

# COMPLEXITY AND AMBIGUITY IN UNIVERSITY LAW: NEGOTIATING THE LEGAL TERRAIN OF STUDENT CHALLENGES TO UNIVERSITY DECISIONS

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*The legal relationship between universities and their students has become increasingly complex over past decades. It is a mix of public and private law, common law and statute. This paper considers the legal framework applying to the student-university relationship in Australia, and under which universities may be subject to legal challenge by students. The paper reiterates the application of public law to the relationship, and the contractual and consumer protection dimensions of the relationship. A third focus is placed on the development of statutory changes and regulation of the 'domestic,' or internal, relationship between student and university. Legislative reform to 'domestic' dispute-handling in the UK and Australia is contrasted, with a view to providing a critical assessment of those developments. The paper draws conclusions about both UK and Australian approaches, although concludes that the Australian approach to regulation of this 'domestic jurisdiction' has greater shortcomings and scope for further reform.*

## I INTRODUCTION

There is a history of administrative justice applying to students in the Anglo-Australian universities now encompassing at least forty years. Until this point in time, 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,'<sup>1</sup> 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.<sup>2</sup>

This particular relationship is legally complex and has been referred to as a 'hybrid' of private and public law elements.<sup>3</sup> I would describe the relationship as affected by, and given effect by, three legal bases, for the purposes of the present paper: public law, contract, and domestic rules. Strictly speaking, the domestic arrangements between the student and university are a sub-set of public and/or private law, in that they operate under the statutory authority a University's founding legislation or within (as terms of) the contractual relationship between the student and the university. A principal argument of this paper is that recent reforms to university legislation in Australia have partially reformed the domestic jurisdiction of the university. An effect of these actions is that student legal challenge to university decisions must either be made in the Courts, or

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with less certainty, authority and independence within the institution, or through external channels arranged by the institution. By way of comparison to the current Australian situation, I refer to the reform of disputes- and complaint-handling jurisdiction for UK universities. Student challenge to university decisions, such as academic progress, discipline, admissions and assessment, may be legally complex in relation to jurisdiction, procedure, the nature of review, and remedy or relief that may be granted. The paper adds to argument that revision of the current approach to ‘in-house’ disputes needs to occur.

## II STUDENT CHALLENGES IN PUBLIC AND PRIVATE LAW

### *A Public Law*

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 Act, and accompanying legislation aimed at the regulation of the provision of higher education, including restrictions on the use of the term ‘university’.<sup>4</sup> Common national protocols agreed to by State/Territory and Commonwealth governments now standardise the approvals process for higher education providers.<sup>5</sup> University operations are also extensively regulated through federal funding legislation,<sup>6</sup> and legislation governing international students in Australia.<sup>7</sup>

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’.<sup>8</sup> In the public university the student is a ‘corporator,’ often alongside other classes of corporator established by statute (e.g., governing body, staff, alumni). In this public university, founded under statutory instrument, the student is a corporator at common law,<sup>9</sup> in the circumstances where their status is not prescribed by the establishing statute. The student’s corporate relationship with the university is found in the ancient concept of the eleemosynary corporation:<sup>10</sup> 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.<sup>11</sup> The student as corporator is comparable to 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.<sup>12</sup> Here the domestic relationship is a product of public law.

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 statutory support in the form of enabling legislation.<sup>13</sup> In these instances, the relationship between the student and university does not find its effect in administrative law but in the private law of contract. The student cannot be understood therefore as a corporator but only as a party to the contract.<sup>14</sup> This has been termed a ‘contract of membership’.<sup>15</sup> One of the more substantial differences in the concept of statutory corporate membership, as against contractual membership, lies 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 (e.g., 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’.<sup>16</sup>

At common law, the susceptibility in principle of public universities to judicial review is well-established.<sup>17</sup> 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,<sup>18</sup> 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*,<sup>19</sup> 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.<sup>20</sup>

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’.<sup>21</sup> While these schemes were originally proposed to expand access to review of government action, it has been argued that the current trend is otherwise.<sup>22</sup>

It has been held that the university, with regard to the ADJR Act, satisfies the test of being an ‘administrative’ body.<sup>23</sup> 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*,<sup>24</sup> 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.<sup>25</sup> 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*. 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* (Qld). 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’.

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<sup>26</sup> and Tasmania.<sup>27</sup> Victoria’s statutory review scheme under the *Administrative Law Act 1978* is distinguishable and the question of jurisdiction under that Act parallels the common law scope for review.<sup>28</sup>

Kamvounias and Varnham have argued<sup>29</sup> 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 (e.g., exclusion). Courts may see fit to intervene in university decision-making where they find abuse of power or error of law.<sup>30</sup> The main source of qualification to this principle is the Courts' reluctance to intervene in matters of academic judgement.<sup>31</sup>

Public law represents a basis of legal challenge by students to university decisions, although limited by available grounds (e.g., denial of procedural fairness, abuse of power, irrationality). Where successful, judicial review of university action may have the effect of enlivening the domestic jurisdiction by remitting decisions to be made according to law.

## B *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) ('*ESOS Act*').

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.<sup>32</sup> 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.<sup>33</sup> 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,<sup>34</sup> US,<sup>35</sup> and Australian<sup>36</sup> legal-academic literature.

In brief, application of the doctrine of contract to university students was rejected in the 19<sup>th</sup> century.<sup>37</sup> But by 1964, in *Sammy v Birkbeck College*,<sup>38</sup> 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 *D'Mello v Loughborough College of Technology*.<sup>39</sup> Nevertheless, the contract was held to provide considerable latitude and discretion to the institution, a dimension to the contract common to the US experience.<sup>40</sup> 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*,<sup>41</sup> the Court of Appeal confirmed the contractual relationship while at the same time adding the conventional qualification on judicial deference to the university in academic

matters. 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*,<sup>42</sup> 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.<sup>43</sup>

With respect to the Australian context, Rochford has remarked that the courts ‘have not adopted an exclusively contractual analysis with any enthusiasm’.<sup>44</sup> 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*,<sup>45</sup> 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*.<sup>46</sup>

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,<sup>47</sup> Kamvounias and Varnham,<sup>48</sup> and Rochford.<sup>49</sup> 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. That is, the courts would not compel specific performance of the contract as a remedy to a proven breach,<sup>50</sup> or for that matter a mandatory injunction that may give a similar effect.<sup>51</sup> 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 (e.g., in the form of fees or income directly foregone) has been found,<sup>52</sup> or even where a student suffers mental distress in the failed performance of the contract (‘disappointment damages’).<sup>53</sup>

The ‘contract of membership’ that operates in 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.<sup>54</sup> Consumer protection provisions of the *Trade Practices Act*, in particular ss 52 and 53 which concern deceptive or misleading conduct and misrepresentation, have been used (or sought to be used) by students on a number of occasions 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*.<sup>55</sup> In that case, the Federal Court tested the phrase as it appeared in the *Workplace Relations Act 1996* (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*.<sup>56</sup> The Full Court in *Quickenden* held:

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.<sup>57</sup>

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'.<sup>58</sup> 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'<sup>59</sup> that fees charged for educational provision established and regulated by statute (in that case, HECS payments under the *Higher Education Funding Act 1988*<sup>60</sup>) 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.<sup>61</sup> Additionally, it has been argued that university marketing or promotional activities, now commonplace, will likely attract s 52, as would communications aimed at inducing or offering services to students already enrolled.<sup>62</sup> 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.<sup>63</sup> But this ought to be considered in the context of a State fair trading case, *Kwan v University of Sydney Foundation Program*.<sup>64</sup>

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*.<sup>65</sup> Some procedural variations aside,<sup>66</sup> 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 law<sup>67</sup> and in that case the educational relationship was seen to be reducible to the 'supply of education services'.<sup>68</sup> 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 (i.e., including 'core' activities such as classes and lectures) operated 'in trade or commerce'.<sup>69</sup> *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'<sup>70</sup> to attract the *Fair Trading Act*. This may not be said of all educational or intellectual activity in the university sector.<sup>71</sup>

Additionally, Victoria and NSW have enacted prohibitions on unjust and unfair terms in consumer contracts, a form of statutory unconscionability.<sup>72</sup> 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'.<sup>73</sup> The Victorian scheme borrows directly from UK and European Unfair Terms in Consumer Contracts legislation,<sup>74</sup> 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 considerable academic analysis in light of the 'unfair terms' legislation.<sup>75</sup> This analysis would apply directly to the Victorian situation.<sup>76</sup> As yet, application of the 'unfair terms' elements of the Victoria 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.<sup>77</sup> It also regulates extensively the terms and conditions by which education may be provided to international students, under the *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007* ('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.<sup>78</sup> Students do have 'complaints and appeals' mechanisms available, by which decisions can be reviewed. I will consider those procedures below.

### III WITHER THE UNIVERSITY'S 'DOMESTIC' JURISDICTION?

#### A *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.<sup>79</sup> 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.<sup>80</sup>

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.<sup>81</sup>

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*:

... 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.<sup>82</sup>

*Thompson* represented a high watermark in judicial treatment of the Visitor. The House of Lords affirmed the role of the University Visitor in *Thomas v University of Bradford*.<sup>83</sup> Decisions of the Visitor may be reviewed for jurisdictional error and for breaches of natural justice.<sup>84</sup> It has been held that appeals on academic decisions do not form part of the Visitor's jurisdiction, 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.<sup>85</sup> Other principles have arisen in the exercise of the Visitor's discretion, such as the award of damages,<sup>86</sup> declining relief where it is in the 'best interest' of the university to do so,<sup>87</sup> and declining to act against a discretion exercised in good faith.<sup>88</sup> 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.<sup>89</sup> While the jurisdiction may be statutory, it can also be invoked in contract.<sup>90</sup>

## B *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.<sup>91</sup> Where the 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.<sup>92</sup>

The office is indeed archaic, especially when scrutinised as 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 appeared notably in a reluctance to sanction an exclusive jurisdiction.<sup>93</sup> 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*<sup>94</sup> ever thought that there was any possibility of intervention by the Visitor'.<sup>95</sup> 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.<sup>96</sup> It did so under the influence of measures such as the *Human Rights Act 1998* (UK).

The office of Visitor was held in *Thomas* as having the 'advantage of cheapness, lack of formality and flexibility',<sup>97</sup> 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.<sup>98</sup> It has been advocated that the jurisdiction may be suitably reformed for contemporary circumstances: 'If properly constituted and qualified the visitorial forum offers all the advantages inherent in suitably constituted specialist tribunals'.<sup>99</sup> Policy has not been, however, 'suitably' 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'.<sup>100</sup> Comparatively unfettered, the Visitor's discretion is also a 'relic' of redundant models of administration. It is unstructured, and despite attempts to discern them,<sup>101</sup> 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 and Australian legal commentary that the Visitor is 'neither necessarily cheap, speedy nor final'.<sup>102</sup>

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 (eg 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 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 adjudication of domestic (corporate) decisions 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.

### C UK Renovation of the Domestic Jurisdiction

Under Part 2 of the UK *Higher Education Act*, the UK Government established a legislative 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.<sup>103</sup>

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’<sup>104</sup> It has been an important step in ‘modernising’ the student-university relationship in that country. A participating institution is obliged to comply with the OIA’s rules,<sup>105</sup> which include an ‘expectation’ that its decisions will be complied with and implemented.<sup>106</sup> To date, this authority has not been tested in the courts. The OIA may issue relief to student complainants, including in 2005 over £250,000 in compensation.<sup>107</sup> Redress may include remitting a decision to a higher education institution to be made afresh, identifying a different course of action, 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.<sup>108</sup> Matters of academic judgement and student admissions can not be dealt with under the Scheme.<sup>109</sup>

A student who takes a matter to the courts cannot subsequently seek to have it heard by the OIA,<sup>110</sup> and a student must exhaust internal complaints procedures before seeking to refer a matter to the OIA.<sup>111</sup>

The OIA’s procedure is typically to adjudicate matters on the papers. Under the Rules, oral hearings, although anticipated, are not the norm.<sup>112</sup> Parallels have been drawn between the OIA and statutory ombudsmen.<sup>113</sup> 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’<sup>114</sup> attendant in the OIA’s actions. In addition, as an ‘adjudicative’ body, as distinct from solely an investigative one, the OIA’s complaint-handling jurisdiction is presented as analogous to judicial procedure and hence determinative. The reforms introduced with the *Higher Education Act* are a significant improvement in cheap, expedient access to justice for students and ‘quality assurance’ for higher education institutions.<sup>115</sup> 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 ...<sup>116</sup>

The universities are not easily reduceable to other forms of public services, in which the public are consumers. They are, as Kirby J stated in *Tang*, ‘peculiar public institutions’<sup>117</sup> in which students maintain a corporate status, and 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.

## D 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.<sup>118</sup> Western Australian universities maintain the Visitor's jurisdiction, which remains exclusive in relation to internal disputes.<sup>119</sup> Bond University has the capacity to appoint a Visitor.<sup>120</sup> Elsewhere, as has been noted, there is no visitorial 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 *ESOS Act* are constructed as 'consumer protection' measures for international students.<sup>121</sup> 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.<sup>122</sup> The Victorian Ombudsman found in 2005 that universities in that jurisdiction 'do not have effective complaint systems and procedures and lack comprehensive centralised record keeping. I expect to see similar reports from other Ombudsmen in the coming months'.<sup>123</sup> The NSW Ombudsman issued complaint-handling guidelines for universities in 2006, following an investigation into the issue at NSW universities.<sup>124</sup> Those guidelines included the recommendation that universities establish an independent 'complaints centre' as part of their internal institutional architecture.<sup>125</sup> This recommendation is not reiterated in the statutory requirements referred to below.

Two principal legislative schemes apply to student disputes in Australian universities,<sup>126</sup> with the effect of regulating internal challenge to university decisions. The *Higher Education Support Act* ('*HESA*') provides that all 'higher education providers' shall have grievance and review procedures to deal with academic and non-academic complaints by students.<sup>127</sup> In turn, the nature of those procedures is prescribed by legislative instrument.<sup>128</sup> The *ESOS Act* requires, under the *National Code*, that 'registered providers' of educational services to international students, including universities, have 'complaints and appeals processes'.<sup>129</sup> These requirements are intended to 'protect the interests of overseas students',<sup>130</sup> although they are obligations on 'providers' and hence available in effect to all students.

What are the effects of these measures on domestic challenge by students in Australia? Construction of complaints and review procedure as required under *HESA* and the *ESOS Act* are similar. Both relevant instruments (the *National Code* and *Higher Education Provider Guidelines* ('*HEP 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*.

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*.<sup>131</sup> 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 *obiter*:

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.<sup>132</sup>

Subsequent amendments have given greater ‘precision’ to the required 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’<sup>133</sup> 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.<sup>134</sup>

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,<sup>135</sup> 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’.<sup>136</sup> 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 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.<sup>137</sup>

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.<sup>138</sup> Neither establishes (nor prescribes) an institutional framework 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<sup>139</sup> would tend to incorporate the general law related procedural fairness into the conduct of both complaints-handling and review schemes.<sup>140</sup> The requirements on providers under the *National Code* are more prescriptive. Internal and external schemes applying to international students requires 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.<sup>141</sup> Finally, in those jurisdictions that have or are the process of introducing 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.<sup>142</sup> This has been the subject of some debate in the UK following introduction of the *Human Rights Act* and its application to UK universities.<sup>143</sup>

#### IV 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 external challenge to university decisions is to be found in public and private law. By extension, however, 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). Student disputes may also sit uneasily in administrative law. Notably, universities are distinguished from 'mainstream' public sector decision-making in that their decision-making overwhelmingly lies outside of the merits review system.<sup>144</sup> It may be expressly stated in university enabling legislation that the institution is not an 'instrumentality of the Crown'.<sup>145</sup>

Historically, avenues for challenge have expanded and the range of redress available to students has widened. Where once the discretionary jurisdiction of the Visitor as 'internal judge' held pre-eminence in relation to domestic disputes, this office is in decline. Student challenge to university decisions or actions is 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<sup>146</sup> 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 enforcement of OIA decisions, adequacy of adjudicative procedure, and removal of academic decisions from the scope of review. Unlike the relatively coherent UK approach, 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<sup>147</sup> or resort to the law and courts<sup>148</sup> would suffice appeared to be accompanied by little or no evidence. The Commonwealth has filled the policy vacuum through requirements on universities for student complaints and review schemes. The Australian regulatory approach has required important revisions to the original legislative rules, most notably in compelling stronger systems of external review.

It is only relatively recently that the regulatory or legislative attempt has been made to craft special mechanisms of review and/or adjudication of student disputes, especially external review. 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, as the OIA has phrased it. 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,<sup>149</sup> 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 derive primarily from the public law tradition. Lessons ought also to be learnt from the broader tradition of ‘administrative justice’ in public law: that the process of review and adjudication may not only resolve individual disputes but improve decision-making in the universities generally.

*Keywords:* Student-university relationship; public law; student-university contract; consumer protection; domestic jurisdiction; Office of the Independent Adjudicator for Higher Education.

#### ACKNOWLEDGEMENTS

The author wishes to acknowledge the valuable and detailed comments provided by the anonymous referees, and previous comments from Professor Margaret Thornton. This article was based on a paper originally given at the Society Of University Lawyers Conference, Melbourne, 27 October 2006.

#### ENDNOTES

1. H H W Wade ‘Judicial control of universities’ (1969) 85 *Law Quarterly Review* 468.
2. Francine Rochford ‘The relationship between the student and university’ (1998) 3 *Australian and New Zealand Journal of Law and Education* 1.
3. *Ibid.*
4. *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).
5. Ministerial Council on Education, Employment, Training and Youth Affairs *National Protocols for Higher Education Approval Processes* (2006).
6. *Higher Education Support Act 2003* (Cth).
7. *Education Services for Overseas Students Act 2000* (Cth).
8. Eg *Melbourne University Act 1958*, s4; *Monash University Act 1958*, s3.
9. *Philips v Bury* [1694] All ER 53.
10. *Ibid.*
11. See Robert Sadler ‘The university visitor: visitatorial precedent and procedure in Australia’ (1982) *University of Tasmania Law Review* 2.
12. *Thompson v University of London* [1864] LJCh 625.
13. *Australian Catholic University (Victoria) Act 1991* (Vic), s 1(a); *Bond University Act (Q)* 1987, Preamble, s 2; *Australian William E Simon University Act 1988* (NSW), s 3.
14. *Herring and Templeman* (1973) 3 All E R 569, 584-5; *Clark v University of Lincolnshire and Humberside* (2000) EWCA Civ 129; *Orr and Bond University* (1997) QICmr 14.
15. Wade, above, n 1.
16. 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.
17. *University of Ceylon v Fernando* (1960) 1 All ER 631; *R v University of Saskatchewan, ex parte King* (1968) 1 DLR (3<sup>rd</sup>) 721; *Ex parte King; Re The University of Sydney* (1943) 44 SR(NSW) 19
18. Francine Rochford ‘Claims against a university: the role of administrative review in Australia and the

- United Kingdom' (2005) 17 *Education and the Law* 1-2 23, 9.
19. (1987) 1 QB 815.
  20. Jim Spigelman 'Foundations of Administrative Law: toward general principles of institutional law' (1999) 58 *Australian Journal of Public Administration* 1 3.
  21. s 5.
  22. Mark Aronson 'Is the ADJR Act hampering the development of Australian administrative law?' (2004) 15 *Public Law Review* 202
  23. *Burns v Australian National University* [1982] 40 ALR 707, 714.
  24. (2005) 221 CLR 99.
  25. Patty Kamvounias and Sally Varnham 'Doctoral dreams destroyed: Does *Griffith University v Tang* spell the end of judicial review of Australian university decisions?' (2005-2006) 10-11 *Australian New Zealand Journal of Law and Education* 1 5, 11-14; Daniel Stewart '*Griffith University v Tang*, "under an enactment" and limiting access to judicial review' (2005) 33 *Federal Law Review* 525; Graeme Hill (2005) '*Griffith University v Tang* – comparison with *Neat Domestic*, and the relevance of constitutional factors' 47 *ALAL Forum* 6; Melissa Gangemi '*Griffith University v Tang*: review of university decisions made "under an enactment' (2005) 27 *Sydney Law Review* 567; Christos Mantziaris and Leighton McDonald 'Federal judicial review jurisdiction after *Griffith University v Tang*' (2006) 17 *Public Law Review* 22.
  26. *Administrative Decision (Judicial Review) Act 1989* (ACT).
  27. *Judicial Review Act 2000* (Tas).
  28. *Monash University v Berg* (1984) VR 383; *Vowell v Steele* (1985) VR 133.
  29. Kamvounias and Varnham, above n 25, 11-14.
  30. For example, in *Bray v University of Melbourne* (2001) VSC 391.
  31. *Thorne v University of London* (1966) 2 QB 237; but compare *R v Higher Education Funding Council, ex parte Institute of Dental Surgery* (1994) 1 WLR 242.
  32. Wade, above, n 1; D J Farrington *The Law of Higher Education* (1994).
  33. William Kaplan and Barbara Lee *The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision-Making* (3<sup>rd</sup> ed., 1985).
  34. Farrington, above n 32, Ch 7; Wade, above n 1; Simon Arrowsmith and Nicola Hart 'The higher education institution-student contract' in David Palfreyman and David Warner (eds) *Higher Education and the Law: A Guide for Managers* (1998) 71; Martin Davis 'Students, academic institutions and contracts – a ticking time bomb?' (2001) 13 *Education and the Law* 1 9; Simon Whittaker 'Public and private law-making: subordinate legislation, contracts and the status of "student rules"' (2001) 27 *Oxford Journal of Legal Studies* 1 103; Tim Kaye, Robert Bickel and Tim Birstwhistle, T 'Criticizing the image of the student as consumer: examining legal trends and administrative responses in the US and UK' (2006) 18 *Education and the Law* 2-3 85; Tim Birstwhistle and Melissa Askew 'The *Teaching and Higher Education Act 1998* – impact of the student contract' (1999) 11 *Education and the Law* 2 89; Sam Middlemiss 'Legal liability of universities for student' (2000) 12 *Education and the Law* 2 69.
  35. In particular, see Kaplan and Lee, above n 33.
  36. Patty Kamvounias and Sally Varnham 'In-house or in court? Legal challenges to university decisions' (2006) 18 *Education and the Law* 1 1 at 11-12; Rochford, above n 2.
  37. *Thompson v University of London* (1864) LJCh 625.
  38. (1964) *The Times* 3 November.
  39. (1970) *The Times* 17 July.
  40. Virginia Dodd 'The non-contractual nature of the student-university contractual relationship' (1985) 33 *Kansas LR* 701.
  41. (2000) EWCA Civ 129 (14 April 2000).
  42. (1994) ELR 187.
  43. see *R v Aston University Senate, ex parte Roffey* (1969) 2 QB 538, 554, 556; Compare *Lee v Showmen's Guild of Great Britain* (1952) 2 QB 829, 341 (Denning LJ).
  44. Rochford, above n 2, 32; although see n 63 below.
  45. (1990) 22 NSWLR 424.

46. (2001) NSWSC 301, [18].
47. Davis, above n 34.
48. Kamvounias and Varnham, above n 36, 11-12.
49. Francine Rochford 'Suing the Alma Mater: what loss has been suffered?' (2001) *Education and the Law* 4 319.
50. 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'. For discussion, see J W Carter and D J Harland *Contract Law in Australia* (2<sup>nd</sup> ed., 1991) [2403]. However, by way of comparison, see *Moran v University College Salford* (1994) ELR 187 (Evans LJ), who 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).
51. 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.
52. See, eg., *Fennell v Australian National University* (1999) FCA 989.
53. *Buckingham v Rycotewood College* Oxford Country Court, 26 March 2002, OX004741/OX 004342. For discussion, see Kamvounias and Varnham, above n 36; and David Palfreyman, 'Phelps... Clark... and now Rycotewood? Disappointment damages for breach of the contract to educate' (2003) 15(4) *Education and the Law* 237.
54. See generally, Patty Kamvounias and Sally Varnham, 'Getting what they paid for: consumer rights of students in higher education' (2006) 15 *Griffith Law Review* 306.
55. (2001) 184 ALR 260.
56. *Dudzinski v Kellow* (1999) FCA 390 [3]; *Matthews v University of Queensland* (2002) FCA 414 [10].
57. *Ibid*, 51.
58. The most relevant sections being, as mentioned, those concerning misleading or deceptive conduct and false representations (ss 52 and 53 respectively).
59. *Quickenden v O'Connor* (2001) 184 ALR 260, 277 [51].
60. Comparable schemes of statutory 'pricing' now operate under the *Higher Education Support Act 2003* (Cth), ss 19.85-19.105.
61. *Ibid*.
62. Philip Clarke, 'University marketing and the law: applying the Trade Practices Act to universities' marketing and promotional activities' (2003) 15 *Deakin Law Review*.
63. Francine Rochford 'Traders of the lost ark – lecturers and liability' (2001) 13 *Education and the Law* 2 127; Lyndon Griggs 'Tertiary education, the market and liability "in trade or commerce"' (2004) 12 *Competition and Consumer Law Journal* 64.
64. (2002) NSWCTTT 83.
65. *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).
66. 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.
67. 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 introducing international students to undergraduate study in Australian universities': *Kwan v University of Sydney Foundation Program P/L and Ors* [2002] NSWCTTT 83 [4].
68. *Ibid* [69].
69. Tribunal Member Deamer found ([66]) specifically that one educational activity, a compulsory excursion, 'formed part of his [the student's] contractual obligations with the Foundation'.

70. *Fasold v Roberts* (1997) 70 FCR 489, 532F (Sackville J), the so-called ‘Noah’s Ark case’.
71. The point made by Sackville J in *Fasold v Roberts* (1997) 70 FCR 489, 534D (and taken up by Rochford, see above n 62) is significant in the wider public function of universities: ‘This case demonstrates that there are limits to the scope and reach of the TP Act and the Fair Trading Acts. Not every false statement attracts a legal remedy, under the legislation. This reflects a broader principle, namely, that the legal system cannot and should not attempt to provide a remedy for every false or misleading statement made in the course of public debate on matters of general interest’.
72. *Fair Trading Act 1999* (Vic), Part 2B; *Contracts Review Act 1980* (NSW).
73. Simon Whittaker ‘Judicial review in public law and in contract law: the example of “student rules”’ (2001) 21 *Oxford Journal of Legal Studies* 2 193, 198.
74. *Unfair Terms in Consumer Contracts Regulations 1999* (SI 1999/2083) (UK); *Directive 93/13 EEC*.
75. Davis, above n 47; Whittaker, above n 73; Birstwhistle and Askew, above n 34.
76. Interpretation of the Victorian provisions has drawn directly and substantially on the UK experience and UK judicial opinion: *Director of Consumer Affairs v AAPT Ltd* (Civil Claims) (2006) VCAT 493 (Morris J).
77. *ESOS Act*, s 15.
78. *Ibid* s 83.
79. *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’.
80. *Thomas v University of Bradford* (1987) 1 AC 795, 816B (Lord Griffiths).
81. *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 R Sadler, above n 11, 8.
82. *Thompson v University of London* [1864] LJCh 625, 634.
83. (1987) 1 AC 795.
84. *R v Aston University Senate, Ex parte Roffey* (1969) 2 QB 538; *Glynn v Keele University* (1971) 1 WLR 487; *University of Ceylon v Fernando* (1960) 1 All ER 631.
85. *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 (Kerr LJ).
86. *Bayley-Jones v University of Newcastle* (1990) 22 NSWLR 424.
87. *Re Macquarie University, ex parte Ong* [1989] 17 NSWLR 113.
88. *Re University of Melbourne, ex parte De Simone* (1981) VR 378, 387.
89. *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, above n 11.
90. *Bayley-Jones v University of Newcastle* (1990) 22 NSWLR 424, 436B.
91. *Eg University Acts (Amendment) Act 2003* (Vic); *University Legislation (Amendment) Act 1994* (NSW).
92. Victoria, *Parliamentary Debates*, Legislative Assembly, 1 May 2003, 1322 (Lyn Kosky, Minister for Education).
93. *Norrie v Senate of the University of Auckland* (1984) 1 NZLR 129.
94. (1943) 44 SR (NSW) 19.
95. *Ex parte McFadyen* (1945) SR (NSW) 200, 205 (Halse Rogers J).
96. ss 20, 46.
97. *Thomas v University of Bradford* (1987) 1 AC 795, 824.
98. Anwar Khan and Alan Davison ‘University Visitor and judicial review in the British Commonwealth (Old) Counties’ (1995) 24 *Journal of Law and Education* 457; Sadler, above n 11.
99. Sadler, above n 11, 32.
100. Tim Kaye ‘Academic judgement, the university Visitor and the *Human Rights Act 1998*’ (1999) 11 *Education and the Law* 3 165, 178.

101. Sadler, above n 11.
102. David Price and Peregrine Whalley 'The university Visitor and university governance' (1996) 18 *Higher Education Policy and Management* 1 45, 53; also Kaye, above n 99.
103. <<http://www.oiahe.org.uk/docs/OIA-Rules-2006.pdf>> at 3 October 2007.
104. *Gajree v Open University* (2006) EWCA Civ 831 [29].
105. *Higher Education Act 2004* (UK), s 15.
106. Office of the Independent Adjudicator for Higher Education *Annual Report* (2005) <<http://www.oiahe.org.uk/>>, Annex 3.
107. *Ibid*, Annex 4.
108. *OIA Rules of the Student Complaint Scheme*, r 7.4.
109. *OIA 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.
110. *Higher Education Act 2004* (UK), Schedule 2, subs 3(2)(c).
111. *Higher Education Act 2004* (UK), Schedule 2, subs 3(2)(b).
112. *OIA Rules of the Student Complaint Scheme*, r 6.2.
113. Bronwyn Oliffe and Anita Stuhmcke 'A national university grievance handler? Transporting the UK Office of the Independent Adjudicator for Higher Education to Australia' (2007) 29 *Journal of Higher Education Policy and Management* 2 203; Neville Harris 'Resolution of student complaints in higher education institutions' (2007) 27 *Legal Studies* 4 566.
114. Harris, above n 113, 599.
115. *Ibid* 579-587.
116. Office of the Independent Adjudicator for Higher Education, above n 106, 12.
117. *Griffith University v Tang* (2005) 221 CLR 99, 156.
118. Oliffe and Stuhmcke, above n 113.
119. *Murdoch University v Bloom and Kyle* (1980) WAR 193.
120. *Bond University Act 1987*, s 14. No such appointment has been made.
121. *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007* ('National Code'), s 6, Standards 7, 8.
122. Victorian Ombudsman *Review of Complaint handling in Victorian Universities*, Parl paper No 131 (2005). The Ombudsman noted that complaints against universities had doubled between 2001-2004.
123. *Ibid*, 2.
124. 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 their reputations and capacity to attract quality staff and students, both locally and internationally"'.<sup>125</sup>
125. *Ibid*, Ch 11.
126. Reference may be made to one further scheme. The South Australian *Training and Skills Development Act 2003* 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.
127. *HESA* ss 19-45.
128. *Higher Education Provider Guidelines 2007* ('HEP Guidelines'), Ch 4 (as made under *Higher Education Support Act 2003*, s 238.10).
129. *National Code*, Standard 8

130. Ibid. s 3.1(c).
131. (2005) FCA 1472.
132. *Ogawa v Secretary, Department of Education, Science and Training* (2005) FCA 1472 [62].
133. *National Code*, s 8.3
134. Ibid, s 8.5.
135. *HEP Guidelines*, s 4.5.2.
136. Ibid, s 4.5.5(a).
137. 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 legislative obligations. Action for breach of the National Code may only be taken by the Minister under s 83 of the *ESOS Act* (see above n 70).
138. There is no restriction on review of academic decisions under the *ESOS* 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).
139. *HESA* ss 19-30.
140. 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*; 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) IEHC 1, *Kane v Board of Governors of the University of British Columbia* (1980) 110 DLR (3<sup>rd</sup>) 311, 321.
141. *National Code*, s 8.1.
142. 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, above n 113, 16-17.
143. See, eg., Mark Davies 'Challenges to "academic immunity" – the beginning of the new era?' (2004) 16 *Education and the Law* 2-3 75; Ruth Crasnow 'Case reports – no oral hearing before a Visitor' (2003) 4 *Education Law Journal* 115.
144. 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.
145. Eg *University of Adelaide Act 1971*, s 4(6).
146. Harris, above n 113, 18.
147. Victoria, Parliament Debates, above n 84.
148. New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 April 1994 (Mr Aquilina, Member for Riverstone).
149. Oliffe and Stuhmcke, above n 113.