])) that ‘it was inappropriate that a member of a disciplinary tribunal should have expertise related to the subject matter before the tribunal.’ Her Honour applied reasoning on the nature and composition of domestic tribunals in Australian Football League v Carlton Football Club Ltd (1998) 2 VR 546, including that expert membership of the tribunal was consistent with its inquisitorial function.
569 See eg Faculty Investigation Committee at the University of Wollongong: Rules for Student Conduct and Discipline subs 7.1.2.
570 Swinburne University of Technology Assessment and Appeals – Higher Education Policy and Procedures, subs 9.4(c), University of Newcastle Student Discipline Rules – Rule 341, subs 4(4).
appointment by the Vice-Chancellor, Board of Studies, or Academic Senate or Academic Board. In one instance, Student Association staff are appointed to the tribunal. Tribunal members may be selected from a larger body, such as a Discipline Panel, itself established by appointment.

6.5.4 Inquisitorial or Adversarial Proceedings?

There is no strictly fixed line between adversarial and inquisitorial methods in tribunals. In serious misconduct cases, adversarial methods would appear a reasonable assumption given the criminal analogy and the ‘quasi-penal’ form of action. The procedure is often expressly inquisitorial, albeit it overlaid with ‘variations of the adversary method of presentation.’ As much is implied in the nature of disciplinary proceedings: that a dispute may lie at the heart of the proceedings, that allegations or ‘charges’ are issued, and there is the possibility of penalties. Added to this is the distinction that a disciplinary decision-maker does not normally instigate his or her own inquiry, although ‘preliminary inquiries’ may precede the ‘laying of charges.’

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571 Eg Griffith University Student Misconduct Resolution, subs 9.1.3. This may be an appointment made in consultation with the relevant student organisation: Australian National University Discipline Statute 2005, s 7.6.
572 University of Western Sydney Student Academic Misconduct Policy [55e].
573 University of Tasmania Ordinance No. 9 – Student Discipline subs 1.6; University of Queensland Statute No. 4 (Student Discipline and Misconduct) 1999, subs 13(1); University of Sydney By-law 1999, Chapter 8 – Student Discipline, subs 64.
574 James Cook University Student Academic Misconduct Requirements subs 7.3.4, 8.3.2. The ‘committee’ includes a ‘case worker’ from the James Cook University Student Association.
575 Eg RMIT Regulation 6.1.1 – Student Discipline s 11. The Council of Flinders University has a ‘Nominating Committee’ whose tasks include selecting members of a panel from which the Vice-Chancellor appoints members to a Board of Inquiry: ‘Policy and procedures for handling a matter under Statute 6.4 – Student Conduct’, s 10.
577 See Flanagan v University College Dublin (1988) IR 724; Khan v University of Ottawa [1997] CanLII 941 (ON C A), [91] (Finlayson JA, dissenting); Mark Aronson, Bruce Dyer, and Matthew Groves Judicial Review of Administrative Action (4th ed, Lawbook Co, 2009), [8.190]: ‘…where an individual is threatened with serious deprivation if some fault or misconduct on the part of that individual is established… the analogy of criminal proceedings, although no more than an analogy, will tend to suggest that the notice be adequate to allow the individual to prepare and mount an adversarial defence.’
578 Forbes Justice in Tribunals, [1.1].
579 Flick Natural Justice: Principles and Practical Application, 12-14.
580 Australian Postal Commission v Hayes (1989) 23 FCR 320, 328. Regarding the nature of proceedings of the Administrative Appeals Tribunal, the role of cross-examination in particular in this forum and the interests of parties before the Tribunal to adduce evidence and test contrary evidence, His Honour stated: ‘In that sense, proceedings before the Tribunal are adversarial, the parties being in active dispute on an issue and being concerned to have findings of fact conducive to their interests.’ [emphasis added]
581 See Aronson, Dyer, and Groves Judicial Review of Administrative Action, [8.295]: ‘Similarly, the fact that a ―first instance‖ tribunal is unable to act of its own motion may well suggest that an adversarial approach is intended.’
582 This is commonly the case in student discipline action. It may be distinguished from, for instance, the circumstances in Hall v New South Wales Trotting Club (1977) 1 NSWLR 378 where charges were laid after the inquiry hearing.
The question of the mode of procedure arose in a student (academic) discipline case in *Simjanovski v La Trobe University*. Broad latitude for an inquisitorial function was held to be available to the disciplinary body, although there were elements of adversarial presentation (a Chief Examiner presented adverse evidence and appeared to act in the role of complainant).

It may be that the types of student disciplinary matters coming before university tribunals and decision-makers require variations in approach. For instance, allegations of plagiarism based solely on documentary evidence may be more conducive to an inquisitorial procedure than a case of general misconduct involving an accuser and witnesses. Additionally, it is reasonable to assume that appeals will proceed within a more adversarial framework. The evidence from the student disciplinary rules supports such a proposition. In particular, as I note below, there is slightly greater scope for a right to cross-examination, or lay and legal representation, in internal appeals, suggesting an adversarial approach is more acceptable at this level of decision-making.

6.5.5 The Hearing

The student has a right to a hearing in misconduct cases. The hearing procedure encompasses not only the conduct of the hearing itself but also measures and requirements preceding, and subsequent to, the hearing.

In all cases, the rules provide for written notice of a hearing in serious misconduct cases within a fixed minimum time frame, ranging from one to two weeks. In all but two cases there are express provisions for ‘particulars’ to be given. In a majority of institutions (11 out of 16) institutions there is express provision in the rules for evidence or relevant information to be made available to the student as part of pre-hearing procedure.

As a rule a student is unrepresented and the subject of inquisitorial proceedings. The right to cross-examine other parties or witnesses is not provided for, other than in a small minority of cases (3 out of 16 institutions). On appeal there is a greater allowance of the right of cross-examination (nearly half of cited institutions). Representation, especially legal representation, appears an equally vexed issue. While there is a greater willingness to allow for non-legal representation at first instance, it is generally prohibited for lawyers to enter the hearing room in primary hearings. Again, there is relaxation of these restrictions for matters on appeal (10

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584 Aronson, Dyer, and Groves *Judicial Review of Administrative Action*, [8.295]: ‘An inquisitorial approach is arguably less likely to be appropriate for a “review” tribunal, which does not engage in primary decision-making. The fact that the jurisdiction of a tribunal is enlivened only where review is sought by a person who is dissatisfied with a decision suggests that the primary purpose of a tribunal is to address justified dissatisfactions. Even if the appeal is a full appeal on the merits by way of a *de novo*..."
institutions allow non-legal representation on appeal, 7 allow legal representation). In this context, representation is taken to mean the right of an appointed ‘agent’ to participate in proceedings on behalf of the student, as distinct from a ‘support’ person or where the role of the agent is restricted or qualified.

The decision-making body is authorised to adjudicate (other than in two circumstances where its role is advisory). Just under half of the decision-makers are obliged to provide reasons for their decision under the rules. Much smaller minorities are under obligation, or have discretion, to publish decisions or employ precedent (2 out of 16 in each case).

Urgent or summary action, including suspension or exclusion, may be required in the context of imminent threats to persons or property, or where the educational process is compromised, disrupted or threatened, whether in a classroom or in relation to another activity. The scope of summary powers typically follows the seniority of the officer authorised to impose penalties. These range from an individual teacher’s discretion to exclude a student from a class to a senior officer’s (eg Dean, Deputy Vice-Chancellor or Vice-Chancellor) power to exclude/suspend a student from the university for a period up to a month, or suspend other rights and privileges.

6.5.6 Penalties

The range of penalties a disciplinary decision-maker may impose is prolific. There are those that may be imposed for serious misconduct. These forms of penalty deprive the student of a fundamental benefit acquired as an enrolled student, including expulsion from the university, exclusion for a substantial period of time (eg one to five years), or the revocation of degrees.

Universities may take other action that, while still substantial, does not affect their interests quite so fundamentally. For instance, the university may suspend a student’s entitlement to attend the university for a period of time (eg up to a semester) or suspend entitlements to use university facilities or services. The university may issue fines, or impose ‘service orders.’

There are penalties affecting a student’s enrolment, such as the imposition of conditions on an enrolment, and academic penalties. The latter may include variation to grades, cancellation of grades, imposition of fail grades, requirement for re-submission of work or to repeat a unit, or conditions on grades that may be awarded. In regards to minor academic infractions, notably those found to be unintentional (eg minor forms of plagiarism), university actions may not be

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hearing, an adversarial approach will inevitably give a higher profile to the dissatisfaction of the appellant and the matters “in dispute”; and that, we suggest, is usually desirable.’
penal but educative in their purpose. Alternatively, minor transgressions may be accompanied by a warning or reprimand.

In general misconduct matters concerning damage to persons or property the university often has powers to order compensation or restitution.

At hearing a student may be able to speak in mitigation of penalty. Guidelines may establish criteria a decision-maker may, or must, consider in the application of penalties.

6.5.7 Appeals

An internal review or appeal mechanism is universal in the schemes investigated. Appeal may only be available on limited grounds, which nevertheless may be broad, such as a failure to hear a case on its merits. Alternatively, they may be narrower, such as where substantial new evidence can be introduced, in matters of disproportionate penalty, or for procedural unfairness or misapplication of the rules/policy.

As noted above, hearing procedure on appeal may be more adversarial than at first instance. In some instances, the rules establish that a ‘respondent’ to an appeal is appointed to act on behalf of ‘the university.’ There is a tendency for appeal proceedings to be chaired by persons with legal training, or appellate bodies include member/s with legal training. 586

6.5.8 Student Misconduct Register

A register of students found to have engaged in misconduct may be established. 587 Discipline procedure may require reference to the register and in cases where a student on the register subsequently is found to have committed misconduct again a more severe, or mandatory, penalty applies.

585 Such as a practicum, fieldtrip or placement: eg University of Technology Sydney Student and Related Rules, subss. 16.13, 16.17. At University of Wollongong, a student may be discipline summarily for bringing the University into ‘public disrepute’: Rules for Student Conduct and Discipline, s 10.
586 The exemplary case here being the requirement that the University of Sydney’s Student Disciplinary Appeals Committee be chaired by a judge or magistrate and at least one other member be an admitted lawyer: University of Sydney By-Law 1999, s 78.
587 Eg, University of Newcastle Student Academic Integrity Policy, subs 4.8.
Table 6.1: Procedures and rules in serious student misconduct cases, selected Australian universities

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588 Refers to rules for general misconduct only, as academic misconduct procedures substantially incommensurate with these procedures.

589 Denoted where right to have access to all documentation or evidence is express duty on decision-maker.

590 In relation to hearings where students have previously been found to have committed academic misconduct, the decision-maker (Head of School) may only make recommendations on the issue of penalty to a relevant Committee.
6.6 Are Student Discipline Rules Fair?

6.6.1 What Sort of Hearing is Required?

The right to be heard is universal in student discipline rules, leaving aside for the moment the issue of summary or urgent action. To that end a particular threshold of procedural fairness is satisfied. The real question perhaps is what is the precise nature of the hearing to be afforded.

In *Board of Education v Rice*,\(^{591}\) Lord Loreburn LC famously said that the duty to ‘fairly listen to both sides’ is qualified by the principle that the decision-maker is not ‘bound to treat such a question as though it were a trial.’ This has been reiterated in university cases, such as *Kane v Board of Governors of the University of British Columbia*.\(^{592}\) In that case, the Canadian Supreme Court heard an appeal from a university professor, and held the decision-maker ‘need not assume the trappings of a court.’\(^{593}\) The court in that case did go on to hold that the proceedings ought to be heard in a ‘judicial spirit,’ and a hearing must provide a ‘real and effective opportunity’ to meet the charges.\(^{594}\) In *R v Aston University Senate; ex parte Roffey*,\(^{595}\) the right to be heard may be ‘orally or in writing, in person or by [the student’s] representatives as might be appropriate.’ The Queensland Supreme Court has taken this *dictum* to mean an oral hearing is not afforded to a student as of right.\(^{596}\) However, the latter case concerns a disputes over grades, rather than the more serious circumstances of discipline and/or expulsion.

By contrast the Irish High court in *Flanagan v University College Dublin*\(^{597}\) drew a strict analogy to court and to criminal procedure. The approach of the Irish Court was in effect to codify procedural fairness in student (academic) disciplinary actions, requiring a high standard in the observance of procedural rights such as representation and cross-examination. *Flanagan* was a case brought by a student found to have committed plagiarism and excluded for a period of time from the university. That Court held\(^{598}\):

The present case is one in which the effect of an adverse decision would have far-reaching consequences for the applicant. Clearly, the charge of plagiarism is a charge of cheating and as such the most serious academic breach of discipline possible. It is also criminal in its nature. In my view, the procedures must approach those of a court hearing. The applicant should have received in writing details of the precise charge being made and the basic facts alleged to constitute the alleged offence. She should equally have been allowed to be represented by someone of her choice, and should have been informed, in sufficient time to enable her to prepare her defence, of such right and of any other rights given to her by the rules governing the

\(^{591}\) (1911) AC 179, 182.

\(^{592}\) (1980) 110 DLR (3d) 311.

\(^{593}\) *Kane v Board of Governors of the University of British Columbia* (1980) 110 DLR (3d) 311, 321.

\(^{594}\) *Kane v Board of Governors of the University of British Columbia* (1980) 110 DLR (3d) 311, 324.

\(^{595}\) (1969) 2 QB 538, 554.

\(^{596}\) *Ivins v Griffith University* (2001) QSC 86, [42].

\(^{597}\) (1988) IR 724.

\(^{598}\) *Flanagan v University College Dublin* (1988) IR 724, [20].
procedure or the disciplinary tribunal. At the hearing itself, she should have been able to hear the evidence against her, to challenge that evidence on cross-examination, and to present her own evidence.

While Flanagan sets a high benchmark, it is not in conflict with the general principle that the procedural standards in disciplinary cases are distinguishable, for instance, from matters involving academic judgement. The latter principle is expressed in *R v University of Cambridge, ex parte Persaud*699 and was supported by Kirby J in *Griffith University v Tang.*600 It is also been held by the Federal Court that a higher level of procedural protection may be required in disciplinary cases conducted by administrative bodies.601 This approach is consistent with the dictum of the High Court in *R v Commonwealth Conciliation and Arbitration Commission; ex parte Angliss Group*602 that the nature of the jurisdiction being exercised is part of the circumstances in which fairness is assessed.

In practice at the institutional level a spectrum of approaches operates for serious misconduct. In primary decision-making the general approach may be described as a form of institutional inquiry, held in closed session. Primary decision-making does possess some trial-like qualities (such as charges), prescribed in rules and/or guidelines,603 and in a minority of instances this extends to representation and cross-examination. The trial analogy may not be entirely absent from first instance proceedings. For instance, there may be capacity for a ‘complainant’ to put their case against the student and be afforded comparable standing before the decision-maker, thus acting as ‘prosecutor.’604 There are circumstances where a complainant, as well as a student, may be represented.605

In general, university discipline hearings need not operate like trials, and in general they do not. There is a minority tendency in the sector to take a more formal approach. One approach to the construction of appeal procedures, for instance, is to establish some elements of more formal, ‘trial-like’ proceedings (eg the right to cross-examination, the right to representation). Proceedings may appear more as a dispute *inter partes* where for instance the university itself becomes a ‘party’ to the proceeding.606 Added to this is a greater propensity for decision-makers on appellate bodies (in particular presiding officers) to be legally-qualified and, presumably,
deal with questions of law. The exemplary body in this respect is the Student Discipline Appeals Committee at the University of Sydney.  

6.6.2 Summary Action

Summary action is ‘magisterial’ or ‘peremptory’ action: ‘It is in the nature of a police action not judicial process.’ Summary powers are universal in the surveyed rules, and in nearly one-third of cases a form of recourse and/or explanation from summary action exists. This is a valuable protection to the student, and a standard arguably in excess of the legal duty. Fairness in respect of summary action may recede to ‘nothingness’ and dispense with the right to be heard. In allowing the business of education to proceed, summary power is nevertheless no general invitation to arbitrary action against students. The purpose of such summary action is to maintain the status quo, ‘carefully expressed as a measure to preserve existing interests, without punitive intent and without prejudice to the issues to be determined later on.’ It necessarily implies a person will be afforded a hearing in due course and as soon as practicable. A typical, maximum timeframe of 1-2 weeks accords with the generally prescribed notice requirements. Such a timeframe may or may not prejudice the preservation of ‘existing interests,’ depending on circumstances. However, a summary suspension period of up to 6 weeks would likely be unfair or unreasonable. Alternatively, provision for restitution for the effects of summary exclusion, especially with regard to academic progress, would provide an important protection against unfairness in this procedure.

6.6.3 Notice and Disclosure

The adequacy of pre-hearing procedure will substantially turn on the questions of notice, particulars and pre-hearing disclosure of evidence. This is an extension of the principle that a student must be give a ‘fair opportunity’ to test or contradict ‘any relevant statement prejudicial

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606 Eg, University of Queensland Statute No 4 (Student Discipline and Misconduct), s 16(e): ‘the chancellor may appoint counsel or solicitor or a member of staff to represent the university at the hearing…’

607 Which includes both a judicial officer (or retired judicial officer) and an admitted legal practitioner.

608 Glynn v Keele University (1971) 1 WLR 487, 494; although now perhaps shed of overtones of action in loco parentis.

609 See Kioa v West (1985) 159 CLR 550, 615.

610 Forbes ‘University Discipline: A New Province For Natural Justice?’ , 95.

611 Kioa v West (1985) 159 CLR 550, 615 (Brennan J): in order to ‘avoid frustrating the purpose for which the power was conferred.’

612 Forbes Justice in Tribunals, [9.7].

613 University of the Sunshine Coast Student Conduct and Discipline Policy s 7.1. In the context of the semester teaching cycle, 6 weeks would typically comprise half of the semester.

614 See University of Sydney By-Law 1999 Ch 8, subs 61(2). In certain circumstances where a student is subsequently found not guilty of an offence ‘reasonable allowance must be made by the University for any academic disadvantage incurred by the student as a result of the suspension.’
to their view." A party should ‘not be left in the dark as to the risk of an adverse finding.’ As Lord Denning put it in *Kanda v Government of Malaya*: ‘If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him.’ In general, ‘The more serious the charge the more important due process becomes.’

Universities would appear to be highly conscious of the requirement to give notice in disciplinary proceedings. It is a principle universally applied at least at a general level. In almost all cases, there is a proscribed timeframe for the notice period. Particular forms in which notice is prescribed vary across the sector. Two mechanisms are common. First, there may be a provision in the rules prescribing the notice content. Alternatively, there may be a model notice, such as a ‘charge letter,’ ‘primary investigation notice,’ or ‘allegation notice,’ which typically include notice of the time, place and nature of the proceedings, details of allegations, and the rules. There are some interesting, and arguably valuable, additions to this general form. For instance, at UTS, it is within the ambit of notice that a student is provided with information on ‘precedent cases.’ At the University of Western Sydney it is a requirement of notice that a student is informed they may continue to attend classes while proceedings are under way.

In proceedings with an adversarial dimension, such as disciplinary action, provision of particulars as part of a ‘sufficiently informative notice’ would generally be required:

> The inadequacy in ordinary civil and criminal litigation of merely providing access to documents is equally applicable to proceedings of a disciplinary character. There is an initial obligation on the prosecuting authority to acquaint the person concerned with adequate particulars of the nature of the case to be made against him.

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615 *Board of Education v Rice* (1911) AC 179, 182.
617 (1962) AC 322, 337. See also *University of Ceylon v Fernando* (1960) 1 All ER 631, 639G-H; *Annamunthodo v Oilfield Workers’ Trade Union* (1961) AC 945.
618 Forbes Justice in Tribunals, [10.9].
619 A good example is RMIT’s discipline regulation, s 21, which provides for notice *inter alia* of particulars including the name of the complainant, the hearing date, what assistance is available to the student, the student’s rights, and a copy of the Regulation.
620 Monash *University Discipline (Student) – Guidelines*, s 2.2.
621 University of Wollongong *Rules for Student Conduct and Discipline*, Appendix E.
622 Griffith University *Student Misconduct Resolution*, s 4.1.
623 ‘… to enable the student to make representations as to the relevance and appropriateness of any such precedent, and refer to any others.’ University of Technology, Sydney *Student and Related Rules*, subs 16.12.4(6).
624 University of Western Sydney *Student Academic Misconduct Policy*, s 61.
625 Forbes Justice in Tribunals, [10.2].
626 *Public Service Board of NSW v Etherton* (1985) 1 NSWLR 430, 432F.
Once allegations or ‘charges’ arise, even in an inquisitorial proceeding, particularisation of the charges is necessary.627 What form this duty takes may vary but at a minimum what is required is that the ‘accused’ have the ‘substance of what is alleged against him.’628 Aside from insufficiency solely in the provision of access to documents, it also not sufficient that the person is provided only with knowledge of the rule or rules alleged to have been broken. Allegations of fact, action or omission also need to be notified.629

The general trend in the universities is, as for instance at James Cook University, that the student must receive ‘the allegation and details of the allegation.’630 However, other rules do specifically refer to the language of particulars.631 Or may contain other forms of construction, for example: ‘the substance of the information provided to support the allegation.’632 What may be gleaned from the rules is that in principle adherence to the requirement to provide particulars is met. What cannot be discerned readily is whether, or to what extent, particularisation of charges is sufficient with respect to content, for instance allegations of fact, action or omission.

Where issues of notice appear more problematic on the face of the rules is in regards to disclosure of relevant materials. As can be seen from Table 6.3, there are a number of instances where disclosure (which may be expressed as access to evidence or materials) is neither an entitlement under the rules nor do the rules provide guidance in this area.

The courts have been cautious to limit pre-hearing disclosure of evidence or materials to those to be relied upon by a decision-maker. There is the concern that comprehensive rules of disclosure would detrimentally affect the efficiency and flexibility of tribunals in administrative proceedings. Forbes discounts the right of pre-hearing access to evidence in disciplinary cases

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627 Bond v Australian Broadcasting Tribunal (No 2) (1988) 84 ALR 646, 662; ‘In investigative proceedings, the incidents of adversarial proceedings, such as particulars and control over one’s case, are in principle inappropriate. If specific allegations are made, fairness and efficiency would support particularisation of those allegations.’
628 Re La Trobe University; ex parte Wild (1987) VR 447, 458: a University Visitor case hearing a petition from a staff member charged with gross misconduct as a consequence of plagiarism. Compare Flick Natural Justice: Principles and Practical Application, 61: ‘It follows that although a notice need not in all cases quote chapter and verse, it must be formulated with sufficient precision to inform the ordinary reasonable man as to what is being complained of and what he is required to do.’
630 James Cook University Student Academic Misconduct Requirements subs 8.3.1(a); compare University of Queensland Statute no 4 (Student Discipline and Misconduct) 1999 subs 7(1); compare University of Wollongong Rules for Student Conduct and Discipline subs 6.2.7.
631 Eg RMIT Regulation 6.1.1 – Student Discipline subs 21(a)(i).
632 University of Tasmania Ordinance no.9 – Student Discipline subs 2.2.6; compare Australian National University Discipline Statute 2005 subs 7.2; University of Sydney Student Plagiarism: Coursework – Policy and Procedure subs 9: a student must ‘be informed of the allegations against them in sufficient detail to enable them to understand the precise nature of the allegations and to properly consider and respond.’
and plays down the analogy to criminal trials, as does Flick. The test as established in *Kioa v West* relates to ‘adverse information that is credible, relevant and significant to the decision to be made.’ Where the disclosure is so conditioned, it will form part of procedural fairness.

In some cases, the language of the rules is comparable to the common law test. For example a committee must ‘make available to the student documents relied upon by the University.’ Other forms of wording are slightly more expansive, such as ‘copies of substantive material upon which the allegations are based,’ or ‘a copy of any document provided to [the committee].’ In other cases, disclosure is of ‘relevant’ materials. In circumstances where closed hearings are commonplace and lay decision-makers the norm, direction and/or guidance on the disclosure standard should, it is submitted, be universal. This protection is lacking in some cases. Where it does operate, it appears satisfactory to standards of fairness.

### 6.6.4 Cross-Examination

The right to cross-examination by parties connotes a level of formality within an adversarial process, a situation seemingly at odds with the desired informality of administrative decision-making. It would tend to shift control over and the focus of proceedings from the decision-maker to the parties. Where cross-examination is allowed it cannot be ‘arbitrarily’ restricted by the decision-maker but must allow it to run its course. Authority on the question of cross-examination as a component of fairness in administrative tribunals is unsettled. In review of authorities, Forbes concludes: ‘The present weight of authority is against a right of cross-examination in tribunals, private or public. But judicial opinion to the contrary is significant (although often unexplained) and there is an unsatisfactory air of uncertainty.’

There are certain circumstances in student discipline hearings where it would seem cross-examination ought to be permitted if a student (or their representative as appropriate) seeks to utilise the technique. Two examples come to mind: where adverse oral evidence is given against

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634 Flick *Natural Justice: Principles and Practical Application*, 60.
635 *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J).
636 See LBC, *Laws of Australia*, vol 2 (at 1 December 2006) ‘Judicial Review of Administrative Action: Procedural Fairness’, [2.5.530]: ‘Like the duty to give notice, the duty of disclosure is one of the more certain aspects of procedural fairness.’
637 Deakin University *Regulation 4.1(1) – Student Discipline*, s 8. Compare University of Tasmania *Ordinance 9 – Student Discipline*, subs 1.7.2: ‘A decision maker considering evidence… must make sure that each party who has presented evidence – (a) is informed of the substance of all evidence that the person or body intends to rely on in making the decision.’
638 Australian National University *Discipline Statute* 2005, s 7.2.
639 Monash *University Discipline (Student) – Guidelines*, subs 2.4.2.
640 However, see for example *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 102.
642 Forbes *Justice in Tribunals*, [12.95].
a student in a general misconduct case; or alternatively, in the circumstances that an exam invigilator gives oral evidence against a student which the student seeks to contest. In such circumstances, credibility may especially be at issue.\(^{643}\)

By comparison, in *University of Ceylon v Fernando*,\(^ {644}\) it was held that had a student accused of academic misconduct sought to cross-examination a witness it may have been unfair to prohibit him from doing so. In another disciplinary context, it was held in *Murray v Greyhound Racing Control Board*\(^ {645}\) that fairness would ‘ordinarily’ require cross-examination to be allowed in an oral hearing and permitting it to only one side would constitute a breach of the rules of natural justice. Yet the decision of the High Court in *O’Rourke v Miller*\(^ {646}\) is contrary.\(^ {647}\) Finally, variations to the system of cross-examination, diluting the adversarial framework, are possible and this may make the process of cross-examination less confronting and more palatable to a tribunal.\(^ {648}\)

In student disciplinary proceedings, the right to cross-examination generally does not apply as a matter of right in the disciplinary rules. There is slightly greater propensity for access to cross-examination on appeal, where there is likely to be greater scope for adversarial procedure. Despite the equivocal correlation of procedural fairness and the opportunity for cross-examination in tribunal actions, the reluctance of university discipline instruments to contemplate the question of cross-examination – that is to say, their silence on the question – presents a difficulty, if not impediment, to fairness for students. Although in practice discretion may lie with a tribunal (or tribunal chair) to permit cross-examination, the rules themselves provide no guidance for decision-makers in this respect. This includes variations to the model of cross-examination as may be effective and appropriate in the circumstances. It is foreseeable that entitlement to cross-examination may lie in certain circumstances.\(^ {649}\) By and large the disciplinary rules fail to account for and accommodate the contingency.

\(^{643}\) See *Healey v Memorial University of Newfoundland* [1992] CanLII 2756 (NL SCTD); *Mohl v Senate Committee on Appeals on Academic Standing* [2000] BCSC 1849.

\(^{644}\) (1960) 1 All ER 631, 641-2.

\(^{645}\) (1979) Qd R 111, 116-117, citing as authority *Barrier Reef Broadcasting Ltd v Minister for Post and Telecommunications* (1979) 19 ALR 425 for the latter principle (the first being established by the court itself) and distinguishing the High Court *dictum in R v War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 228.

\(^{646}\) (1985) 156 CLR 342.

\(^{647}\) In that case, a probationary police constable had his position terminated on disciplinary grounds. He claimed a denial of fairness on the ground that he was not permitted to cross-examine two witnesses to an incident leading to the disciplinary action. The Court held there was no denial of fairness. Certain factors may distinguish this decision from application to disciplinary tribunals more generally, such as the probationary nature of the constable’s appointment and the fact that the witnesses were members of the general public.


\(^{649}\) See *McCabe v Fitzgerald* (1992) 28 ALD 175.
Rules regulating representation of a student before a disciplinary hearing are widespread and preponderantly are aimed at restricting representation. With a desire not to ‘legalise’ proceedings and to limit adversarial methods, there is an understandable reluctance by universities to allow legal representation as of right. This is loosened slightly for matters on appeal. There is also widespread restriction on non-legal representation. In these cases, the rules do allow for a support person. But in some cases, there is additional restriction placed upon the support person being a non-lawyer. Most clauses exclusive of representation are non-discretionary, notably the prohibition on representation by lawyers, although in a few cases some discretion does lie with the decision-maker: for instance, ‘at the express invitation of the Chair.’

Historically, the role of student associations in providing non-legal representation to students, analogous to union representation of workers in industrial matters, has filled the gap between unassisted self-representation and legal representation. This would tend to explain a propensity for non-legal representation in student discipline rules. In some instances, direct reference is made to representation by student union advocates. Are these fetters and qualifications on representation fair?

Procedural fairness provides no absolute right to legal representation before a domestic tribunal. On grounds of fairness, the situation is similar before statutory bodies, although on the basis of the law of agency the right to representation is more likely. There is no absolute rule the other way, prohibiting representation without regard to all the circumstances, and this may be of concern in relation to several student disciplinary schemes. As Lord Denning remarked in *Enderby Town Football Club v Football Association Ltd*:

‘The Tribunal must not fetter its discretion by rigid bonds. A domestic tribunal is not at liberty to lay down an absolute rule: ‘We will never allow anyone to have a lawyer appear for him.”’

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651 University of Newcastle *Student Discipline Rules* subs 4(9)(d). See also University of Western Sydney *Student Academic Misconduct Policy*, s64, ANU Discipline Statute 2005, s 8.8.
652 See Chapter 8, section 8.3, below.
653 Eg James Cook University *Student Academic Misconduct Requirements*, s 3.
654 *Cains v Jenkins* (1979) 28 ALR 219; *Enderby Town Football Club Ltd v Football Association Ltd* [1971] 1 Ch 591.
656 *R v Board of Appeal; ex parte Kay* (1916) 22 CLR 183.
657 (1971) 1 Ch 591, 605. See also *Freedman v Petty* (1981) VR 1001, 1015: ‘Mandatory disallowance of legal representation in all cases conflicts with the notion that natural justice may dictate that in a particular case it should be permitted. So understood, a rule which denies legal representation in all cases irrespective of the merits is capable of being regarded as contrary to the principles of natural justice.’
In hybrid tribunals, such as student discipline tribunals, the capacity for legal representation to be absolutely proscribed depends on more than the ‘statutory backing’ of enabling legislation. Rather, what is required is ‘express or implied statutory power for such a rule.’ It is arguable that such exclusion clauses in subordinate instruments, including relevant university by-laws and rules, may be beyond power.

Statutory exclusions aside, what does fairness require where discretion exists? What might university hearings require? In short, ‘There must be flexibility.’ More usefully, fairness does require ‘an application for… representation [to be] properly considered.’ Legal representation was rejected in Cains v Jenkins because the official charged was knowledgeable in the rules and business of the union concerned. In Pett v Greyhound Racing Association Ltd (No 2), fairness was not held as a ground supplying a right to legal representation until a ‘society… has reached some degree of sophistication in its affairs.’ More instructively, in Krstic v Australian Telecommunications Commission, Woodward J stated: ‘… it depends upon the ability of the person concerned to conduct his or her own case.’ Having regard to non-legal representation or assistance as well as legal representation, His Honour went on to say:

A person with tertiary qualification and a normal amount of self-confidence should require no representation or assistance. But even that person may have to ask to have a friend present, for reassurance and, perhaps, consultation at times. A tribunal such as that in the present case [for review of probationary officers] would, in my view, be well advised to grant such a request, unless there is good reason for rejecting it. At the other end of the scale, a person having a low standard of education, and perhaps some difficulty with the English language, who is lacking in self-confidence, may be quite incapable of adequate self-representation, and only able to put the case through a friend or union representative – or if these are not available, a lawyer. Such an application should clearly be granted.

University decision-makers typically face rigid controls on the question of student representation. The rules rarely adopt a discretionary approach, providing instead a codified form of entitlement. Such an approach is more problematic given the in camera nature of these proceedings.

As measured against Krstic v Australian Telecommunications Commission, restrictions on representation in student discipline rules are undesirable and inflexible. For instance, fairness in the context of hearing for an international student with poor English and a cultural disposition

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659 See also Forbes Justice in Tribunals, [11.1].
661 (1979) 26 ALR 652.
not to dispute authority would be qualitatively different to an admitted lawyer studying for postgraduate qualifications or even an articulate, English-speaking undergraduate student.

6.6.6 Reasons

The value of giving reasons includes their contribution to the transparency of decision-making and to the correctness and lawfulness of decisions: ‘It has long been recognised that the giving of reasons by a tribunal for its decisions is a desirable course of action.’

There are further imperatives in university hearings: they are generally held in closed session and, as a rule, there is no recourse to external merits review where the giving of reasons would be standard.

Providing reasons has been a legislated requirement of a wide range of Australian statutory decision-making since the 1970s. At common law, it has been pointed out that the judicial stance on the duty to give reasons contains a significant tension, notably in the difference between the general and particular approaches to the duty:

Now while the courts continue to restate the absence of a general duty to give reasons, they are sounding more and more like Mark Antony at Caesar’s funeral: saying one thing and meaning another.

There is no general rule at common law that fairness requires the giving of reasons. This was emphatically stated by the High Court in Public Service Board of NSW v Osmond. ‘Exceptions’ to the general rule would appear to be sufficiently prolific, as circumstances and fairness dictate, that

the general proposition is meaningful only in indicating that the mere fact that a decision-making process is held to be subject to the requirement of fairness does not automatically or naturally lead to the further conclusion that reasons must be given. However it is certainly now the case that a decision-maker subject to the requirements of fairness should consider carefully whether, in the particular circumstances of the case, reasons should be given.

While this may be the position in relation to decision-making by statutory bodies, for domestic tribunals the dictum in Public Service Board of NSW v Osmond more readily

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666 Eg Administrative Decision (Judicial Review) Act 1977 (Cth), s 13; Administrative Law Act 1978 (Vic), s 8.
667 Galligan Due Process and Fair Procedures, 435.
668 (1986) 159 CLR 656.
669 De Smith, Woolf And Jowell Judicial Review Of Administrative Action , [9-041].
670 R v Civil Service Appeal Board; ex parte Cunningham (1991) 4 All ER 310, 318: ‘I do not accept that, just because Parliament has ruled that some tribunals should be required to give reasons for their
Applies. Absence of a general duty to give reasons for university decisions is supported by the judgement in *Wing Kew Leung v Imperial College of Science, Technology and Medicine*.672

In respect of circumstances where the duty may apply, Sedley J, in *R v Higher Education Funding Council; ex parte Institute of Dental Surgery*,673 posed a threshold as to the duty to give reasons. While no general duty lies, at least two classes of case exist where a duty would exist: where fundamental interests are affected (he gives the example of personal freedom), and where the decision *prima facie* ‘appears aberrant.’674 In student discipline cases the latter test is more likely to be triggered.675 A similar approach may be found in *Jackson v Director-General of Corrective Services*.676

A statutory obligation lies on universities in several Australian jurisdictions to provide reasons for decisions when requested by an affected person. Even so, there may be no requirement in the relevant discipline rules for a university decision-maker to provide reasons. In Victoria, for instance, in spite of the *Administrative Law Act 1978* (Vic), s 8, three out of four surveyed institutions do not require decision-makers to supply reasons. On the other hand, the Queensland universities677 and ANU, subject to similar statutory requirements678 but where justiciability may be in question,679 do require reasons to be given.

Just over half of the surveyed institutions (10 of 16) do not require decision-makers to provide reasons for their decisions. This division perhaps reflects tension in the law regarding this duty as an administrative standard, and apprehension in application of this standard in a disciplinary context. At common law reasons are not required for fairness. The stance of many universities is

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671 Dixon *v Australian Society of Accountants* (1989) 18 ALD 102; compare the well-known dissenting opinion of Lord Denning MR in *Breen v Amalgamated Engineering Union* (1971) 2 QB 175, 190-191: ‘Then comes the problem: ought such a body, statutory or domestic, to give reasons or to give the person concerned a chance of being heard? Not always, but sometimes. It all depends on what is fair in the circumstances… The giving of reasons is one of the fundamentals of good administration.’

672 [2002] EWHC Admin 1358, [37]. This position was common ground between the parties. The issue lay in the adequacy and consistency of reasons, especially supplementary reasons, which the College had provided in any case.


674 *R v Higher Education Funding Council; ex parte Institute of Dental Surgery* [1994] 1 WLR 242, 263

675 Eg, where there is an arguable case of irrationality or disproportion in the decision.

676 (1990) 21 ALD 261, 264: ‘If an authority is not bound to state reasons for a decision but chooses to do so a court may act on them if they demonstrate an erroneous approach to an exercise of power… equally so when the reasons appear directly or by clear inference from other proved facts and circumstances.’ (emphasis added)

677 Other than the University of Queensland, which appears to be in the unusual position of not requiring reasons as part of the decision – although an appeal committee is required to keep a record of the proceedings including how it conducted the inquiry (s 16(2)) – but must ‘record and publish details of findings of misconduct according to a scheme approved by the senate.’(s 24).


679 Despite the fact that, where the rules are not in a statutory instrument, the review legislation would not apply: *Griffith University v Tang* (2005) 221 CLR 99.
consistent with this prevailing standard. A number of institutions appear in excess of the
standard. However, that may be for the value that the practice of formulating reasons brings to
the decision-making process.

6.6.7 Appeal Rights

As noted, internal recourse from primary decisions is universal in the universities investigated.
Two questions arise from this fact. First, are existing appeal mechanisms capable of ‘curing’
failures to accord procedural fairness at first instance? Second, how accessible are appeal rights?

Denial of procedural fairness is a ground for appeal from an original decision in all the
investigated cases, although the precise wording may vary. At James Cook University,
indeed, it is the sole ground of appeal. From the construction of the rules, it is expressly stated
or reasonable to discern that a form of re-hearing de novo is available to students in 8 of the 17
institutions. Where a re-hearing de novo is available, it is possible that the appeal may ‘cure’ a
procedural defect of the primary decision. In situations where less than a full de novo hearing
operates it will be the case that an appellant is entitled to a fair hearing at both levels of
decision-making. Therefore, slightly fewer than half of the universities investigated in this
study have established adjudicative machinery capable of ‘curing’ procedural unfairness by
original decision-makers. It is arguable that failure to provide this adjudicative procedure, and
indeed appeal procedures ‘fuller or enlarged’ from those employed at first instance, reflects an
ambivalence on the part of university rule-makers to mechanisms that would allow to challenge
to internal decisions affecting students.

Having said this, there are a number of examples where appeal procedures are ‘fuller or
enlarged’ over those of the original hearing. This includes rights to cross-examination and
representation. Decision-makers on appeal are apt to be senior officers of the university and/or
required to have legal qualifications. Greater ‘judicialisation’ of procedure on appeal provides
an element of protection from error in primary decision-making.

680 Eg Deakin University’s Discipline Regulation provides appeal is available for ‘misapplication of
procedures,’ which presumably implies denial of procedural fairness (Discipline Committees are
expressly required to observe the rules of natural justice). Swinburne University uses the term ‘procedural
irregularity’ as a ground of appeal. Monash University uses the term ‘significant procedural irregularity.’
681 , [14.7]:[14.12]: A re-hearing de novo is more in the nature of a re-trial than a conventional appeal.’ He cites Allesch v Maunz (2000) 203 CLR
172, 180 in support of the distinction between a re-hearing de novo and an appeal properly speaking
(dealing with an error of law).
682 Calvin v Carr (1979) 1 NSWLR 1.
The requirement to observe procedural fairness in domestic tribunals does not compel an internal right of appeal, although in practice internal appellate bodies are common. Whether or not such a body exists, and whatever its precise powers and functions, both the appellate and first-instance decision-makers will be required to proceed fairly, and if there is no internal recourse on this question an affected person may turn to the courts for judicial review. In the case of statutory tribunals, systems of administrative appeal are available. Historically, of course, in the case of university tribunals, recourse may be had to the Visitor. But that avenue was largely removed. In Australia, as distinct from the UK, no alternative body of external or statutory appeal or merits review has been established.

Whether or not the rules provide for a re-hearing on appeal, there is an initial question of access to the appeal procedure. Most disciplinary rules provide for appeal rights on specified grounds without any further limitation or discretion upon an appellate body or other decision-maker to hear an appeal. The appellate body would, presumably, adjudicate on any dispute over whether a student meets the ground or grounds of appeal. This task is expressly provided for in the University of Tasmania rules, where the Discipline Appeals Committee must determine the preliminary question as to whether an application ‘discloses a reasonable basis’ of appeal. Appeal procedures at Curtin University are the exception to this rule. At that institution, appeal from a decision imposed by various University officers may only be made by leave of the University Registrar to a Board of Discipline (acting as the appellate body). A decision on an application for appeal made by the Registrar is final, and, in relation to appeal procedures operable at other universities, the exercise of an extraordinary and unregulated discretion over the availability to students of appeal rights.

In general, access to appeal rights is straightforward. Although not strictly required for fair procedure to be observed, the availability of appeal mechanisms is a common feature of student discipline rules. It is a valuable protection against injustices that may be perpetrated in the course of the administration of discipline. Arguably, this is an important feature of a jurisdiction from which review on the merits is absent or, at best, uncertain. Additionally, in circumstances of judicial review the grant of discretionary remedies may well be refused where a form of internal recourse and remedy is available. The shortcoming of the present investigation,
however, is that, while appeal by way of re-hearing is expressly established in various rules, what occurs in practice in half of the surveyed institutions is uncertain.

6.7 Conclusions

Since the 1960s universities have found themselves increasingly obliged to accord their students elementary administrative justice. In a situation where the student may be deprived of their status as a student, or face some other substantial deprivation, the university will be required to accord the student procedural fairness. Procedures for subjecting a student to university discipline may result in the suspension or expulsion of the student, revocation of a degree, or imposition of other significant penalty. Design of these rules has been crafted from the functional need to maintain internal order and academic standards, as well as the application of standards of fairness in decision-making required by law.

In their study of student discipline procedures in US universities, Berger and Berger have remarked: 689 ‘Bedrock safeguards such as written notice of charges, the right to an impartial hearing body, respect for the privilege against self-incrimination, and availability of appeal are almost universally accepted.’ It may be said of Australian universities that, taking into account differing constitutional arrangements, ‘bedrock safeguards’ are equally universal. This is true for basic tenets of procedural fairness: the right to a hearing, the right to adequate notice, and the right to an appeal. Procedural standards can vary widely across institutions, and it should not be discounted that in some instances high standards of procedural fairness apply, sometimes in excess of what would be required at common law.

In general, shortcomings are more pronounced when we consider those elements of fair procedure that give effect to (student) participation in the hearing process. It is unsurprising, in an effort to limit adversarial procedure, that the right to cross-examine other parties or witnesses is not expressly provided for in most disciplinary codes. But equally it does not require a leap of the imagination to anticipate circumstances where such a right may, in the circumstances, facilitate the attainment of fairness. Such flexibility ought to be appreciated in the rules and generally it is not. Rules regarding representation are more explicit and restrictive. Universities are justifiably concerned not to legalise proceedings and they are certainly under no obligation to do so. However, the prevailing approach expressly prohibits or constrains even non-legal representation. This is an inflexible position. It drifts toward clear unfairness where the question of representation cannot even be countenanced by the decision-maker.

Provision of reasons is a further area where there is unevenness in approach. At common law, fairness does not require a decision-maker to give reasons, although there are circumstances where statutory review schemes would compel the giving of reasons in disciplinary cases if they were requested. Those institutions that do not impose a duty to give reasons cannot be faulted technically on grounds of fairness, at least against the common law standard. If they are to be faulted, it may be on grounds of good practice: that decisions, especially those affecting a student in a substantial manner, should be reasoned, transparent (to the student) and respectful.\footnote{See Galligan \textit{Due Process and Fair Procedures}, 429-434.}

Application of fair standards in appeal rights is also equivocal. While appeal procedures themselves commonly have stronger procedural safeguards than hearings at first instance, appeal rights may prove a site of unfairness where grounds of review are restricted and a form of merits review is inaccessible. Limitation of internal appeal rights is made more problematic in the university sector by the general absence of statutory merits review for university decisions.

Warnings against the ‘legalisation’\footnote{Rochford ‘The Relationship Between the Student and University’.} of the student-university relationship, or of the ‘over-judicialisation’\footnote{Eg Lord Diplock’s statement in \textit{Bushell v Secretary of State for the Environment} (1989) AC 75, 97.} of administrative proceedings, are important to bear in mind in domestic proceedings concerning students. At the same time, standards of procedure ought to be assessed in a context of the growing financial liabilities borne by students, a growing propensity to (and avenues for) litigation, and at best uncertain avenues for merits review of university decisions. Published university discipline schemes may generally be described as fair, although this should not detract from the need to address procedural shortcomings at some institutions and in relation to certain standards across the sector.\footnote{This assessment compares rather more critically to Dutile’s (limited) assessment of disciplinary procedures, noted above at Chapter 5, section 5.1: Dutile ‘Law, Governance and Academic and Disciplinary Decision in Australian Universities: An American Perspective’.

\footnote{See Galligan \textit{Due Process and Fair Procedures}, 429-434.}
\footnote{Rochford ‘The Relationship Between the Student and University’.}
\footnote{Eg Lord Diplock’s statement in \textit{Bushell v Secretary of State for the Environment} (1989) AC 75, 97.}
\footnote{This assessment compares rather more critically to Dutile’s (limited) assessment of disciplinary procedures, noted above at Chapter 5, section 5.1: Dutile ‘Law, Governance and Academic and Disciplinary Decision in Australian Universities: An American Perspective’.
<table>
<thead>
<tr>
<th>University</th>
<th>Re-hearing de novo expressly required or reasonably inferred from the rules?</th>
<th>Grounds</th>
<th>Relevant provisions in scheme</th>
</tr>
</thead>
<tbody>
<tr>
<td>U Syd</td>
<td>No</td>
<td>Determination unreasonable; denial of natural justice; evidence should not have been admitted; new evidence; misapplication of rules; general miscarriage of justice; excessive or inappropriate penalty</td>
<td>University of Sydney By-Law 1999, subs. 79(c)</td>
</tr>
<tr>
<td>JCU</td>
<td>No</td>
<td>Denial of procedural fairness</td>
<td>Student Academic Misconduct Requirements, subs 7.4.2</td>
</tr>
<tr>
<td>Curtin</td>
<td>Yes</td>
<td>Both student and university may appeal any decision; matter may be heard de novo, on penalty, or on point of law</td>
<td>Statute No. 10 – Student Disciplinary Statute, subs 19(1), 19(2), 20(2)(a)-(c)</td>
</tr>
<tr>
<td>Deakin</td>
<td>No</td>
<td>New evidence; excessive penalty; misapplication of rules</td>
<td>Regulation 4.1(1), subs 17, 25</td>
</tr>
<tr>
<td>Swinburne</td>
<td>Yes</td>
<td>Matter not heard on merits; new evidence; “procedural irregularity”</td>
<td>Regulation 16 – Student Discipline, subs 6.1(a)-(c)</td>
</tr>
<tr>
<td>Newcastle</td>
<td>Yes (Discretion with appeal body)</td>
<td></td>
<td>Student Discipline Rules, s 3</td>
</tr>
<tr>
<td>Griffith</td>
<td>Yes (Discretion lies with appeal body)</td>
<td></td>
<td>Council Resolution 6/2005 Student Misconduct, subs 12.1, 13.1.11</td>
</tr>
<tr>
<td>Monash</td>
<td>Yes</td>
<td>Excessive penalty; bias; “significant procedural irregularity”; new evidence</td>
<td>Statute 4.1 – Discipline, s 11.1</td>
</tr>
<tr>
<td>UWS</td>
<td>No</td>
<td>Denial of procedural fairness; new evidence</td>
<td>Student Academic Misconduct Policy, sub 14.2</td>
</tr>
<tr>
<td>ANU</td>
<td>No (Broad discretion lies with appeal body; committee may substitute its own decision for primary decision)</td>
<td></td>
<td>Discipline Statute 2005, subs 19.1, 21, 23.1(c)</td>
</tr>
<tr>
<td>UTS</td>
<td>No</td>
<td>“misunderstanding” of rules; error of fact; denial of procedural fairness; new evidence; penalty “manifestly excessive or inappropriate”</td>
<td>Student and Related Rules, subs 16.18</td>
</tr>
<tr>
<td>Tasmania</td>
<td>No</td>
<td>Bias; denial of procedural fairness; new evidence; penalty “manifestly excessive or inappropriate”</td>
<td>Ordinance No. 9 – Student Discipline, sub 4.2</td>
</tr>
<tr>
<td>Queensland</td>
<td>Yes (Discretion with appeals body)</td>
<td></td>
<td>Statute No. 4 (Student Discipline and Misconduct), ss 15, 16</td>
</tr>
<tr>
<td>RMIT</td>
<td>No</td>
<td>Bias; denial of natural justice; excessive or inappropriate penalty</td>
<td>Regulation 6.1.1 – Student Discipline, s 24</td>
</tr>
<tr>
<td>Wollongong</td>
<td>Yes</td>
<td>Denial of procedural fairness; new evidence</td>
<td>Rules for Student Conduct and Discipline, subs 7.3.1</td>
</tr>
<tr>
<td>Sunshine Coast</td>
<td>Yes (Discretion with appeal body)</td>
<td></td>
<td>Student Conduct and Discipline Policy, subs 9.1.1, 9.3.1</td>
</tr>
</tbody>
</table>
Chapter 7
Delivering In-House Justice? Practice and Procedure in University Discipline

The slim body of empirical literature that exists on student disciplinary action in universities focuses analysis on published rules and the case law applying to higher education.\textsuperscript{694} Investigation of formal discipline rules and procedures does shed light on this form of university decision-making up to a point. The limitation effectively lies in how the rules are translated into practice – if we may paraphrase T S Eliot,\textsuperscript{695} in the ‘shadow’ between the formal rules and the reality of their practical implementation.

Other fields of scholarship, such as psychology, have shed light on phenomena of student (mis)behaviour.\textsuperscript{696} However, as valuable as this research is, it has done little to advance knowledge about university conduct with respect to student ‘indiscipline’ and transgression, especially in academic endeavours.

This chapter seeks to fill this gap in knowledge of decision-making by university discipline tribunals. It seeks to extend investigation of basic legal norms operating in disciplinary proceedings through consideration of available information on ‘in-house’ cases at Australian public universities.

7.1 Research Methods and Preliminary Findings

The empirical research was based on an investigation of 38 individual student disciplinary cases at two Australian public universities. By agreement with the institutions, access was granted to case files, which contained all written materials relevant to and produced in the course of the proceeding. All material in the files was de-identified prior to access. Field notes obtained from these materials are the qualitative data on which the discussion in this chapter is based. I refer to the institutions as University A and University B. From University A, 21 cases were investigated. From University B, 17 files were examined: see Table 7.1.

\textsuperscript{694} See Chapter 5 above.
\textsuperscript{695} ‘The Hollow Men’ in T S Eliot \textit{The Complete Poems and Plays} (Faber and Faber, 1969), 83-86.
\textsuperscript{696} See Chapter 4 above.
Table 7.1: Student Misconduct Cases, Universities A and B

<table>
<thead>
<tr>
<th>Cases</th>
<th>University A</th>
<th>University B</th>
<th>All</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total cases</td>
<td>21</td>
<td>17</td>
<td>38</td>
</tr>
<tr>
<td>Academic misconduct</td>
<td>16</td>
<td>12</td>
<td>28</td>
</tr>
<tr>
<td>General misconduct</td>
<td>5</td>
<td>5</td>
<td>10</td>
</tr>
<tr>
<td>Appeals</td>
<td>5</td>
<td>6</td>
<td>11</td>
</tr>
<tr>
<td>Finding of misconduct, or appeal dismissed</td>
<td>19</td>
<td>13</td>
<td>32</td>
</tr>
<tr>
<td>Misconduct not found, or appeal upheld</td>
<td>2</td>
<td>4</td>
<td>6</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Penalties</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Academic penalty</td>
<td>13</td>
<td>8</td>
<td>21</td>
</tr>
<tr>
<td>Exclusion</td>
<td>15</td>
<td>1</td>
<td>16</td>
</tr>
<tr>
<td>Fine</td>
<td>2</td>
<td>1</td>
<td>3</td>
</tr>
</tbody>
</table>

At University A, of the 21 cases available, 14 involved allegations of academic misconduct perpetrated in examinations. Only one case concerned plagiarism, and one other matter involved another allegation of academic misconduct. Five cases related to allegations of general misconduct. Five matters involved an action taken on appeal. At University B, of the academic misconduct cases 7 concerned exam misconduct, 4 plagiarism and one case involved falsification of a medical certificate.

It may appear surprising, on the basis of the academic literature on student misconduct (which tends to focus on plagiarism), that the largest proportion of files concern exam cheating. This may be explained by the operation of internal jurisdiction. There is a tendency, as a matter of policy, in both institutions for decision-making regarding plagiarism to be delegated to a ‘local’ (School or Faculty) level. It is only where plagiarism actions are taken on appeal that they tend to appear at the ‘central’ university tribunal. All cases investigated were heard before ‘central’ tribunals.

In all but 6 cases the student was found to have breached the discipline rules and a penalty (or penalties) was applied, or their appeal against a primary decision was dismissed. At University A, no appeals were upheld. At University B, 2 cases concluded with no finding of misconduct at the original hearing, and in 2 appeals the tribunal found in favour of the student and overturned the original decision. In one other case, a finding of misconduct was made but no penalty was imposed. In one case, an appeal against a finding of misconduct was notified and subsequently withdrawn.

Penalties ranged from a reprimand to exclusion from the University for not less than five years. In general, the penalties at University A were more severe than those applied at University B. For example, in only one case at University B was a student excluded from the University – in
this case expelled. Most penalties at University B were academic, such as imposing fail grades, or reprimand. At University A, in 12 cases students were excluded from the University (in some cases, those exclusions were suspended on conditions). In two appeal cases at University A, penalties were varied (and mitigated) on appeal. In several of the appeal cases, review was sought for mitigation of penalty, which is submitted as unreasonably harsh or disproportionate to the offence. In mitigation, it is common for students to cite financial and professional consequences of penalties, notably those that include action to exclude the student from the University for a period of time. Some appeal cases also make submission for mitigation of penalty giving regard to personal circumstances.

7.1.1 Exam Cases

Academic misconduct in examinations typically occurs (although not always) in final examinations, which are organised en masse, and overseen by invigilators. Academic staff, as examiners, are usually present during some or all of the examination time. The most common form of exam cheating concerns students taking ‘unauthorised’ materials into the examination room, such as notes. Where such material is prohibited, the exam is known as a ‘closed book’ exam. Established formal procedures operate in ‘mass’ examinations, including the issuing of written and oral instructions to students and notification of ‘allowable’ material in any particular examination. At University A, reports are issued by an invigilator, the ‘invigilator-in-charge,’ the examiner, and the Chair of the Examination Board. Material may be confiscated and used in evidence. The examiner normally makes a statement as to the advantage alleged through the access to the confiscated material. In effect, the adverse documentary material confronting a student in an exam cheating case includes these statements, any confiscated materials, and pro forma rules and instructions issued. There are fewer cases of student misconduct arising from exams other than in ‘mass’ settings. These are examinations at a School or Faculty level. In one instance, students were accused of collusion in an exam by transmitting answers by text message. In another, intriguing instance, a student had another person take a test for him (ie impersonate him).

7.1.2 Other Academic Misconduct Cases

Two other types of academic misconduct are ‘tried’ in this sample. The more common is plagiarism. Only one case of plagiarism arises from the University A cases, and 4 from University B. It is not uncommon for plagiarism cases to be disputed, not least because of the contentious nature of the concept of plagiarism. The other types of misconduct reported in these cases concern a form of academic misconduct analogous to ‘professional’ misconduct at
University A (in the context of a nursing ‘practicum’), and a student found to have falsified a medical certificate for the purposes of receiving special dispensation at University B.

7.1.3 General Misconduct Cases

The subject-matter of general misconduct cases is eclectic. This fact may be explained by the wide scope of ‘offences’ captured within that concept. In the present sample, the cases falling under this heading include:

University A

- Disruptive behaviour in a lecture (Case 5);
- Attempted theft from the University Bookshop (Case 16);
- Disruptive and unruly behaviour on a field trip (Case 17);
- Misrepresentation of residency status and of prior academic qualifications (Case 20);
- Misrepresentation of qualifications to another university (Case 21).

University B

- Misuse of the university email system (sending abusive emails) (Case 10);
- Student assault (Case 11);
- Misuse of email system (sending threatening emails) (Case 12);
- Assault and threats to assault (Case 13);
- Misuse of internet system (accessing pornography) (Case 14).

Most cases involve what may be termed ‘traditional’ disciplinary breaches relating to improper conduct in an educational setting and ‘offences’ against persons or property. Scope for new forms of misconduct, such as misuse of the electronic communications systems, are also evident. The latter two cases at University A are analogous to instances of fraud. In both, the matters were also referred to the police.

7.2 Discipline Rules

Within universities’ establishing legislation there is typically provision, consistent with the wide discretion granted to the governing body (or bodies), for the institution to enact subordinate legislation for the purposes of guaranteeing the ‘good order and discipline of the University.’ Institutions may enact the substance of student discipline rules under this power, as is the case at
both Universities A and B. Alternatively, they may give effect to disciplinary powers, wholly or in part, through ‘policy’ or non-statutory instruments.

The Discipline Rules contain a number of components, which I refer to in a generalised form.

A first part establishes in effect a disciplinary code for students, including a range of proscribed conduct and behaviours. Both sets of rules contain a broad ‘general article’ provision.

A second element establishes delegated disciplinary powers distributed among various officers of the University as well as to a disciplinary tribunal. The rules establish a disciplinary tribunal and its jurisdiction. All cases considered in the present sample refer to matters dealt with by one or more internal disciplinary tribunals. Powers include powers and duties to impose penalties, which may range from reprimand and academic penalties to expulsion. Formally, tribunals are ‘lay’ bodies comprising membership from various ‘constituencies’ of the university, including senior staff, academic staff and students. They are ‘lay’ bodies in the sense they are not legally- or judicially-trained. At both investigated institutions, tribunals are ad hoc panels chosen (by undisclosed means) from among the membership of a wider body (in effect, from a ‘pool’ of appointed members).

A third element of the Rules is the establishment of procedure for the conduct of proceedings, which will include procedures for handling a disciplinary matter other than before a tribunal (eg emergency action), procedure for bringing a matter before a tribunal (eg referral), hearing procedures (including requirements for procedural fairness and excluding the rules of evidence), and appeal procedures. The precise content of hearing procedure varies in the present situations: at University A, a tribunal proceeds on the face of the rules in an adversary fashion, to the extent that the ‘complainant’ (or appellant as the case may be) and the student put their respective cases before the tribunal. While it is expected that proceedings will occur, as a form of domestic action, in private, the rules at University A (but not University B) provide for an open hearing as a general rule.

7.3 Scope of Potential Legal Problems

In the majority of cases investigated in this study there is no compelling evidence of breaches of legal standards (with the exception of provision of notice at University A: see sub-section 7.4.1 below). Nevertheless, evidence of prima facie legal problems emerged in 16, or 42%, of cases. Other shortcomings were revealed in decision-making practices. The scope of these problems in particular cases is outlined in Table 7.2.
Insight into the decision-making process and ‘state of mind’ of the tribunal is influenced by the nature of the record contained in the case files. There are no requirements for provision of reasons or publication of decisions. There is no evidence of a student asking for written reasons. At University B, detailed minutes are available and proved a valuable source of information into the conduct and approach of tribunals. No such record was available at University A. In significant part, this particular practice (providing a record of proceedings) explains the different volume of cases exhibiting *prima facie* legal issues. It is reasonable to assume, therefore, potential for under-reporting of problems in the present sample of cases.

**Table 7.2: Prima facie legal problems in student discipline cases, Universities A and B**

<table>
<thead>
<tr>
<th>Case</th>
<th>Nature of misconduct</th>
<th>Nature of principal issue(s) and/or arguable defect(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>A6</td>
<td>Academic misconduct; analogous to ‘professional misconduct’ on practical placement</td>
<td>Disciplinary action beyond power; tribunal lacks jurisdiction</td>
</tr>
<tr>
<td>A10</td>
<td>Exam cheating</td>
<td>No evidence; evaluation of evidence; bias</td>
</tr>
<tr>
<td>A16</td>
<td>General misconduct (attempted theft from university bookshop)</td>
<td>Failure to take into account relevant consideration; retrospective application of penalties</td>
</tr>
<tr>
<td>A20</td>
<td>Academic fraud (misrepresented residency status and undergraduate qualifications)</td>
<td>Failure to disclose material relied upon; failure to discharge a duty to inquire.</td>
</tr>
<tr>
<td>B2</td>
<td>Exam cheating</td>
<td>Denial of procedural fairness (failure to provide an opportunity to meet charge)</td>
</tr>
<tr>
<td>B3</td>
<td>Plagiarism</td>
<td>No evidence (of probative value); reversal of burden of proof; failure of disclosure (taking evidence from other ‘party’ in absence of student).</td>
</tr>
<tr>
<td>B4</td>
<td>Plagiarism</td>
<td>Misconception of rules (plagiarism); excess of jurisdiction</td>
</tr>
<tr>
<td>B6</td>
<td>Plagiarism</td>
<td>Misconception of rules (plagiarism); excess of jurisdiction</td>
</tr>
<tr>
<td>B7</td>
<td>Exam cheating</td>
<td>Failure to discharge a duty to inquire.</td>
</tr>
<tr>
<td>B9</td>
<td>Plagiarism</td>
<td>Failure to discharge a duty to inquire; reversal of onus of proof.</td>
</tr>
<tr>
<td>B10</td>
<td>General misconduct (misuse of email to send threatening communications)</td>
<td>Denial of procedural fairness (hearing proceeded in absence of accused student)</td>
</tr>
<tr>
<td>B11</td>
<td>General misconduct (assault against another student)</td>
<td>Breach of rules (failure to provide timely hearing subsequent to summary suspension); failure to supply adequate notice.</td>
</tr>
<tr>
<td>B14</td>
<td>Plagiarism</td>
<td>Misconception of rules (plagiarism); excess of jurisdiction</td>
</tr>
<tr>
<td>B15</td>
<td>General misconduct (misuse of internet, accessing pornography)</td>
<td>Denial of procedural fairness (failure to provide for cross-examination of relevant witness)</td>
</tr>
<tr>
<td>B16</td>
<td>Exam cheating</td>
<td>Misapplication of rules (finding of misconduct overturned on appeal)</td>
</tr>
<tr>
<td>B17</td>
<td>Exam cheating</td>
<td>Bias; failure to discharged duty to inquire (findings of misconduct overturned on appeal)</td>
</tr>
</tbody>
</table>
7.4 Fairness

7.4.1 Particulars

Satisfactory particulars are a component of the provision of adequate notice to a person whose rights, interests or legitimate expectations are affected by a decision. An accused student is entitled to know at least the ‘substance’ of the charge against him/her and the case s/he is to meet. A simple recitation of a rule allegedly breached would not likely be sufficient, as the basic procedural requirement is that a student is given a ‘real and effective opportunity to correct or meet any adverse statement made.’ The requirement to supply particulars is expressly stated in the rules of both institutions.

There is a systemic failure formally and sufficiently to particularise ‘charges’ at University A. I refer here to particulars of allegations of fact, act or omission on the part of a student, in addition to the notice of the rules alleged to have been breached. The University’s standard practice is to issue a compendious ‘charge sheet’ against the student, comprising in effect a schedule of alleged ‘disciplinary offences’ derived from both the Discipline Regulation and (in many instances of academic misconduct), by cross-reference, from alternative internal rules governing academic assessment. In general, this schedule of rules is unaccompanied by express reference to facts, actions or omissions on the part of the student. The student is presented with a considerable (and probably intimidating) list of rules alleged to have been broken. It may be that the relevant facts can be reasonably inferred from other documents, such as, in the case of exam misconduct, invigilator reports. But, as Forbes has remarked:

A person accused of misconduct is entitled to know in advance not only the rule allegedly broken but also the particulars of how it was broken. A charge is not the same thing as particulars. A charge identifies the legal prohibition; particulars inform the person charged of the facts that are said to constitute the breach.

Even where the facts constituting the breach may be reasonably inferred from other materials, the student would likely face the further task of responding to charges implicit in all the rules notified, or alternatively second-guessing which are the appropriate rules to respond to. For example, in a relatively simple exam misconduct case, the student is confronted with allegations of a breach of the ‘general article’ and 20 other rules or sub-rules under two different statutory instruments. While the absence of factual allegations may create a real risk of leaving a student ‘in the dark’ as to what is alleged against him, the proliferation of rules cited against him/her are

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697 Generally, see Chapter 6, section 6.6, above.
698 Re La Trobe University; ex parte Wild (1987) VR 447, 458.
700 Kane v Board of Governors of the University of British Columbia (1980) 110 DLR (3d) 311, 324.
701 Forbes Justice in Tribunals, [10.2].
in practice ‘so complex or so numerous as to confuse a party or otherwise deprive him of a fair hearing.’ The ‘guesswork’ required to decipher and respond to the notice means that, in nearly all cases at this institution, adequate notice is not supplied.

The provision of particulars is generally more satisfactory at University B. Out of 17 cases, questions regarding satisfactory particulars of allegations might reasonably be raised in 4 cases. In 3 of those cases, better particulars may have been requested, including more accurate details of alleged actions of events. In another case (at the School level), notice arguably failed to give an accurate representation of proceedings, referring to its purpose simply ‘to investigate the matter,’ and with no regard to the disciplinary nature of the action.

7.4.2 Other Deficient Notices

In the case just referred to, a student was summoned, without notice, to an ‘informal meeting’ regarding exam misconduct, which staff members appear to have used as an investigation. This ‘meeting’ appears to have been conducted in much the same manner as a formal hearing. There is no provision for this inquiry procedure in the relevant rule or delegations. Material from the meeting led to formal allegations being made at the School level and formal notice of a hearing issued. The student indicated verbally she was unable to attend the hearing. As a result of administrative breakdown, this was not communicated to the relevant School tribunal, which proceeded in her absence and found misconduct. On appeal, by majority, the School’s decision was upheld. The appeal committee did not consider the question of whether, in the face of administrative failure, an opportunity to be heard was not given, whether an adjournment the student sought was not given, or whether the matter should be re-heard. Additionally, it did not consider whether the informal investigation was appropriate or ultra vires the University’s disciplinary procedures. Serious questions of correct procedure and conduct on the part of the University appear to have been disregarded, to the student’s detriment, notwithstanding for the moment more detailed questions as to when, in the course of an inquiry, notice should be given.

In another case at University B, a student was summarily suspended from the University following an allegation of physical violence against another student. The rules required subsequent notice of a hearing and the hearing to be convened within 10 days. The ‘emergency’ action can last no longer than 14 days. The student countered that she was not provided notice of the rules under which the suspension occurred and was suspended for 30 days, in which case

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702 Forbes Justice in Tribunals, [10.14].
703 See Forest v La Caisse Populaire de Saint-Boniface Credit Union (1962) 37 DLR (2d) 440, 445, which held that a person should not have to rely on ‘guesswork’ to determine what is alleged against them, and therefore that a satisfactory notice is one which ‘must be clear and definite and particularize the grounds of complaint’: Vanton v British Columbia Council of Human Rights [1994] CanLII 911 (BC S. C.), 18.
she had ‘effectively failed the semester.’ The tribunal issued a reprimand and arranged (presumably with consent) the student’s withdrawal without financial or academic penalty. The University sought, it would appear, to apply some principles of restitution to its own breach of the rules and its unsatisfactory notice.

7.4.3 Disclosure

The requirement to disclose material or information that may be relied upon by a decision-maker is a cornerstone of administrative justice,⁷⁰⁴ and a logical extension of proper notice and the entitlement of an affected party to know the case they need to meet.⁷⁰⁵ Universities are generally quite conscious of the need to provide relevant documentation and in ‘routine’ discipline matters, such as plagiarism or exam cheating, this occurs as a matter of course.

There are two circumstances in which unfairness in this respect occurs: one exceptional, the other recurrent. In one case a Chinese student was excluded for at least 5 years for ‘academic fraud.’ The student had misrepresented himself as a permanent resident when he held only a temporary resident visa. It was also alleged that he had misrepresented his academic qualifications by submitting a false certificate of an undergraduate degree in China.⁷⁰⁶ The documents suggest complex, unfortunate and matrimonial causes to his situation. In particular, it could be inferred from information on the file that his ex-wife wrote to the University bringing these issues to its attention. An official receiving the information referred the matter to the discipline tribunal, with the advice that the source and existence of the correspondence not be disclosed to the accused student. The conduct of the proceedings would suggest that the letter and its author were not disclosed to the student, and he had no opportunity to contend with its contents (nor with the author or her motives). It seems likely that this material had considerable impact on the case and on the student’s fortunes. For instance, it may have exposed malice and/or misinformation on the part of the estranged wife. It may have given greater scope for the student to bring to light the role of his estranged wife in the process of his application and enrolment at the University. In short, the student may have tested, or may have wished to test, the credibility of this evidence.⁷⁰⁷ Additionally, it would appear the Panel made no effort to hear

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⁷⁰⁴ Kioa v West (1985) 159 CLR 550, 629 (Brennan J); the test applies to ‘adverse information that is credible, relevant and significant to the decision to be made.’ See also Chapter 6, subsection 6.6.3, above.


⁷⁰⁶ On this point, certified documentation had been sent to the University in October 2002, although correspondence from the Australian Visa Office in Shanghai in May 2001 to the student suggested the student’s degree certificate was fraudulent.

⁷⁰⁷ Compare Finch v Goldstein (1981) 55 FLR 257, 273-76; Hamblin v Duffy (No 2) (1981) 55 FLR 228, 240: I readily understand that for the Board to reveal to each appellant the names of all persons who gave evidence before it, on matters touching on the comparative efficiency of its officers, could cause disharmony between officers of the A.B.C. and an absence of frankness by witnesses. But an appellant should be told by the Board as fully as possible, without necessarily revealing the identity of the persons
from the wife or seek to have her appear as a witness.\textsuperscript{708} Such an appearance may have allowed cross-examination by the student or his representative. There are various other potential breaches of law in this case.\textsuperscript{709}

In the second set of circumstances there is a practice by tribunals to take evidence or receive oral submissions in the absence of the student. This occurs in five cases at University B. This kind of conduct tends to contravene directly the admonition of Lord Denning in \textit{Kanda v Government of Malaya}\textsuperscript{710} that a decision-maker must not ‘hear evidence or receive representations from one side behind the back of another.’ Alternatively, it may be argued that, even where information of substance is not revealed or at issue in the student’s absence, proceeding in the presence of one ‘party’ (or even where they are solely considered an informant) may lead to claims of bias. In at least three cases, the tribunal’s exchange with School officials contains matters the student may wish to know, correct or contend with. In two cases, the student and their representative were expressly required to leave the proceedings while the tribunal took further evidence from representatives of the relevant School. No record of any additional matters of substance appears to have been provided to the student. In another situation, two students were investigated over exam cheating allegations, in which one was alleged to have sent a text message to the other containing answers to exam questions. The matters were heard at separate hearings, and evidence and submissions were taken from both students in their own hearings. The tribunal appeared to act on knowledge elicited from the first hearing in the second. No record made available to the second affected student. Neither student, however, sought to call the other to give evidence before the tribunal.

\textbf{7.5 The Legal Burden}

In a number of cases, argument is made on behalf of a student that the tribunal has either incorrectly imposed the legal burden (burden of proof) on the student, or alternatively, failed to impose the onus on the School or other ‘party’ bringing the allegations of misconduct to prove their case. In what is available in the files, misapplication of the onus of proof is a problem in some cases, especially plagiarism and/or ‘collusion’ cases.

\textsuperscript{708} While hearsay evidence is permitted in hearings of this type, the student may have diminished or discredited it in this case, or sought to diminish or discredit it. It was an opportunity ever afforded him.

\textsuperscript{709} For example, the student states in a Statutory Declaration that he neither completed nor signed his enrolment documents, which raises questions of fraud in regards to the enrolment. Further, the student appears to have enrolled in rush and claims not to have understood the documents he was dealing with (or indeed the process generally) and was asked no questions by the University administration upon enrolment. These claims also raise the question of consideration, if not unconscionability, on the part of the University in regards to the contract it was entering into with the student.

\textsuperscript{710} (1962) AC 322, 337.
In administrative proceedings it is frequently the situation that, in order for a tribunal to be satisfied as to a finding, no burden lies on one ‘party’ over another to persuade the tribunal of its position and therefore to discharge an onus of proof.\textsuperscript{711} This is especially the case where there are no ‘parties’ \textit{per se}, in the sense of a \textit{lis inter partes}.\textsuperscript{712} However, obligations vary with the nature of the proceedings and the duty to discharge the legal burden operates in disciplinary proceedings, especially as a result of the accusatorial character of the proceedings.\textsuperscript{713}

It would be strange if, even allowing for the administrative nature of the proceedings, the general onus, based on common sense and considerations of justice and summed up in the phrase “he who asserts must prove,” did not apply.\textsuperscript{714}

In student discipline proceedings, the onus of proof of a breach of university discipline lies on the ‘prosecuting’ School or other body bringing the accusation, or alternatively, on the tribunal itself if, in substance, it is the accuser.\textsuperscript{715}

This question arises in Case 10 at University A and Cases 3, 7, 9, 12 and 17, University B. In Case 10 at University A, the student conceded misconduct in respect of one minor charge of the 19 alleged. The student disputed the ‘general article’ and serious charges, such as cheating, committing academic misconduct or breaching the ‘good order’ of the University. Neither the complainant nor the tribunal possessed evidence, on the face of it, regarding the contents of the ‘unauthorised materials,’ that the student had used the materials or gained any advantage from them, or that her story (having gone to the toilet with menstrual cramping and unwittingly taken ‘unauthorised’ materials with her) was implausible or lacked credibility. On appeal several of these factors were cited as grounds that the penalties imposed were disproportionate.\textsuperscript{716} Perhaps more to the point, regarding onus of proof, the penalties were imposed under the main Discipline Regulation (rather than a lesser Statute, under which the student had pleaded ‘guilty’), and therefore the finding of misconduct was made in relation to the disputed allegations, not where misconduct was conceded. It is difficult to say, on the documentary

\textsuperscript{711} McDonald v Director-General of Social Security (1984) 1 FCR 354.
\textsuperscript{712} See McDonald v Director-General of Social Security (1984) 1 FCR 354, 369 (Jenkinson J). The question as to whether university disciplinary proceedings are properly a dispute between parties is considered in Chapter 6, subsection 6.6.1, above. The concept of a \textit{lis inter partes} in these proceedings is refuted in Kane v Board of Governors of the University of British Columbia (1980) 110 DLR (3d) 311.
\textsuperscript{713} Minister for Health v Thomson (1985) 60 ALR 701, 712 (Beaumont J); Secretary, Department of Social Security v Willee (1990) 96 ALR 211, 220 (Foster J).
\textsuperscript{714} Secretary, Department of Social Security v Willee (1990) 96 ALR 211, 220 (Foster J).
\textsuperscript{715} See Enid Campbell ‘Principles of Evidence and Administrative Tribunals’ in Enid Campbell and Louis Waller (eds) \textit{Well and Truly Tried} (Law Book Company, 1982), 53: ‘This would be so notwithstanding that the accuser was also, of necessity, the person or body having authority to adjudicate.’
\textsuperscript{716} Conceding the student was in possession of the materials, submission was made at first instance that the appropriate penalty would be a reprimand. In the event, the student was reprimanded, lost credit for the examination and excluded for 12 months (with 6 months suspended). The appeal solely went to penalty and the assertion it was disproportionate.
evidence at least, that, where the burden is on the complainant in these circumstances, that it could have been discharged in regards to many, or most, of the ‘charges.’

The situation at University B is more mixed. In two plagiarism cases (Cases 3 and 9), the misconduct was alleged to have involved more than one student, and the findings appear to be primarily based upon similarities between, or copies of, other students’ work. *Prima facie* evidence of misconduct exists but the complainant adduces no evidence to attribute misconduct to the accused student. In Case 3, although the student’s representative expressly raises the point of a reversal of the burden of proof, the matter is decided against him. The file includes correspondence with the University Solicitor’s Office concerned that the matter (and a related one) has not been correctly decided. There is no record that the matter was re-heard. In Case 9 the presumption seems to lie against the student and at times the line of questioning from the tribunal seems to be hostile to him. The student is unable to answer why his work (construction of a web site) is the same as that of another student (who had already completed the course). The tribunal decides against him on the basis of the strong similarities and the inference that the accused student has committed the plagiarism. Significantly, there is no evidence adduced by the ‘complainant’ School, nor the tribunal, as to how the student had, or could have, gained access to the original work.

There is an occasional sense in these internal tribunals, in respect in particular of allegations of plagiarism or ‘collusion’ among students (rather than from other sources), of decision-makers’ frustration with requirements of proof. This sentiment is exemplified in material from a School hearing at University B (Case 17). The allegation facing the student (which she disputed) was that she had taken a 14-page marked up exam booklet into an examination. The student’s representative asserted that the handwriting on the unauthorised material and the student’s exam differed. The School found against the student on the basis *inter alia* that ‘…someone brought the sample paper into the exam room.’ In this case, the misconduct finding was overturned on appeal, on the ground that the original decision was affected by bias.

A burden of proof lies against a person or body bringing misconduct charges against a student and there is evidence that the burden has been ignored, if not reversed, by some university tribunals. Where this problem does arise, it does so notably where the case against the student is circumstantial, where there are no direct proofs of the student’s misconduct. It may be that decision-makers in those situations do not sufficiently grasp the nuance and balance of their role, which is to arrive at a state of reasonable satisfaction that the accused student has engaged in misconduct (or, more accurately, engaged in the misconduct alleged in the complaint notified against him/her). They may expect to be persuaded definitively, or sufficiently, one way or the other but find themselves (as Jenkinson J put it in *McDonald v Director-General of Social*
Security) ‘unpersuaded either that a circumstance exists or that it does not exist.’ Allocation of the burden of proof to the accuser, in that case, becomes a precursor to the tribunal’s state of mind: that, if unpersuaded, it must find for the student. The persuasive value of materials in a number of the cases leaves much to be desired.

7.6 Legal Error: Misconceptions and Excess of Jurisdiction

7.6.1 Plagiarism

Universities exercise broad powers in fulfilling statutory duties to conduct higher education and research. Disciplinary codes refine that jurisdiction. There are two circumstances in the present cases where limits of jurisdiction are tested by tribunal decisions. Arguably, the decision-makers exceed their powers on both sets of circumstances.

One of those (which is likely to be the more common) is an expanded and misconceived understanding of plagiarism. The issue is likely to have substantial and wide-ranging implications for university practice and rules.

The first point to make is that confusion, ignorance or misapplication of the concept of plagiarism exists under the discipline rules. Misconduct is found for a student’s failure to adhere to the correct conventions of academic citation, especially as a result of poor understanding of those conventions. The problem arises in distinguishing action that may be considered plagiarism from that which may be considered as poor academic work: disciplinary action ought to be distinguished from questions of poor referencing. A finding of misconduct turns on the question of intention or negligence on the part of the student, in excess of any question of mere competence. Plagiarism properly falls into the scope of misconduct, where it is found the student’s actions are, by definition, more than a matter of academic judgement (although academic judgement may play a central role). The equation of plagiarism with intention or quasi-legal wrong is consistent with judicial and quasi-judicial treatment of the issue. ‘Boundary’ issues concerning plagiarism as a disciplinary matter were considered at length in Chapter 4.

718 For instance, in Case B14, a matter of appeal from a School hearing, the original decision-maker is reported to have been ‘unclear about which policy should be used and told myself [student] and the Student Rights Officer… to “take it up with the University.”’ The student is minuted as saying in the appeal hearing, with some justification: ‘I don’t feel it is my responsibility to “take it up with the university.” The university has all the power, they make the rules, and if they don’t know which one applies, I’m not sure what I can do about it.’
Findings of misconduct in circumstances where the facts do not support an intention to reproduce work without attribution or acknowledgment, nor ‘carelessness or negligence’ (bearing in mind the circumstances of the student), but are symptomatic of poor academic work, are, on the face of it, in error. *Mutatis mutandis*, not only does a tribunal in those circumstances misconceive plagiarism, but it is acting beyond the power granted it by the relevant authority (University Council). It is acting where there is no question of misconduct to be resolved.

The distinction of misconduct and academic judgement here may seem fine, or even tenuous. However, it is important not least because the consequences for misconduct may be far more severe than for poor academic work, including the prospect of exclusion from the university, the end of career prospects (e.g., law students), and/or an impact on migration status.\(^\text{719}\)

At University A, the prohibition on plagiarism has been formulated in such a broad manner as to encompass any act of un-attributed reproduction, notwithstanding the question of intention or other factors. In my mind this is bad policy, but effectively removes the problem of decision-makers acting beyond their powers in poor referencing cases. At University B, the concept of plagiarism is stated generally and the jurisdictional problem could arise – and indeed it does. In two cases, misconduct is found against students for what is in effect poor referencing. The confusion over the concept of plagiarism is captured in the minutes of proceedings. In one of those cases there is a debate within the tribunal itself over precisely the question of whether poor referencing equates to plagiarism or not.

**7.6.2 Jurisdictional Fact: Who is a Student?**

A second circumstance in which potential for jurisdictional error arises relates to the concept of the student *per se*, and the subsequent authority of the university to discipline an individual *qua* student. A nursing student, in a midwifery program, was on practical placement at a hospital. She was held to have breached the discipline rules when she visited a patient outside of the organised activities and requirements of her academic course, whom she was observing as part of that program. The student had been ‘observing’ the patient (an expectant mother) during the course of the semester, and she was witness to an ‘adverse’ event during the birth of the mother’s child. At the invitation of the mother, the student visited her some weeks after the birth, ‘for coffee,’ in a public place. The main charges against the student were that she had had contact with a patient, known to her through her program, against the ‘direction’ of relevant staff and that would have constituted a ‘risk’ to the student, the patient, and the reputation of the University. The student contended the visit was purely ‘social’ and she acted in her capacity as a ‘private citizen.’ There was no dispute that the visit took place, nor that the student was a

\(^{719}\) See Chapter 4, sub-section 4.6.2, above.
student in good standing at the University. The University, it was argued on her behalf, had no
jurisdiction to discipline her for misconduct, thereby falling into legal error for wont of
jurisdiction. The tribunal found against her. The student was represented at the hearing and
substantial written submissions were made on her behalf.

In these circumstances, the student’s status appears as a question of jurisdictional fact, a
‘condition precedent’ to the exercise of power by the disciplinary tribunal. As the High Court
stated in Corporation of the City of Einfeld v Development Assessment Commission: 720

The term ‘jurisdictional fact’ (which may be a complex of elements) is often used to identify that
criterion, satisfaction of which enlivens the power of the decision-maker to exercise a discretion.
Used here, it identifies a criterion, satisfaction of which mandates a particular outcome.721

Spiegleman CJ stated in Timbarra Protection Coalition Inc v Ross Mining NL722 that the issue
of jurisdictional fact arose out of the process of statutory interpretation: ‘Whether or not a
particular finding of fact is jurisdictional in the requisite sense, depends upon the proper
construction of the factual reference in the particular statutory formulation in which it appears.’
As it may go to the issue of whether an authority has acted correctly or not according to law,
that process of interpretation and fact-finding is susceptible to review by the courts, ‘which
decides whether it thinks the fact existed at the relevant time.’723

At its widest, the University’s disciplinary jurisdiction applies to student conduct that may
disturb the ‘good order and discipline of the University.’ Under the University’s Act, student is
defined as an ‘enrolled student.’ Disciplinary action must be protective of the University rather
than punitive toward the student. This will include the need to maintain academic standards and
safeguard its reputation and/or relationships with other bodies necessary to the performance of
its functions (as, in this case, the hospital where the placement occurred). In this latter respect,
the disciplinary criterion is similar to disreputable conduct clauses operating in the rules of
sporting codes or other voluntary associations.724 Yet, in regard to the student’s ‘private’ visit to
the mother, was she relevantly a ‘student’? By way of comparison, if a student should threaten a
staff member, with whom they are otherwise unconnected, with violence on a public street near
the University, are he/she subject to the University’s disciplinary jurisdiction? In effect, the
fundamental question arising in this case is the limit of the university’s capacity to regulate the
conduct of individuals who happen to be students. Alternatively, in what respects are the

722 [1999] NSWCA 8, [28].
723 Mark Aronson, Bruce Dyer, and Matthew Groves Judicial Review Of Administrative Action (4th ed,
Lawbook Co, 2009), [4.290].
724 See Kosla ‘Disciplined for “Bringing a Sport into Disrepute” – A Framework for Judicial Review’; see
also Chapter 10, sub-section 10.3.2, below.
behaviours of private citizens who are also students specific or peculiar to their status as students, or in other words, in what ways are the behaviours (or even disposition and manner of conduct) of students more than would be expected, appropriate or possible of ordinary citizens?

It is no doubt true that the ‘social’ visit would not have occurred other than by the a priori fact of the student’s participation in the course and the particular unit. There is no suggestion on the file that the student and patient were acquainted prior to the events concerned. It is also the case that the precise scope of ‘domestic’ jurisdiction, as it concerns the management or ‘good government’ of the university, may, at the margins, be unsettled. Finally, it appears as common ground on the file records that the student disregarded a relevant direction from an academic staff member not to participate in the ‘visit’ (an action that may enliven the disciplinary jurisdiction, in certain circumstances, where applicable to a student). Yet none of these facts or concessions resolves the key issue as to where the boundary between student and private citizen lies.

The proximity of personal and professional conduct has been considered in cases concerning nurse discipline. In Yelds v Nurses Tribunal, for instance, it was held that misconduct need not occur ‘in the course of nursing’ but may display conduct inappropriate to the profession. Relevantly, of course, the student was not a registered nurse or midwife and therefore did not owe professional duties applicable at law by a registered nurse or midwife. There is no evidence on the file that the University issued instructions, promulgated policy or provided advice to students generally regarding forms and/or standards of conduct applicable to students’ involvement in, or proximity to, clinical or therapeutic settings, prior to engagement in those settings. The production of such a policy, advice or instruction may have been invaluable to the characterisation of (students’) conduct and approaches to the clinical and/or therapeutic situation, and dispositive of the present problem. It is unlikely that, in practice, a document might be produced to codify or prescribe the entire range of possible situations, conflicts or

725 Consider the scope of the Visitor’s jurisdiction (which extends as far as management of the domestic sphere) in Murdoch University v Bloom and Kyle (1980) WAR 193, 199 (Burt CJ), where His Honour specifically refers to the ‘grey area’ on matters that fall within the domestic sphere and those that do not.
726 I use the term here for the sake of description rather than settling the legal status of the relevant actions or behaviors.
729 See also Childs v Walton (unreported, NSW Court of Appeal, Samuels JA, 13 November 1990), 9.
730 On the contrary, there is evidence that the text of a subsequent ‘agreement’ between the student and the relevant academic area sought to contend with precisely these issues, by, for example, requiring the student to acknowledge the University’s ‘expertise’ and conduct herself in a manner comparable to relevant professional standards. This action appears to impose on the student an ex post facto and ad hoc ‘code of conduct’ as terms for suspension of an exclusion order against her. Also, the directions the student received prior to the ‘visit’ appear rather confused, if not contradictory. In the first instance, a supervising academic agrees to the ‘social visit’ where it is clear this is as a ‘private’ person. Following further internal discussions among academic staff, the contrary instruction is given. The student requests it in writing, but does not receive in until after the ‘visit’ has occurred.
ambiguities in which a (midwifery) student may find himself or herself, in the clinical setting. Nevertheless, a relevant code might identify (and sanction) the *limits* of behaviour applicable to the clinical/therapeutic setting, giving regard to the particular (educational and clinical) circumstances of the student. While the student on practicum cannot be treated as a registered, clinical practitioner, subject to the entire gamut of professional conduct rules, the circumstances in which they relate to the clinical setting may treated as *analogous* to those facing the registered professional. It is noteworthy therefore that the rules of conduct of registered nurses do include ‘guidelines’ in respect of ‘professional boundaries,’ including boundaries between nurses and patients.\(^{731}\) Such rules would be apposite to the facts of the present case, and arguably influential in determining the question of jurisdiction in the absence of anything more. In the case examined that point is, of course, moot.

Nevertheless, considering, for example, the ‘professional boundaries’ guidelines issued by the Nurses Board of Victoria, it is possible, though arguably unlikely, that the student conduct would meet the tests of (mis)conduct provided for in those rules. In an underpinning definition, the *Guidelines* state:\(^{732}\)

3. Professional Boundaries

Professional boundaries are defined as ‘limits that protect the space between the professional’s power and the patient’s vulnerability’… Maintaining appropriate boundaries manages this power differential and allows for a safe interaction between the professional and the patient based on the patient’s needs and recognising the patient’s vulnerabilities. The maintenance of boundaries need not be seen as an impediment to the professional relationship, but rather as facilitating it. Maintaining professional boundaries protects the safe space in the relationship and thereby enhances the building of the trust which is essential to enable patients to reveal their needs and have them met therapeutically. Concepts of ‘power differential’ and patient ‘vulnerability’ are central to considerations of inappropriate conduct and/or misconduct. The *Guidelines* consider ‘confusion between the needs of the registered nurse and those of the patient’ as symptomatic of the ‘breaching of boundaries.’ Concurrently, they provide scope for ‘dual relationships,’ including social relationships.\(^{733}\) It may be arguable, if at the margins, that the student has ‘crossed’ the boundaries as indicated by these professional guidelines, having regard, for instance, to the fact

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\(^{731}\) See eg Nurses Board of Victoria *Professional Boundaries: Guidelines for Registered Nurses in Victoria* (2007); Nurses Board of South Australia *Standard Therapeutic Relationships and Professional Boundaries* (2002); ACT Nursing and Midwifery Board *Professional Boundaries for Enrolled and Registered Nurses* (2007); Nursing Board of Tasmania *Professional Boundary Standards for Nurses in Tasmania* (2005).

\(^{732}\) Nurses Board of Victoria *Professional Boundaries*, para 3.

\(^{733}\) The Nurses Board of Victoria *Professional Boundaries* Guidelines provide a range of ‘indicative’ conduct that ‘cross’ the boundaries of the therapeutic relationship, including inter alia ‘giving inappropriate or special status to a patient,’ ‘extending personal social invitations,’ and ‘entering into a dual role with the patient or their family outside the scope of the therapeutic relationship.' These are perhaps behaviours most comparable to the circumstances of the present case. It may be arguable that the
that the ‘dual relationship’ problem would not have been inevitable,\(^734\) and that the student was ‘giving inappropriate… status’ to the patient. Yet a number of factors militate against a finding of misconduct, even using these Guidelines, and on balance it is more likely that, *mutatis mutandis*, the student’s action could not be subsumed within the University’s jurisdiction. First, such Guidelines would have been of themselves of limited interpretative value and would have to be read in the context of the *anomalous* situation of the student ‘nurse,’ thereby taking into account the limited knowledge and clinical authority of the student, the various supervisory relationships (academic and clinical), and so on. Second, the student did in fact notify the relevant supervisor of the intended ‘visit’ and was initially granted ‘permission’ to attend it. That action was consistent with the approach in the Victorian Guidelines to ‘dual relationship’ situations.\(^735\) The conduct and procedure of the supervising academic authorities were problematic at best. Finally, the standard of disciplinary procedure (especially given its professional context and potential impact on future livelihood) would arguably require the tribunal’s decision on the facts to be made having regard to a relatively high standard of proof, and specifically weight be given to the student’s ‘presumption of innocence.’\(^736\) In this case, it would be a considerable task for the ‘prosecuting’ School or the tribunal itself to discharge a persuasive burden against the student on the information provided.\(^737\)

In all the circumstances, there appears a likely error of law in the decision made in this case, although it must be acknowledged that the case comprised difficult, complex issues, warranting more than strictly legal and administrative responses.

**7.7 Failure of a Duty to Inquire?**

There is a body of judicial opinion that a tribunal with wide discretion to regulate its own procedure has a limited duty to make inquiries and undertaken investigations.\(^738\) In limiting that duty, the courts are influenced by the prevalence of the adversary method in adjudication. A duty to inquire is viewed as a correlate of the requirement to take into account relevant considerations,\(^739\) and the duty to act fairly.\(^740\) While the duty may be enlivened by facts that are

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\(^{734}\) That is to say, the *ad hoc* ‘social relationship’ could easily have been avoided, and the circumstances were not in, for example, a small country town (an example used in the Guidelines where the ‘dual relationship’ question would more likely arise).

\(^{735}\) Nurses Board of Victoria *Professional Boundaries*, para 6.3.

\(^{736}\) See *Briginshaw v Briginshaw* (1938) 60 CLR 336, 363 (Dixon J).

\(^{737}\) Compare Chapter 4, section 4.6, above.

\(^{738}\) *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 65 ALR 549; *Ażī v Minister for Immigration and Multicultural Affairs* (2002) 120 FCR 48; *Dhiman v Minister for Immigration and Multicultural Affairs* [1999] FCA 1291.

\(^{739}\) *Sullivan v Department of Transport* (1978) 1 ALD 383; *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 65 ALR 549.

\(^{740}\) *Finch v Goldstein* (1981) 55 FLR 257.
constructively known to the decision-maker, and there may even be circumstances in which ‘own motion’ inquiries are warranted, the general rule is that a tribunal is not required to make a party’s case for it.

There is also opinion that a statutory investigative body is under a statutory duty to inquire and those inquiries cannot be arbitrarily limited or curtailed. It may be that the duty to inquire is an implied duty on student disciplinary tribunals.

A problem arising in the present student discipline cases is that fact or inference may advert to further relevant information, often in support of a student’s case, but not put before the tribunal by the student nor dealt with in argument, examination or deliberations. The problem, in my submission, is as much one of legality in decision-making (in this case a extension of fairness and rational decision-making) as of practice and procedure crafted to achieve what, on the face of it, student disciplinary tribunals seek to achieve: an adjudicative inquiry. In this respect, the situation in these tribunals is not dissimilar to flaws found in the approach of a public service appeals committee in Finch v Goldstein, including that the inquisitorial body might '[absolve] itself from the need to inquire further into the truth or otherwise of... allegations or that a variable standard of inquiry might apply depending on all the circumstances.

In five cases, the issue as to whether the tribunal has conducted a sufficient inquiry arises. The outcome of all five cases goes against the students involved.

Case 20 at University A has been referred to already. In that case, a student was found to have committed misconduct through misrepresenting himself as a domestic student and, as a basis for

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741 See Azzi v Minister for Immigration and Multicultural Affairs (2002) 120 FCR 48, 74.
742 Prasad v Minister for Immigration and Ethnic Affairs (1985) 65 ALR 549, 563.
743 R v Australian Broadcasting Tribunal; ex parte Hardiman (1980) 144 CLR 13, 33-34: ‘... we are of the opinion that the Tribunal failed to discharge its statutory responsibility in that, by its rulings, precluded itself from inquiring into matters which were relevant to the inquiry and which it was bound to investigate.’ Hamblin v Duffy (No 2) (981) 55FLR 228, 242-3.
744 This ground (failure to discharge a duty to inquire) is expressly argued on appeal by a legal representative on behalf of students in case A17. The appeal body found for the students on another ground. In Simjanoski v La Trobe University [2004] VSC 180, a student disciplinary tribunal did take this approach and this was accepted by the Court reviewing the decision.
746 Finch v Goldstein (1981) 55 FLR 257, 278. A distinguishing feature in Finch v Goldstein is that the appeals body was under an express statutory duty to make ‘full inquiries.’
747 Compare Finch v Goldstein (1981) 55 FLR 257, 279:

To undertake such inquiries might mean delay, inconvenience and even embarrassment to members of the committee in having to decide on the credibility of fellow officers. It may have made no difference to their ultimate decision. But it is an inquiry, in my view, which, in the special circumstances of this case, they were bound to undertake. In not doing so they failed to fulfil their duty “to make full inquiries” into the complaint of Mrs. Finch. If the parties are not allowed to have legal representation or to be present when others are called and there is no power to summon witnesses, the need for the committee to inquire itself into relevant matters only becomes greater. It does not mean they must examine every detail but it does mean that in each case they should take sufficient steps to inquire so that what they undertake can reasonably be described as “full inquiries” into the claims of the parties.

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admission, as a graduate of a Chinese university. Among the various developments of this case, express reference is made in the case to the involvement of the student’s (estranged) wife in these actions, and indirect inference is made to her involvement in these misrepresentations coming to the attention of the University administration. Additionally, the student’s own evidence included the claim that there was little oversight or proper assessment of the student’s application by internal administrators at the time he came to enrol. There is no information as to whether the student’s ex-partner or the relevant administrator(s) was called to give evidence. The inferred actions of the ex-wife and suggestions of maladministration are troubling aspects of this case. In the face of the possible consequences, the student was entitled to have the case heard rigorously, to a high standard of proof.

In Case 7 at University B a finding of misconduct was made against a student where he had received an SMS message from another student in the course of an examination and the message had assisted him with the exam. Case 8 is the converse case of the student sending the message. The students disputed that they had intended to cheat or that the timing of the message would have provided any advantage. In addition, they claimed animosity of the part of the tutor making the allegation. The charges against the students were heard separately, and neither student was called by give evidence in the other hearing despite the matters being inter-related. No record of evidence in one hearing was provided in the other. A ‘department representative’ was present at both hearings, although it does not appear this was the tutor in question. In any case, they are only reported to have answered elementary questions regarding the conduct of the exam. On the same materials, the first student was found to have committed misconduct; the second student was not. In the proceeding minutes, references were made by both students to the need to make inquiries of the tutor as to his/her motivations for making the allegations. The tutor’s report states that he was ‘suspicious about them before [the exam].’ No evidence was adduced from the tutor as to the allegations or his ‘suspicions.’

In two cases at University B (3, 9), students were found guilty of misconduct on the basis of work similar to, or reproduced, from other students. These are cases of plagiarism or ‘collusion.’ The facts of Case 3 are reproduced above. In that case, no other students allegedly involved in the collusion (or alleged as the source of the material copied) provided evidence. In

748 Including that the student had not himself signed the enrolment forms. This claim was made in his own sworn statement.
749 On behalf of the student, an unsworn statement was made by a Salvation Army officer, and the student submitted his own sworn statement by statutory declaration.
750 Alongside the fact that a relatively senior University officer sought to withhold the source of the allegations and reports from the student.
751 The student had been granted temporary residency under a Spouse Visa. It was unknown at the time of the hearing what type of visa he was in possession of. It may be that, in dissolution of the marriage and without a student visa, the student had no lawful residency status and may have been liable to deportation.
752 Compare Re Pochi and Minister for Immigration and Ethnic Affairs (1979) 26 ALR 247, 255 (Brennan J).
Case 9 at University B, a student was found to have committed plagiarism by submitting an assignment on ‘web page construction’ based on another student’s work (coding). The work submitted was substantially the same. The student admits to poor referencing but denies appropriating the work of the other student. In the course of proceedings, the student notes an antagonistic relationship with the other student. That information is dismissed by the tribunal. Following an adjournment to allow the two bodies of work to be submitted to, and compared by, the tribunal, it appears further material was submitted electronically on the student’s account. The student denies he was the person who submitted the material. No evidence is adduced from the student whose work is alleged to be the source of the plagiarism, nor in relation to the submission of the additional materials.

In her critical examination of Administrative Appeals Tribunal practice, Dwyer advocates ‘adoption of an inquisitorial role’ for the Tribunal, presenting an interesting point of comparison to university tribunal practice. In comparison to Dwyer, typical intervention by a tribunal in university discipline proceedings occurs by direct examination and questioning of parties, principally the student. For Dwyer, the scope of intervention (or participation) is considerably wider, necessitating judicious and skilful action by the decision-maker at various points in the proceedings. The tribunal may take a role in the ‘formulation of the issues,’ assistance to unrepresented parties, intervention in decisions about calling witnesses, and involvement in the conduct of investigations. The schema of functions articulated by Dwyer in inquisitorial conduct contrasts critically with the pattern of practice employed in student disciplinary actions, especially in what may be taken to be a selective and unsystematic adoption of inquisitorial methods. In particular, while student tribunals may be involved in the conduct of investigation at an oral hearing, there is little evidence, where it may be appropriate for such intervention to be employed (eg where issues are in dispute, or further argument or evidence may be warranted), of them actively ‘formulating the issues,’ intervening in decisions about calling witnesses or adducing evidence, or assisting an unrepresented party. Inquisitorial procedure may well be open to university tribunals – and it may be well advisable for decision-makers to take this approach – but there is evidence that it is employed, at best, in an unsystematic manner, and, at worst, in an incoherent, even partial, manner.

7.8 A Precarious Impartiality?

The ‘second limb’ of procedural fairness ensures a prohibition at law on a decision-maker acting partially, or by interests, conduct, association, or consideration of extraneous information,


failing to approach a matter with a mind open to persuasion. Bias may be actual (prejudgement) or ostensible (reasonable apprehension of bias ‘on the part of fair-minded, informed lay observer’\textsuperscript{755}). The applicable test will vary depending on whether the decision-maker is exercising a statutory duty or giving effect to the rules of a private organisation. Although they bear certain characteristics of ‘domestic’ tribunals,\textsuperscript{756} the test for bias in university disciplinary tribunals is absence of apparent as well as actual bias.\textsuperscript{757}

Problems of the ‘reasonable apprehension’ of bias can be especially sensitive in the context of inquisitorial proceedings where active participation of the adjudicator in the proceedings is expected or required.\textsuperscript{758} Interventionist conduct by decision-makers in administrative review or adjudication has led to tribunal decisions being struck down for appearances of bias,\textsuperscript{759} although discretion to engage in active lines of inquiry has been advocated in other quarters.\textsuperscript{760}

In my assessment, the question of bias arises in seven cases, across both institutions, and questions regarding actual and apprehended bias arise. In addition, the observed (or in the case of University A, imputed) approach of the tribunals in adopting a limited inquisitorial procedure has the potential to raise questions of bias, if proceedings are not handled in a sufficiently prudent manner.\textsuperscript{761}

The student cases involve a range of potential, or even likely, circumstances of bias, in particular allegations of prejudgement, a decision-maker with a direct interest in the proceeding, and conduct by a tribunal that may bring its impartiality into question. In Case A10, an examination cheating case, the chair of the discipline tribunal would also appear to have been the examiner, among whose tasks it was to provide a written report on the allegation of misconduct. He provided a report tentatively in support of the invigilator’s allegations. This case would appear to be a classic instance of a person acting as ‘a judge in their own cause,’ that is, as having a direct interest in the proceeding over which he was presiding, a ground for automatic disqualification. It would not be arguable that the rule of necessity could be invoked

\textsuperscript{755} Webb v R (1994) 181 CLR 41, 76 (Deane J).
\textsuperscript{756} Forbes terms them ‘hybrid’ tribunals: see Forbes Justice in Tribunals, [2.16]-[2.18].
\textsuperscript{757} Simjanoski v La Trobe University [2004] VSC 180; R v Cambridge University; ex parte Beg [1998] EWHC Admin 423
\textsuperscript{759} R v Optical Board of Registration; ex parte Qurban (1933) SASR 1.
\textsuperscript{760} See eg Joan Dwyer ‘Fair Play the Inquisitorial Way’.
In this circumstance. In cases B3 and B10, the tribunal proceeded in the students’ absence, in the former case against the protestations of the student’s representative. The tribunal examined the representative from the academic department (the party ‘referring’ the charge) in the students’ absence. In the latter case, the tribunal summarised the proceedings to that point once the student have arrived. This type of conduct may be distinguished from that in case B13, where a tribunal proceeded in the student’s absence after the student had been effectively given notice of the hearing on two occasions and failed to appear both times. The tribunal appears to have made inquiries as to whether the student would be participating. In the former circumstances, a claim might be made that a decision-maker is taking evidence ‘behind the back’ of one party (the student), thus not affording him/her a fair hearing, although summarising the material (especially adverse elements) would tend to mitigate the possibility of unfairness. In respect of the bias rule, partiality may be attributable to the tribunal because of improper communications with a person effectively in the position of accuser, notwithstanding that their prosecutorial role is limited to bringing the charge and proffering evidence adverse to the student (or potentially doing so). That fact that this conduct occurred in the context of a hearing, albeit inquisitorial, is different to inquiries that a tribunal might reasonably conduct ex parte, on its ‘own motion,’ or outside of the context of a hearing.

In cases B14 and B17 allegations of bias and ‘ill-will’ are directed against primary decision-makers at the School level. Subsequently, those decisions were taken on appeal. Case B14 is of limited value as the student withdrew from the University and the case not heard before the appeals tribunal. It is not possible to make any assessment of the allegations. In Case B17, the rather exceptional circumstances arise where patent claims of bias against a decision-maker are made and dealt with. In that case, a student was found to have committed exam misconduct by a ‘local’ (School) panel, specifically for taking an annotated sample exam paper into an examination. The student took the matter on appeal, and at the latter hearing was accompanied by a solicitor. In a rare outcome, the Appeals Board found for the student (by majority) on the ground inter alia that the primary decision-maker acted with bias and ‘ill-will.’ On the materials available, two grounds of bias appear to be made out: first, that a remark by the original decision-maker that ‘Asian’ students’ handwriting all look alike gave rise to the apprehension of

762 It would have been relatively straightforward for the chair to stand down and another presiding member appointed from among the tribunal members or other qualified persons (the tribunal is drawn from a wider pool of potential tribunal members). Compare Cain v Jenkins (1979) 26 ALR 652.

763 Compare Stollery v Greyhound Racing Board of Control (1072) 128 CLR 509, 517 (Barwick CJ): ‘… the reasonable inference to be drawn by the reasonable bystander in that situation was that Mr Smith was in a position to participate in the Board’s deliberations and at least to influence to result of those deliberations adversely to the appellant. The existence of that reasonable inference, in my opinion, is sufficient warrant for concluding that, in a matter in which the Board was bound to act in a judicial manner, natural justice was denied.’

764 Compare R v Coburn; ex parte Fomin (1981) 51 FLR 79. The student disciplinary rules at issue are silent on the question of ex parte communications or investigations, and do require a matter to proceed by hearing.
bias on the decision-maker’s part; secondly, on evidence adduced from a Student Rights’
Officer in attendance at the original hearing, that it was apparent the decision-maker was
already predisposed to a guilty finding. The appeals board, however, appears only to make a
finding of bias in respect of the former circumstances. The board does not appear to deal with
the latter claim in its recorded deliberations.  

Finally, I think case A20, the Chinese student academic fraud case, presents some challenges on
the question of bias. This case presents questionable conduct that may give rise to appearances
of impartiality, but in addition it brings into relief problems of impartiality for those tribunals
where they adopt inquisitorial procedures. Adoption of a limited, if not truncated, form of
inquisitorial procedure may well present problems in the appearance of ‘disinterested’
conduct, where the procedure (or some element of it) disadvantages one side or the other – in
this case, the student.

It may be recalled that in A20 the evidence on file suggested that the student’s estranged wife
made allegations and supplied evidence against him which were subsequently investigated but,
it would appear, their source was not disclosed to him (although the complaint was disclosed to
the tribunal). There is some inference that the complaint was motivated by malice, although it
was also not without substance. The University’s investigations principally went to immigration
authorities, the relevant educational institution in China (undertaken by administrative sections
of the University) and examination of the student himself (undertaken by the tribunal at
hearing). The student supplied documentary evidence in support of his character and marital
circumstances. There was no indication that the original complainant was interviewed, let alone
examined before the tribunal. Additionally, there appear to have been irregularities in
administration of the student’s enrolment, and there is no suggestion that any evidence was
taken from relevant administrative staff. The student appears to have been unrepresented.

The problem manifest here, I would submit, is that the procedure adopted at best lends itself to a
charge of apparent bias. At worst, especially taking the anonymity and non-disclosure of the
original complainant into account, there is an appearance of the tribunal conspiring against the
student and effectively conducting itself as a partisan in the proceedings. In any case, the
question of procedure adopted (and hence the decision-maker’s conduct) raises the prospect of a

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765 Although upholding the student’s appeal that the original decision was void, the appeals board
subsequently seeks to substitute an alternative sanction – that the student must undertake an alternative
assessment. Following correspondence from the student’s solicitor that their (appeal board’s) finding
meant no alternative penalty could be substituted, the Board appears to concede this point and withdrew
any sanction.

766 Allars ‘Neutrality, the Judicial Paradigm and Tribunal Procedure’. Professor Allars concludes that, for
decision-making exhibiting propensities to inquisitorial procedure, the concept of a judicial neutrality is
less helpful or appropriate in arriving at an impartial proceeding than the concept of ‘disinterestedness.’

767 For instance, there are no written submissions prepared on his behalf by a representative.
reasonable suspicion on the part of a fair-minded informed lay observer that the tribunal has not brought an open mind to its task. This nexus between the procedure adopted by a decision-maker and the appearance of bias arose in *R v Optical Board of Registration; ex parte Qurban*768 (‗Qurban‘) and has been considered since.769 In *Qurban* the decision of the tribunal was quashed for bias, as it had so actively engaged in the process of investigation its conduct amounted to assuming the role of prosecutor as well as adjudicator. If literal breach of the *nemo judex* rule can be achieved by the investigative zealotry of a disciplinary tribunal, then arguably a procedure that effectively amounts to *abstention by a tribunal from considered fact-finding* produces the same impartiality by different, indeed opposing, means.770 Such an effect might reasonably be alleged in the Chinese student’s case. The tribunal’s decision, on its face, reveals a mind not open to persuasion, and that appearance substantially derives from the procedure adopted in practice by the tribunal, whose operation constrained inquiry, effectively limited information available to itself (including any contradictory information put by the student to the original complaint), and thereby might be said to have closed its mind. Additionally, while it may or may not be the case that a common law duty to inquire applies to these circumstances, if it does a failure to observe the duty may also amount to a failure to maintain the appearances of impartiality; the ‘provenance’ of the duty to inquire can be traced to the duty to accord procedural fairness.771

Problems of reconciling procedure and impartiality in student disciplinary actions, I suggest, go beyond the particular circumstances (and failings) of this Chinese student’s case. As with the disciplinary schema at issue in *Qurban* and *ex parte S*,772 the student discipline procedures under investigation contain no formal provision for a separation of powers between preliminary investigator and adjudicator. In matter of fact, in A20 the preliminary investigations were handled (for good or ill) on an informal, *ad hoc*, basis by university administrators. Tribunals are therefore left to conduct the proceedings, including inquiries, as best they can in the course of a single, continuous hearing. In most cases, where extensive investigations do not appear to be required, this may be satisfactory. But that outcome is contingent on the circumstances of particular cases as much as (if not more than) on the design of procedure.

768 (1933) SASR 1.
769 Eg *R Medical Board of South Australia; ex parte S* (1976) 14 SASR 360. In that case, similar procedural problems to those in *Qurban* arose, such as the means by which an investigation should be conducted. *Qurban* was distinguished, however, as the Board ‘procured’ the investigation into the matter from the Crown Solicitor, rather than attempting to conduct the investigation itself.
770 Compare also *Hulaba v Minister for Immigration and Ethnic Affairs* (1995) 59 FCR 518, where a decision on review from an original decision to reject a refugee claimants’ application for asylum was invalidated for bias, as the review decision plagiarised substantial sections of the original decision. Beazley J held that this approach denied the applicant procedural fairness because the reviewer failed to bring an ‘independent mind’ to the matter.
It is important to recall that, in practice, student disciplinary proceedings primarily consist of exchanges between the tribunal and the student (and his/her representative, as the case may be). This inquisitorial character of proceedings contains a substantial, if not inherent, tension between fairness and impartiality, notably in the propensity of an active adjudicator being seen to be acting in the role of ‘prosecutor,’ or advocate for the case against the student. Precisely this issue arose in Simjanoski v La Trobe University, an academic misconduct case, but the claim of apparent bias failed because the interventionist conduct of the tribunal was held to be within its powers and interpretation of the proceedings as adversarial was rejected. Fairness does not require ‘non-intervention’ by the decision-maker in the proceedings, but, as Professor Allars has remarked, ‘situations may arise where it is difficult for an umpire to comply with both the hearing rule and the bias rule at the same time, or at least an umpire must tread a narrow and dangerous path between infringing either rule.’ This type of inquisitorial procedure has been more roundly criticised in respect of US administrative appeal jurisdictions. Wolfe and Proszek have argued that the inquisitorial ‘judge’ in ‘single-party’ proceedings necessarily tends to conduct matters as a ‘moving party,’ if not in a prosecutorial fashion. This conduct is a structural corollary of the need to engage in fact-finding and adduce evidence for the purposes of attaining the complete ‘administrative record,’ where an accusatorial party is absent. In resolution of these tensions, Professor Allars proposes that the concept of ‘non-intervention,’ or ‘neutrality,’ on the part of the decision-maker is the wrong way to approach the problem. Given that what is substantively at issue in administrative proceedings (and recognised in the doctrine of procedural fairness) are interests, the proper role of the adjudicator is ‘disinterestedness,’ not neutrality. This may also been seen as synonymous with ‘even-handedness.’ The treatment of Refugee Review Tribunal decisions, for instance, by Australian superior courts would indicate that active adjudication in ‘single-party’ actions can

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772 (1976) 14 SASR 360.
774 The allegations related to cheating in examinations. The Chief Examiner attended the hearing and presented charges and evidence against the students. The Court stated ([23]): ‘The request that the chief examiners attend and provide materials was, as the Board said in ruling on the application that it disqualify itself, to advise the chief examiners of the hearing and “to ensure that if they were to assist [a transcription error for persist?] in the allegation, that they would be required to produce material.” It was a means of ensuring administratively that the hearing could proceed.’
776 Wolfe and Proszek ‘Interactional Dynamics In Federal Administrative Decision-Making’.
777 The US Federal Courts have held a duty on administrative law judges to ‘fully and fairly develop the record as to material issues’: Baca v Department of Health and Human Services (1993) 5 F.3rd 476, 479-480. It has also been held that ‘This duty is especially strong in the case of an unrepresented claimant’: Carter v Chater 73 F.3rd 1019, 1021. The duty has similarities to the duty under Australian common law to make inquiries and/or to assist unrepresented parties, although the duty on US administrative adjudicators in respect of the former goes further than in the Australian situation.
778 Or more accurately, borrowing from Joseph Raz The Morality of Freedom (Oxford University Press, 1986), a ‘principled neutrality,’ aimed at helping or hindering parties ‘to an equal degree’: Allars ‘Neutrality, the Judicial Paradigm and Tribunal Procedure’, 382-3.
779 Allars ‘Neutrality, the Judicial Paradigm and Tribunal Procedure’, 412-413.
be accommodated within the bounds of impartiality and fairness. Wolfe and Proszek argue that the tendency to ‘predisposition’ (ie bias) in administrative-inquisitorial proceedings cannot effectively be avoided, and a more sweeping reform of procedure in administrative adjudications in warranted.

7.9 The Value of Representation

As a general rule, representation in this type of hearing is not available as of right. However, at University B the right to representation exists under the rules; at University A, there is no such express right, although a student is entitled to an adviser. In the latter context, representation appears to be generally permitted in practice by discretion of the tribunal.

The availability of representation for student ‘defendants’ has a significant impact on the nature of a student’s participation in the proceedings, if not in the outcome of a case. At University A, student representation is only indicated by written submissions (or appeal documents) presented on the student’s behalf; at University B, it is, additionally, indicated by minuted account of their participation in the proceedings. Typically, representation is (or appears to be) provided by a student organisation. In one instance, representation was by a legal practitioner. The value of representation to a student is evident in the substance and detail of written submissions on the student’s behalf in disputed cases, which includes the presentation of argument as to fact as well, on a number of occasions, as to law. Where the evidence is available it is clear also that student representatives may play an active role in oral argument before the tribunal, including contending with the tribunal on questions of interpretation of the rules (eg plagiarism), the burden of proof, procedural failings, and bias. In many instances, it is by way of submission and/or challenge on behalf of students that issues in the proceedings are on the record.

The impact of student representation on the outcome of proceedings is more difficult to gauge, although research in the UK has identified that skilled representation before informal tribunals has a significant impact on the likelihood of success of applicants. Given the overall trend toward misconduct findings, the capacity of representatives to sway tribunal opinion toward the student appears to be limited in the present cases. An obvious departure from this pattern appears in relation to case B17, the sole case in which a student is known to be represented by a lawyer. In that case, a finding of misconduct was overturned on appeal (the student was represented at the appeal), on the ground that the original decision-maker had manifested bias.

(in the form of racial prejudice). This case is the strongest indication that (legal) representation made a material difference to student outcomes in misconduct actions.

7.10 Testing Evidence

In respect of administrative tribunals charged with regulating their own proceedings, the general rule at common law is that the formal rules of evidence do not apply but that decisions made by those bodies must be based on evidence that is credible, relevant and logically probative. As it has been famously stated, administrative tribunals cannot ignore the rules of evidence ‘as of no account’. They must be accorded at least some ‘persuasive value,’ depending on the circumstances, as they have evolved as a key mechanism for the testing of proofs and attainment of truth in adjudicative action.

Empirical analysis supports the notion that there is some basis in evidence for findings of misconduct in student cases. This observation must necessarily be qualified by the limits of the materials available for analysis, in particular the absence of written reasons for decisions. The vast majority of cases considered led to findings of misconduct. In many exam cases, misconduct findings appear to be uncontroversial, based on written reports from invigilators and examiners, and the availability of confiscated materials (e.g., ‘unauthorised’ materials taken into exams). In some cases, misconduct is not disputed (although penalty may be), and students may even exhibit contrition or mitigating circumstances.

Yet, the general approach of these tribunals to questions of evidence and to proof of misconduct is susceptible to criticism on a number of grounds. There are particular cases where material facts are disputed (15 cases) and/or there is contest over the evaluation of evidence which may go in the student’s direction. In addition, there are also circumstances in which further evidence may have been adduced by the student (or by the tribunal itself) but was not. The more systemic criticism lies in those cases where credibility or reliability of evidence would typically be at issue, especially where evidence is provided by witnesses or might reasonably be provided by witnesses. Exam misconduct cases and incidents of general misconduct are the obvious circumstances where credibility or reliability of witnesses would be at issue. Leaving aside School/Department evidence, the potential for witness evidence to be adduced and/or cross-

783 R v Deputy Industrial Injuries Commissioner; ex parte Moore (1965) 1 QB 456; Re Pochi and the Minister for Immigration and Ethnic Affairs (1979) 26 ALR 247; Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321.
784 R v War Pensions Entitlement Appeals Tribunal; ex parte Bott (1933) 50 CLR 228, 256 (Evatt J).
785 Forbes Justice in Tribunals, [12.44].
786 Compare the dictum of Lord Diplock in R v Deputy Industrial Injuries Commissioner; ex parte Moore (1965) 1 QB 456, 488; Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321.
787 Exam disputes are typically brought by an invigilator and their written evidence (report) is normally important to the case.
examination to be conducted, in respect of incidents of alleged misconduct, appears relevant to 7 cases. It is openly drawn into dispute in only 1 case. Yet in none of those cases was witness evidence adduced either by a student in support of their own case, a School/Department in support of their referred allegation, or a tribunal in the course of inquiry.

The role of School/Departmental representative is ambiguous. On the face of it, they have a prosecutorial function (referring the case, presenting argument and/or evidence in support of the case for misconduct, etc). More often in practice they act as an ‘expert’ witness for the tribunal, for example in considering assessment or pedagogical methods, or academic content. There is no evidence of formal cross-examination of those representatives by a student or a student’s representative. The process of examination is conducted primarily, and led by, the tribunal. The tribunals possess their own ‘expert,’ or at least ‘inside,’ knowledge, which they are entitled to bring to bear on the investigation and on the tribunal’s decision-making. This expert knowledge may include knowledge of academic procedure (eg assessment, teaching methods) or course content. However, this knowledge does not preclude disagreement and/or uncertainty over key academic concepts such as plagiarism.

In short, issues arising on the treatment of evidence particularly concern problems of evidentiary practice and procedure, viz, the question of the testing of evidence, especially for reliability and in respect of witnesses. The cases do not advert to findings of misconduct made in the face of obvious ‘unreasonableness,’ such as in the absence of any reliable, relevant and logically probative evidence. In some cases where ‘not guilty’ findings are made, it would appear to be on the basis of ‘no evidence.’ In other cases, where questions over, for instance, weight of evidence affect decision-making, it is not possible to assess the process of evaluation as no written reasoning is available. Limited evidence available from University B in written minutes would suggest, however, cursory evaluation of evidence before decision-makers and a general absence of deliberation taking into account appropriate standards or measures in that process of evaluation.

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788 Compare *Simjanoski v La Trobe University* [2004] VSC 180, [23].
789 Although in one circumstance there is evidence of direct, face-to-face dispute and challenge between the student ‘defendant’ and a School representative.
790 Compare, for example, the significance of witness credibility and, subsequently, the role of cross-examination in fair proceedings in student cases in *Healey v. Memorial University of Newfoundland* [1993] 106 Nfld. & P.E.I.R. 304 and *Mohl v Senate Committee on Appeals on Academic Standing* [2000] BCSC 1849.
791 For example, there is a general absence of express reference to standards of probability or likelihood in cases of disputed facts, or attempts to systematically weigh one set of facts against other (disputed) facts. This is not say, however, that some such process of evaluation did not occur in the minds of individual decision-makers.
7.11 Penalty and Proportionality

In a strict sense, disciplinary action taken by university decision-makers is not ‘penal’ at all, but understood as a form of ‘protective’ sanction intended to maintain the order of the institution and the integrity of its academic affairs. It is significant then – if for no other reason than from the point of view of an institutional and disciplinary culture of practice – that the language of penalty is used, and, indeed, is used in combination with other language importing a ‘quasi-criminal’ flavour to disciplinary action. Penalties issued in these cases range from reprimand to exclusion from the university. They also include academic penalties (which may have financial implications), such as those affecting grades, and fines. Discretion over penalty is wide and relatively unregulated (at the ‘central’ tribunal level). There is no reference to ‘precedent’ or comparable cases. A decision-maker in this situation faces the immediate problem, on finding a student ‘guilty’ of misconduct, of determining an appropriate or correct sanction. This task is, arguably, problematic for two reasons. First, a notable ground of appeal is for excessive or inappropriate penalty. Second, notwithstanding comparable patterns and forms of misconduct at the investigated universities, the pattern of sanction at University A is, in relative terms, consistently more severe than at University B. For comparable cases, the consequences at the former institution typically exhibit greater gravity than at the latter. Both of these circumstances raise the question of proportionality in the application of penalties for breaches of university discipline. The question of proportionality in Australian administrative law is not well-advanced, although the test for proportionality of penalty in this context would have regard to the purposes of the university and its objects as expressed in its governing legislation.

7.12 Conclusions

7.12.1 A Cross-Section of Fairness and Legality

Investigation of student discipline case-files provides greater insight into the actual conduct and practice of decision-makers in these proceedings than is possible from mere scrutiny of rules or reported cases before the courts. This information is not without its limits – notably reliance in documentary records, which are occasionally incomplete – but it does present a microcosm of disciplinary practice and decision-making in this context. It was found that an arguable departure from various legal standards occurred in a significant minority of cases. Other problems of practice and procedure, outside of the scope of prima facie illegality, were also

793 Compare New South Wales Bar Council v Evatt (1968) 117 CLR 177.
794 Compare Ex parte Forster; Re University of Sydney (1963) SR (NSW) 723.
795 For example, terms such as ‘guilty,’ ‘charge,’ and disciplinary ‘offence’ are employed in the rules.
noted. Adherence to tenets of procedural fairness, in particular, appeared problematic in a number of discrete cases. In one aspect (provision of particulars at University A) in-house practice constitutes a systemic problem. It may be remarked that, on this evidence, there is room for improvement in disciplinary practices. Improvement might begin with greater education and training of decision-makers, but also needs to consider the role and training of ‘preliminary investigators’ and, indeed, the structure and operation of disciplinary practice and procedure more generally.

7.12.2 A Confused Model of Procedure?

From what can be ascertained in university files, it is ordinarily the case that student discipline tribunals take an inquisitorial approach to the conduct of proceedings before them, an approach that is open to them. Following formalities regarding recitation of the charges by the tribunal, the student states their case and the tribunal embarks on the process of examination. The role of the representative may be significant, especially where questions of law or policy are concerned. In most cases, the role of the departmental representative is marginal, and reduced to answering relatively technical (eg pedagogical) questions put to him/her by the tribunal. The process of examination and questioning is led by the tribunal (under the direction of the chair), and to this extent the tribunal is the leading participant in the proceeding. There are no instances of witnesses called by the student, by the department, or by the tribunal itself. There is no evidence that the tribunal undertakes any investigations on its own motion, and it is rare for the tribunal to raise matters with either ‘party’ before it that the tribunal believes warrants further inquiry. The process of inquiry is substantially contained with the hearing itself, subject to the appropriate requirements of pre-hearing procedure such as notice.

At the level of appearances, then, the proceedings before the tribunal bear similarities to the inquisitorial approach employed in other administrative/adjudicative jurisdictions such as the Refugee Review Tribunal, professional discipline and complaints’ jurisdictions, or some administrative appeals jurisdictions.

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798 On at least one occasion, a direct confrontation between the student and departmental representative occurred, which assumed the form more of a dispute between witnesses than any type of examination or cross-examination. The incident appears to have started at the instigation of the departmental representative and the tribunal appeared somewhat tardy in putting a halt to it.

799 In one case, the tribunal adjourned the proceedings in order to receive additional evidence from the School in respect of allegations of plagiarism. On reconvening the representative for the student raised a number of procedural matters (eg regarding the burden of proof) which were dismissed, probably ill-advisedly, by the tribunal.

800 See eg the description of procedure at the Refugee Review Tribunal (‘RRT’) in Catherine Dauvergne and Jenni Millbank ‘Burdened by Proof: How the Australian Refugee Review Tribunal has Failed Lesbian and Gay Asylum Seekers’ (2003) 31 Federal Law Review 299, 304: ‘In a typical RRT hearing there are only three people in the room: the decision-maker, the claimant and an interpreter. The claimant tells her story and the Tribunal decides if she is a refugee. Credibility is often an issue... Witnesses are
The situation regarding procedure in student discipline actions is distinguishable in a number of key respects. First of all, student discipline tribunals are not required to produce reasoned decisions, and there is no evidence in the investigated cases of those bodies being asked to produce reasons. Second, while certain avenues of external appeal from university decisions exist, these proceedings operate in-house and are relatively remote from judicial control. They are largely removed from public scrutiny. Third, they are an expression of an exceptionally broad, if not ‘peculiar,’ statutory discretion. Fourth, as distinct from ‘purely’ administrative adjudication, these actions are accusatorial, and have the overtones of ‘quasi-criminal’ conduct. In this respect, it might seem reasonable to assume a greater relevance for adversarial method (than for example in RRT or planning disputes). Indeed if we give regard to general conceptions of the adversary system it is clear that important elements of adversary procedure do remain in the approach by these disciplinary tribunals. For instance, in his seminal critique of the adversary system, Sir Richard Eggleston\textsuperscript{801} proposes four features of the adversary system: the parties determine the conduct of the litigation up to the trial; procedure concentrates the judicial function into one continuous hearing; evidence is elicited by the parties; sanction for breach of the judicial body’s rules is normally at the request of a party. In respect of university discipline proceedings, the first two of these features tend to be present, while the second two are generally absent.

An important distinguishing feature of student disciplinary proceedings, therefore, is that the adversary-formulated approach of concentrating the decision-making process at a single, continuous hearing is combined with the inquisitorial method expressed in the leading, participatory role of the decision-maker. That is to say, the inquiry or investigative process is substantially limited to the oral hearing. There is no clear distinction to be made between the investigative component of the process and the adjudicative element. Preliminary procedure is, in this respect, minimal, and comprises principally of the process of ‘referral’ of a matter to a disciplinary tribunal.\textsuperscript{802} In practice, preliminary investigation\textsuperscript{803} does occur, relatively ad hoc, and there is no formal requirement to determine whether a prima facie case exists.

\textsuperscript{801} Sir Richard Eggleston ‘What is Wrong with the Adversary System?’ (1975) 49 Australian Law Journal 428, 429.

\textsuperscript{802} Preliminary investigations in disciplinary matters may be exempted from many of the safeguards built into the hearing rule of procedural fairness, under the assumption that the opportunity to be heard (and other accompanying standards as may be appropriate) will be afforded at a later stage of the proceedings: Velasco v Carpenter (1997) 48 ALD 22 (‘The rules of procedural fairness clearly applied to the inquiry and were to be adapted to the exigencies of an inquisitorial inquiry which was only in its formative stages.’)
It is noteworthy by way of comparison that statutory schemes for professional complaint and discipline have increasingly moved toward a separation of the procedures and powers of preliminary investigation and adjudication, or of complaint-handling and discipline. This trend has been referred to as ‘co-regulation’ (between profession and government agency). It has occurred as part of a move away from ‘peer review,’ or in other words internal regulation and sanction within ‘autonomous’ professional communities. Increased statutory control over professional conduct is, in this respect, in some contrast to continued ‘domestic’ regulation by universities in respect of students’ conduct – also under the rubric of autonomy.

It is worth bearing in mind that reform of procedure and powers in these jurisdictions was prompted by, among other things, injustices or inadequacies in previous models of regulation. The rise of a ‘consumer’-focused ethic has had a major influence on these new models of procedure. Consumerist discourse in higher education, by contrast, has seemingly led to little advance in models of individualised administrative justice.

803 The distinction between preliminary investigations (to which an opportunity to be heard does not necessarily apply) and a hearing proper (where the duty to afford an opportunity normally will arise) is considered further in Chapter 10, subsection 10.2.2, below.

804 See Thomas ‘Peer Review as an Outdated Model for Health Practitioner Regulation’. As Thomas notes in respect of ‘co-regulation’ (at 34): ‘It should be said that the Medical Board welcomed this development. Co-regulation provided investigatory expertise and resources which the Board itself lacked at the time and the new system [in NSW] operated successfully and relatively smoothly after it was introduced.’ Compare the description of the new procedural and regulatory arrangements for health practitioners in Victoria in the Minister’s Second Reading Speech, on introduction of similar reforms to the Victorian Parliament:

‘… the [Health Professions Registration] bill establishes better separation of powers in the disciplinary processes of boards. The bill provides for the hearing of serious allegations of professional misconduct by the Victorian Civil and Administrative Tribunal, rather than within each board. This reform separates the investigation and prosecution function undertaken by boards from that of hearing and determining such disciplinary matters. With the transfer of this function to VCAT, the bill preserves the principle of peer review in disciplinary decision making while creating a structural framework to ensure procedural fairness. Panel hearings within VCAT that make final determinations concerning health practitioners will be constituted by at least three persons, of whom two must be practitioners from the same profession as the practitioner who is the subject of the disciplinary action.’

(Victoria, Parliamentary Debates, Legislative Assembly, 27 October 2005, 1946 (Ms Pike, Minister for Health)).

805 Thomas ‘Peer Review as an Outdated Model for Health Practitioner Regulation’.
Chapter 8
University Discipline and the ‘Higher Education Crisis’: Student Advocates’ Experiences and Perceptions of Quasi-Judicial Decision-Making in the University Sector

8.1 Introduction

This chapter presents the third part of empirical investigations into disciplinary decision-making. In this case, the focus is on the experiences, perceptions and opinions of student advocacy staff within the university system.

8.2 Methodology

In the first half of 2006, 13 semi-structured interviews were conducted with 14 student advocates/student rights officers (working at 13 different public universities). Each interview was approximately one-hour in length. The interviews included questions intended to investigate disciplinary practice and procedure, provide an overall assessment of decision-making practices, and consider the impact of university commercialisation on this type of institutional action. The interviewees worked within a range of institutions, encompassing the spectrum of institutional types: ‘sandstone’ to ‘new generation,’ metropolitan and regional. Their experiences in the role also varied, with incumbency ranging from several months to 18 years and disciplinary caseloads ranging from single figures to hundreds. A schematic overview of information and responses is presented in Table 8.1. Interviewees are coded by number.

8.3 The Student Advocate

In the university system, the student advocate finds analogy in the role of union representatives before industrial tribunals, or alternatively in the concept of the ‘McKenzie friend.’ In the context of domestic university tribunals or disputes handling, student advocates advise students of rights, obligations and courses of action available. Additionally, they may represent students in internal hearings or in the ‘prosecution’ and/or resolution of complaints against university staff or decision-makers. University rules do not necessarily allow for a student to be represented before an internal tribunal, such as a disciplinary tribunal, although in practice it is commonly the case that direct representation by student advocates occurs.

806 McKenzie v McKenzie (1970) 3 All ER 1034; Krstic v Australian Telecommunications Commission (1988) 16 ALD 751, 754. Compare interview with R13: ‘My main role is to offer support and advocacy. We’re not recognised as advocates by [the university] when we enter the formal hearings; we are a
The role has emerged as a form of accessible, free, non-legal assistance to students, including in the performance of administrative justice within the institution. In respect of university discipline:

What I do is upon approach from a student who has normally been contacted by the university in relation to some part of the discipline or misconduct process [is] provide a student with advice and assistance in responding to that, be that at the more informal stages or the panel stage. That could include written submissions and personal representation at the hearing. (R3)

As one student organisation has succinctly put it: ‘In its essence, our casework revolves around problems – either the problems that students have with the university (grievances), or the problems that the university has with students (discipline, academic progress).’

Student advocacy is typically a service supplied by student organisations. The role appears to have evolved in the 1980s and 1990s in Australian universities as a response to distinct, if inter-related, needs. First, in welfare and academic support services for individual students; second, in the research and policy functions of the student organisations themselves and thereby in support of elected student representatives’ engagement in (internal and external) policy-making processes. In many instances, the dual role – individual assistance and representation, and engagement in policy-based advocacy – is maintained. Introduction of federal Voluntary Student Unionism laws, aimed primarily at removing non-academic fees charged to students, has had a significant and detrimental effect on the operation of student advocacy in the university system.

The experience of student advocates in the present sample varies considerably in terms of time served in the role and the number of disciplinary cases handled. Advocates who indicated a response have served between 1 and 18 years. Numbers of cases handled range between ‘4-5’

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“friend” or adviser. We can’t actually be advocates. But as employees [of the student association] we are advocates. We just tip toe around that in the formal hearings.’


808 ‘Of all the student services any student organisation can provide, independent advocacy and representation is the most important’: Council of Australian Postgraduate Associations (‘CAPA’) The Impact of VSU on Postgraduate Students (2007), 19. CAPA continues at 20: ‘Students are much less likely to approach an organisation providing advocacy services where they do not perceive them to be impartial and separate to the university. This is especially the case for international students.’

809 CAPA The Impact of VSU on Postgraduate Students, 21: ‘While the advocacy function initially assists individual students, generally the outcomes have wider implications as they often lead to changes in university policy and procedure. The advocate role also contributes to university accountability by ensuring that policy and procedures are implemented consistently and appropriately and by identifying any systemic issues that may arise.’

810 Typically at least a proportion of those fees were provided to student organisations or comparable bodies, whose functions included provision of advocacy services. CAPA finds in its The Impact of VSU on Postgraduate Students report that 30% of the 28 postgraduate organisations it surveyed were no longer able to provide advocacy following VSU. This appears to have had a disproportionate impact on international students. The authors note (at 20): ‘At universities with a relatively high international postgraduate student enrolment (over 30%) [international students] comprise approximately 90% of PGSA caseload.’
and approximately 1000. It is not uncommon for advocates to have handled dozens of such cases.

8.4 Nature of Disciplinary Proceedings

The nature of student disciplinary proceedings has been considered at some length in Chapter 6, including the right to fair procedure, and the ‘quasi-judicial’ and ‘inquisitorial’ character of proceedings. The inquisitorial characterisation of procedure is acknowledged or indicated by all student advocate interviewees. An informal approach to proceedings is also noted in some instances, although elements of formality are noted in other circumstances. For example:

A: The student is required to enter a plea. The prosecutor gives the case. The student, either by themselves or through their representative, is able to give a response. Then essentially what happens is that there is a discussion between the members of the panel, the prosecutor and the student and their representative. That discussion will generally deal with –

Q: By discussion you mean drawing out information from all the parties?

A: Yes there is a process of questioning, which is usually initially conducted through the chair but then usually degenerates into more informal type of discussion where members of the panel question the complainant and the student or their representative. But there is even the opportunity as part of that process for occasionally as part of the discussion process the student and their representative and the complainant will have direct interaction independent of the chair. (R3)

Generalisation of disciplinary procedures is complicated by proliferation of rules and administrative (policy) instruments in addition to statutory codes. Disciplinary rules, nonetheless, have certain common characteristics: the disciplinary code of proscribed behaviours; primary decision-makers, often at first instance at a ‘local’ Faculty or School level; a disciplinary tribunal for more serious incidents or for appeal hearings; a schedule of sanctions; rules of procedure; and occasionally provision for a misconduct register.

8.5 General Assessments

All interviewees expressed a greater or lesser degree of discontent with the decision-making process in disciplinary cases, and by extension a broader or narrower critique of the process. That outcome is partially captured in interviewees’ response to a request for an overall assessment of disciplinary action: 7 out of 13 responded that the process of ‘unsatisfactory,’ 6 out of 13 responded that they found the process ‘satisfactory’ or alternatively they provided somewhat more ambivalent responses. Weight of opinion generally may fall toward categorising the system as deficient, but this finding is qualified by a spectrum of critique, ranging from specific procedural problems at one end through to significant structural problems with disciplinary action at the other end. For instance, interviewee R8 was generally satisfied by

811 See Chapter 6, section 6.4, above.
the process but raises a number of specific procedural problems, such as the low standard of
proof employed by the disciplinary tribunal, possible appearances of bias and the technical
difficulties of hearings by teleconference. By contrast, interviewee R9 is fundamentally critical
of the function of disciplinary action per se:

The way it was done… I’ve seen it at other universities… there no real useful role for it. There’s
no way it would have increased the quality of the students’ work. They always preface
discussions any conversation about plagiarism with phrases like ‘integrity’ but there was no
actual impact on that [academic integrity]… by student discipline. (R9)

The opinion of interviewee R11, alternatively, is that the quality of decision-making is uneven,
depending in part on the nature of the procedure (general or academic misconduct) and who is
handling the matter: ‘I find some people here are really good, other people (the same as any
university) have more questionable practices.’ (R11)

8.6 Procedural Safeguards

As a means of providing a measure of standards across institutions, certain questions put to
interviewees sought to elicit their opinions and experience of legal (procedural) safeguards for
students. These safeguards arise in the application of administrative law principles to
disciplinary action against students. Across the sector application of the doctrine of procedural
fairness in the construction of disciplinary schema is mixed, and indeed the content of the duty
to accord procedural fairness in university cases in not entirely settled.812

Key features of procedure considered include: provision of adequate particulars (as part of
notice), whether disclosure of evidence or material to be relied on in decision-making was
adequate, whether the onus to prove misconduct was placed on the ‘complainant’ authority or
officer, whether written reasons were supplied, and whether the advocate was entitled in
practice to represent the student.

Lines of questioning in regards to these legal standards sought, therefore, to inquire into the
substance of those rules. For instance, in eliciting perceptions or opinions as to bias,
interviewees might be asked whether they perceived a decision-maker had formed preconceived
views or had not approached their task with an open mind. That line of questioning therefore
tests for experiences of actual bias:

Clearly a panel can take on an inquisitorial role and can be seen to be quite involved in the
process, and that doesn’t necessarily make it biased. In your opinion are there instance where a
panel has a preconceived idea about what the outcome should be? (R6)

812 With respect to these points, see Chapter 6, section 6.2, above.
In respect of issues such as provision of particulars, it may be asked of interviewees whether notice includes details of rules allegedly breached, circumstances of the breach, and allegations of fact. In respect of provision of reasons, questioning may go to the explanatory value or contents of decisions:

In your experience do you think the reasons are usually an adequate explanation of why the investigator’s come to that decision… it may be for instance they don’t adequately consider the facts…? (R10)

8.6.1 Hearing

All the institutions at which respondents work provide for a hearing at first instance for students alleged to have breached disciplinary rules, as well as an appeal facility. Where respondents raise concerns about hearing procedure it typically relates to the conduct of proceedings rather than access to a hearing per se: ‘[The disciplinary process] provides the opportunity for a hearing. There’s no summary justice in that sense, there’s no summary decision-making. It provides the opportunity for a hearing but I don’t think it necessarily provides the opportunity for a fair hearing.’ (R3, New Generation)

8.6.2 Particulars And Disclosure

The question of sufficient notice is fundamental to provision of a fair hearing. The issue of particulars (including allegations of fact or action) in the context of an accusatorial process allows the accused person to know the charge against him and the case he/she has to meet. Respondents were asked specifically about the provision or notice and particulars, and 8 out of 12 considered the provision of particulars to be adequate. This rate of provision of adequate particulars is slightly lower than might be expected in an inspection of disciplinary rules across the sector. ‘Adequate’ in the circumstances was viewed as including factual information. General satisfaction with particulars does not prevent dispute arising over the question of notice. In a minority of cases adequate particulars remain outstanding, but the issue of disclosure draws greater concern. Of the 9 respondents who contended with this issue, 5 identified university disclosure as inadequate. In one instance (R9) the situation was seen to improve over time. Disclosure may be seen as an extension of the duty to provide sufficient notice, and in university tribunals two circumstances of inadequate disclosure are raised. First, the university is generally obliged to provide to the student documentary evidence that is ‘credible, relevant

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813 In one interview, R7, there was evidence provided by the interviewee suggesting that, in minor academic misconduct cases, disciplinary action proceeded without the opportunity for hearing.
814 See chapter 6, section 6.5.2, above.
815 Chapter 6, section 6.5.2, above; although compare Berger and Berger ‘Academic Discipline: A Guide to Fair Process for the University Student’, 297, where rates vary depending on the content of the notice.
816 For example, in respect of pre-hearing access to evidence: see Forbes Justice in Tribunals, [10.13].
and significant to the decision to be made," or may be prejudicial to the student. Failure to provide documentary materials was a first point of concern. For example:

A: …What we find is that often students aren’t properly informed of their rights, they’re not informed of what the suspicions are or what evidence there is, and it often seems to be approached on the assumption that the student has indeed cheated. What then gets reported to the HOS is often only a partial take on things. They’ll report all the stuff that the student says to indicate that they might be guilty, none of the stuff about circumstances or other issues.
A: The other important feature of that is that one thing that the schools really pushed for when the plagiarism procedure was being drafted, was students would not have access to evidence because they felt it would be prejudicial to finding the truth.
Q: So under the current system they’re required to give students evidence?
A: There’s no explicit outlining of what particulars the charge actually means. Students were receiving in writing particulars of the charge, but we’ve been having an ongoing battle with the University about the interpretation of that. We did get it confirmed in writing from the Academic Registrar in the case of one particular school, but she refused that to be allowed to be generalised. (R1, 4)

Secondly, shortcomings in disclosure concerned the conduct of inquiries by the decision-maker in the absent of the student; that is, adducing oral evidence with no opportunity for a student to know of its contents and/or meet it. Conceding that it is acceptable for evidence to be taken in this manner in preliminary inquiries, the problem arises where no opportunity exists for a student to know of potentially adverse information and deal with it prior to a decision being made. For example:

Q: …when matters go on appeal, which is the only time there’s actually a panel hearing, you mentioned before it’s somewhat more of a formal process
A: Yes
Q: … by a panel, but that tends to be an inquisitorial process as well?
A: Yes
Q: Rather than an adversarial one
A: Yes, yes, it’s inquisitorial. There’s no applicant and respondent, it’s just the applicant with the Board
Q: And the student, or all the parties are not present at the same time?
A: That’s correct
Q: They’re interviewed separately?
A: They’re interviewed separately.
Q: So there’s no opportunity for each one to test statements by the other…?
A: That’s correct and, you know, in our view that’s one of the big problems with the process.

8.6.3 Written Reasons

There is no general obligation at common law in Australia for administrators to provide reasons for decisions as a component of procedural fairness. In some jurisdictions, there may be obligations to provide reasons under statutory review schemes. It is not uncommon for

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817 Kioa v West (1985) 159 CLR 550, 629 (Brennan J).
818 Kanda v Government of Malaya (1962) AC 322.
universities to require, in their rules, reasons for decisions to be provided.\textsuperscript{820} While there is not a neat correlation between the institutions surveyed for the former research and the institutions from which the present sample of advocates were drawn, the evidence from advocates suggests that written reasons are even more unlikely to be forthcoming in practice. Eight out of thirteen interviewees noted written reasons were not provided; in one instance reasons were provided in particular types of hearings (in specific faculties) (R5); in one instance, they were provided on appeal but not at first instance (R7), and two other interviewees noted they were supplied ‘sometimes’ or ‘occasionally.’ In only one instance (R13) did the interviewee indicate adequate written reasons are supplied as a matter of course. The value of properly constructed reasons in student disciplinary proceedings, preferably supplied in writing, accords with those benefits relevant to fairness in administrative decision-making more generally: to provide better quality, more considered, decisions; to allow decisions to be scrutinised for correctness or propriety; and to show respect for the subject of the decision and allow him/her to understand the basis of it.\textsuperscript{821}

There are two other factors, which amplify these principles of fairness. First, university discipline proceedings typically take place in camera. There appears to be little in the way of record of many decisions, let alone explanation, especially at Faculty or School levels. Second, as an extension of the principle that a decision ought to be explicable to the person affected by it, there is educative value for students subject to disciplinary action in the reasons for university sanction. This proposition is not merely an alibi for greater scrutiny of decisions. The educative effect of disciplinary action is, in the context of many academic misconduct proceedings, an extension of the academic operation of the university. It was noted by several interviewees that an educational approach is often taken to the misconduct process, especially where plagiarism or poor referencing is involved, or alternatively that an educative approach ought to be taken. Indeed, in those institutions with ‘misconduct register,’ a first breach of these rules may often be considered as expressly an educative problem; only subsequent breaches may be considered as truly disciplinary issues.

\textit{8.6.4 Bias}

Absent written reasons or transcripts, or judicial review of disciplinary action in the courts, investigation of university hearings for bias is a difficult task. The perceptions of student advocates provide a useful, albeit indirect, means of assessing the ‘judicial style’ of disciplinary decision-makers in respect of impartiality (or ‘disinterestedness’\textsuperscript{822}). The issue of a lack of impartiality on the part of decision-makers recurs in the course of the interviews, usually in

\textsuperscript{820} In respect of these points, see Chapter 6, section, 6.5.5 above.

\textsuperscript{821} See Galligan \textit{Due Process and Fair Procedures}, 431-434.

\textsuperscript{822} Allars ‘Neutrality, the Judicial Paradigm and Tribunal Procedure’, 398; see Chapter 7, section 7.6, above.
perceptions of conduct or statements portraying preconception, or conduct exhibiting inappropriate associations.\textsuperscript{823}

In 8 of 13 interviews, the issue of bias arises. On the question of the ‘state of mind’ of decision-makers, there is a body of opinion among the interviewees that decision-makers approach their task, occasionally or commonly, with pre-formed ideas and preconceived outcomes. This response is impressionistic but repeated:

Q: In those faculties, or any faculty, but those ones in particular, have you had situations where you’ve had a relatively strong case that a student is not guilty of an offence and they’ve been found guilty?
A: Yeah, some. Some have got off though.
Q: What I’m trying to get at, in those situations that you’ve explained, do committees disregard evidence?
A: They generally take what the student says with a grain of salt. I think what the problem I find with both those faculties is that they don’t enter into the committee with an open mind. They enter the committee with an idea that the student is already guilty and their idea of what’s already happened. No matter what the student says or what explanation they offer they just harass them about it and say ‘No what actually happened is this.’ Even though the student says that isn’t what happened. (R13)

A: …When we walked in the room most of the time there was no question that a committee had a belief –
Q: Had formed an opinion?
A: Yep, Yep –
Q: Beforehand?
A: Yep.
Q: What sort of indications did you get for that?
A: Because they had no follow up or no other way of further investigating the matter if the student had a reasonable explanation for the questions they were asking.
Q: Where there’s a dispute over the facts, for instance. Say for instance the student’s disputing they committed plagiarism, the fact that they didn’t do it –
A: That’s where hearings would go on for longer. Usually repetitive, back and forth, and members would ask the same questions. They were trying to wear the student down. (R9)

Q: An example that you gave before about the, even the Chair of that panel or investigator approaching the task not necessarily with an open mind that they might have a preconceived idea about what’s happened here or who’s in the wrong, does that occur?
A: Yes, I think very much so, I mean I think that touches on you know people seeing what their role is and divorcing themselves from representing the University in those roles.
Q: What sort of things would they say that would give you that impression?
A: Well they just give more weight to say an academic that’s made an allegation as opposed to a student. You know, I think that’s probably the best way to put it. They simply give more weight to. I mean the case that comes to mind the placement supervisor made various allegations. Now, you know as far as the investigator was concerned, the School reaffirmed those allegations, that was far more persuasive evidence than anything the student had to say and I you know I believe the process was begun that way really.
Q: Does that happen in other cases too?
A: Yeah, from time to time, yeah sure. (R10)

\textsuperscript{823} Such as informality between the decision-maker and a ‘complainant’ (compare Simjanoski v La Trobe University [2004] VSC 180), or a complaint directly ‘prosecuted’ by a person with direct line-management relationship to the decision-maker (see R v Cambridge University; ex parte Beg [1998] EWHC Admin 423, [59]).
Perceptions of prejudgment with respect to the treatment of international students is also noted by the interviewees:

A: I just want to add – and this is not my subjective view – and probably many of us [advocates] will tell you, that if an international student is in a hearing or is accused of plagiarism usually, it’s a low probability for him to get a soft outcome.
Q: You mean for an international student, there is a likelihood that they’re going to get treated more harshly because they’re international students?
A: Yes, and because it is identified that international students have more instances of plagiarism. But rather than dealing with it positively or progressively they tend to penalise them to send a message, and it’s not my subjective view –
Q: There’s a pattern of it - ?
A: There’s a pattern of it.
Q: Even if you had a domestic student at a hearing and then an international student going to the next hearing, and the circumstances were identical, you’d say the international student is going to get treated more harshly?
A: He’s likely to have a harsher punishment, yes. In the same faculty for a similar sort of plagiarism, yes.
Q: Is that across the board or in some faculties?
A: Specific to some faculties. (R2)

The other circumstance in which the problem of bias is manifest in the evidence of student advocates is in the conduct of proceedings, and in particular where the person bringing the accusation remains with the tribunal or decision-maker during their deliberations (or possibly participates in the deliberations), suggesting a quite literal breach of the nemo judex rule. The latter person may be an academic staff member or a more senior officer:

Q: Can I go back to how they conduct the hearing? When you’re in the meeting with the HoD and say the lecturer, have the lecturer and the HoD discussed the matter beforehand?
A: I’d say so.
Q: When it’s been discussed in the course of the hearing, is the lecturer asked to put their side of the case at that time?
A: Oh yep. It depends. Sometimes it’s clear-cut and the student will say ‘I did it.’ The HoD who will explain it. The reason being because it gives the context of why it’s severe and serious and they want it to be seriously regarded –
Q: What I was trying to get was what the relationship between whoever the accuser is – the lecturer or tutor – and the HoD at the time. For instance, once the student has been able to put their side of the story, does the HoD and the lecturer or tutor discuss it subsequently when the student’s not there?
A: Yes. They usually ask us to leave the room.
Q: The decision that’s made, even if it’s just a decision on penalty, is that made as a matter of consultation between the two of them?
A: I’d say so.
Q: Not simply made by the HoD?
A: No. (R16)

The question of bias may be closely associated with another form of legal error perceived by interviewees, the tendency to impose the legal burden of the case on the student (accused) rather than on the ‘complainant.’ This is a common complaint or observation of advocates. When

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824 Or at a minimum, if not the ‘complainant’ or a ‘party,’ involved in referring the accusation or giving evidence in support of it.
825 Compare Stollery v Greyhound Racing Control Board (1972) 128 CLR 509.
826 See Chapter 7, section 7.5, above.
asked directly about it, 8 of 13 interviewees concluded that the burden of proof was placed on the student in disciplinary hearings.\(^{827}\)

8.7 Organisation of Procedure

Reform of professional discipline jurisdictions over the past two decades in Australia has commonly resulted in a reorganisation of procedure and redistribution of powers within the disciplinary process. These changes have occurred by statutory prescription with an aim of producing greater transparency and accountability in decision-making, and with the effect of separating complaints-handling and investigations from disciplinary adjudication.\(^{828}\)

Subject, by comparison, to little public scrutiny or extended critique, university discipline has not tended to go down this path, notwithstanding certain tendencies toward autonomous (usually internal) complaints-handling bodies\(^{829}\) and statutory requirements for review of decisions.\(^{830}\)

University discipline procedures present analogies to the older ‘peer-review’ model of professional conduct investigation and complaints-handling, especially with regard to absence of clear delineation between preliminary investigation, adjudication, and appeal. Problems with an obscure demarcation of investigative and determinative action also emerge periodically in truly domestic proceedings.

For university discipline it is the distinction between, and transparency of, preliminary investigations and the adjudicative (therefore determinative) process that is commonly adverted to by student advocates. Each interviewee was asked to explain the disciplinary process. This explanation typically identified the cycle of procedural arrangements in place. In practice, several different models appear to operate. It is not uncommon that a process of preliminary investigation operates informally, with greater or lesser rigour, at the ‘local’ (eg School or Department) level, from which a ‘referral’ is made to a disciplinary body (whether a tribunal or an officer with powers to determine the matter). Alternatively, an informal process of inquiry and decision-making may occur, in which the process of informal investigation and formal hearing is obscured. A number of advocates were critical of this type of action for the lack of procedural safeguards, and the discretionary, if not arbitrary, nature of these ‘hearings.’

\(^{827}\) It was alternatively expressed in the interviews as a presumption of guilt falling on the student. Three interviewees felt that the onus to prove their case did fall on the ‘complainant’; in one case, the onus fell correctly ‘sometimes,’ and in another instance it was felt that the burden fell on the student at first instance but was correctly applied in appeal hearings.

\(^{828}\) See Chapter 7, subsection 7.12.2. above.

\(^{829}\) Such as establishment of internal ombudsmen: see eg Rachael Field and Michael Barnes ‘University Ombuds: Issues for Fair and Equitable Complaints Resolution’ (2003) 14 Australasian Dispute Resolution Journal 198.

\(^{830}\) HEP Guidelines 2005, subss 4.5.2, 4.5.5; National Code, Standard 8.
Q: …what does happen when a student’s charged? When these matters are raised with a student even whether they’re charged or not?
A1: It can range. It depends on what School the student is in because some schools have a very good understanding of the procedure and other schools either have an understanding and ignore it, or don’t have an understanding of the procedure. So you get lots of situations, really inconsistent, in the worst Schools you get situations where students are called in for informal discussions, get sent emails before any communication has been sent to them, students not receiving results for marks and then querying that and at that point being told informally, we caught you cheating, you’ll be getting a letter ...
A2: I reckon 70-80% of the time there’s some sort of informal interview with the student or informal communication
A1: Which is a procedural breach. (R1,R4)

A: The first instance is that the student meets the HoS and another person, such as the lecturer, the person who marked their paper.
Q: Is that relatively informal?
A: It’s roundtable, very informal. Usually they say ‘we think you did this, you may or may not have done this is your opportunity to ‘fess up.’ Then there’s a more formal meeting, with a representative of the registrar. We call him the ‘dobber.’ The ‘dobber’ makes a report and that goes to the registrar. The report is –
Q: At what point does it shift from one to the other?
A: It tends to be up to the HoS to report it. They’ll report it straight away if it’s a second offence or if they think the person’s being a bit cheeky about it.
Q: So it’s quite discretionary?
A: Yeah. Absolutely. And that’s one of the problems we’re sort of looking at the moment. (R5)

Discretionary or informal handling of disciplinary issues in the university sector may be problematic in terms of the proper application of legal standards, this ‘short-cut’ approach is not solely explicable in terms of the workloads pressures involved. For academic misconduct cases, the issue may be genuinely educational and there may be the inclination or desire on the part of a ‘local’ decision-maker to view disciplinary powers as a reasonable extension of a professional academic discretion. The problem is, of course, the student’s interests may be adversely affected by the decision, even where this is an academic penalty; the disciplinary nature of the action can be difficult to avoid.

In other circumstances, distinct mechanisms for preliminary investigation do appear to operate. This may be in the form of investigation by a ‘subject panel’ (R9), or by a dedicated ‘investigations officer.’ (R10, R7) In the former circumstances, it would appear that the investigation is genuinely ‘preliminary’ and not determinative. However, in the latter cases, the function of the investigator replicates elements of the ambiguity evident in other forms of ‘local’ (School or Departmental) decision-making. While such officers may function in the manner of ‘pre-hearing’ investigators (eg conducting separate interviews with involved individuals), they appear also to possess limited discretion to apply penalties or sanctions. Again, it would appear there is a confusion of procedure in this approach, between ‘preliminary’ and ‘final’ (ie determinative) inquiries:

831 Compare Sutherland-Smith ‘Hiding in the Shadows’; Chapter 4, section 4.4, above.
A: Yep, well, at the investigation, I mean I attend with the student, normally the investigator asks, you know, does questioning of the student about the matters concerned, you know, the student provides answers. As an advocate I provide submissions, etc, to the investigating officer. Sometimes, we even give submissions to them on penalty if it’s a case where that’s appropriate, and then the investigating officer, writes up, writes up a decision with reasons and then provides, promulgates, those. If we’re not happy with that outcome then it goes to an appeal board…

Q: With regard to how the investigation’s conducted, it is not normally the practice that everyone is present during the course of the investigation, that is the student and yourself, whoever’s bringing the complaint, any other people involved in the process, they’re all interviewed separately.

A: Yeah, that’s correct. That’s absolutely correct.

8.8 Discipline, Commercialisation and the University Crisis

In light of these concerns, how might ‘domestic’ administration of justice in student misconduct cases be affected by underlying social and economic conditions in the university sector?

Student advocates were engaged in discussion about the impact of commercialisation of the universities on student discipline and disciplinary processes. They were also asked about the place of university discipline in university operations. It was to be expected that interviewees were familiar with relevant government policy settings and institutional responses. In part, this expectation arises because of the policy-research role advocates often maintain (or they work closely with specialist research staff); in part, experience in dispute handling would necessarily require knowledge of institutional conditions and general government policy arrangements for the sector.

8.8.1 The Concept of Sectoral Crisis

Long-term decline in public funding to higher education, ‘uneven development’ within the sector, and ‘disengagement’ of students with institutions are among the key factors giving rise to a discourse of ‘crisis.’

It is a recurrent theme in analyses of higher education policy that government funding as a proportion of all revenues has fallen from around 90% in the early 1980s to approximately 40% in 2006. The balance has largely been made up by income from private sources, most notably student fees in the form of up-front payments or ‘deferred’ fee arrangements. This trajectory has occurred under the influence of ‘market forces’ in the sector, commodification of ‘education

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832 See, generally, Chapter 2, sections 2.2-2.4, above.
services,’ and commercialisation of the approach of institutions to the ‘delivery’ of higher 
education and research. Reinvention has broadly led to emergence, with variations, of an 
‘enterprise university.’

‘Crisis’ has been viewed as a concomitant effect of the market-based approach and 
commercialisation. A watershed moment in public circulation of the concept was publication of 
the Senate Employment, Workplace Relations, Small Business and Education References 
Committee’s 2001 Universities in Crisis report. That Report considered a wide range of causes 
and effects in the higher education sector’s problems. Issues of austerity, the market imperative, 
commercialisation, lack of direction, and ‘erosion’ of the pedagogic and intellectual base of the 
universities were central to their conclusions.

For present purposes, two manifestations of crisis are pertinent. The contradiction, as Marginson 
has put it, of ‘global enterprise’ and ‘local squalor,’ or what I would term, following Andre 
Gunder Frank’s analysis of development economics, the ‘development of under-
development’ in teaching and learning, is symptomatic of unfolding conditions in the 
universities:

The universities failed to maintain support for core teaching and research activities both because 
of absolute lack of finance and because the incentive structure created by policy propelled scarce 
expenditure in other directions, especially corporate and commercial development.

The second development is the changing circumstances of the student, both ‘objectively’ in 
terms of the balance of education and other commitments (notably paid work), and 
‘subjectively’ in terms of cultural dispositions and practices. These elements of ‘crisis’ have 
been encapsulated in concepts of ‘disengagement’ or ‘negotiated engagement’ of students with 
the academy.

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835 See generally Marginson Markets in Education; Marginson ‘Investment in the Self: The Government 
of Student Financing in Australia’.
836 Considine and Marginson The Enterprise University.
837 See, in summary, Senate Employment, Workplace Relations, Small Business and Education 
References Committee Universities in Crisis, [1.20]-[1.39].
838 Simon Marginson ‘Global Enterprise and Local Squalor: Australian Higher Education and the 
International Student Market’ (Australian Association for Research in Education, 2001), 
840 Compare Chapter 2, sub-section 2.2.2, above.
841 Marginson ‘Global Enterprise and Local Squalor’; see also Senate Employment, Workplace Relations, 
Small Business and Education References Committee Universities in Crisis, [1.21]: ‘There was almost 
unanimous agreement that current levels of government funding are inadequate to sustain the quality and 
diversity of core teaching and research functions.’
842 See Chapter 2, section 2.4, above.
8.8.2 The Impact of Commercialisation on University Discipline Generally

These forces and developments are powerful factors bearing on the function and uses of university discipline, especially where the problem is associated with a ‘crisis’ of academic standards,\textsuperscript{843} of integrity, and public reputation.\textsuperscript{844}

In the course of interviews, 11 out of 13 interviewees made reference to the impact of commercialisation. Of those, 8 unequivocally considered that it had had an impact on disciplinary processes at the university, one said it did not, another said it did not other than in one course, and another stated it was ‘possible’ that commercialisation had an impact. Given the sweeping changes to higher education over two decades it is hardly surprising that the weight of opinion was that those changes had affected the character and uses of disciplinary action.

8.8.3 What Role for University Discipline?

When the relationship between academic standards and university discipline was raised with advocates the response was intriguing and complex. Even the more critical interviewees saw a role for disciplinary action. Grounds for ongoing legitimacy of university discipline may vary, however. Maintenance of academic standards is one reason.

Q: Do you think student discipline procedures are appropriate in a highly consumerised university? Should they still be there?
A: Yeah, I think it is important because it does maintain integrity of the award. Many students are accused of plagiarism because of skill gaps, but there are students, not many, who are doing it intentionally. Such a mechanism does help university to maintain integrity. (R2)

But another, reason is the status of the student as a member of the university, which gives rise to (public) legal rights and obligations:

I think there is a place for discipline because the student is a constituent of the university and I think that despite the shift to corporate service provision by the universities, students still retain – the concept of client or customer is not entirely reflective of the student role of experience. I think that there still are aspects of the student’s membership of the university which give rise to rights and obligations that are dealt with some kind of due process. There is a role for a discipline process of some form. I’d suggest it needs to be revised significantly… (R3)

Interestingly, universities appear to be experimenting with new discourses of student subjectivity, in an attempt to navigate problems in the commercial model of student-university relationships. In part, these innovations are aimed precisely at combating rhetorical weaknesses in applying disciplinary controls and standards to the consumer-service provider model:

\textsuperscript{843} Senate Employment, Workplace Relations, Small Business and Education References Committee’s \textit{Universities in Crisis}, [5.26]-[5.54]; Abelson ‘Surveying University Student Standards in Economics’.
\textsuperscript{844} See Chapter 4, section 4.4, above.
Q: In your opinion what do you think the role is for discipline processes is in the university? Does it shift the balance or affect the rights of students? They’re paying a lot of money…
A: [The University] is just starting to use the rhetoric of the university as not so much a service provider but as a stockbroker, a facilitator, that can provide a portfolio of experiences and portfolio of education. It’s up to the individual to choose what they want. I have a feeling that that rhetoric is going to become quite well entrenched, certainly at [this University], and it wouldn’t surprise me if it started to spread to other institutions. It’s kind of a tempting rhetoric to see the university as a facilitator rather than a service provider in that it gives the university scope to discipline students, to say you’re paying for this but at the same time we’re allowed to wrap you over the knuckles, we’re allowed to do whatever because you’re not buying a service from us, you’re buying an opportunity. You’re paying us to provide an opportunity. It’s going one step beyond the simple service provider customer relationship; it’s actually going to the next level. (R6)

8.8.4 Administration of Discipline: First Point of Crisis?

A persistent theme in the interviews is concern on the part of advocates with uneven standards applied by disciplinary bodies within institutions, often combined with concerns about highly discretionary approaches to decision-making, and a lack of understanding about the ‘judicial’ nature of the role. The problem of unevenness of approach was stated by 9 out of 13 advocates; only 1 found this was not a concern. Unevenness in this context refers to inconsistency, notably between Faculties or Schools, but also over time. In practice, this may mean considerable variation on the part of decision-makers about how they approach matters, conduct proceedings, and apply penalties/sanctions.

A distinction is often made between those Faculties whose approach is clearly punitive and others where the approach is ‘educative,’ which may not be problematic as such but raises concerns, notably in the former circumstances, that the approach is symptomatic of prejudice or infected by ulterior motive (eg facilitative of a general ‘campaign’ against plagiarism). I consider these issues further below. Appeal mechanisms had some effect in ‘evening out’ the standards of decision-making across institutions, such as where the procedures where more formalised (R1&4), or chaired by a lawyer (R6) or a person external to the University. A lack of training and/or comprehension of the quasi-judicial nature of the function are also noted by several interviewees.

845 For example, where the panel chair was an external member of the University Council, or the tribunal was chaired by a judicial officer.
8.8.5 Managing Tension and Contradiction: Disciplinary Control as a Response to Pedagogical Crisis

Pedagogical crisis in the universities has a number of key signifiers. I use the term to mean ‘rupture’ or ‘deterioration’ of the educational cycle, in the relation of teaching and learning. Upward trends in student-to-staff ratios; high rates of casualisation of teaching; ‘disengagement’ of students from class and campus; displacement of resources from educational delivery to administration and commercial projects; poor English-language competence are all representative of the phenomenon. These sociological indicators of crisis are reinforced by notions of cultural crisis in the academy, which may be seen to have its roots in the instrumentalisation of academic knowledge.

Interviewees considered, in some depth, the relationship between this academic crisis and the function of disciplinary controls. There is evidence from student advocates that resource austerity in teaching and learning and problems with pedagogical methods (often associated with resource pressures) directly contribute to growth in misconduct rates and consequently in disciplinary action. From this perspective, misconduct is symptomatic of the crisis in universities’ ‘core business.’ Thus, it is noted by various interviewees that quantitative indicators (eg growing class sizes, casualisation of teaching) signal an erosion in the quality of the pedagogical relationship (interaction of teacher and student), and that there is a necessary link between these factors and rates of disciplinary proceedings. Problems with academic methods and administration also constitute a source of strain on the pedagogical system, giving rise to disciplinary action. These two points (quantitative deterioration and various forms of qualitative stress) are clearly inter-connected. It may be broadly stated that, in respect of both qualitative and quantitative dimensions of the ‘crisis,’ many student advocates, in their discussion on the impact of commercialisation (and otherwise), draw unambiguous connections between the conduct of institutions (and government), including their academic conduct, and the impugned conduct of students. For example:

A2: The other area that commercialisation and privatisation has on this is that, take computer science for example, all those problems we were having with that school a few years ago, how many times we wished that the school had enough money to be able to run proper staff training days. There was no staff training and most of the staff had never even read the procedures let alone understand them. They haven’t had them explained, they don’t get any opportunity to reflect and provide feedback to the HOS, they don’t get any opportunity to de-brief with each other about individual matters.

846 Looking more frankly and theoretically at the political-discursive underpinnings of the ‘market order’ in contemporary Australian higher education, Marginson employs the term ‘desolation’: Marginson ‘They Make A Desolation And They Call It F A Hayek’
847 See Chapter 2, sub-section 2.2.2. above.
A1: And they had about a third of the plagiarism problem that they thought that they had. The problem they had was because their assessment was boring as batshit and really poorly conceptualised. . . .

Q: So are they the circumstances leading to a disproportionate volume of disciplinary cases.
A2: Exactly. That’s what I’m saying. You’ve got more students being picked up for plagiarism because there’s 4 courses on, the exam hasn’t been changed for the last 5 years, the exam paper was just sitting in the library just waiting for someone to memorise the answers. (R1, R4)

. . .

Let’s say there were two students sitting next to each other in the lab to the wee hours of the morning. A full lab. They’d be doing the same assignment and talking to each other a bit it, as you would. But because they were in a different group and there were similarities noticed – and it may be a sentence or something – that’d be identified as plagiarism or misconduct. There was this sort of line where that would have been okay within the group and collaboration would have been encouraged. But if that set of circumstances it wasn’t allowed. The committee would quite often try to get a student to admit that they’d intentionally colluded. If there was a situation where a student had consistently higher grades they’d try to imply that one student was trying to gain advantage at the other’s expense.

Q: Given the changes in universities, more commercialised, more concerned with things like plagiarism, resource pressures, in that context, what do you see as the role for these disciplinary procedures?
A: Where things like vague referencing, or work in collaboration, those things really need to be dealt with. And just inadequate teaching, unavailable teachers. Those things could have been dealt with the school level. They probably made a decision that it cheaper to run a discipline campaign and if you put it in the constraints of a commercial university that’s a possible explanation for why that’s all happened. That didn’t really work for them. (R9)

Part of the prevailing critique of universities in their handling of disciplinary issues arises from concern and frustration that institutions have been overtaken by events, and that, in applying disciplinary controls, they are ignoring broader obligations as educational bodies:

A: The whole playing field has changed. The way universities used to operate – You can’t have the absent-minded professor any more. You’ve got to have someone who’s professional because people are paying thousands on thousands of dollars. They don’t want some idiot, who’ll turn up twenty minutes before the end of the lecture and say ‘Oh I’m sorry, I’ve got to have a lecture today,’ which was what it was like when I went to uni. And that was great, but the expectation of students has changed. . . When you get money involved it’s not like the students are buying a Mars Bar… It’s like they’re buying their education. . . The whole prevalence and rise of plagiarism – plagiarism detection software is often used to get out of plagiarism. I’ve had students get someone else’s essay and change the words, submit it to the plagiarism detection software and change the name... and then they have a report saying it’s not plagiarised. So it’s all changing. The problem is that when you’ve got so much money when students are under such pressure to pass... every dollar counts. They can find a fast-track. . . The university has to recognise that the plagiarism issue has changed, the pressures students are under, and the role misconduct plays.

Q: What do you think the role of misconduct should be?
A: Philosophically I still believe in free education... and I think education is the most important line. Plagiarism should be pulled up. I think it should be pulled up in a more educative role than the university is currently doing, and there is a role for misconduct... It also has to change with the way the university is changing.

Q: For instance there needs to be a much more educative dimension to panel hearings?
A: Yeah, and if you’ve got a student who has got a hearing for plagiarism and they’ve had no idea whether they were doing it, it comes back to... the university’s got a responsibility to basically educate the student.

Q: Misconduct processes are often used in the context of ensuring standards of education, at which point you may respond ‘Does the university have a responsibility to deal with that question when the students comes here?’
A: I think that’s something that’s just been brought up at the plagiarism working group … The thing about academic standards… when you’ve got lecturers with 400 students and you might catch one or two students… I think no one is under any misapprehension that plagiarism is rife. It clearly is, whether it’s known or not known… And while the universities go for this really economic rationalist line and increase workloads – the whole system is just totally unbalanced. (R13)

The dismissal of university discipline per se by Interviewee R9 (see above ‘General assessments’) is merely an extension of this thinking: that the role of disciplinary sanction as a means of safeguarding academic standards has broken down.

Short of this conclusion, there is a sense that institutions are misusing the disciplinary system, largely because they are unwilling or unable to deal with wider educational problems. One manifestation of this argument is the claim that disciplinary controls have become important for management of public perception of the university’s academic standards:

A: Well I’ve even heard it said in hearings that the university has to be careful of its reputation… Reputation and the ability to market itself as one of the big universities in Australia.
Q: The question of reputation, or the sensitivity to reputation, how does that affect how they approach the matter? Are they more severe about discipline or they’re less?
A: They’re more severe. When it comes to plagiarism cases this is where it comes out most frequently. They’re worried about letting people slip through the system and end up with an inferior [University] degree and thereby dragging the name of [the University] down in the outside world. I’ve heard them say that in discipline hearings. That’s the big concern of theirs… (R6)
…
Q: … when you’ve got vast volumes of students going through and enormous resource pressure… and plagiarism is one of the growth problems, is it that the universities’ tend to fall back on misconduct provisions to deal with that kind of matter…?
A: Yeah, they probably do, I mean … I think that’s probably a reasonable assumption … I suppose it’s the easiest way for them to show there is some quality control there because you know the reverse way is they can you it is a bit of an advertisement advocating their standards…
Q: Yeah, if not to students, to the government
A: That’s right (R10)
…

A 2: I think these are all the insidious effects of privatisation and commercialisation. I think that it does really impact on the procedures. The reason why the plagiarism procedure was written in the first place was to do with these things.
A 1: Yes, it was to try and streamline things… catching and finding people guilty but…
A 2: But also so that [the University] can present this image of itself to overseas markets, that we take plagiarism and we take cheating seriously, we’re a good disciplinarian university and we will ensure that your money is well spent. (R1, R4)

There was common perception among student advocates that commercial pressures had produced a contradictory response on the part of institutions to their handling of misconduct. Notably, institutions are seeking to impose academic standards (whether genuinely or for the purposes of public consumption) in the context of declining per student resources, and simultaneously they are compelled to maintain enrolments and thereby revenue streams. Interviewee R5 remarked, for example:
Q: With regard to commercialisation, do you think that has had a substantial impact on discipline processes?
A: Yes.
Q: Why’s that?
A: They’ve got a different goal. The goal is no longer an educational one. It’s a keeping people in seats one.
Q: They’re less inclined to use misconduct provisions -?
A: Yes, but also the opposite. They’re also inclined to use over the top misconduct provisions. Like that plagiarism case, that was clearly one of ‘We are [X] University, we are good’ –
Q: They use it maintain standards, as it were?
A: Yes, some myth of greatness. It’s the total opposite of keeping bums on seats and not using discipline standards. The pressure on the individual faculties to keep bums on seats to maintain their funding...
Q: So there are substantial external policy issues that have an effect on how discipline processes are used?
A: I believe so, yeah. I can’t imagine that that amount of pressure could be exerted and have no influence on how people behave themselves. (R5)

8.8.6 International Students

Where these tensions and contradictions are exposed most prominently is in respect of international students. International students have come to play a critical role in the commercialisation strategy of the higher education sector, via revenues generated from market-based fees. Growth in reliance on international student fee revenues (especially as a proportion of institutional budgets) has more recently become a source of concern to university administrators and the Federal Government. At the same time, public criticism has been raised regarding the effect of international student fee revenues on universities’ academic standards – that is, the ‘reduction’ of standards in exchange for income – including wilful ignorance of academic misconduct. International students, on the other hand, have taken direct action over what they view as poor academic practices or inadequate resources. It is

849 Federal Education Minister Gillard is reported as referring to a ‘dangerous over-reliance’ on international student fee revenues: Sushi Das ‘The Dollars and the Scholars’ The Age (Melbourne) Saturday 26 July 2008, Insight, 3.

850 See Eg NSW Independent Commission Against Corruption Report On Investigation Into The University Of Newcastle’s Handling Of Plagiarism Allegations (2005); Senate Employment, Workplace Relations, Small Business and Education References Committee Universities in Crisis, [5.46]-[5.54]. An example of this type of action is given by interviewee R10:
Well I think, I mean the first thing that comes to mind with the disciplinary process and commercialisation is … a student’s paying the University a lot of money and there’s far less incentive to have found that they’ve done anything wrong. ... [This] brings to mind actually [a] soliciting case where the… a student had got someone else to do [an assessment] for them... so just straight up fraud... There was no disciplinary action... it was discovered, it was investigated, and no disciplinary action was taken and that was an international student paying $25,000 a year... I mean there’s a feeling... in this place that if you’re paying up front money, then your disciplinary matter will be treated differently than if you’re not... It’s like the elephant in the room in this industry.

An example linking commercialisation processes with allegations of corrupt conduct was also supplied by R11, although the context differed and did not involve international students.

851 One of the most dramatic collective responses by international students to local grievances occurred at Central Queensland University’s ‘international’ campuses in Melbourne and Sydney, where dozens of students commenced a hunger strike in pursuit of claims over teaching and grades in a Business course: see ‘Failed Uni Students Threaten Hunger Strike’ Sydney Morning Herald (Sydney), 16 March 2006,
important to note that, although the fee base for domestic and international students differs, the ‘delivery of services,’ including teaching, are not differentiated. Simon Marginson crystallises the central role of international commercialisation strategy in the general academic crisis:

Problems of standards are bound to accumulate in a system in which there is consistent downward pressure on resources for teaching, and quality assurance runs as a branch of marketing, which slows recognition of standards problems. These limits affect both domestic and international students; though resources and capacities vary and matters are worse in some locations than others. However, there are special problems in the commercial market in international education. The commercial aim is to minimize costs and maximise market share and surplus revenues. Australia has become very good at the standardized processing of high volumes of Business and computing students. But standardized processing is in tension with the educational and cultural imperatives created by the nature of the clientele. Half our international students speak one or other Chinese language, not the language of daily use. Language testing at the point of entry does not guarantee an adequate preparation in academic English or for learning in the students’ chosen discipline. But institutions are loath to provide a higher level of academic preparation and support because of costs. Nor have they redesigned pedagogies [to] account for the prior preparation of students in their home countries, the obvious educational strategy, and one that would enrich local programs. Such institutions are forced for economic reasons to take students marginal in educational and linguistic terms... The problem of standards is not easily dealt with. It cannot be eliminated by pathologizing extreme cases. It is endemic to policy settings. 852

In academic terms, ‘standardised processing’ and ‘marginality’ are forces conspiring to subvert the capacity, if not the intention, of international students in particular to adhere to established academic norms. Such tendencies are acknowledged repeatedly by advocates – 9 out of 13 identified treatment of international students as an issue – and in particular the issue of a lack of English-language proficiency. 853 The logical (and in the experience of advocates, practical) consequence of these factors is the use of disciplinary powers as a response, directly or indirectly, to underlying pedagogical and resource crises visited relatively intensively on international students. This occurs notwithstanding attempts by institutions to deploy disciplinary instruments in an ‘educative’ fashion. Interviewee R6 remarks:

Q: Given so many international students in the university, is English proficiency an issue?  
A: There are certainly a lot that come up with plagiarism. A lot of the reasons they cite – and a lot of exam cheating – a lot of the reasons they cite are that they were so stressed because of the English standards. That they either used someone else’s words because they thought the words were better or they were just stressed preparing for exams and they just didn’t think they were going to be up to it. So they decided to take in a cheat sheet.


Q: Do you think there are any cultural issues?
A: With plagiarism, certainly. At least as the students tell me they come from different backgrounds where they have different standards… Just in relation to non-western style learning, yes. That comes up a fair bit. It’s hard trying to convince committee members of this though. Some faculties run orientation programs specifically targeting western standards of academia and academic standards. Some of the faculties try to run orientation programs for international students that specifically target this type of issue and what’s required of western style academic…

In the examples cited by advocates, the nature of misconduct undertaken by, or alleged against, international students often takes the form of poor citation (ie plagiarism), ‘collusion,’ or exam cheating. Interviewee R2 characterised the real nature of the problem as ‘genuine skill gaps,’ an observation reinforcing Marginson’s comments above. Three interviewees expressly note that a key part of their function, especially in hearings, is to act as an ‘interpreter’ – that is, to decode the process for the student, to act ‘as a facilitator of the whole thing.’ (R13)

A further observation made in respect of international students adds a more disturbing dimension to the critique of disciplinary controls. Two interviewees make reference to circumstances of bias in disciplinary proceedings, where decision-makers have expressed ethnic or cultural antagonism toward international students:

Q: Even if you had a domestic student at a hearing and then an international student going to the next hearing, and the circumstances were identical, you’d say the international student is going to get treated more harshly?
A: He’s likely to have a harsher punishment, yes. In the same faculty for a similar sort of plagiarism, yes.
Q: Is that across the board or in some faculties?
A: Specific to some faculties.
Q: Which faculties would they tend to be? You don’t have to name them but just give me a generality of what sort of discipline areas do you think are worse than others?
A: In each university you would have a faculty or a school which would have higher international enrolments –
Q: Like business or IT - ?
A: Like business or IT. And in such faculties you are more likely to find this trend.
Q: What you are saying is that the harsher the treatment of international students tends to be proportionate to where the numbers of international students are higher?
A: Yes. Because probably they are too fed up with the frequency of plagiarism.

In remarking on the variable standard of hearings across Faculties, R13 provides an example of one tribunal’s approach to the ‘cultural’ dislocation experienced by some international students:

A: …we talk a lot about intent in the faculties, it’s not so much talked about in the central committees because they know… that has a bit of weight, whereas at the faculties it’s just like ‘Oh come on we know it’s plagiarism… don’t come at us with that cultural bullshit.’
Q: Do they actually say stuff like that?
A: We did have one guy say, ‘I’ve actually worked in India and I know it’s not like that.’ This guy’s [student] experienced. Telling them what his prior degree was, in the Indian University … really that’s how it was. He was going ‘I’ve been to India and it’s not like that.’ (R13)
The plagiarism question has been considered at length in Chapter 4, including critique of the disciplinary limits of that form of academic behaviour. In analysis of the disciplinary situation in the sector, interviewees viewed academic misconduct as an extension of the wider pedagogical crisis. Plagiarism was a recurrent theme throughout the interviews, not least because it was a form of misconduct advocates were dealing with constantly. Five interviewees expressly discussed the prevalence of plagiarism as a proportion of their total caseload: the consensus was that plagiarism was the largest single source of casework, if not a clear majority.\footnote{Responses included quantitative estimates – approximately 50\% (R2), 50\% (R6) and 75-80\% (R15) – and qualitative assessments (cases are ‘mostly’ plagiarism or ‘increasing’ numbers are plagiarism).}

An essence of student advocates’ critique was that disciplinary controls were being applied to primarily academic problems (especially lack of knowledge of academic conventions or their application). The distinction between ‘purely academic’ matters and disciplinary matters may not be clear-cut or unambiguous. The experience of interviewees indicates that certain institutions have sought, in the construction and application of disciplinary rules, to produce in effect a spectrum of responses to academic misconduct to account for ‘inadvertent’ acts: at one end, accommodating an ‘educative’ approach. Yet, such an approach is not without controversy. It may be subject to variation and inconsistency across Faculties or Schools;\footnote{Eg R9: Q: With the question of intention, did committees distinguish between questions that were academic or educational problems and disciplinary problems? Subsidiary to that, what sort of variations across schools was there? A: Where there was a bigger problem they had less variation in how they treated those kinds of distinctions. For instance a block of text hadn’t been referenced they’d treat that the same as a similarity between one person’s piece of work and another. Pretty much approaches it the same way. Q: They dealt with all matters in a disciplinary fashion? A: Yeah. Other schools would sort of treat bad referencing examples as bad referencing. That’s why they probably had fewer cases coming to them because they didn’t see that as a case of misconduct.} typically some form of sanction, albeit minor, still applies;\footnote{Eg R7: Q: Are the most, most of the cases an educative issue rather than a disciplinary issue? A: Mostly educative, yeah. Q: Right. So that, well, in those circumstances, how would most students respond to the allegation, would they seek to just admit what they’ve done and seek an [academic] penalty or something like that? A: Well, if it’s an educative thing, they’ll generally accept that they’ll look at it, and if it’s a case that they’ve not referenced properly, they’ll generally see that… and they’re quite happy go away, re-do the assignment, get assistance from our [Learning] Advisers… and then re-submit for a maximum amount so that you get a maximum of 50\% on that assignment.} and the incident may invoke longer-term surveillance.\footnote{Eg R7: Q: Are the most, most of the cases an educative issue rather than a disciplinary issue? A: Mostly educative, yeah. Q: Right. So that, well, in those circumstances, how would most students respond to the allegation, would they seek to just admit what they’ve done and seek an [academic] penalty or something like that? A: Well, if it’s an educative thing, they’ll generally accept that they’ll look at it, and if it’s a case that they’ve not referenced properly, they’ll generally see that… and they’re quite happy go away, re-do the assignment, get assistance from our [Learning] Advisers… and then re-submit for a maximum amount so that you get a maximum of 50\% on that assignment.} Further, operation of ‘educative’ approaches does not per se displace or temper, either over time or across the sector, a more unambiguously disciplinary approach, or as I argue below, a culture of academic ‘policing.’ Indeed, there is some evidence that these approaches are cyclical, or transitory, over time.
Q: In those circumstances where a student’s disputed they’ve done something wrong and the issue revolves around something like intention, in a situation where it would difficult to prove a student intended to cheat – what sort of attention did they pay to the question of intention?
A: That changed over time. The first year I was there they sort of had this unspoken policy that they were going to stamp out plagiarism. At first they were trying to give punishments and they would treat it a bit like mandatory sentencing. What they saw as similar offences they would give a similar penalty. But over time committee had to find students not guilty of misconduct because of the other problems in the school. Over time they began to make the distinction between bad referencing and [plagiarism]… (R9)

The pressures of commercialisation and ‘underdevelopment’ of teaching and learning have combined with pressures to maintain or reinforce academic standards (or at least maintain the appearances of doing so). In analysis by advocates, these pressures and tensions are crystallised in an institutional anxiety over plagiarism in particular.

There’s been a real knee-jerk reaction to plagiarism… and it’s been punitive… (R13)

Q: Are academic misconduct cases more prevalent than general misconduct cases?
A: Yes.
Q: Are they quite prevalent here?
A: Becoming more so.
Q: Why would you say that?
A: Just because of their [university] phobia about plagiarism and the loose interpretation of the all-encompassing things that constitute plagiarism these days. What would have been considered poor referencing in old times is now considered plagiarism. There have been lunatics where a whole class has been accused of cheating because of improper actions of the lecturer concerned. (R11)

Consequently, plagiarism has found itself the focal point of concerted action by universities in response to perceptions of ‘crisis’ in academic standards and the problems of students’ (academic) behaviours. In the views of a number of student advocates disciplinary controls are central to the universities’ response, and their deployment is part of a (semi) organised campaign, founded on the perceptions of threat, but in reality underpinned by sectoral conditions:

What I see is one of the biggest factors at work is actually that all of the pressure on the sector, changes in their working lives, in student-staff ratios, the amount of teaching they have to do, their familiarity with classes and stuff, it gets quite easily projected onto and objectified in a sort of external threat – ‘they’re plagiarists, they’re cheats’ – like all this stuff that you get now in the media and throughout the universities about the internet making it easier to cheat when personally I think the hey day of students cheating was probably when assignments were all hand-written and there was no record of what had been submitted last year. So, from what I see, that is an effect of corporatisation. The way I see it working is that the student gets quite sort of ‘Othered’ and the assumption is that there’s some horrible, lurking menace to the University. Hence all that stuff about presumption of guilt, about why they want the student to show they’re capable of being saved, or making a clean breast of it, picking up a highlighter and indicating their guilt. (R1, R4)

857 In particular, students subject to disciplinary action, even primarily of an ‘educative’ nature, will at certain institutions be placed on a ‘Misconduct Register’ or an equivalent.
From this viewpoint, the approach of the academy reproduces the mode of ‘crisis’ or ‘emergency’ of the wider political society:

A1: … plagiarism education is very John Howard, George Bush sort of war on drugs, George Bush Snr, you know: ‘don’t inhale’. They’ve got this poster that’s everywhere – ‘beware of plagiarism and its penalties’ without saying what this thing actually is… So you see them seriously attempting but you know, having a direct quote with an attributed reference but no quotation marks and that in the eyes of many academics is guilt.

A2: The whole reason the plagiarism procedure was written as a corollary if the discipline procedure, we argued at the time that there was absolutely no necessity for it. It’s like the terror laws, they don’t need to make new terror laws, there’s plenty of provision in the existing laws that allow them to detain people and all that sort of stuff, but plagiarism was about posturing, it was about presenting an image in a situation of crisis where the University is realising its funding is decreasing, we need to be seen as being serious about academic integrity because it’s become a marketable catchphrase, we need to come up with something stronger, more war on drugs style. (R1, R4)

At one level, then, disciplinary controls serve a public-relations’ function, but also a policing function. The widespread problems experienced or perceived by interviewees in the conduct of disciplinary action is consistent as much with an ambivalence toward a ‘judicial’ approach to academic discipline, and inclinations toward summary or ‘police’ action (at least at the ‘local’ level of Faculties or Schools), as insufficient training or preparation for the role. It appears from the interviewees that increased use of technology in academic surveillance also contributed to this approach. Use of ‘plagiarism detection’ software, such as ‘Turnitin,’ was reported by 5 advocates. There is some evidence to indicate that these technologies had led to growth in substantial growth in numbers of misconduct proceedings.\(^{858}\)

8.9 Conclusion

Combined with problems in the administration of discipline, dispositions within universities toward treating plagiarism as a ‘policing’ problem go some way to explaining weaknesses and shortcomings in the practice and procedure adopted by disciplinary bodies and decision-makers.\(^{859}\) There is a real concern that the ‘judicial’ approach of the fair and unbiased hearing

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\(^{858}\) R2:

Q: You referred to Turnitin. Do you think instances of misconduct, especially plagiarism, have increased substantially because of that? -?
A: Oh yes! In last peak period, which was from Oct 2005 to Jan 2006 we had around 150 hearings from one faculty and they all had Turnitin involved as evidence.

Q: And how does that compare with the same faculty in previous seasons?
A: Less, very much less, probably 100% [sic] less. So around 75.

859 Eg R9:

Q: … First of all, whether you consider the process to be satisfactory or not and if not, why not?
A: It wasn’t satisfactory. There was sort of a knee-jerk reaction during one period there. People were acting on perception not evidence; they won’t sort of address what they thought the problems were. They should have gathered some evidence first. They should have dealt with what they thought were problems but what they did is take this policeman approach and in that approach a lot of things that were definitely not plagiarism got caught up into the net.

Q: There was sort of a general campaign or crisis about misconduct and about plagiarism?
A: Yep, especially plagiarism.

Q: That tended to die away over time?
gives way to expediency, discretion, or at its limits, capriciousness. These qualities may be facilitated by the discourse of ‘crisis,’ resource pressures, lack of training and/or specialisation in handling ‘quasi-judicial’ cases, and institutional inertia, especially in the design and practice of disciplinary tribunals and procedure. Scope for the exercise of discretion is, of course, to be found in disciplinary rules, including in the conduct of proceedings and in application of sanctions in cases of misconduct. The concern arising in a ‘policing’ or ‘prosecutorial’ approach to academic misconduct is that discretion and expediency displaces (or erodes) basic tenets of administrative justice. If the problems of academic behaviour were purely educational, such as the failure to comprehend academic content or technique, then a generally unfettered exercise of academic (professional) discretion may be appropriate. But in the present circumstances disciplinary controls are at issue, entailing the prospect of sanction, ‘penalty,’ and detrimental impact on students’ interests, in which case discretion must be balanced with justice. Institutional campaigns against plagiarism may be warranted but they ought not to detract from the provision of justice to individuals caught within the scope of disciplinary powers.

A: It didn’t really. What happened was that kind of reaction started to seep into other schools, because it started in the school of IT? It didn’t change it because the way that school reacted – even though over time they got lobbied and they realised themselves it wasn’t really helping them, their own situation. They realised they were putting students through a process they didn’t need to go through because they hadn’t done anything wrong basically. Most of them. That kind of initial knee-jerk reaction flowed onto the way the registrar’s office operated and things like that.
Table 8.1: Student advocates, Australian higher education: responses to selected issues

<table>
<thead>
<tr>
<th>Interviewee</th>
<th>Length of employment (yrs)</th>
<th>No. of cases (est)</th>
<th>% plagiarism (est)</th>
<th>Adequate particulars</th>
<th>Adequate disclosure</th>
<th>Onus of proof on complainant</th>
<th>Act as representative</th>
<th>Written reasons</th>
<th>Uneven approach</th>
<th>Assessment</th>
<th>International students</th>
<th>Commercialisation impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>R1, R4</td>
<td>4, 8</td>
<td>60-80</td>
<td>-</td>
<td>N</td>
<td>N</td>
<td>N</td>
<td>Y</td>
<td>N</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>R2</td>
<td>-</td>
<td>500-600</td>
<td>50</td>
<td>Y</td>
<td>-</td>
<td>N</td>
<td>Y</td>
<td>Y</td>
<td>N</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>R3</td>
<td>-</td>
<td>10-15</td>
<td>-</td>
<td>N</td>
<td>Y</td>
<td>N</td>
<td>Y</td>
<td>N</td>
<td>-</td>
<td>U</td>
<td>Y</td>
<td>-</td>
</tr>
<tr>
<td>R5</td>
<td>-</td>
<td>4-5</td>
<td>-</td>
<td>Y</td>
<td>-</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>N</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>R6</td>
<td>3</td>
<td>40-50</td>
<td>‘large number,’ 50%</td>
<td>Y</td>
<td>Y</td>
<td>N</td>
<td>Y</td>
<td>N</td>
<td>Y</td>
<td>G</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>R7</td>
<td>6.5</td>
<td>45 per year (292)</td>
<td>-</td>
<td>N</td>
<td>N</td>
<td>‘sometimes’</td>
<td>Y</td>
<td>N</td>
<td>N</td>
<td>G</td>
<td>-</td>
<td>Y</td>
</tr>
<tr>
<td>R8</td>
<td>1</td>
<td>7</td>
<td>-</td>
<td>Y</td>
<td>Y</td>
<td>N</td>
<td>Y</td>
<td>N</td>
<td>Y</td>
<td>-</td>
<td>G</td>
<td>Y</td>
</tr>
<tr>
<td>R9</td>
<td>3</td>
<td>200</td>
<td>‘mostly’</td>
<td>Y</td>
<td>N</td>
<td>N</td>
<td>Y</td>
<td>N</td>
<td>Y</td>
<td>U</td>
<td>-</td>
<td>Y</td>
</tr>
<tr>
<td>R10</td>
<td>2.5</td>
<td>25-30</td>
<td>-</td>
<td>Y</td>
<td>N</td>
<td>N</td>
<td>Y</td>
<td>‘sometimes’</td>
<td>Y</td>
<td>U</td>
<td>-</td>
<td>Y</td>
</tr>
<tr>
<td>R11</td>
<td>18</td>
<td>12-24</td>
<td>‘increasing’</td>
<td>Y</td>
<td>-</td>
<td>Y</td>
<td>‘occasionally’</td>
<td>-</td>
<td>S</td>
<td>-</td>
<td>N</td>
<td>-</td>
</tr>
<tr>
<td>R13</td>
<td>‘4-5’</td>
<td>1000</td>
<td>-</td>
<td>-</td>
<td>N (on appeal, Y)</td>
<td>‘mostly’</td>
<td>Y</td>
<td>Y</td>
<td>G</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>R15</td>
<td>‘100s’</td>
<td>75-80%</td>
<td>N</td>
<td>N</td>
<td>N</td>
<td>‘in some circumstances’</td>
<td>N</td>
<td>Y</td>
<td>Y</td>
<td>U</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>R16</td>
<td>3</td>
<td>40-50</td>
<td>-</td>
<td>Y</td>
<td>‘mostly’</td>
<td>Y</td>
<td>Y</td>
<td>N</td>
<td>Y</td>
<td>S</td>
<td>Y</td>
<td>N</td>
</tr>
</tbody>
</table>

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860 Whether the approach to disciplinary proceedings was consistent or even across the various Schools, Faculties or relevant units of the institution.
861 Overall assessment of disciplinary procedures: whether satisfactory (S), generally satisfactory (G) or unsatisfactory (U)
862 Whether the treatment of international students specifically was an issue.
863 Whether commercialisation of the sector had had an impact on disciplinary processes at the institution.
864 In certain types (clinical) hearings only.
865 In general misconduct matters, satisfactory; in academic misconduct matters ‘50%’ satisfactory.

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Chapter 9:  
The Search for Administrative Justice in the University

In discussion of the concept of ‘administrative justice,’ Robin Creyke makes the point that, as well as being unsettled, the concept is historically novel. It rose to prominence in the 1970s in Australia, and has had a more recent renaissance. If this is the case generally, then its application to the university is even more novel, if not precarious. Although the term sits within the framework of administrative law, it is worth reiterating the long history of disquiet and unfamiliarity in control of higher education institutions by judicial or quasi-judicial authorities. In the US the scepticism is broadly retained in the rule of ‘deference’ of the courts to university decision-making, especially where any academic content is concerned. In the UK, one source of such cultural and institutional reticence might be found in the law and fact of the eleemosynary corporation – where the ‘King’s writ did not run’ – and perhaps in the quite specific character of leading universities historically possessing their own judicial powers. For centuries, authorities at Oxford and Cambridge could dispense justice, rather than being on its receiving end. In Australia, courts were loathe, in the ordinary course of statutory interpretation, to upset the ‘very wide discretion’ conferred on university authorities for the purposes of administering higher education.

When ‘administrative justice’ definitively arrived at the university’s doors, in the 1960s – in the US as a result of Dixon v Alabama State Board of Education and in the UK and Commonwealth in decisions such as University of Ceylon v Fernando and R v Aston University Senate, ex parte Roffey – it was by way of judicial review for ‘due process’ rights, and the development was not hailed but regretted. As Professor Wade remarked: ‘In the days when university discipline was a quasi-parental affair, it was administered without thought of legal consequence and students would accept it in the same spirit… Natural justice, separation

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868 ‘There must be no Alsatia in England where the King’s writ does not run’: Czarnikow v Roth, Schmitt and Co (1922) 2 KB, 478, 488 (Scotton LJ), cited in R v Lord President of the Privy Council; ex parte Page [1993] 1 All ER 97.
869 Ex parte McFadyen (1945) 45 SR (NSW) 200, 204 (Davidson J). Halse-Rogers J remarks further: ‘I think it is quite clear that the Legislature intended that there should be no outside person or body having any right to interfere with the control of the Senate over the domestic affairs of the University.’
870 294 F.2d 150 (5th Cir. 1961). Dixon concerned the application of ‘due process’ rights guaranteed under the Fourteenth Amendment of the US Constitution to publicly-funded educational colleges. It has been, and continues to be, influential on procedural rights available to students in US public colleges and universities: generally, see Kaplin and Lee The Law of Higher Education, 485-490.
871 (1960) 1 All ER 631.
872 (1969) 2 QB 538.
of powers, tribunals of appeal, court orders – the whole legal paraphernalia must now be
imported into academic life.’\textsuperscript{873}

Professor Wade’s lament now seems quaint, especially given the extraordinary expansion and
transformation of the university sector in the meantime, including extensive and prescriptive
regulation. Administrative government is well and truly entrenched on campus in Australia. In
this context, perhaps somewhat surprisingly, ‘administrative justice’ has progressed in fits and
starts. Access to judicial review and ombudsmen are accepted parts of the institutional
landscape, as indeed are wider sources of litigation, such as disputes in contract or tort.
Universities not infrequently find themselves in administrative tribunals over matters such as
discrimination complaints or freedom-of-information disputes.\textsuperscript{874}

In respect of its domestic jurisdiction – that is to say, the exercise of the university’s wide and
specialised authority – provision of ‘administrative justice’ is problematic. This state of affairs
is, I would submit, the result (among other things) of a need to accommodate a radically
changing policy environment, and the need to balance administrative, legal and educational
factors in university operations. The university has had limited success is achieving this balance
in a manner that might be considered consistent with the provision of ‘administrative justice’ to
its students. This assertion accords with the evidence available from the foregoing empirical
analysis of disciplinary decision-making in the university.

9.1 Administrative Justice

The scope of ‘administrative justice’ might be said to encompass the ‘web’ of institutions,
practices, rules and procedures straddling the constitutional divide between executive power and
judicial power, or between public administration (or, in the case of certain complaints or
arbitrative arrangements, private administration) and adjudicative functions. The concept
accounts for differences in approach and procedure, ranging from tribunals to public inquiries,
to Ombudsman and inspectors, to judicial review by the courts. In general, the concept is
understood to weld together, and balance, the exercise of discretion in the achievement of
administrative and/or policy goals with accommodation of the treatment and concerns of
affected individuals.\textsuperscript{875}

\textsuperscript{873} Wade ‘Judicial Control of Universities’, 469.
\textsuperscript{874} Hilary Astor has recently noted that discrimination and FOI claims are the largest single sources of
student disputes that were litigated between 1985-2006: Hilary Astor Disputes between Students and
Australian Universities: Lessons from a Survey of Litigated Cases, (Paper Presented To It’s Academic: A
National Ombudsman For Australian Universities Conference, Byron Bay, 11-12 December 2008).
\textsuperscript{875} Galligan views the provision of individualised justice within the confines or framework of
administration – in contrast to bureaucratic, collective and/or political operation of standards, policy and
decisions – as the central distinguishing feature of administrative justice: Galligan Due Process of Fair
The notion within English law that ‘justice’ might be delivered by mechanisms other than the ‘ordinary courts’ was, to the 1960s, problematic. ‘Justice’ in respect of Executive action was generally limited to control of government action by the courts or, alternatively, by petition to Parliament or by the actions of Members of Parliament, or perhaps by the determination of specialist tribunals. Administrative justice,’ in this respect, was influenced by the Diceyan concept of the rule of law and Parliamentary supervision of the Executive. Dicey asserted that English law contained no ‘administrative law’ as such, and hence no ‘privileged’ domain of ‘administrative justice,’ in contradistinction to ‘continental’ law. For Dicey, ‘administrative justice’ was indistinguishable from proper operation of the (British) Constitution:

Modern legislation and that dominant legislative opinion which in reality controls the action of Parliament has undoubtedly conferred upon Cabinet, or upon servants of the Crown who may be influenced or guided by Cabinet, a considerable amount of judicial or quasi-judicial authority. This is a considerable step towards the introduction among us of something like the droit administratif of France, but the fact that the ordinary courts of law can deal with any actual and provable breach of the law committed by any servant of the Crown still preserves the rule of law which is fatal to the existence of true droit administratif. Nor... is it useless to bear in mind that impeachment is still part of the law of England, and that impeachment is the legal action of the High Court of Parliament.

The 1958 Franks Committee Report led to reform and overhaul of the UK administrative tribunal system, but the Australian reforms of the 1970s went further in establishing a ‘comprehensive administrative law,’ including merits review of administrative decisions by mixed legal-administrative tribunals. Other mechanisms, procedures and authorities of administrative justice followed, including establishment of a Commonwealth Ombudsman, reform of judicial review procedures through the Administrative Decisions (Judicial Review) Act 1977, and freedom of information legislation.

This project of administrative justice – representing the ‘particular application of a general concept [ie justice]’ – incorporates not only issues of procedural propriety, lawfulness and

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879 Committee on Administrative Tribunals and Enquiries Report of the Committee on Administrative Tribunals and Enquiries (1957).
rationality, but additionally wider values of good government, including accountability, efficiency and efficacy in decision-making, and norms of fair treatment in administrative action. Justice French (as he then was) correlates the ‘particular application’ with the judicialised approach to public administration:

The essential attributes of administrative justice do not, in my opinion, differ in substance from those of curial justice, albeit processes and trappings will differ as well as the formal effect of the decision.

In the context of the use of administrative tribunals as the vehicle for ‘administrative justice,’ this description is apposite. Considering the ‘juxtaposition of “administrative” and “justice” … [as involving] balancing the distributive justice focus of public administration against individual interests,’ Creyke argues that the concept now coincides (not always neatly) with the ‘integrity arm of government,’ and the new ‘separation of powers’ articulated in that theory. The breadth of Creyke’s conceptualisation does not limit ‘administrative justice’ necessarily to the ‘judicialisation of administration’ but includes wider models and procedures for the ‘particular application’ of justice to administrative power, such as the Ombudsman or Auditor-General, which operate more in the mould of an inspectorate. Yet, where individualised application is concerned, investigative bodies such as Ombudsman must also operate on the adjudicative or ‘judicial’ plane to some degree – that is, to the point of according fairness to affected parties, in both the procedural sense and the substantive sense.

In any case, whether the vehicle of administrative justice is judicial and determinative or investigative and/or non-determinative, at the level of substance the concept denotes typically a

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882 See eg John Goldring ‘Public Law And Accountability Of Government’ (1985) 15 Federal Law Review 1, 22: ‘The main impact of, and the “radical” changes resulting from, the “New Administrative Law,” [as distinct from the “Old Administrative Law” of judicial review] will be to expand the methods by which government can be made accountable, not to Parliament or the courts, but to individuals. Most likely these will be richer individuals and corporations but, to some extent, the new rules may also be available to groups working on behalf of disadvantaged, poor or working people, and others, who as individuals, lack the resources to take action.’

883 Hence the widely used concept of the decision-maker on merits review being required to make a ‘correct or preferable’ decision: Drake v Minister for Immigration and Ethnic Affairs (1979) 2 ALD 60, 68.

884 Galligan Due Process of Fair Procedures, 238: ‘What is missing from the administrative model is the simple point that individualized processes are not only about efficient and effective decisions, but are also about the treatment of persons… It recognises that each person’s case has to be properly considered, thereby giving a direction and emphasis which is missing in the administrative model. Indeed, we have here the germ of the administrative justice model, or, as I would prefer, the fair treatment model.’


886 In transposing the judicial model to administration, other reforms – such as, freedom of information – are consistent or complementary, especially as the latter may provide transparency and openness in ex ante decision-making. Compare Diane Longley and Rhoda James Administrative Justice: Central Issues in UK and European Administrative Law (Cavendish Publishing, 1999), 4: ‘… administrative justice has both ex ante and ex post elements. Decisions not only need to be justified and open to challenge after they have been taken, but machinery must be provided to allow involvement of relevant parties in the policy process prior to the taking of decisions…’

synthesis of law and discretionary decision-making distinct from the scope of judicial review by the ‘ordinary courts.’ Provision of administrative justice remains formally a function of executive power, although having acquired an independent status. The most significant point in this regard is that it concerns the exercise of administrative discretion in a particular manner, including where appropriate, on questions of policy. ‘There is ample authority…’ notes a former Commonwealth Ombudsman, ‘to suggest that the exercise of discretionary powers should be guided by concepts of “consistency, fairness and administrative justice.”’ In the form of the administrative tribunal, the judicial model is intended to supply those guiding values.

The operation of administrative justice may exhibit a broad spectrum of characteristics, depending on the nature, purposes, powers and subject-matter of the decision under consideration and the decision-maker. Application of the judicial model may be greater or lesser, in particular where the policy or political content of the decision may vary, such as between a Ministerial decision on the one hand or arbitration on the other hand. That is to say, the judicial content of decision-making may vary, although within the established tribunal systems for administrative review the judicial model is given considerable prominence, qualified by the need to exercise the administrative discretion (‘stand in the shoes of the decision-maker’) and on occasion contend with issues of policy. As the Federal court stated in *Drake v Minister for Immigration and Ethnic Affairs*:

The function of the Tribunal is… an administrative one. It is to review the administrative decision that is under attack before it. In that review, the Tribunal is not restricted to consideration of the questions which are relevant to a judicial determination of whether a discretionary power allowed by statute has been validly exercised. Except in a case where only one decision can lawfully be made, it is not ordinarily part of the function of a court either to determine what decision should have been made in the exercise of an administrative discretion in a given case or, where a decision has been lawfully been made in pursuance of a permissible policy, to adjudicate upon the merits of the decision or the propriety of the policy. That is primarily an administrative rather than a judicial function. It is the function which has been entrusted to the Tribunal… Even in a case, such as the present where the legislation under which the relevant decision was made fails to specify the particular criteria or considerations which are relevant to the decision, the Tribunal is not, however, at large. In its proceedings, it is obliged to act judicially, that is to say, with judicial fairness and detachment.

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888 Robin Creyke ‘Tribunals and Access to Justice’ (2002) 2 Queensland University of Technology Law and Justice Journal 64, 76: ‘How to be and be perceived to be independent is one of the most pressing issues for tribunals.’
890 Compare H W R Wade ‘Quasi-Judicial and its Background’ (1950) 10 Cambridge Law Journal 216, 227: ‘We may now turn to the “quasi-judicial” function as conceived by the courts and the [Committee on Ministerial Powers]. It is “an administrative decision, some stage or element of which possesses judicial characteristics”… It might be said that [critical attention of the Report of the Committee on Ministerial Powers] takes the wrong approach: it takes the quasi-judicial process as a judicial process from which one or more elements are missing, rather than an administrative process to which one or more judicial elements are added.’
891 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60; *Re Drake and Minister for Immigration and Ethnic Affairs* (No 2) (1979) 2 ALD 634.
892 (1979) 2 ALD 60, 68-69 (Bowen CJ and Deane J).
The distinguishing characteristic of ‘judicial fairness and detachment’ has been variously considered and expressed in relation to administrative tribunals, although the need for consistency and predictability, equal treatment, reason, and impartiality in the ‘judicial mind’ remain good guides. In the model sense, however, the judicial approach also requires identification and application of a standard, a form of measure, as distinct from the uncontrolled or ‘free’ exercise of discretion. Administrative justice is a complex, even opaque, fusion, therefore falling somewhere in between. Minimal standards will tend to be adherence to fair procedure and simple intra vires requirements. Speaking extra-curially in respect of administrative review, Chief Justice Gleaon, as he then was, posited that ‘References to the judicial method are usually intended to embrace the requirements of procedural fairness, the openness of procedure, and giving of reasons for decisions.’ Significantly, His Honour also made the point that what may be required of the judicial approach in the supply of administrative justice is not static. Regarding the AAT, he commented: ‘The Tribunal is not bound to the judicial model as it existed in 1975.’ Necessarily, what is meant by incorporation of judicial method into administrative decision-making evolves as the judicial method and expectations of it also evolve. This will reflect the strengthening and development of ‘public law values’ in administration and government generally, including judicial administration.

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894 Eg Wade ‘Quasi-Judicial and its Background’, 223: ‘The “objective” character of the judicial function is derived from a standard (even though sometimes a discretionary one) enjoined upon the courts by the Parliament or by the common law. The canons of policy are eternally flexible and today’s decisions may be revoked tomorrow. But once a rule has become law it must so continue (unless repealed by due process) irrespective of its rightness, wrongness, convenience or inconvenience. It is, in theory at least, certain and binding.’

895 Although with respect to treatment of policy, for example, effective rules tend to be laid down in the context of de novo review by administrative tribunals, leading to only cautious departure from positions laid down by Executive decision-makers: Re Drake (No 2).


898 ‘The development in the Australian community of a cultural expectation that those in authority are able and willing to justify the exercise of power is one of the most important aspects of modern public life’: Chief Justice Gleeon ‘Outcome, Process and the Rule of Law’, 12. His Honour refers to Administrative Review Council The Scope of Judicial Review: Report to the Attorney-General (2006). The Council notes, in a footnote to p 30: ‘The Council considers five core administrative law values—fairness, lawfulness, rationality, openness (or transparency) and efficiency—fundamental to the Commonwealth administrative system and has used them as benchmarks for analysis in a number of its reports and other publications.’
9.2 University Discretion and Administrative Justice: Creeping ‘Judicialisation’ of University Affairs?

As I have noted in Chapter 3, universities are at law administrative bodies. Notwithstanding the ‘long march’ of the ethic of consumerisation and the market in higher education, from the perspective of the ‘legal order,’ the public law model remains the appropriate framework by which to scrutinise university administration. In the intervening decades subsequent to Ex parte McFadyen, the ‘very wide discretion’ of university action has been progressively constrained and/or codified by statutory means as well as by judicial controls. I have noted the breadth, complexity and content of legal controls in the student-university relationship in earlier chapters. The growth of sectoral legislative and administrative controls over university action in the past two decades, particularly relate to the ‘marketisation’ program post-1988, together with the additional, complicating and ‘collateral’ involvement of universities in immigration regulation via the ESOS Act. Administrative justice, in the form of merits review, only marginally enters into higher education law.

If the public university is an administrative body, possessing discretion over matters such as admissions, academic performance, discipline, academic programs and research, and institutional administration and governance, its ‘peculiarity’ may be explained by the exceptional nature of the corporation: the eleemosynary body, its purposes ad studendum et orandum, and its traditional and legal origins in self-government and public benefit. The exercise of discretion in the university, in respect of students and the ‘domestic’ jurisdiction, is aimed at the provision of higher learning and engagement in research. Other basic objectives may be included in governing legislation, such as service to a particular region.

Statutory interventions over the past two decades have served to regulate how this corporate machinery functions and organises itself. Likewise judicial intervention has served to temper and constrain university discretion, consistent with notions of individualised justice. Remarking

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899 See eg Kaye, Bickel and Birstwhistle ‘Criticizing the Image of the Student as Consumer: Examining Legal Trends and Administrative Responses in the US and UK’.
902 (1945) 45 SR (NSW) 200.
903 Ex parte McFadyen (1945) 45 SR (NSW) 200, 204 (Halse-Rogers J).
904 Literally, ‘for study and prayer’: see eg Queens’ College, University of Cambridge Charter of Foundation 1448, [http://www.queens.cam.ac.uk/Queens/admin/charter.html](http://www.queens.cam.ac.uk/Queens/admin/charter.html) (viewed 16 March 2009); compare obiter dicta of Starke J in R v University of Sydney; ex parte Drummond (1943) 67 CLR 95, 110: ‘At all events the university has no purpose to serve but the advancement of learning, and in the achievement of that purpose it will no doubt do all that is proper and possible in the circumstances.’
on the tension of fairness and managerialism in the higher education sector, Helen Fleming writes:905

The vast majority of decisions in universities are made without resort to a formal process. Nevertheless, it is important, whether one subscribes to managerialism or not, to ensure that there are sufficient safeguards against excessive or wrongful decision-making.

The university’s wide powers to achieve its purposes encompass many classes of decision-making, ranging from academic decisions to application for residential tenancies, fee-setting, letting of contracts and purchase of goods and services. Not all decision-making will be affected by a propensity for individualised modes of justice to be taken in to account in the exercise of power or authority, let alone that ‘judicialised’ methods will be required in addition to expertise and/or expedience. Yet in respect of certain key areas of university action, involving students, some scope of ‘judicial fairness and detachment’ will be required. That is to say, paradigmatically, administrative justice has crept into various forms of university action, to greater or lesser degrees. I will consider some of these briefly before embarking on discussion of how, or indeed whether, administrative justice is, on the available evidence, being delivered in respect of the discipline of students.

9.2.1 Academic Decision-Making

The exercise of an academic judgement is central to the university. The special character of universities owes a considerable amount to this particular content of discretion. This content is indivisible from the eleemosynary character of the university.906 Does the individualised, ‘judicial’ model of justice apply to this basic institutional exercise of academic judgement? Academic decision-making covers a range of circumstances, including undergraduate assessment, postgraduate thesis examination, and peer-review in research. The second and third examples may be more extended, rigorous and specialised exercises, while the former may combine both elements of professional judgement and mass decision-making.

Surely, the specialist (if not esoteric) and ‘domestic’ nature of decision-making places academic assessment outside of the scope of judicial or adjudicative methods! Galligan would suggest, ‘not necessarily.’ In considering the application of the hearing principle to ‘professional judgements,’ he argues: ‘We may start with the proposition that the hearing principle should apply to processes based on professional standards in the same way it applies to standard

906 The university, established for the purposes and functions of ‘higher learning,’ necessarily depends on the application of specialist and expert knowledge in the pedagogical relationship.
The structure of professional judgment is not intrinsically antithetical to a wider notion of adjudication. On the contrary,

…let us be clear that a professional judgement has the same elements, the same structure, as any other practical judgement, facts, standards, and the application of standards to the facts. It differs only in the nature of the standards, of it is the standards and their application which invoke expert knowledge. The danger to be guarded against is that the element of expert knowledge will overshadow other elements of the judgement and so that the whole appears impervious to scrutiny.

Arguably, the specialist nature of academic decision-making is, comparable to other forms of professional judgement, the appropriate balancing of the application of a professional or ‘higher order’ body of knowledge, with the conduct and procedure of adjudication itself.

If we may consider academic judgement as a form of primary decision-making – distinguishable from a circumstances in which academic expertise is supplied as form of opinion (as in the provision of expert evidence) – what adjudicative principles and methods might apply? What does justice require? Are notice, disclosure and hearing required?

As Kirby J noted in Tang,

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.

Academic discretion does not absolve university decision-makers of a duty to observe certain tenets of justice, in particular in the conduct of academic judgement.

There is a long history of ‘immunity’ of academic decisions from interference by formal, curial justice. Sedley LJ in Clarke puts this type of decision in the same category as ‘religious or aesthetic questions.’ Until recently the rule at law was one of strict non-interference in anything that concerned academic judgement. This rule was famously stated by Diplock LJ in Thorne v University of London. In more recent times, performance of academic judgement has been qualified by interference in those decisions on grounds of unfairness and impropriety. The scope of ‘immunity’ has narrowed, although ‘deference’ to academic decision-makers tends to differ between North American, and UK and Australian jurisdictions.

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907 Galligan Due Process and Fair Procedures, 381.
908 Galligan Due Process and Fair Procedures, 259.
910 Clarke v University of Lincolnshire and Humberside (2000) 1 WLR 1988, [12].
911 (1966) 2 QB 237, where His Honour stated (243): ‘The High Court does not act as a Court of Appeal from university examiners. Speaking for my own part, I am very glad that it declines this jurisdiction.’
912 The test for judicial intervention in US disputes continues to lie generally in action detrimental to the student can be characterised by male fides, or as ‘arbitrary’ or ‘capricious’: see generally Kaplan and Lee.
Procedural fairness has been crafted to the exercise of academic discretion in respect of the criterion of impartiality rather than the right to be heard. Unreasonableness or irrationality, such as in the form of irrelevant considerations, may also jeopardise an academic decision. Thus, in *R v Universities Funding Council, ex parte Institute for Dental Surgery*, Sedley LJ held:

> We would hold that where what is sought to be impugned is on the evidence *no more* than an informed exercise of academic judgment, fairness alone will not require reasons to be given. This is not to say for a moment that academic decisions are beyond challenge. A mark, for example, awarded at an examiners' meeting where irrelevant and damaging personal factors have been allowed to enter into the evaluation of a candidate's written paper is something more than an informed exercise of academic judgment. Where evidence shows that something extraneous has entered into the process of academic judgment, one of two results may follow depending on the nature of the fault: either the decision will fall without more, or the court may require reasons to be given, so that the decision can either be seen to be sound or can be seen or (absent reasons) be inferred to be flawed. But purely academic judgments, in our view, will as a rule not be in the class of case, exemplified (though by no means exhausted) by Doody, where the nature and impact of the decision itself call for reasons as a routine aspect of procedural fairness. They will be in the *Cunningham* class, where some trigger factor is required to show that, in the circumstances of the particular decision, fairness calls for reasons to be given.

In the context of the *Institute for Dental Surgery* case, a court may scrutinise academic decisions for matters ‘extraneous’ to the ‘informed exercise of academic judgment.’ Justice may require the giving of reasons. Only a few years later, Sedley LJ left open potential to widen the grounds on which intervention may occur to ‘exercises of academic judgement, which though never patently aberrant, are nevertheless of sufficient importance to the individual to require that reasons be given for them.’ *R v University of Portsmouth, ex parte Lakareber* is authority for the further notion that decisions of academic judgement also need to be *intra vires* university regulations, or, that is, accord substantive as well as procedural fairness. Issues of bias or irrationality will, nevertheless, be distinguishable from disagreements over standards and the competence of academic decision-makers, and impropriety will not extend to claims of unsatisfactory academic experiences and assistance.

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914 *R v Secretary of State for the Home Department; ex parte Doody* [1993] 3 WLR 154.
915 *R v Civil Service Appeal Board; ex parte Cunningham* [1992] ICR 816.
916 *R v University of Cambridge, ex parte Evans* [1997] EWHC Admin 787, [27].
917 [1998] EWCA Civ 1553: ‘Only the clearest and most obvious unfairness or departure from the university’s own regulations would justify an attempt by judicial review to impugn an academic decision of this character.’
918 See also *R v Leeds Metropolitan University; ex parte Manders* [1997] EWHC Admin 852, [9].
919 *R v Cranfield University Senate, ex parte Bashir* [1999] EWCA Civ 995.
920 Gajree *v The Open University* [2006] EWCA Civ 831, [27]:

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Application of justice in these circumstances might be said to be the shaping or coloration of a specialised method of ‘adjudication.’ Effectively, academic judgement is adjudication on knowledge, intellectual performance and competence, as distinct from the (judicial) adjudication on rights and duties. Both might be claimed to be “artificial” methods of thought employed by all who have to make sound judgements… The reasoning on which the judgement is to be formed becomes, as we say, impersonal.” 921 It is not especially surprising, in this light, that academic and judicial approaches to decision-making should coincide, if momentarily, on the exercise of the ‘technique of impartial [and rational] thought.” 922 The question of a right to be heard, as a function of administrative justice, is entirely less relevant in a context where academic adjudication inherently requires the student to ‘argue’ their ‘case’ for competence or learning by way of participation in the process of examination or assessment. 923

9.2.2 Academic progress

We have also noted elsewhere that a further area in which forms of judicial method have evolved in the exercise of university powers is the restriction, exclusion or other interference with a student’s enrolment (or status) on grounds of poor academic performance. Again, these tendencies to the control of university action have originated in courts and extension of common law principles over those institutions. The capacity of institutions to dismiss or otherwise affect students’ enrolments on these grounds has been clear in Australian law since it was held in Ex parte Forster 924 that

It is essential to the proper performance by a university of its functions that it maintain and insist upon high standards of scholarship… It is difficult to conceive of an institution’s being given the title of a university which has not power, amongst other things, to preclude or defer the further participation in a course of study a student whose past performance in that course has repeatedly proved unsatisfactory.

Since Ex parte Roffey, 925 it has been held a legal requirement that in such circumstances rudimentary justice applies. The content of the rules of fair procedure in these circumstances may be lower than for disciplinary action, in particular that there is no necessary requirement for an oral hearing.

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921 Robson Justice and Administrative Law, 386-7.
923 Compare Ivins v Griffith University [2001] QCA 393, 8.
924 (1963) SR (NSW) 723, 728.
925 R v Aston University Senate, ex parte Roffey (1969) 2 QB 538.
9.2.3 Admissions

Admission to university courses has been the subject of litigation before Australian courts, and the principles at law that have tended to flow from such actions reinforce the notion that universities have a duty to maintain appropriate standards of scholarship, including through administrative controls on entry to university courses. Additionally, in dispute over questions of admission, courts are reluctant to make executive orders in respect of universities. At this point of the administrative cycle an applicant for admission to a university has no status, and therefore there is much less in the form of ‘interests’ to compel or direct the nature of the procedure institutions ought, or might, adopt in dealing with applications. Complaints mechanisms required of universities under the Higher Education Support Act do, however, oblige institutions to have some method of handling disputes arising from admissions decisions. Indeed, applications for admission will be commonly questions of ‘routine’ administration. Primary decisions as to admission, where they are administered within the universities own rules and contain no factors that may enliven other sources of law, include no requirement for decision-making to be qualified by ‘judicial’ principles of fair treatment.

9.2.4 Complaints

The scope of university decisions that may the subject of complaints, appeal, or disputes is extensive, and, by authority of higher education legislation, encompasses both academic and visitorial jurisdiction, it has been held, by contrast, extends to disputes concerning question of membership: Patel v University of Bradford Senate [1978] 1 WLR 1488.

926 See eg R v University of Sydney, ex parte Drummond [1943] HCA 11; (1943) 67 CLR 95; Harding v University of New South Wales [2002] NSWCA 325.
927 Harding v University of New South Wales [2002] NSWCA 325, [79].
928 Harding v University of New South Wales [2002] NSWCA 325, [96].
929 See eg Deakin University Statute 05.01 - Admission Selection And Enrolment, ss 4-5: ‘A person who is eligible for admission to the University and has been selected into a course may enrol in that course leading to an award of the University… A person who is permitted to enrol for a course shall, upon enrolment, become a student of the University.’
930 Visitorial jurisdiction, it has been held, by contrast, extends to disputes concerning question of membership: Patel v University of Bradford Senate [1978] 1 WLR 1488.
931 Higher Education Support Act 2003 (Cth), subs 19-45(1): ‘A higher education provider must have: (a) a grievance procedure for dealing with complaints by the provider’s students, and persons seeking to enrol in courses of study with the provider, relating to non-academic matters…’
932 See Galligan’s distinction of ‘routine administration’ from decision-making involving adjudication or policy-based discretion: Galligan Due Process and Fair Procedures, 235-236. This is not to diminish the fact that there will be cases where the exercise of academic judgement will be required in respect of applications for certain courses. See for example, Deakin University Selection to Undergraduate Awards (Higher Education – Procedure), para 7.

Course selection committees will determine the level of performance, based on faculty rules of selection approved by the Academic Board, that enables a non-school leaver’s academic merit to be compared with the ENTER score and conditions by which school leaver applicants have been ranked. Course selection committees will apply these equivalent performance standards to all eligible non-school leaver applicants to form a rank order of all applicants.

There is no sense in these rules that, although provision for interview may exist, they are in any respect quasi-judicial in their character, or require policy (political or legislative) decisions.
933 Such as, for example, unlawful discrimination.
To that end, scope for potential redress is, under statutory schema, wider for Australian higher education students than for their UK counterparts. Australian higher education providers must have complaints and review mechanisms, including means of external review. Statutory requirements under higher education legislation do not specify or mandate the nature of procedure for resolving disputes or reviewing decisions. However, it is worth bearing in mind that deference and regard given to university decision-making by the courts typically include a requirement that a dispute between a student and university will not be entertained until internal procedures of complaint and/or appeal have been used and/or exhausted. This principle arguably raises the stakes for the significance of ‘internal review,’ although it does not necessarily impose any particular standard on the manner in which such review ought to be conducted.

Leaving aside appeals from disciplinary decisions, sources of complaint may include decisions on academic judgement or examination, academic performance, admissions, the administration of supervision or academic programs, fees, housing, student organisations or allegations of discrimination. Kamvounias and Varnham identify three broad categories of complaint by students in universities (in the consumerised university): representations prior to enrolment, quality of education, and adverse decision-making. The legal standard of procedural fairness to which a student is entitled in disciplinary cases is unsettled and likely variable according to the specific circumstances. It is unlikely that what is required in the standard of treatment of non-disciplinary complaints would be higher. Indeed, ‘judicial’ treatment beyond an impartial approach and proper adherence to the rules (observation of procedural and substantive fairness respectively) may be unwarranted in some circumstances of internal review; in other circumstances, a form of hearing, not necessarily oral, will be the correct approach.

Complaints in universities have led to debate over the merits of Ombudsman in individual institutions and sector-wide, as well as a growing propensity for such offices to be established in universities. The investigative function of the ombudsman model may lend itself to institutional preference for this approach over the use of tribunal models, with greater

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934 Higher Education Support Act 2003 (Cth), s 19-45; see Chapter 3, subsection 3.3.4, above.
935 R v Dunsheath; ex parte Meredith [1951] 1 KB 127; Harelkin v University of Regina (1979) 2 SCR 561.
937 Compare Ivins v Griffith University [2001] QSC 86, [42].
938 Consider, for example, the debate over the role of the Ombudsman in the Ogawa saga at the University of Melbourne: Megumi Ogawa ‘University Grievance Handling for Overseas Students: ESOS Act and the National Code’ (2003) 10 Australian Journal of Administrative Law 3 162; Professor A D Gilbert ‘Response from the University of Melbourne’ (2003) 11 Australian Journal of Administrative Law 44; Ogawa v Secretary, Department of Education, Science and Training (2005) FCA 1472.
adversarial features. In any case, ‘judicial’ standards necessary for the execution of ‘fair treatment’ will broadly be similar, depending on the precise circumstances of complaint or grievance. The standards of justice in such circumstances will function independently of the specific ‘machinery’ of justice used. Further, it is likely that in many internal complaint handling jurisdictions, including disciplinary complaints against students, forms of ‘alternative dispute resolution,’ such as mediation, are integrated into procedures, prior to any kind of formal hearing.

9.2.5 Legislative Action

Primary university statutes consist of broad enabling legislation. Universities have wide powers for enacting secondary legislation for the regulation of internal affairs, including for domestic and academic affairs, as well as for corporate administration or ancillary activities. These legislative powers may take the form of by-laws, ‘statutes,’ ‘regulation,’ or ‘rules,’ and the capacity for academic self-regulation is fundamental to the raison d’etre of the university. The university attains the status of a ‘political community,’ as well as a corporation, and the analogy has been drawn between the university and the municipal community.

The boundary between legislative action and administrative action is not without some ambiguity. However, legislative action may be understood as ‘action in general, in that it is directed towards a class rather than towards a particular individual, and that it is policy-based, in the sense that it moves upon wider considerations of the public good rather than upon any factors specifically referable to a given person.’ Craven additionally argues that these are substantive characteristics of legislative action, and, while most often statutory in form, may also apply to the use of discretionary powers.

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940 Compare, eg, Julia Pedley and Virginia Goldblatt ‘The Development Of A Student Contract And Improvement In Student Disciplinary Procedures At Massey University (2007) 12 Australian and New Zealand Journal of Law and Education 173, 79:

In line with the intention of seeking informal resolution wherever possible to complaints of misconduct, it is to be noted that, provided that at all times the requirements of natural justice are observed, all decision-makers under these procedures are permitted to resolve complaints without resort to formal processes where appropriate in the circumstances of the alleged misconduct. The overt encouragement to resolve misconduct by a consensual process such as mediation is seen as a key feature of the new code and disciplinary procedures. For example, in the case of misdemeanours and serious misconduct, the complaint may be referred to mediation. Where this occurs, then only in the event that the respondent declines to mediate, or the mediation is unsuccessful is the matter referred back to the relevant body for resolution by other means.

941 For example, in Kerr The Uses of the University.


Enactment of secondary legislation will not as a rule attract common law obligations of procedural fairness,944 and to that extent university ‘legislators’ will not be required to ‘hear’ affected parties in making, for example, decisions in fee-setting or changes to academic programs. Typically, these decisions would affect thousands of students and staff. Statutory schemes governing enactment and operation of secondary legislation may contain provisions for ‘consultation’ or forms of public participation in rule-making by governmental bodies, yet it is not necessarily the case that these schema encompass university rule-making. Consultation mechanisms in the case of statutory rule-making are viewed, however, as consistent with, if not analogous to, standards of justice embodied in the procedural fairness doctrine.945 Statutory requirements for participation or ‘hearing’ vary across jurisdictions. For example, the Subordinate Legislation Act 1989 (NSW) expressly exempts universities from the statutory framework governing subordinate legislation.946 In Victoria, the Subordinate Legislation Act 1994 provides for ‘guidelines’ for consultation947 although university rules do not fall within the ambit of ‘statutory rules’ under that enactment.948 In South Australia university rule-making is susceptible to the Subordinate Legislation Act 1978949 but consultation is not required under that legislation. In Queensland, by contrast, university legislative activity is susceptible to the Statutory Instruments Act 1992,950 and by s 45 of that Act a form of notification and consultation is required. Aside from issues of procedural fairness, university rule-making, as with delegated legislation generally, remains susceptible to judicial review on questions of substantive fairness, that is where legislative conduct departs sufficiently from the provisions of the primary statute as to be beyond power, improper or unreasonable.951 An arguable example of this sort of departure from governing legislation might occur in respect of the rules regulating the conduct of students off-campus.952

945 See eg Administrative Review Council Rule-Making by Commonwealth Agencies: Report to the Attorney-General (1992) Parl Paper No 93, [5.2]: ‘Consultation prior to law making is consistent with the principles of procedural fairness as it enables individuals and groups with a particular interest to put their views. It serves the public interest by enabling decisions to be made in light of competing interests ad requires government to account for its proposals. In the final analysis, rules made following consultation are likely to be more considered and better for having been exposed to the community before being made.’
946 Schedule 4.
947 Sections 6, 26.
948 Section 3.
949 Section 4.
950 Section 7.
952 Although compare Lara Marini David ‘Has Big Brother Moved Off-Campus? An Examination of College Communities’ Responses to Unruly Student Behaviour’ (2006) 35 Journal of Law and Education 153.
9.3 Administrative Justice, the University and Discipline: Restating the Key Findings

The practical application of administrative justice to disciplinary decision-making affecting university students has been the primary object of this study. Justice, in this sense, has been the main variable in investigating and assessing the quality of this decision-making in the exercise of disciplinary powers, and, more specifically, quality has been measured principally against the legal standard of procedural fairness. Other standards of legality have emerged as relevant in the course of the research. The focus on disciplinary decision-making arose because this form of institutional action is relatively formalised and structured and there are clear lines of application of the rules of natural justice to this form of action.

The policy environment in which Australian universities have historically operated has been influenced by instrumental as well as cultural motivations on the part of governments. Over the past two decades, reconstitution of the university as an instrument of government policy has been explicit, and the prevailing trend has been toward use of the university as an extension of economic policy. Consequently, human capital theory has played a major role in higher education policy. Governments and higher education institutions themselves have fostered commercialised modes of behaviour (both institutional and individual). Among the key features of this operating context are the dominance of market or ‘quasi-market’ relations on a range of levels, including between the university and student; the rise of new student subjectivities, dispositions and behaviours; and an internal ‘developmental’ dialectic, leading to relative austerity in ‘core’ pedagogical areas. Theoretical and empirical evidence suggests a rise in the significance of administrative-rational or bureaucratic modes of operation in the university. This development supports a hypothesis that forms and methods of ‘administrative government’ have become more important and central to the operation of higher education.

Given this policy context, I have considered the nature and function of student disciplinary action as an exercise of institutional power. Having regard to the domestic nature of the university’s disciplinary jurisdiction, and the complex public-private legal context in which it operates, administration of university discipline over students has two primary purposes: the protection of internal order, and the ‘protection’ of academic standards. The latter purpose has, arguably, become the preponderant focus of disciplinary action in contemporary times. The process of disciplinary action and the operation of disciplinary codes (either by statutory instrument or contractual terms, or both) include frameworks for the protection of people and property and codes of academic behaviour. The content of those codes may vary across institutions, although the broad framework will be constant, and at the margins the behaviours against which disciplinary powers are deployed may not be entirely settled. I have noted that the key disciplinary concept of plagiarism falls within this category of unsettled norms.
Disciplinary action by universities is a clear example in which individualised justice, in the form of fair treatment, is directly applicable, and attracts a broad complement of procedural protections. Other tenets of ‘administrative justice’ arise, such as in the role of internal review of primary decisions, or of external review, such as by State of Federal Ombudsman or by other means. The question of external review of university decisions is, however, not easily ‘navigable.’ The exercise of disciplinary powers, in addition, has evolved in the context of rules expressly designed to account for the requirements of justice – most notably, procedural justice – which the courts have progressively imposed on the universities. Given these ‘judicial controls,’ disciplinary rules and practices are particularly amenable to scrutiny for procedural justice.

9.3.1 Rates and Forms of Disciplinary Action

Information regarding volumes of disciplinary action by universities against students is patchy, and when read in terms of estimates of student misconduct it might be considered perplexing. The literature suggests high rates of transgression, especially in regards to academic misconduct (plagiarism, cheating, etc). Research on complaints and litigation suggests actions involving discipline or misconduct lie at 10% or less of university cases dealt with by the courts and tribunals and the OIA in the UK, and affect a small fraction of students in the university. These data are indirect and representative estimates of the volume of actual discipline cases handled by universities. They do not seek to quantify directly the number of discipline cases, but they do provide an indication of the actual caseload. These figures do suggest that the rate of disciplinary action is a fraction of the estimated rate of misconduct.

Quantitative information on actual disciplinary proceedings was collected for the present research project. It poses rates of investigation and ‘prosecution’ of misconduct that is even smaller than for other (indirect) samples. Collection of statistical information for this investigation places the figure of disciplinary action at a little under 1% of students in the universities surveyed. The overwhelming majority of these cases concern academic misconduct, with plagiarism being the single most prevalent (mis)behaviour of that category. Measured against estimates of student misconduct in the sector, the rate of disciplinary action is negligible. This correlation confirms the impression that overwhelmingly most student misconduct is undetected or unchallenged.

Having said that, I would submit that the rate of formal disciplinary action is significant. In absolute terms, these figures amounted to more than 1600 instances of formal student misconduct.

953 Chapter 5, section 5.3, above.
disciplinary action in the sample year (2006) at those institutions surveyed. Generalising these figures, it could be estimated that over 9,000 higher education students faced disciplinary action across Australia in that year. This volume of cases amounts not only to a substantial administrative burden on the universities but potentially many individuals sanctioned and careers jeopardised. Further, de Lambert et al’s study of discipline in New Zealand tertiary institutions suggests that informal (and possibly illegal) disciplinary action taken by institutional staff or officers runs at a rate considerably higher than formal action. For whatever reason, if informal action and/or sanction (whatever its precise nature) were being applied in Australian universities at similar rates, students affected by some form of disciplinary intervention would run into the tens of thousands.

9.3.2 University Discipline, Law and Practice

University discipline falls squarely within the institution’s ‘domestic’ or internal jurisdiction, which, as I have noted, has recently been the subject of legal reform both in Australia and the UK. It has clearly come to pass, as Professor Wade envisaged, that the ‘paraphernalia’ of administrative law has been imported into the student-university relationship, and that in addition principles of contract law and tort have achieved refinement in student cases since the 1990s.

It is established law that in discipline cases universities are required to observe procedural fairness, and indeed that the standards required clearly import the ‘judicial’ framework of a fair and impartial hearing. Summary or urgent action represents a limited exception to this rule. What precisely is required for fairness to be accorded, or what may be required be way of ‘judicialisation’ of procedure, is less certain. In Griffith University v Tang, the opportunity for the content of the rules of natural justice to be tested in a student case, before an Australian superior court, was never taken. Case law deriving from international superior courts supports a range of possible approaches, from proceedings analogous to trial to administrative adjudication absent any comparison to a lis inter partes.

In principle, this spectrum of approaches is explicable given the variety of circumstances and allegations that may potentially arise under the aegis of university discipline. I have explored some of these above, ranging from minor transgressions and competent ‘defendants’ to serious allegations against unrepresented (and confused) parties facing serious and lasting consequences. It would generally be the case, however, that disciplinary cases will be treated with more gravity than, for instance, academic disputes, and the minimum threshold of

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954 de Lambert, et al ‘Chalkface Challenge’.
955 Chapter 3, subsections 3.3.4-3.3.5.
protections – the ‘bedrock safeguards’ – available in discipline cases will include notice and the opportunity for an oral hearing. In many cases, fairness would require more. Unfortunately, there is evidence from the present investigations that in some instances even these basic standards are not being met satisfactorily.

Applicability of the requirement for impartiality in decision-making may seem to be less problematic than the precise permutations and combinations of fair hearing procedures. For example, there is nothing in the way of ‘policy’ decisions to be made. Yet allegations of bias do arise in judicial review applications to the courts. The more significant practical questions that emerge are the ‘village’ atmosphere of university associations and insufficient appearance of ‘independence’ (a potential problem of ‘domestic’ jurisdictions generally), and decision-makers’ use of their own expert knowledge in the conduct of investigations. Yet, as we have seen (and discuss below), issues of a failure to act impartially go further than these instances.

9.3.2.1 Fairness and Rules

The few empirical studies undertaken on university discipline interrogate disciplinary rules and written procedures, subjecting them to scrutiny against standards of procedural fairness (‘due process’) at law. One component of my investigation sought to reproduce this research method, comparing rules at selected Australian universities against those legal norms. Having regard to differences in scale and context, this aspect of the research produced similar findings to the more recent US research, in particular that basic procedural protections are generally met in university rules. These include a right to be heard and receive notice. It may be of concern that, in regard to basic rights such as receipt of particulars and access to all evidence to be relied upon, that the selected rules are not universal in providing express entitlements. Yet, other procedural features that may be important, even critical, for students in university hearings, may not be available or may be circumscribed. I refer notably to rights to representation, cross-examination in some circumstances, the provision of reasons, and internal review rights. Sector-wide, there is ambivalence over providing these procedural features as of right.

9.3.2.2 Fairness and Practice

Analysis of discipline files and interviews with student advocates gave insight into university practice in disciplinary matters. The problem of higher education institutions affording procedural fairness as a matter of practice has received little attention in research literature, although it has been emphasised by one specialist body commonly dealing with such issues, the

956 Wade ‘Judicial Control of Universities’.
UK Office of the Independent Adjudicator for Higher Education. I included express interrogation of key features of procedural fairness in regards to both of the above ‘data sources’ (cases and interviews) precisely as a means of comparing and contrasting the results within each information source as well as with the results of the survey of rules. In each empirical study, there is no straightforward correlation of institutions investigated: there is, however, overlap. Consider the fundamental question of a right to a (oral) hearing. Evidence from all three studies supports the proposition that the right to be heard is universally observed in university discipline action. Subsequently, consider the equally basic entitlement to notice, including satisfactory particulars and disclosure of all material that may be adverse to the student. In the rules, there is some slippage from universality of approach: requirement for written notice is universal in the rules, requirement for particulars applies in 87.5% (14/16) of institutions, requirement for disclosure is expressly stated in 62.5% (10/16) of institutions. Concerns over adequate notice become amplified once evidence from the case-files and interview are taken into consideration. All case-files at one university under examination exhibit a ‘systemic failure’ (as I have described it) to particularise allegations satisfactorily. There are six cases that exhibit problems in respect of adequate and fair disclosure of information to the student. On the question of notice, slightly more than a third of student advocates described particulars as inadequate (proportionately higher than appears from the rules), and a slight majority of those considering this issue thought disclosure to be unsatisfactory. On both issues, then, poor practical performance in regards to these standards is reiterated at a higher rate by advocates than is discernable from the written rules. In general, of 16 case-files exhibiting prima facie some error of law, 9 of those cases (or just under one-quarter) suggested evidence of procedural unfairness.

Investigation of case-files and advocates’ experiences allowed analysis to go beyond the formality of rules and deal with how decision-making actually unfolded. This approach gave some insight into the ‘state of mind’ of decision-makers, including on the question of ‘open-mindedness’ or impartiality. Absent a written record of proceedings, preferably in transcript form, it is challenging to make an assessment of bias in these domestic proceedings. Case files at one university did provide a good written record of tribunal proceedings and deliberation, and at the other investigated institution inferential evidence of the tribunal’s approach was available in some cases. In all, seven cases (approximately 18%) exhibited evidence prima facie of a failure to observe satisfactorily the rule against bias. Add to this assessment the unease

957 Office of the Independent Adjudicator for Higher Education Annual Report (2005), 9: It emerged that the most difficult concept for HEIs to deal with was the requirements of the rules of natural justice (so familiar to lawyers) that apply to complaints handling, namely, that the complainant should be made fully aware of any charge against him or her, that both parties should be heard and that judging panels should be free of bias.

958 Interestingly, in their study of university rules, Berger and Berger did ask, in their survey instrument to institutions, whether students were provided with an impartial tribunal. While it would be difficult to explain a university answering negatively to this question, nearly 10% of surveyed institutions did answer
expressed by a number of student advocates regarding the impartiality of decision-makers, and there is a sense that systemically, if in a minority of cases, the conduct and/or thought-processes of disciplinary tribunals are in issue.

The performance of university tribunals in respect of other aspects of procedure and practice is mixed. For example, I raise concerns regarding the testing of evidence before these tribunals, especially where official written claims are made by witnesses (eg exam invigilators) who are not subsequently subject to oral examination or cross-examination. No effort appears to be made to assess the weighting of evidence in these circumstances. On the question of the provision of written reasons, although not necessarily obligatory at common law, slightly more than 40% of surveyed universities provide for reasons in their rules. Written reasons are not provided (or required under the rules) in the case-file universities, and, on the information supplied by student advocates, provision of written reasons at least ‘occasionally’ occurs in only around 30% of institutions. No information regarding the content or quality of those reasons was available. While on these procedural points universities do not appear to perform especially well, a marked and valuable departure from applicable standards in the written rules occurs in respect of representation. An inflexible approach to representation was manifest in the rules, yet in the experience of student advocates an effective right to representation by these non-legal staff operates in nearly all institutions where they work. If evidence on the case-files is anything to go by, representation by a ‘professional advocate,’ if not lawyer, significantly improves the quality of submissions and the capacity of the student to negotiate the proceedings. It does not, however, necessarily affect outcomes.

9.3.2.3 Disciplinary Practice and Other Forms of Legal Error

While procedural fairness has been the central object of scrutiny in the empirical study, other issues of legality in disciplinary practice arose in the course of analysis, compounding, I would argue, patterns of shortcoming in the handling of disciplinary cases. These other areas of potential legal error are more or less complex, arguable or difficult to contend with by ‘hybrid’ tribunals. For instance, the issue of jurisdictional fact arising in Chapter 7, turning of the definition of a student, may not be immediately obvious and may require relatively sophisticated analysis of fact and law to be resolved.

In respect of obligations on an accuser or the tribunal itself to discharge the onus of proof against a student facing claims of misconduct, guidance in the case law is rather clearer (that the burden lies with the accuser). Notwithstanding this situation, half a dozen case-files contain

negatively. It is not clear in that study what precisely that response may have meant: Berger and Berger ‘Academic Discipline: A Guide to Fair Process for the University Student’.

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information that this rule was not applied or indeed that the onus of proof was reversed and placed on the student. This unfortunate state of affairs is repeated in the information supplied by student advocates, where only 5 of 13 (38%) respondents assert that the ‘persuasive burden’ is placed on the accuser or complainant either unambiguously or occasionally. In the remainder of institutions, it is the perception of advocates that students bear the onus of persuading a decision-maker of their case.

Additionally, in five case-files there is evidence that decision-makers failed satisfactorily to inquire into or examine the facts of cases before them, which likely contributed to adverse findings against students. While there is legal authority and commentary to the effect that inquisitorial bodies have a duty to make inquiries, the precise content of the rule is more open to debate. Nevertheless, it is inferred in several of these case-files that decision-makers either unreasonably limited their investigations and/or analytical faculties, or alternatively failed to extend their inquiries to where available evidence might reasonably be said to take them.

9.3.2.4 The Administration of Discipline

The administration of discipline was not a central focus of the empirical study, and, for instance, interview of tribunal members and/or administrators was not undertaken (primarily for practical reasons of access to these personnel). I have noted that it would be reasonable to assume that the numbers of cases proceeding annually requires significant administrative effort on the part of institutions and their internal bodies. No doubt the burden of this effort is exacerbated by a particular confluence of forces relevant to disciplinary case-handling. First, tribunals are typically comprised of middle managers (eg Heads of School, Deans) or internal, ‘lay’ members drawn from the academic staff, who undertake these duties in addition to their primary teaching and research work. Second, workloads on academic staff generally have steadily increased in recent years, and administration constitutes a growing proportion of that workload. Disciplinary decision-makers, then, commonly find themselves in a role additional to their existing, primary duties, consistent with the ‘collegial’ model of university administration. The ‘collegial’ model of university ‘village community’ has come under sustained challenge from corporate management models. An uneasy co-existence between the two models appears to be the present norm. On the question of the administration of discipline, to the extent that generalisation is possible, current arrangements lead to at least two immediate points of critique, which arise from the empirical research.

In the first place, commonly no clear demarcation occurs between the investigation process and the adjudicative (or determinative) process, either in terms of bodies or personnel charged with these functions or in terms of discrete procedures and rules operative in these distinct situations.
I have noted parallels in reform to regulatory frameworks in the professions, where separation of these functions occurred as a departure from ‘peer review’ practices. Such parallels need to be approached cautiously in the university setting. In some institutions, there have been attempts formally to separate the roles of investigator and adjudicator, for example, by instituting the role of ‘investigation officers.’959 Also, some circumstances of complaint and disciplinary action against students may be sufficiently minor, or remedial, or undisputed, that the need for separate machinery of complaint and investigation is unwarranted and excessive. The case-files investigated support this notion of a range of gravity and complexity in discipline cases. In addition, it is not unusual for university discipline rules at present to provide for various thresholds in the seriousness of cases and/or discretions to be exercised on the part of decision-makers to refer matters to more senior official or bodies.

A second manifest problem with administration is evidence from student advocates of an inconsistent or ‘uneven’ approach to discipline within institutions. Of those who discussed this issue, concern was almost universal. As I note in Chapter 8, variability of approach, especially between Faculties and/or Schools, and as regards competence, may be such as to render decision-making arbitrary or capricious, with standards dependent upon which organisational area is handling a case. Appeals processes appear to have some benefit in mitigating this variability.

9.3.2.5 The Impact of Commercialisation Policies on University Discipline

I would place the concept of commercialisation (or ‘marketisation’) as a subset of the broader neo-liberal policy agenda in higher education, with the latter including changes to roles and subjectivities of internal actors and also crisis-affected patterns of resource distribution and development. Having said that, the boundaries between these phenomena are not clear-cut, and they are obviously inter-related. Dynamics of commercialisation and crisis came in for particular discussion in research with student advocates in Chapter 8. It was widely perceived by student advocates that commercialisation pressures in higher education had had an impact on disciplinary systems and processes.

At its most general, the critique of commercialisation was that it had intensified a systemic tension between the role of disciplinary systems in the guarantee of academic standards and integrity, and imperatives for revenues derived from students’ fees. This tension is most keenly expressed in relation to international students. Further tensions in terms of outcomes were noted, including polarised approaches by institutions (and within institutions) to the treatment of

959 Yet even here the parallel to independent investigators in the professions is ambiguous, as ‘investigators’ in university faculties or schools may have some determinative (decision-making) powers:
misconduct allegations and use of disciplinary mechanisms, ranging from a punitive, even indiscriminate, approach (including for reputational purposes) to an ‘educative’ approach. Elsewhere, commercial pressures on university staff have led to failures in the proper handling of misconduct amounting to corruption.

A climate of austerity affecting ‘core’ functions of teaching and learning was also viewed as having an impact on the use of disciplinary processes, especially where declining academic standards lead to a disciplinary response. That is, there was evidence from interviewees that disciplinary controls are emerging as default instruments contending with symptoms of ‘pedagogical crisis.’ In some instances (I refer to the treatment of plagiarism cases in particular) disciplinary policy appears to be used as a form of academic ‘policing’ of student conduct. It is also evident that disciplinary action is not uniformly ‘punitive.’ Rather there is significant evidence from advocates that universities are also using disciplinary proceedings as an ‘educative’ instrument, presumably in less serious cases. Given ambiguities surrounding the concept of plagiarism, this is likely to be one area where an educative approach is employed.

Interestingly, I would suggest that commercialisation, and neo-liberal policy more generally, has presented the university with a new problem in regards to the legitimacy of disciplinary processes. This problem arises not from practical shortcomings (or not solely) but rather from the principal object of disciplinary action in the contemporary period: the maintenance of academic standards and integrity. While even critical student advocates supported a role for discipline in regulating standards, the view expressed by one advocate that ‘no real useful role’ exists for disciplinary mechanisms because of the failure of disciplinary systems to impact on standards or ‘integrity’ in any meaningful way cannot be dismissed out of hand. Disparities between reported rates of academic ‘dishonesty’ and disciplinary proceedings support, on their face, such a criticism. However, I would view that response as expressing the need for a more fundamental critique of policy within and outside of the university than merely a call for the abolition of the existing disciplinary machinery. A sentiment expressed by certain student advocates was that university policy and conduct, in so far as it is manifest through the operation of disciplinary action, has lost sight of basic educational purposes, or is at risk of doing so: ‘They’ve got a different goal. The goal is no longer an educational one. It’s… keeping people in seats…’

I submit that it is (re) orientation of disciplinary policy toward the fundamental educational purposes of the university – as a corollary of those objects – that must represent a basic measure of substantive justice. It may be that wider policy changes are required: indeed re-founding the confused and confusing relationship between student and institution, in law and educational-economic policy. That is a bigger project than the present

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960 Interviewee R5, cited in Chapter 8, sub-section 8.8.5, above.
one. Nevertheless, there is scope for reform of disciplinary policy and procedure in the university sector that may achieve a greater semblance of ‘administrative justice’ in university decision-making.

9.4 Conclusions: Validating the Hypothesis of Poor or Problematic Decision-Making

‘Administrative justice’ found a foothold in the university decades ago. Its application has been widening incrementally since that time. In most major classes of decision-making affecting individual students account is taken not only of the exercise of discretion – the enrolment, assessment and graduation of students – but that that exercise occurs fairly. Disciplinary decision-making has been a province of university affairs particularly susceptible to the legal doctrine of fair procedure, given its essentially adjudicative character and close proximity, even in earlier times, to forms of judicial decision-making.

Despite these developments, little empirical information has been available on disciplinary decision-making by universities. This research has indicated that rates of disciplinary action are low as a proportion of the student body, but that significant numbers of individuals are nevertheless affected by university discipline in absolute terms. The research reiterates or confirms that, based on existing estimates of misconduct by university students, recourse to formal disciplinary action by institutions occurs in only a small fraction of instances.

A principal objective of this research was to consider the quality of decision-making in disciplinary cases, using adherence to the legal standard(s) of procedural fairness as the main criterion of quality. Reference to this standard may also be viewed as consistent with considering how well, how rigorously or effectively, a concept of ‘administrative justice’ has been imported into the university. The initial hypothesis of the study was that the quality of such decision-making was poor or exhibited shortcomings. This hypothesis originally arose from the author’s practical experience in the university sector. The key hypothetical questions asked: Is the quality of university decision-making in respect of student disciplinary decision-making satisfactory? If we equate quality with fairness, do universities as a general rule meet legal standards of fairness in their conduct, practice and procedure? Generally, the hypothesis has been shown to be correct on empirical investigation against a range of data sources, On the available evidence, shortcomings in fair treatment and good practice are systemic. If they do not represent dominant trends in institutional conduct or approach, instances of unfairness, poor practice and potential illegality are nevertheless recurrent across the sector and identified by varying research methods. They manifest patterns of institutional (administrative) weakness, requiring concerted attention. The alternative might be the growing expense of litigation, even if only in exceptional cases. It might be, for a considerable number of individuals, an injustice
done to them. The *status quo* is likely to continue to contribute to the substantial administrative burden of the universities and, above all, its staff. The limitations highlighted in this research are not insurmountable. It would be beneficial for the logic of reform, notably in respect of disciplinary procedure and practice, to be visited upon the halls of academia. For the sake of a semblance of justice, as well as potential efficiencies for the universities, the point of departure for disciplinary decision-making should be that disciplinary bodies are modelled on the ordinary (administrative) tribunal system, attracting the norms and standards of administrative justice as are expected elsewhere in the public (and parts of the private) sector. Beyond that principle, precise models, rules and standards may be negotiable. It is to this general question of reform I now turn.
Chapter 10
Toward a Reform Program for Disciplinary Decision-Making in the University

From the perspective of standards and practice, the structure of university decision-making in respect of student discipline has a three-tiered arrangement: primary decision-making, internal appeal, and external review. While rates of internal appeal are, relatively speaking, quite high, and resort to external action is growing, overwhelmingly the exercise of disciplinary powers occurs at the level of the original ‘proceedings’ and goes no further. By dint of sheer numbers therefore it is reasonable to assume that any focus on reform and improvement to the quality of decision-making ought to prioritise the conduct and rules of initial proceedings and perhaps the nature and operation of internal appeals. I begin with these issues. The question of external review mechanisms in the sector has been the subject of specific debate, and, subsequent to discussion on domestic affairs, I engage that debate more fully below.

10.1 Fair Procedure

In respect of the ‘bedrock’ of procedural safeguards, as well as more arguable legal entitlements, universities generally are not exemplary decision-makers. Various areas in which observance of the rules of procedural fairness is wanting have been noted. As a matter of reform to rules and practice, I make the following proposals for ‘model’ procedures. While certain proposals of reform impact on the primary disciplinary instrument (rules), it would be a matter of good practice that, in other respects, rules of procedure or conduct are more better contained in ‘guidelines’ or supporting instruments. These documents would be intended to inform decision-makers about the correct or preferred approach and read in conjunction with the primary instrument. This is the practice of several institutions presently: for example, Monash University provides comprehensive ‘guidelines’ in support of primary rules.

10.1.1 Notice

Problems arising in the provision of sufficient notice concentrate on particularisation of allegations or ‘charges,’ and disclosure of all information likely to be adverse to the student. Clarification of the content of these rules ought to be provided in the primary rules. For instance, provision of particulars ought to incorporate the requirement for notice not only of the rule(s) allegedly breached but also allegations of fact, act or omission on the part of the student. Rules of disclosure ought to articulate the common law standard in general terms, while providing greater detail and clarification to decision-makers in supporting guidelines (including rules and prohibitions on ex parte contacts with decision-makers). Allegations of fact, action or omission ought to be made in respect of each rule allegedly breached.
10.1.2 Summary Action

While duties of fairness are highly circumscribed in the context of urgent action, it is reasonable and appropriate for the rules to provide for limited mechanisms of appeal or review of such action, where it adversely affects a student’s interests or may significantly prejudice their education. This type of provision operates, for example, in disciplinary rules at the University of Queensland and may be considered a relevant model. Additionally, supporting documents ought to provide a more thorough explanation of the purpose and rationale of summary disciplinary action, notably its intention to maintain a status quo prior to a fuller hearing of the matters at issue.

10.1.3 Cross-examination

The primary rules ought to establish clearly the institution’s approach to the taking of oral evidence by witnesses or involved parties (eg staff bringing allegations) and the testing of their evidence where this is necessary and/or appropriate. In particular, provision is needed in the rules for an entitlement, if qualified, to cross-examination by a student or their representative. In addition, guidance will likely be needed for the conduct of cross-examination and possibly evidence-in-chief. It is foreseeable that there will be circumstances in which a student may want to confront or test the statements of a witness or another party, or it may be necessary to do so. These circumstances may be exceptional rather than the norm.

The right to cross-examination may be crucial to a student’s ability to make their case and contradict evidence from witnesses or other participants. It may be an extension of their right to a fair hearing. There is a further benefit in that procedure: it may provide a context of structured confrontation of statements adverse to the student, limiting the potential for uncontrolled antagonism in the hearing. Yet, the gravity, seriousness and formality of hearings will vary, ranging from informal proceedings in which ‘cross-examination’ may extend only to clarification of facts presented by a complainant, to substantial adversarial procedure accommodating features of a trial. Similarly, I would propose that the rules anticipate the exercise of a range of approaches, with discretion vested in the chair to adopt an appropriate procedural model. If it is necessary, then there may be a case for preliminary hearing to resolve the appropriate approach to take, or this question may be dealt with in the substantive hearing. To that end, the range of procedural models ought to be specified or prescribed in additional guidelines, and these might include: cross-examination conducted by the student or his/her

representative consistent with the ordinary rules of evidence, examination by leave of the chair, perhaps providing an indication of the line of questioning to be pursued; questions or lines of questioning submitted to the Chair to be pursued by the tribunal (with or without written notice). In any case, a tribunal will be prohibited from restricting or limiting arbitrarily a line of questioning that is relevant to the proceedings. Whatever approach is adopted in general, or in any particular case, ‘it is desirable for decision-makers to adopt a conscious, coherent, and consistent procedural strategy.’

It may be that the tribunal, or another relevant person, is required to assist an unrepresented student with the concept and/or conduct of cross-examination. Guidelines in this respect would properly be aside from the text of the primary rules. Finally, the rules ought to require the tribunal to put to the student directly, in circumstances where adverse oral evidence is heard against them, whether the student wishes to put questions to the witness, notwithstanding the precise procedural strategy adopted.

The cross-examination issue raises other questions of the powers of university tribunals. First, university tribunals will typically lack statutory powers to compel witnesses to attend the hearing, be subject to cross-examination, or take evidence on oath. Strictly speaking, cross-examination will only arise as an issue where a witness has given evidence already and a party, including a student (or their representative), wishes to deal with it. Yet other circumstances may arise where a student wishes a particular witness to be available to be examined and presumably this cannot be arranged privately by the student. Scrutinising the evidence of an exam invigilator may be such an example. Provisions for the request of a witness operate, for example, under the procedures of the Refugee Review Tribunal. Powers to direct students or staff to attend a hearing and give evidence might be instituted under the rules and be considered a reasonable direction operating under contract or delegated legislative powers of the university. It is common presently, by way of comparison, for the disciplinary rules to include as a breach or ‘offence’ the failure to follow a reasonable direction of an authorised officer or staff member. Leaving these rather convoluted mechanics aside, where evidence – especially oral evidence – cannot be tested, or there is a refusal to allow it to be tested, this factor ought to be taken into account in determining its weight or persuasive value in the decision-making process.

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962 See eg Evidence Act 1995 (Cth), Division 5.
965 See Aronson, Dyer and Groves Judicial Review of Administrative Action, [8.395]; compare Forbes Justice in Tribunals, [12.96]: ‘An even simpler device would be to adopt a rule that often, if not always, an absence of cross-examination so reduces the weight of disputed evidence that it is “irrational” to rely upon it.’ It may not necessary to go this far, but guiding principles as to the weight of disputed evidence in such circumstances would be productive.
I have been particularly critical above of restrictions placed upon students seeking to be represented. It was also noted that, in practice, many if not most universities permit a student to be represented at least by a non-legal specialist. Most commonly this assistance is provided by professional staff from the student organisation. Empirical literature on the effect of representation in administrative proceedings points to clear advantages for a complainant or affected persons in having representation.\textsuperscript{966} There are likely benefits to the decision-making body also.\textsuperscript{967} A right to representation in hearings must be balanced against the desire not to ‘legalise’ proceedings excessively. In these circumstances, it appears appropriate to provide a right to non-legal representation to students at first instance. It may be that the discretion to allow legal representation in hearings is provided on internal appeal, as there is a general drift to greater formality in the latter proceedings. Representation provided by non-legal advocates from student organisations, or internal services, would lead to a range of benefits: more specialised advice and support than arguably may come from lawyers, a lesser tendency to ‘legalise’ proceedings, and lesser need by a decision-maker(s) to guide and assist a student through the process.

\textbf{10.1.5 Reasons}

As a matter of routine procedure (as distinct for example from rights to cross-examination), it may be that the most controversial duty that may be imposed on the disciplinary decision-maker will be a duty to give reasons. At the same time, for a range of reasons, this particular duty is critical to raising the standards and quality of decision-making. The controversy is likely to arise in relation to the burden imposed on decision-makers. An ulterior motive may be a desire to avoid transparency and scrutiny in decision-making. The latter can be dismissed as unacceptable, but the former issue needs to be taken seriously, especially where decision-

\textsuperscript{966} Eg H Genn and Y Genn ‘Expectations And Experience Of Tribunal Hearings’ in Denis Galligan (ed) \textit{A Reader on Administrative Law} (Oxford University Press, 1996), 466-476. See also Cowan and Halliday \textit{The Appeals of Internal Review}, 192-197 (emphasis added): ‘Our qualitative data about the conduct of internal reviews with the HPU suggests that legal representation makes a positive difference to applicant’s chances of success. \textit{It certainly affects the way in which internal review is handled}.’ The Australian Law Reform Commission has found that in various AAT jurisdictions success rates for represented applicants is between 17.2\% and 27.2\% higher than for unrepresented applicants: Australian Law Reform Commission \textit{Part One: Empirical Information About The Administrative Appeals Tribunal} (1999), cited in Roger Douglas \textit{Douglas and Jones’ Administrative Law} (Federation Press, 5\textsuperscript{th} ed, 2006), 263. See also Australian Law Reform Commission \textit{The Unrepresented Party Adversarial Background Paper No. 4} (1996), http://www.austlii.edu.au/au/other/alrc/publications/bp/4/unrepresented.html#4.Federaltribunals-Theeffectofrepresentation (accessed 8 March 2009).

\textsuperscript{967} See eg Administrative Review Council \textit{Internal Review of Agency Decision-Making} Report No. 44 (2000), [4.13]-[4.14]: ‘The right to representation is of particular importance when the applicant is facing educational, language or cultural barriers or is disabled… The agency may also benefit by being able to deal with an experienced person with an understanding of the relevant legislation.’
makers are not ‘professional,’ or at least they must combine this administrative activity with their ‘core’ tasks of teaching, research or (in the case of student tribunal members) study. I make further comment on means of striking efficiencies in the work of disciplinary tribunals to accommodate the task of reasons-writing.

I would submit that is no longer, if it was previously, satisfactory for university disciplinary tribunals not to provide properly reasoned decisions as a routine part of their decision-making. The value of written reasons has been dealt with elsewhere. Added to these philosophical and jurisprudential grounds for written reasons, there are more practical and legal considerations. I have noted previously the case-law under which, even at common law, provision of reasons may be required on bodies such as university tribunals (bearing in mind that the law remains that at common law an administrator is not generally required to provide reasons). Notably, this might occur where a decision appears ‘aberrant.’ In addition, in Victoria at least, a student must be provided with written reasons for such a decision where they request them. Universities in that State must also supply reports under the Supreme Court’s admissions rules documenting any instances in which law students have been investigated for, or found to have engaged in, academic misconduct. While not amounting necessarily to written reasons for disciplinary decisions, these rules add pressure for greater documentation and explanation of disciplinary actions and decisions. Finally, if a student aggrieved by a disciplinary decision subsequently takes action through an institution’s grievance procedures, the student can receive, on request, reasons of the institution’s decision under that procedure (not necessarily the discipline procedure directly).

Finally, the form and content of written reasons would need to be considered in the rules. Standards of written reasons in administrative decisions have been the subject of investigation elsewhere. I would note the construction of provisions under the relevant review jurisdictions in migration legislation as instructive. Sub-section 368(1) of the Migration Act 1958, for example, establishes relevant criteria for written reasons supplied by the Migration Review Tribunal:

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969 Administrative Law Act 1978 (Vic), s 8.
970 Legal Profession (Admission) Rules 2008 (Vic), r 5.02(c)(v): see Chapter 4, sub-section 4.6.1, above
971 See Higher Education Provider Guidelines 2007 (Cth), ssub 4.5.5(h): The higher education provider must… h) give reasons and full explanation in writing for decisions and actions taken as part of the procedures, if requested by the complainant and/or respondent.’
(1) Where the Tribunal makes its decision on a review, the Tribunal must prepare a written statement that:
   (a) sets out the decision of the Tribunal on the review;
   (b) sets out the reasons for the decision;
   (c) sets out the findings on any material questions of fact; and
   (d) refers to the evidence or any other material on which the findings of fact were based.

10.1.6 Appeal Rights

Although unusual, access to (internal) appeal rights may be restricted or discretionary for students. The more substantial issue is the scope of appeal allowed from primary disciplinary decisions. Bearing in mind that rights of appeal are common practice in university discipline, the question of provision of an appeal mechanism per se is not especially at issue. If the procedure is to be supplied, perhaps the more pertinent question is: will it have the scope and capacity, if conducted properly, to ‘cure’ any defect arising from a first instance hearing? Further to this question, the issue of policy is whether the scope of appeal rights is restricted to particular types of questions or ‘defects’ – and therefore whether, by providing for prescribed grounds of appeal cognisable by an appeals body, the scope of appeal is effectively codified in the rules – or whether a student’s right of appeal is unrestricted. In either situation, the appeals panel may proceed by a re-hearing de novo or by more limited action. From what can be gauged in the analysis of cases in Chapter 7, instances arise where the scope of questions under re-examination may be problematic and disputed. Data from Chapter 5 indicates that rates of internal appeal are not insignificant, and evidence from all three chapters reporting empirical information suggests that the risk of error in decision-making at first instance is sufficiently great as to warrant as wide, comprehensive and thorough machinery of internal appeal as may be possible in the circumstances. In ordinary circumstances, therefore, broad scope for appeal appears preferable. The threshold of ‘standing’ for an internal appeal ought to be, as for many administrative review jurisdictions, merely that a student is ‘aggrieved’ by the primary decision.

If ‘codification’ of grounds of appeal is desirable, this action should only occur as a matter of guidance to students, in respect of the more common or likely circumstances leading to appeal (eg claims of denial of procedural fairness, misapplication of the rules, error of fact on the part of a primary decision-maker, or availability of new and relevant evidence).

973 There is also the question of whether some kind of recourse ought to be available in circumstances of summary or urgent action. Given that potential for error or abuse in such situations is arguably no less than for any other instance of the administration of discipline, it seems reasonable that a form of appeal might be available against summary decisions. Balance would need to be struck between controls constructed so as not to frustrate the exercise of these powers and means to be heard in the interests of the proper administration of those powers. A good model and effective compromise can be found at University of Queensland Statute No. 4 (Student Discipline and Misconduct) 1999, subs 27(2):

(1) The vice-chancellor may suspend a student on considering it necessary to avert a substantial risk of (a) injury to a person; or (b) damage to property; or (c) serious disruption of a university activity. (2) Before imposing the suspension the vice-chancellor must make a reasonable effort (having regard to the seriousness and urgency of the risk) to provide the student with an opportunity to explain why the suspension ought not to be imposed.
Additionally, as Forbes has remarked\(^{974}\) in respect of denial of natural justice:

> If an internal appeal is to ‘cure’ an earlier breach of natural justice, it must afford the defendant the same opportunities to canvass the issues that the defendant would have had if the primary hearing had been fairly conducted. In practice, this means that the appeal must take the form of a re-hearing *de novo* – a re-trial and a fresh decision reached without any restriction or presumption arising from the original adjudication.

If such a ‘re-trial’ is essential in instances of procedural error, it would be complex and ungainly to create alternative (and more restrictive) forms of review where error might alternatively concern issues of fact, rules of policy. A general policy of appeal by re-hearing is preferable.

### 10.2 Efficient and Effective Procedure

There is a need to balance fairness in disciplinary procedure against efficiency and effectiveness in the operation of disciplinary action. Hearing volumes suggest that internal disciplinary bodies may be under considerable pressure at certain times. Question of efficiency and effectiveness also appear to arise in relation to the organisation and structure of the disciplinary process, and in relation to the support and training given to decision-makers. In the latter situation, shortcomings may contribute both to inefficiencies and unfairness. I raise two areas of reform in this respect: the composition and competence of decision-making bodies, and the overall organisation of disciplinary procedure.

#### 10.2.1 The Composition and Competence of Tribunals

In Chapter 7 I drew an analogy between university tribunals and older forms of ‘peer-review’ discipline operating in the professions. Those older professional jurisdictions emerged at a time when ‘gentleman’ professionals, such as doctors, were expected to administer their profession as an extension of service to that community. Under ‘lay’ adjudicators, the model of ‘peer-review’ was, in essence, the administration of discipline by the ‘amateur’ adjudicator, at arm’s length from professional judges. Reform of these jurisdictions arguably moved this decision-making toward a form of ‘professionalisation’ of the administration of discipline.

Extending my analogy, I would argue that university tribunals exhibit features of this ‘amateur’ or self-governing ‘lay’ jurisdiction. This situation has undoubted benefits, such as tying together the ‘village atmosphere’ of the university, as Sullivan J put it in *Ex Parte Beg*,\(^{975}\) and providing a body with relevant experience and expertise to deal with disciplinary matters. Yet, this does

\(^{974}\) Forbes *Justice in Tribunals*, [14.10].

\(^{975}\) *R v Cambridge University ex parte Beg* [1998] EWHC Admin 423, [60].
not mean that such bodies exist in aspic. I would submit that certain features of ‘professionalisation’ are warranted and necessary. Professional disciplinary jurisdictions provide some guidance, but academic analysis of domestic university contexts is also of interest.

Exercise of university disciplinary powers is commonly reposed in a range of decision-makers, depending on circumstances (eg type of conduct at issue, whether a form of summary authority) and potential severity of the consequences. Minor issues and penalties may be handled by ‘local’ administrators. For the sake of clarity, I consider here those circumstances in which a hearing is held before a collective body, which occurs at university-wide and School- and Faculty-level hearings.

First, appropriate training ought to be provided to tribunal members, including training in issues of law as well as adjudication, tribunal procedure and the content and nature of the disciplinary code. The operation of a ‘pool’ of trained members from which panels may be drawn is a common feature of disciplinary procedure currently and it is an important practice to continue for various reasons, including accommodating turnover and development of tribunal personnel. A further, fundamental issue spanning the domestic/‘professional’ divide is recognition and remuneration of tribunal members, especially through the accounting of such ‘administrative’ work in the scope of academic responsibilities (alongside teaching and research).

Provision of guidelines as noted above would be of considerable benefit to members. In addition, where reported reasons for decisions are unlikely and, it is conceded, unwieldy, it would be valuable for ‘model’ decisions to be published976 and/or summary reports on findings, decisions and penalties.977

Second, it is common for university discipline tribunals to be large bodies of up to half a dozen or more members. It is my submission that this is unnecessary, unwieldy and inefficient, notably where members are properly trained and written reasons are required. Indeed, the requirement to provide reasons adds impetus, on grounds of efficiency, for smaller decision-making bodies that, from a larger pool, can meet, for example, concurrently. It seems reasonable, as a model, that tribunals hearing matters at first instance comprise two members.978 On appeal, I would submit that the model should include a Chair who is legally-qualified and a three-member panel.

976 See eg the OIA’s practice at http://www.oiahe.org.uk/news.asp#cases.
977 See eg University of Queensland Statute No. 4 (Student Discipline and Misconduct) 1999, s 24: ‘Publication – The secretary and registrar must record and publish details of findings of misconduct according to a scheme approved by senate.
978 Allowing for instance a combination of experienced and inexperienced members, relevant expertise and independence, or staff and student members. Presumably, administrative/secretarial support is in addition to this number. This ‘coupling’ of members is relatively common in merits review tribunals, in order to balance expert and legal knowledge, for example.
This composition would be preferred given the potential for appeal actions to deal with issues of law, as well as scope for greater procedural formality.

10.2.2 The Organisation of Procedure

One of the most significant issues that arose in Chapter 7 concerning the work of disciplinary tribunals was the proper procedure to be adopted by the tribunal and subsequently how these bodies are to handle and to distinguish the process of investigation from the process of adjudication. They are necessarily adjudicative entities, yet in many situations they confront cases and circumstances where the basis of knowledge on which they are proceeding is inadequate or incomplete. In some circumstances, I have suggested, decision-makers appear uncertain as to the appropriate or correct mode of procedure to adopt, or at least which features of inquisitorial or adversarial procedure to adopt and how to integrate these features into a unified method of approach.

My conclusion is that several problems are actually at work here, accumulating in the issue of procedural arrangements. The first of these problems is the proper place and role for investigative/inquisitorial procedure, as against adversarial modes of conduct. Second, there is an issue of how complaints against students, typical of disciplinary allegations, are handled by the university. Third, there is the issue of the point at which it is necessary for an adjudicative body, such as a disciplinary tribunal, to handle those matters and exercise its jurisdiction. In fact, therefore, this problem of procedure opens up wider issues of complaints handling in the university, consideration of disciplinary matters as disputes appropriate for forms of ‘alternative dispute resolution,’ and the role of disciplinary tribunals in that architecture. The nature of disciplinary action as involving complaint- or dispute-handling has been noted by Pedley and Goldblatt in their valuable contribution on re-crafting universities’ discipline policies. I have also noted above that forms of autonomous investigator have been established in some Australian universities. I return to these models below.

The approach I would propose in general aims at distinguishing and clarifying complaints-handling and investigative functions on the one hand and adjudication on the other hand – although this is a simplification. Complaints amounting to (or including) allegations of misconduct would be referred to an appropriate complaints-handling authority within the university. This authority may lie within the office of a relevant senior manager (Dean, Pro Vice-Chancellor, etc), or alternatively may be an extension of (and distinct function within) those separate complaints-handling bodies increasingly emerging within universities.

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979 Pedley and Goldblatt ‘The Development of a Student Contract and Improvement in Student Disciplinary Procedures at Massey University’, especially 78-9.
(Ombudsman, Dean of Students, etc). Classification of disciplinary complaints according to gravity of the allegations might be made at this point, and subsequently an appropriate approach to investigation and resolution (including the capacity for adjudication) of the matter determined.

This approach provides the capacity for preliminary investigations to be handled, in an organised rather than ad hoc fashion, by a body other than the disciplinary tribunal. Rules and guidelines for the conduct of those investigations would, logically, need to accompany its role and functions. In addition, this arrangement would allow appropriate cases to be handled by consent (where, for example, misconduct is conceded), cases of minor infraction or those characterised primarily as educational (eg of ‘poor academic practice’) to be dealt with accordingly, and more serious matters to be investigated and referred to a tribunal for adjudication. In each situation, procedural fairness will need to be afforded the student. In each situation, other than referral to a tribunal for hearing, recommendations on an outcome should be put before a tribunal for ratification, variation or rejection as appropriate. In the case of referral of serious allegations of misconduct to a disciplinary tribunal for hearing, the investigator’s role then becomes, analogous to the ‘co-regulation’ model of professional discipline, a form of ‘prosecutor’ or at least ‘informant’ to the proceedings.

Where a matter goes to hearing before a disciplinary tribunal, I do not think the procedures outlined above necessarily remove an inquisitorial role for that body. Rather, the process above would provide a more substantive and organised footing on which the tribunal could pursue its own inquiries, as these are needed. Effectively, establishment of separate investigative machinery recognises the limits on any adjudicative body to undertake its own inquiries, as well as the need for that process nevertheless to be done thoroughly. A disciplinary tribunal ought to retain an inquisitorial function where it is necessary in the opinion of the tribunal to take this type of approach, and consequently powers to make inquiries (or require an investigator to make further inquiries) ought to be provided for in disciplinary rules.

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980 Powers of summary action in ‘emergency’ situations should remain with local staff or managers.
981 See Pedley and Goldblatt ‘The Development of a Student Contract and Improvement in Student Disciplinary Procedures at Massey University’.
982 Consistent with the content identified above. See also Pedley and Goldblatt ‘The Development of a Student Contract and Improvement in Student Disciplinary Procedures at Massey University’, 79.
983 Where an investigator’s recommendations are rejected or varied, the matter would ordinarily have to proceed to some form of hearing before the tribunal.
10.3 Elements of Policy in the Disciplinary Code

10.3.1 Plagiarism

In its broadest sense, university discipline policy comprises disciplinary machinery and procedure, on one side, and the disciplinary code (normative system of behaviours) on the other side. The disciplinary code is perhaps less a source of interest and reform than procedural arrangements. Nevertheless, I have signalled the need for reform, or, better, clarification, of one important aspect of that code: the concept of plagiarism. As inferred by the analysis in Chapter 4, it is my submission that plagiarism should expressly be distinguished from ‘poor academic practice,’ or, that is, problems that primarily concern academic competence and/or experience. Consistent with the case-law, etymology and ordinary use of the term, conduct caught within the framework of plagiarism ought exhibit characteristics of intention or ‘wrong’ (eg failure to take reasonable care in preparation and production of academic work). These standards need to take into account, as Ex Parte Wild adverts, the educational context (eg academic experience) of the person against whom allegation of plagiarism is made. For the sake of efficiency, it would be preferable for the prohibition against plagiarism generally to be incorporated into the primary rules, and more specific codification of plagiarism rules to be incorporated into accompanying guidelines.

10.3.2 ‘Bringing the University into Disrepute’

The charge of ‘bringing a university into disrepute’ reproduces in the university rules a common ‘general article’ proscription985 found in domestic or statutory discipline codes. It may also be related to requirements on members or persons under the jurisdiction of the disciplinary code to be a ‘fit and proper person,’ or refrain from ‘infamous’ conduct. The latter phrases, if they ever operated under university rules, would likely not to have survived the decline of a ‘social club’ approach to disciplinary matters. The issue of ‘disrepute’ on the other hand remains live in university rules. In the prolific ‘charge list’ at University A (Chapter 7), this charge was nominally presented in some cases. It may be that the rule surfaces in, for example, cases involving protest or political action on campus, cases concerning research fraud, or inappropriate behaviour in off-campus university activities. Universities are now large, commercial operations, deeply concerned with their public reputation. They are sensitive, among other things, to commentary that may be associated with them or expressed in their name. Academics now find their ability or duty to make public comment tightly regulated, and normally restricted to their nominal area of expertise. Postgraduate students may find themselves in a similar situation.

985 See generally Forbes Justice in Tribunals, [6.18].
Historic, and indeed structural, freedoms and openness on university campuses, combined with the ‘imprecise nature’ of disrepute provisions, make this type of prohibition potentially controversial and difficult to characterise. Martin Kosla has proposed a useful framework for establishing the content of conduct that may reasonably fall under this rule. As he notes, ‘closer examination of the disrepute clause has revealed that the clause does have boundaries and limits and must, therefore, operate within a framework.’ Although constructed with a view to sporting organisations, the general principles are transferable to universities. Kosla argues for two primary criteria attributable to ‘disreputable’ conduct: that the conduct ‘becomes common or public knowledge,’ and that the conduct is injurious (to the sport). Regarding the latter category, consistent with Kosla’s scheme, it would be a requirement of any impugned conduct that it be injurious to the university, not merely to the student’s interests or those of any other person affected. Such conduct may be where the academic standards of the university are brought into question. The criterion of public exposure represents perhaps a greater departure from the sporting context in which Kosla proposes his framework. Sport is commonly a public activity. Education at university does not have the same public gaze, and therefore there is perhaps a higher practical or factual threshold before misconduct and/or misbehaviour at university can be said to enter the ‘public domain’ and bring disrepute upon the institution.

10.4 External Review

It would clearly be preferable to improve decision-making processes within universities than to rely upon forms of external review, appeal or complaint to resolve shortcomings in internal operations in any particular case, or systemically. Many deserving cases may not proceed to an external appeal, or the expense, time or effort in seeking outside recourse may be prohibitive or unjustified. Having said this, it appears from the foregoing analysis, as well as from other research on litigation against, and volumes of complaint/dispute in, universities, considerable scope for the exercise of an external review jurisdiction exists. Further, an independent review may be an important safeguard for fair and/or correct decision-making. Various rules and mechanisms now operate to which students have recourse. They ought to be considered and

986 See Rochford ‘Academic Freedom as Insubordination’.
987 Kosla ‘Disciplined for “Bringing a Sport into Disrepute”’, 666.
988 Kosla ‘Disciplined for “Bringing a Sport into Disrepute”’.
989 Kosla ‘Disciplined for “Bringing a Sport into Disrepute”’, 678.
990 Kosla ‘Disciplined for “Bringing a Sport into Disrepute”’, 667.
991 Kosla ‘Disciplined for “Bringing a Sport into Disrepute”’, 669-78.
992 See Chapter 5, section 5.3, above. Between 2005 and 2007, the UK OIA has dealt with increase of 36.6% (537-734) in the number of applications received, and an increase of 77.5% (338-600) in complaints accepted: Office of Independent Adjudicator for Higher Education Annual Report (2007), 18-19. This volume is necessarily affected by the fact that the OIA does not have jurisdiction to handle complaints regarding academic matters. On increasing litigation in courts and tribunals involving
assessed. I have made reference to them in Chapter 3. Finally, there has been ongoing debate over the best mechanism for handling university disputes, and these remarks merely contribute to that debate. In these comments, I conclude, consistent with other commentators, that availability of specialist external review and dispute-settling is preferable for the higher education sector (indeed for the wider tertiary education sectors), and key issues lie in the machinery, procedures and powers that give effect to that kind of mechanism. The following remarks are not constrained solely to external review from disciplinary decisions in universities. That type of decision likely represents a small fraction of disputes to which students and universities are party. I make these remarks with the broader issues of complaints- and disputes-handling in the higher education sector in mind.

10.4.1 Existing Arrangements and Models

In the UK, the question of review and/or appeal from university decisions has gone a considerable way toward being settled, with establishment of the Office of the Independent Adjudicator for Higher Education (OIA). That body was instituted in replacement of the Visitor in chartered universities, as well as supplying a review body for non-chartered universities. The OIA is in effect a specialist ombudsman. In Australia, as I have noted in Chapter 3, review of university decisions is more uncertain and variable depending on State jurisdiction and the class of student affected. State Parliamentary Ombudsmen have reported on grievance handling and appeals at Australian universities.

As in the UK, disciplinary decisions (as with other forms of decision) may be the subject of some kind of review. Variously, review may be sought by petition to a University Visitor (in WA), complaint to an Ombudsman (public universities, under State, Territory or Commonwealth legislation), and a complaint made under external review schemes required under higher education legislation. In addition, depending on the nature of the dispute, it may be justiciable within the administrative tribunal system, or in a consumer claims jurisdiction, or, of course, at judicial review. This situation seems unwieldy, if not confusing and in some universities, see Astor ‘Australian Universities in Court: Causes, Costs and Consequences of Increasing Litigation’. Astor also notes the increasing complexity of this litigation pattern.


994 The OIA, in its most recent Annual Report, found only 7% of the complaints it dealt with involved discipline: Office of the Independent Adjudicator for Higher Education Annual Report 2007, 19.


996 Other than by internal review procedures accompanying primary disciplinary decisions.

997 Which may go to the relevant State or Territory Ombudsman in any case: compare Ogawa v Secretary of Department of Education, Science and Training [2005] FCA 1472.
instances unfair. Limitations remain with the UK system, but it does have the advantage of providing a single, centralised point of complaint and dispute resolution for matters involving students that cannot be resolved within the institutions, as well as clarifying the respective roles of the OIA and the courts. Argument has been made for development of a similar model of university ‘ombudsman’ for Australian universities. Alternatively, it could be contended that the various Parliamentary Ombudsman are a satisfactory source of complaint-handling and redress. In a time when universities were subject far less to the tide of privatised funding and commercial operation, it was also argued that the jurisdiction of the Visitor ought to be reformed to conform with the methods and powers of merits review tribunals. The present issue, it might be argued, is: what is the best model for review of university decisions, and what are the appropriate powers and procedures to be vested in the review body?

10.4.2 Ombudsman

It is feasible to identify three general models of recourse that may be applicable to review of university decisions. The first I would identify is the ombudsman model, which is probably the most accessible and used mechanism of external review of university decisions at present. To briefly rehearse the concept of the Ombudsman, it is an office originally developed in Scandinavia, independent of executive power, charged with investigating and redressing grievances concerning the administration of government. In the Australian context, the office has wide jurisdiction typically to investigate a ‘matter of administration’ and report to Parliament where government action has been illegal, unjust, unreasonable, oppressive, ‘improperly discriminatory,’ mistaken, or ‘wrong.’ The Ombudsman has been viewed, in the context of the growing complexity and size of the administrative state, as a key means of scrutiny and remedy to maladministration, especially where the role, effective powers and/or

998 For example, an international student has access to external review, from which any favourable outcome must be implemented by the institution: National Code, Standards 8.5. Domestic students, who have access to review only under another legislative instrument, have not guarantees of such implementation: Higher Education Provider Guidelines, s 4.5.2(c), and compare Ogawa v Secretary, Department of Education, Science and Training [2005] FCA 1472.

999 For example, decisions categorised as academic are outside of the jurisdiction of the OIA. Also, OIA decisions are not binding on institutions, so the latter may choose not to accept OIA recommendations.

1000 Compare Baroness Deech ‘Adjudicating Student Complaints’: ‘I think the trend to central decision-making is inevitable, in that students want equivalent treatment whatever their university, and international students want a guarantee their expensive experience will be worth it...’

1001 The OIA will not assume jurisdiction for a matter that has been dealt with by the courts or tribunal system: Office of the Independent Adjudicator for Higher Education Rules of the Student Complaints Scheme (2008), r 3.3.

1002 Olliffe and Stuhmcke ‘A National University Grievance Handler?’. Sadler ‘The University Visitor’.


1004 See eg Ombudsman Act 1976 (Cth), subs 5(1)(a).
jurisdiction of other institutions are limited.\textsuperscript{1007} Growing debate and unease has emerged, however, in precisely what bodies or institutions ought to be nominated as ‘Ombudsman,’ as distinct from other means of complaints-handling. In part, this concern has arisen with proliferation of bodies termed ‘Ombudsman,’ especially private ‘industry’ ombudsman, such as in banking, insurance, and utilities. Some universities have established internal ‘Ombudsmen.’ The Commonwealth Ombudsman has raised concerns with use and abuse of the ‘brand,’ notably where it may be employed as a marketing exercise or where its conditions, functions or powers diverge from the historic understanding of functions of the Ombudsman in public administration.\textsuperscript{1008} He identifies an Ombudsman as possessing certain ‘essential criteria’: independence, jurisdiction, investigative powers, accessibility, procedural fairness, and accountability.\textsuperscript{1009}

The scope of powers, jurisdiction and authority under the ‘traditional’ public-sector Ombudsmen seems wide and impressive. Yet important limitations and particular characteristics of the Ombudsman model ought to be considered in applying such a model of review of university decisions. I note these limits not least because the UK OIA mechanism is effectively based on an Ombudsman model, notwithstanding the nomenclature of ‘adjudicator.’ These limitations and characteristics are reproduced in the OIA framework. For instance, typically a ‘traditional’ Parliamentary Ombudsman has no powers to make determinations, substitute or vary original decision, or make binding decisions or orders. Their function is to form an ‘opinion’\textsuperscript{1010} regarding an administrative issue and report to Parliament on that matter, as well as report to the investigated agency and where appropriate seek redress (which may include systemic or policy change). Ombudsman may act on complaints or on their ‘own motion.’ Significantly, private ‘industry’ Ombudsman may exercise determinative powers, including imposing monetary awards.\textsuperscript{1011} The OIA possesses features of public and private Ombudsman models. This ‘hybrid’ arrangement is perhaps not surprising given the ‘hybrid’ public-private character of universities. Consistent with the ‘traditional’ (public) Ombudsman, the OIA does

\begin{thebibliography}{1000}
\bibitem{1006} Eg \textit{Ombudsman Act 1976} (Cth), s 15.
\bibitem{1007} See K C Wheare \textit{Maladministration and its Remedies} (Stevens and Son, 1973), 110-140. He notes, in conclusions, 141: ‘Perhaps the most striking feature in the search for more effective remedies for maladministration in the last twenty years has been the discovery of the Ombudsman or equivalent.’ The other methods of redress he identifies are the courts, tribunals system, Ministerial accountability to Parliament, and Parliamentary Committees.
\bibitem{1009} McMillan ‘What’s in a Name?’ In South Australia and New Zealand use of the term ‘Ombudsman’ is controlled by law: \textit{Ombudsman Act 1972} (SA), s 32; \textit{Ombudsman Act 1975} (NZ), s 28A.
\bibitem{1010} This is the language of \textit{the Ombudsman Act 1976} (Cth), s 15; see also Chairperson, ATSIC v \textit{Commonwealth Ombudsman} (1995) 134 ALR 238, 249-250.
\bibitem{1011} See eg Banking and Financial Services Ombudsman Ltd \textit{Terms of Reference 2004}, paragraphs [1.2], [1.6], [7.10]-[7.13]:
\end{thebibliography}
not exercise determinative powers; comparable to ‘industry’ Ombudsman, the OIA is a corporate entity and funded by contributions from the ‘industry’ itself (ie institutions), although the scheme has statutory support.

While the Ombudsman’s approach is self-evidently investigative or inquisitorial, this approach is clearly distinguishable from the ‘inquisitorial’ role of administrative tribunals. Very few of the adversarial features commonly retained in the tribunal system extend to the Ombudsman model, in particular the participatory features of the adversary system do not operate. The complainant does not assume the position, for instance, of a ‘party’ to a dispute: ‘Once the complainant gives the Ombudsman the facts, their [complainant] formal role is over.’ While the complainant does not have to deal with rules and threshold of ‘standing,’ they likewise do not determine the course or manner of the investigation or ‘proceedings.’ This situation does add to the standing of the Ombudsman, at least in the public sphere, as a supervisory actor of the legislature, an officer of the Parliament formally overseeing the exercise of executive power.

The Legislature’s institution of a supervisory, albeit non-judicial and non-determinative, office also reflects the scope and nature of the Ombudsman’s jurisdiction to investigate actions ‘relating to a matter of administration.’ Consistent with the separation of powers doctrine, the scope of ‘administration’ is generally distinguishable from legislative or judicial power. On judicial review, it has been held that the Ombudsman’s jurisdiction does not therefore extend to questions of government policy. More pertinently for review of university decisions, ‘administration’ for the purposes of investigation by Ombudsman may extend to decisions that incorporate the exercise of professional or expert judgement as an ‘incident in an administrative process, and as of an administrative character.’

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1014 See Paul Verkuil ‘The Ombudsman and the Limits of the Adversary System’ (1975) 75 Columbia Law Review 845, 851: ‘In many ways the principles underlying the ombudsman model are at war with those underlying the adversary system. The ombudsman reconciles, reinforces and legitimates community or central decisionmaking; the adversary system polarizes issues, and fosters individualism and passive decisionmaking. The ombudsman, in other words, is at home in the inquisitorial system, where control in the decisionmaker is the central characteristic.’
1015 Compare Verkuil’s characterization of the Ombudsman: ‘(1) The Ombudsman is an independent and non-partisan officer of the legislature, usually provided for in the constitution, who supervises the administration; (2) He deals with specific complaints from the public against administrative injustice and maladministration; and (3) He has the power to investigate, criticize and publicize, but not to reverse, administration action.’ Verkuil ‘The Ombudsman and the Limits of the Adversary System’, 847.
1016 Booth v Dillon (No 2) [1976] VR 434.
context of academic decision-making, including examinations, fall within the wider rubric of administration.\textsuperscript{1018} It is arguable, then, that review conducted by an Ombudsman into university decision-making, where academic content plays a role in the decision-making, is confined and regulated by similar considerations and calculations applicable to judicial review. While decisions of ‘purely academic judgement’ would retain immunity from scrutiny and criticism, features of the organisation and conduct of academic decisions would be susceptible to scrutiny and, as relevant, correction.

In summary, aside from issues of accessibility, fairness and independence (and how these features may authentically be achieved), Ombudsman-type review can be generally characterised by non-determinative powers, centralised investigation with little participation or control by disputants or parties, and broad jurisdiction over ‘administrative’ matters but without capacity to deal with complaints about policy or judicial action.

10.4.3 The Visitor

A second model of review is the University Visitor, a delegate of the institution’s ‘founder’ and ‘special judge,’\textsuperscript{1019} whose origins lie in the law of charities.\textsuperscript{1020} In a strict sense, the Visitor is not external to the university at all, but a necessary part of the domestic machinery of the university. In practice, nevertheless, exercise of the Visitor’s jurisdiction is independent of other organs of university government. The office in Australia has commonly been vested in the relevant Governor and exercised by, or on advice of, a judge.

It is highly unlikely that we will see resurgence of the office of University Visitor, not simply because it is a medieval relic. Indeed, it was not too long ago that the House of Lords held a notable and contrary opinion.\textsuperscript{1021} In the UK, human rights law\textsuperscript{1022} and consumer protection legislation\textsuperscript{1023} contributed to the Visitor’s demise, and, although Australian jurisdictions may have ‘jumped the gun,’ comparable legislation here\textsuperscript{1024} may eventually have led to the same

\textsuperscript{1019} R \textit{v Lord President of the Privy Council, ex parte Page} [1993] 1 All ER 97, 106 (Lord Browne-Wilkinson).
\textsuperscript{1021} Most recently in R \textit{v Lord President of the Privy Council, ex Parte Page} [1993] 1 All ER 97.
\textsuperscript{1022} Human Rights Act 1998 (UK).
\textsuperscript{1023} \textit{Unfair Terms in Consumer Contract Regulations} 1999 (UK).
\textsuperscript{1024} Eg \textit{Charter of Rights and Responsibilities Act} 2006 (Vic); \textit{Fair Trading Act} 1999 (Vic), Part 2B. Both bodies of legislation borrowed heavily from their UK counterparts.
result. Nevertheless, the Visitor had the benefit of providing a jurisdiction akin to a ‘specialist tribunal,’ specifically associated with the university and its community. It also provided binding (and often, in Australia, reasoned) decisions. The other primary benefit of the Visitor’s jurisdiction concerns the issues of powers and certainty: for the sake of carrying out the will of the founder, the Visitor exercises determinative powers. This feature is generally absent in the functions of the (public) Ombudsman.

In theory and in respect of public universities in Australia, both the University Visitor and the Ombudsman are instruments of the Parliament, albeit in slightly different capacities and, arguably, with differing functions. In the case of the Visitor, it is to exercise the intentions and powers of the Founder, and apply and, where necessary, adjudicate on the ‘foundation instrument.’ These elements of foundation are Parliament and the establishing enactment respectively. For the Ombudsman, the function is the proper administration of government. For the public university, the Visitor is a delegate of the Parliament; the Ombudsman an officer. Additionally, as tends to be absent from the ‘administrative’ jurisdiction of the Ombudsman, it is arguably within the scope of the Visitor’s powers to make findings and decisions on questions of university policy, at least in so far as this approach does not upset the terms of the governing enactment.

10.4.4 Limits of Ombudsman and Visitorial Models

With eclipse of the Visitorial jurisdiction, it appears that the non-determinative role of an ombudsman actually supplies less in terms of certainty of outcome than operated previously. If successful on review, a student may nevertheless be frustrated by an obdurate university. If that eventuality is unlikely, it is possible, especially if the matter were bitterly contested or opposed by the institution. In such an instance, injustice may result. Other curiosities and anomalies now present themselves also. If a process of dispute or appeal by an international student, handled under the relevant provisions of the National Code, were referred to a State Ombudsman as the review body, any recommendations benefiting the student would effectively be binding on the institution. However, this benefit does not extend to domestic students.

Inherent limitations present themselves in both the Ombudsman and Visitorial models. For the Visitor, it is redundancy. For the Ombudsman, the notable limits are absence of an intrinsic

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1025 See Sadler ‘The University Visitor’, 32.
1026 Compare the examples of notorious, expensive and protracted disputes noted in Astor ‘Improving Dispute Resolution in Australian Universities’, 49.
1027 National Code, Standard 8.2.
1028 National Code, Standard 8.5: ‘If the internal or any external complaint handling or appeal process results in a decision that supports the student, the registered provider must immediately implement any decision and/or corrective and preventative action required and advise the student of the outcome.’
capacity for the reviewer to give effect to corrective action, and a general absence of participation by a complainant in the process of dispute.

Given participation rates in higher education in Australia, and the extent of the impact (or potential impact) of university decision-making on individual lives, it seems anomalous that the ‘long march’ of administrative review has substantially by-passed the university. In the face of a growing need for external adjudication on university decisions, these pressures are now handled by the courts, or by existing tribunals unsuited to the underlying or real complaint. No doubt there is scope for students’ substantive complaints against universities to be dealt with on judicial review, notwithstanding limits on the scope of this type of review. Yet, when considered as whole, the ‘administrative law revolution’ has only found its way into the halls of the university partially, ad hoc, with great reticence. As Professor Astor concludes in her study of university litigation:

...students [are] litigating about the fairness of university decision-making. Further, these students appear to be struggling to find appropriate legal remedies for independent review of university decisions. Improved decision making and grievance handling by universities are suggested by the data.

I think that, finally, there is a need to consider the role and (potential) nature of an adjudicative mechanism for external review, capable of some degree of ‘review on the merits’ of university decisions. Notwithstanding the nomenclature of the OIA, ‘merits review,’ as it commonly understood, has ostensibly by-passed the universities, and it has been little discussed. It is this model of review to which I now turn.

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1029 See subsection 10.4.1. above.
1030 In 2007, just under one million (976,786) students were enrolled in Australian public higher education institutions, and 1,029,846 students were enrolled in all Australia higher education providers: Department of Education, Employment and Workplace Relations Students 2007: Selected Higher Education Statistics (2008).
1031 See Astor’s point that around half of student disputes brought before external fora involved discrimination complaints, yet ‘few of these cases are actually about conduct prohibited by discrimination legislation. Many of them involve students aggrieved about what they perceive to be unfair treatment or decision-making by a university.’ Astor ‘Australian Universities in Court’, 167. By way of comparison, the OIA reports that just under 65% of all complaints accepted concerned issues of ‘academic status’ (eg exam results, academic appeals): Office of the Independent Adjudicator for Higher Education Annual Report (2007), 19.
1032 However, compare Peter Cane ‘Merits Review and Judicial Review – The Administrative Appeals Tribunal as Trojan Horse’ (2000) 28 Federal Law Review 213.
1033 Astor ‘Australian Universities in Court’, 169.
10.4.5 A University Appeals Tribunal?

‘Review on the merits’ provides for a matter to be re-heard and the capacity for the original decision to be substituted (or varied) by a decision of the tribunal.\(^{1034}\) To greater or lesser degrees, the hearing is adjudicative, containing features of adversarial and inquisitorial method. While the Commonwealth Administrative Appeals Tribunal (AAT) conducts itself in a relatively court-like fashion, other specialist tribunals such as the Social Security Appeals Tribunal or Refugee Review Tribunal proceed with less formality, and a more inquisitorial approach. The over-riding purpose of merits review has been described as achieving the ‘correct or preferable’ decision on the materials available to the tribunal.\(^{1035}\) The general concept of merits review, especially as developed by the AAT (or by challenge to its decisions), includes \textit{de novo} (re)consideration of a decision on the facts, requirement or capacity for review of administrative policy, consistency in decision-making, extent of application of the rules of evidence, and review of questions of law.\(^{1036}\) While the wide-ranging jurisdiction of the AAT provides for review of questions of fact, law and policy, review jurisdiction may be limited, especially in respect of application of government policy.\(^{1037}\)

In respect of application of ‘merits review’ to university decisions affecting students, several key questions arise as to the propriety of this approach, the scope of review, and the approach and procedure required of a review body. Regarding propriety, a careful, if not cautious, approach is no doubt warranted. A certain body of practice and opinion militates for comprehensive merits review of university decisions. The effect of the \textit{National Code}, as already noted, is to provide access to a form of external merits review. The scope of review in those circumstances does not exclude, on the face of the rule, decisions of an academic nature. Perhaps reinforcing this point, the Administrative Review Council (ARC) has advised, in respect of application of merits review in principle, that ‘an administrative decision that will, or is likely to, affect the interests of a person should be subject to merits review.’\(^{1038}\) Its test is

\(^{1034}\) See eg Cheryl Saunders ‘Appeal or Review: The Experience of Administrative Appeals in Australia’\(\text{(1993) Acta Juridica 88, 88: ‘… for present purposes it should be noted that [the review jurisdiction of the AAT] enables, and in fact requires, the decision to be remade…’}\)

\(^{1035}\) \textit{Drake v Minister for Immigration and Ethnic Affairs} (1979) 2 ALD 60, 68.

\(^{1036}\) See John McMillan ‘Merits Review and the AAT – A Concept Develops’.

\(^{1037}\) Eg \textit{Victorian Civil and Administrative Tribunal Act 1998} (Vic), s 57; \textit{State Administrative Tribunal Act 2004} (WA), 28.

\(^{1038}\) Administrative Review Council \textit{What Decisions Should Be Subject to Merits Review?} (1999), \texttt{http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Downloads_What_decisions_should_be_subject_to_merit_review} (accessed 12 March 2009), [2.1]. The Council continues: ‘2.4. The Council prefers a broad approach to the identification of merits reviewable decisions. If an administrative decision is likely to have an effect on the interests of any person, in the absence of good reason, that decision should ordinarily be open to be reviewed on the merits. 2.5. If a more restrictive approach is adopted, there is a risk of denying an opportunity for review to someone whose interests have been adversely affected by a decision. Further, there is a risk of losing the broader and beneficial effects that merits review is intended to have on the overall quality of government decision-making. 2.6. The Council’s approach is intended to be sufficiently broad to include decisions that affect intellectual and spiritual interests, and not merely property, financial or physical interests.’
wide. The ARC includes in those ‘factors that will not exclude merits review’ circumstances in which the decision-maker is an ‘expert, or requires specialist expertise.’ Presumably, this category might include academic decision-makers. That approach to review is, in respect of academic judgements, in conflict with established curial practice and authority providing for deference to academic decision-making, at least in so far as those decisions are of ‘purely’ academic judgement. Those classes of decisions which the ARC advises are not ‘suitable’ for merits review are decisions of a legislative nature and ‘automatic or mandatory’ decisions, where no effective discretion operates. Considerable (academic) discretion operates in respect of academic decisions. On this reading of the ARC’s advice, it would appear all major classes of university decision ought to be amenable to merits review. Decisions of an academic nature are the most problematic category of decision. The ARC’s approach might effectively subvert the *dictum* in *Thorne v University of London*: ‘The High Court does not act as a court of appeal from university examiners…’

On the authority of the ARC, external adjudication on decisions affecting students seems appropriate and viable. That situation would be less ambiguous than current arrangements. Academic judgement, however, ought to be recognised as an appropriate limit on the scope of review, distinguishing decisions of ‘purely’ academic judgement (application of standards of competence to an object of ‘performance’ of a specialised body of knowledge) from decisions where conduct of academic judgement (the ‘administrative’ content of the decision-making) may be impugned, as indicated in *Evans v Friemann* and in *Institute of Dental Surgery*. Exercise of review jurisdiction ought not to remake decisions of academic judgement where academic (expert or disciplinary) knowledge is the sole determinant and basis of the decision, and where ‘extraneous’ factors are absent. This form of immunity and limit to review presently operates in appeals from academic decisions in policy and legislative instruments at certain universities.

1039 Administrative Review Council *What Decisions Should Be Subject to Merits Review?*, [5.16], my emphasis.
1040 Administrative Review Council *What Decisions Should Be Subject to Merits Review?*, [3.8]-[3.12]
1041 (1966) 2 QB 237, 243 (Diplock LJ).
1042 *R v Universities Funding Council, ex parte Institute for Dental Surgery* [1993] EWHC Admin 5.

> When considering a matter regarding an assessment result (including higher degree theses) or admission to a program not governed by the Admission rules, the grounds for appeal are limited to:
> - improper, irregular, or negligent conduct by a person involved; or
> - discrimination, prejudice, or bias against a student; or
> - failure to adhere to relevant published policies and procedures; or
> - failure to give sufficient consideration to a matter of specific relevance to the student.

A judgement regarding the academic merit of any work or the grade assigned, based on reassessment of content, does not fall within the jurisdiction of the Committee.

If limits on jurisdiction ought to apply to academic decision-making, how should the grant of jurisdiction for a review body fall on the question of handling matters of policy as they apply to particular cases. Ombudsman cannot typically deal with questions of policy, by constraint to ‘matters of administration.’ Although qualified, review tribunals commonly can, notably where ‘the policy is unlawful or… its application tends to produce an unjust decision in the circumstances of the particular case.’ The capacity of the AAT, for instance, to depart from ministerial or governmental policy will be qualified by its exceptionality, by consideration of propriety in particular circumstances, and the relationship of the policy to Parliamentary scrutiny and oversight. While it is arguable that departure from university policy in any particular case may be cautious, consistent with the general, authoritative approach, deference to university administrators is not quite as imperative as deference to Ministers of the Crown. There are principled and empirical reasons for the difference. In so far as questions of policy (or administrative rules) rather than delegated legislation are at issue, university administrators do not possess comparable authority to that wielded by Ministers. Parliaments generally do not scrutinise university rule-making. Empirically, shortcomings in university rules occur. Review of general policy by an appeal tribunal ought to be available, on the terms expressed in *Drake (No 2)*.

If a broad, qualified merits review is defensible as a matter of policy, a further question concerns procedure. As adjudication by specialist tribunal would suggest, minimal or basic features of adversarial method ought to apply, notably the requirement (and responsibility) for participation by the complainant and some element of control by them over the proceedings. As I have noted in Chapter 4, substantial features of adversarial procedure may be present in internal appeals. I do not advocate here court-like proceedings, or further escalation of confrontational and formal methods that may be employed for internal appeals. An informal and inquisitorial approach would be warranted. Further, by the inherent nature of the disputes, proceedings would tend to reflect a considerable disparity of power, knowledge and resources.

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1044 *Re Drake And The Minister For Immigration And Ethnic Affairs* (No. 2) (1979) 2 ALD 634, 645.

1045 On the last point, see *Re Drake and the Minister for Immigration and Ethnic Affairs* (No. 2) (1979) 2 ALD 634, 644.
between complainant student and respondent university. In those circumstances, a leading and inquisitorial role for tribunal decision-makers would be appropriate. The interventionist role of the tribunal may be modified to the circumstances, for instance, where a student is represented. As distinct from the common approach for internal proceedings, a university appeals tribunal would possess powers to take evidence on oath and compel information, especially from institutions. Such powers are normally at the disposal of administrative tribunals.

It is worth considering the nature of engagement that an external review tribunal might have with the institutions whose decisions it would be called upon to review. At one level, ‘engagement’ is a matter of accommodating the latter of two general (and perhaps strained) purposes of administrative adjudication: justice in individual cases, and better administration. It is central to the ‘merits review’ model. Response by administrators and agencies to tribunal decision-making may be considered in terms of ‘bureaucratic impact.’

Merits review and its ‘bureaucratic impact’ does not necessary assume a ‘proactive’ or strategic approach to engagement with reviewable agencies on questions of systemic practice, organisation or administrative policy. This type of approach is, however, typical of the Ombudsman model, through mechanisms such as ‘own motion’ inquiries and reporting on administrative practices. The OIA reproduces this aspect of the Ombudsman. It is preferable to maintain the requirement and capacity for a review body to make recommendations on ‘good practice,’ in addition to powers of determination in individual cases, for the ‘strategic’ value of ‘good practice’ this capacity would bring to the sector. Given the general critique I have posed of


1047 Committee on Administrative Tribunals and Enquiries Report of the Committee on Administrative Tribunals and Enquiries (1957), [20]-[22]; generally see Galligan Due Process and Fair Procedures, Ch 8.

1048 See eg Stephen Skehill ‘The Impact of the AAT on Commonwealth Administration: A View from the Administration’ in John McMillan (ed) The AAT: Twenty Years Forward (Australian Institute of Administrative Law, 1998). In particular, Skehill remarks, in light of the Administrative Review Council’s Better Decisions report (at 61): ‘… the AAT should actively be seeking to work with agencies whose decisions it reviews to help them to develop decision-making systems and training and to enhance policies and processes with a view to minimizing the risk of further mistaken or inappropriate decisions. In a sense, administrative tribunals should be working with the other elements of the executive arm to so improve the quality of primary decision-making that the need for the continued existence of the tribunal becomes an issue in itself.’


1050 Reviewing individual cases and engaging with the university sector directly on systemic or policy issues are central to the OIA’s approach. OIA Annual Report 2004, 3:
university decision-making, in respect of the application of legal standards, a recommendatory role on university (perhaps also sectoral) practices would provide a systemic approach to contending with shortcomings, contribute to transparency and candour in higher education administration, and provide a central focus and point of coordination for this work.

10.5 Conclusions

What ought to be the appropriate standards and methods of adjudication in university discipline? How might universities reorganise the internal administration of disciplinary action so as to better achieve objectives of both justice and efficiency? What recourse ought to be available to a student aggrieved with university decisions? The posing of these questions is reasonable in light of the problems associated with disciplinary action that have been posed in the foregoing chapters. In response to those issues and shortcomings, reform and improvement to university decision-making is warranted. Disciplinary decision-making is a relatively formalised and ‘judicial’ affair. In that context, reform and improvement ought to take the course of bringing university conduct, generally speaking, into line with the ‘relaxed formality’ and the ‘proper and structured sense of purpose’ characteristic of certain administrative tribunals.

Forbes’ 1970 warning against ‘judicialisation’ of these domestic tribunals remains apposite in important respects. It is inappropriate to impose court-like standards on these bodies. Unlike the major administrative review tribunals, no judges sit on university discipline matters. In most instances, even under my proposals, lawyers would not sit on these tribunals. Arguably, it would be more impractical under the resource and administrative pressures of the university today, as distinct from 1970, to impose forms of trial on the exercise of internal discipline. Nevertheless, the internal operations of the university were, by and large, by-passed by the administrative law ‘revolution’ of the 1970s, which are now deeply entrenched in other domains of public administration, as well as certain areas of corporate administration. It has become an uncontroversible reality that decision-making by public (and indeed private) tribunals has become more conscious of law, more affected by the reason, if not the styling, of law. Given emphasis at law for substantive principles of fairness, openness, rationality, and consistency in decision-making, it is invaluable that a certain element of ‘legalisation’ impart openness and co-operation from the parties in order to maximise our effectiveness. An added bonus of the scheme is that we will be making good practice recommendations.

1051 The term is Martin Partington’s: see Martin Partington ‘Taking Administrative Justice Seriously: Reflection on the Australian Administrative Appeals Tribunal’ in John McMillan, ed. The AAT – Twenty Years Forward (Australian Institute of Administrative Law, 1998), 147, 150. He writes at 147-48: ‘to me this implies what happens in practice: that while tribunals do not follow vastly complex, pre-determined rules of procedure, they do not stand on ceremony, they do not dress up in wigs and gowns – all those essential features of the British judicial system. Nevertheless, they go about their business with a proper and structured sense of purpose.’ He nominates the SSAT as typical of this approach and comparable to the approach of many UK tribunals.

1052 The only exception to this rule that I have found is the composition of the Student Disciplinary Appeals Committee at the University of Sydney: University of Sydney By-Law 1999, s 78(1).
these types of values on the conduct of university tribunals, that is, any person or body required to exercise disciplinary powers in a ‘quasi-judicial’ fashion. As Sir Gerard Brennan, the first President of the Administrative Appeals Tribunal, said of the early years of that body: ‘The AAT was charged with the responsibility of blowing the winds of legal orthodoxy through the corridors of administrative power.’ On a rather smaller scale, it is time to apply properly and effectively what has been learnt from the recent history of administrative law to disciplinary decision-making in the university, and, of course, to adapt those principles sensitively to the academy’s ‘peculiarities.’

Appendix 1: Survey of Student Disciplinary Proceedings

Student Discipline Survey

Name of institution

**Student misconduct/discipline proceedings**

**How many student misconduct/discipline matters were commenced in the 2005 academic year in each of the following categories (state NA for Not Available):**¹⁰⁵⁴

Academic misconduct

School, Faculty, or comparable internal level of decision-making (eg a Faculty Discipline Committee)

*Total:* _______________

*Plagiarism:* _______________

*Exam misconduct:* __________

*Other:* _______________

University, or central, level of decision-making (eg. a University Discipline Committee)

*Total:* _______________

*Plagiarism:* _______________

*Exam misconduct:* __________

*Other:* _______________

¹⁰⁵⁴ Including all matters that commenced in 2005 and may not have been dealt with on appeal or review until 2006.
University appeals (eg. a Discipline Appeals Committee)

Total:________________________

Plagiarism:____________________

Exam misconduct:______________

Other:________________________

If practical, please provide a breakdown of student discipline proceedings by School, Faculty or other internal unit.

General/nonacademic misconduct

How many student misconduct/discipline matters were commenced in the 2005 academic year in each of the following categories (state NA for Not Available):

School, Faculty, or comparable level of decision-making (eg a Faculty Discipline Committee or Faculty Officer)

Total:________________________

University, or central, level of decision-making (eg. a University Discipline Committee)

Total:________________________

University appeals (eg. a Discipline Appeals Committee)

Total:________________________

Summary action:

Total:________________________
Comments

Has there been a change in the volume and/or nature of student discipline cases in the last 5 years? 10 years?

Please feel free to make any other comments you think relevant:
Appendix 2: Schedule of Questions, Student Advocates

Interview schedule,
Student advocates in student organisations (or comparable positions)

1. Initial information

- What is your name?
- What organisation do you work for, and what is your position?
- What is your role in misconduct/student discipline cases.
- When were you most recently involved in a misconduct/discipline case? What were the circumstances of that case?
- How many discipline/misconduct cases have you been involved in?
  a. <5
  b. 6-10
  c. 11-15
  d. 15-20
  e. >20

2. The discipline process

- In what sort of circumstances are student charged with disciplinary breaches/offences? What are the more common allegations/offences? (eg cheating, plagiarism, general misconduct)
- Could you please explain in general the discipline process? (To start with, what are the misconduct rules? When and how would a student be charged with an offence/breaching those rules? What happens when they are?)
- In relation to a formal hearing:
  a. When is there a formal hearing?
  b. What procedures are used by the panel in hearing the matter? Ie how does a panel/committee go about it task?
  c. What sort of information is presented and/or what information does the panel rely upon in making a determination/finding/decision?
  d. Is the onus on the student to prove his/herself “not guilty”?
  e. Who speaks or in entitled to speak?
  f. Does the committee explain its decisions? Are these made public in any way?
3. Evaluating the discipline process

- Is the hearing process satisfactory in your opinion? Why/why not?
- What is the role of the student disciplinary process in the university, especially in light of:
  
  The growing commercialisation of higher education;
  The tendency to treat students as consumers/customers;
  The resource pressures on staff and students

Apparent public concerns with academic standards and cheating and the introduction of technologies such as ‘plagiarism detection software.’
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