THE FUTURE OF UNIVERSITY TRIBUNALS

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The notion of a 'university tribunal' might provoke in lawyers a sense of curiosity and in university administrators a sense of unease. Lawyers may not immediately equate university bodies with the ordinary quasi-judicial environment of tribunals. Administrators might not be entirely comfortable with the obvious legal connotations of the term 'tribunal'. Tribunals, however, have existed in these institutions for centuries. In the chartered English universities, the Visitor functioned as an inherent 'judicial arm' of the corporation's government[1] and, until recently, that office typically had jurisdiction in Australian universities.[2] Until the end of the 19th century, Oxford and Cambridge Universities had criminal jurisdiction over the towns as well as the universities.[3] English and Australian courts have recognised the quasi-judicial character of various circumstances of university decision-making since at least the early 1960s.[4]

The term 'tribunal' is not only apposite to certain classes of university decision but university tribunals should be placed on a comparable practical footing with other statutory administrative tribunals, albeit having regard to the 'peculiar'[5] nature of their academic setting and universities' self-governing character.

Such change is desirable due to the intensifying subjection of academic life to public policy and control since at least the 1980s, including the student as a subject of policy and administration. Consistent with this perspective, it has been noted that the relationship of the student and the university has 'changed irrevocably'[6] from so-called 'elite' higher education to 'mass' higher education. This 'irrevocable' shift is as much political-economic as juridical: the circumstances of university decision-making have arguably not kept pace with the emergence of the institution as 'provider' and the student subject as purported 'consumer' of intellectual training, user of services, or procurer of knowledge. It is difficult, if not impossible, anymore to conceive of the relationship of student and university as 'akin to membership of a social body, a club with perhaps something more than mere social status attached to it.'[7]

The sector

In 2010, over 1.19 million students were enrolled in the higher education system, comprising just over 1.11 million students (93.2%) in the public university system (in 38 institutions), and a further 81,000 (6.8%) in the private providers (in 87 providers).[8] The university might be now understood as an institutional expression of a multi-billion dollar industry, based substantially on 'educational services' as well as research and other activities (eg consulting). International higher education revenues, achieved largely in the form of international students' fees, have consistently been lauded as one of the top sources of foreign income and presently education services as a whole are Australia's largest services export ($16.3 billion). Revenues in 2010-2011 in higher education were $9.4 billion.[9]

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Regulatory developments in the sector have historically had a major impact on the nature and trajectory of the university system and have generally been 'deregulatory' in two main waves: from 1988 with passage of the *Higher Education Funding Act 1988* (Cth), introduction of HECS and subsequently deregulation of fee-charging for international and postgraduate students; and from 2003 onwards, with passage of the *Higher Education Support Act 2003* (Cth), which introduced further 'marketization' measures and deepened the commercial (provider-consumer) model of internal relations. In addition, the *Education Services for Overseas Students Act 2000* (Cth) expressly included strong 'consumer protection' measures for that cohort of students.

Decision-making: the legal terrain

The legal categories governing the student-university relationship, and decision-making in respect thereof, have remained relatively stable through the course of this long-term, broad-based revolution in policy and practice.

It is now well-established that the student-university relationship can arise both under statute (a status of membership conferred under an institution's governing enactment)[10] and contract, and that these bodies of law can co-exist in the same relationship.[11] Where institutions are not established by statute but underpinned by statute, the founding relationship will be entirely contractual.[12]

It was once held that the relationship was exclusively founded on the student's status under the governing instrument,[13] although this position was progressively[14] and then definitively[15] departed from.

The relationship of administrative law to Australian public universities, where their dealings with students are concerned, is a difficult and messy one, made more problematic by the High Court's 2005 decision in *Griffith University v Tang*.[16] Post-*Tang*, the precise scope of the public law relationship, at least for the purposes of judicial review, will be influenced by jurisdiction, the nature of the institutional decision, and the status of institutional rules.[17]

As to the private law relationship, this has been described as a 'contract of membership',[18] analogous to trade unions or other private bodies, reflective of the dual domestic (corporate) and consensual character of the relationship. Where the student is not a 'corporator',[19] the contract will ordinarily still contain mechanisms for dealing with matters such as discipline, academic progress and disputes. The distinction might be made, however, between those bodies where there is some form of statutory underpinning to the institution (where it is not founded by statute) and so-called 'private providers' (where no statutory support for their corporate structure exists). Arguably, any semblance of a 'domestic' relationship in respect of the latter falls away. Focusing on the 'public university' sector, it is generally sufficient to say the relationship mixes public and private law, including administrative law standards and forms, in relation to decision-making. That is the point at which the question of 'tribunals' becomes significant. At what point is it appropriate or correct to talk of 'university tribunals' as distinct from other modes of decision-making? And what does that mean for the methods and character of those entities we understand as 'university tribunals'?

It has been said that the term 'tribunal' is not a term of art.[20] In Victoria, it has been reduced to statutory form.[21] In the university, I would suggest, the term is applicable to those persons or entities whose decisions are adjudicative and attract, to greater or lesser degree, the rules of procedural fairness. The distinction may be made, as in Denis Galligan's typology of procedure,[22] between adjudicative decisions and those which are an exercise of policy-based discretion or decisions that are a form of 'routine administration'. In this adjudicative space, Galligan would have it, a 'great mass of administrative process'[23] lies. It is here that the basic principle is that a decision is made 'by an enquiry into the facts and a judgment

applying authoritative standards to them',[24] including the normative standards of 'fair treatment' and (to greater or lesser degree) participation by those affected by the decision.[25]

By the end of the 1960s, it had become clear that natural justice applied to university disciplinary decisions[26] and actions pertaining to a student's academic progress.[27] A truncated form (of natural justice) also applies to complaints.[28]

Leaving aside the precise procedural content required in any case, at least three general forms of decision-making are susceptible to hearings before a tribunal of some description: disciplinary, academic progress, and complaints/appeals.

It has been said that these are 'hybrid' bodies,[29] exercising domestic and statutory jurisdiction over students. However, in my view, they should be considered primarily as objects of public policy and public administration, as indeed the universities and students have an objective foundation in public policy and administration.

Some reference can be made to the role and function of the University Visitor in this context.[30] That office provided a form of 'anomalous, indeed unique'[31] tribunal, competent to deal with all matters within its 'exclusive' domestic jurisdiction.[32] It was, however, as Sadler expressed it, a 'tribunal of last resort'.[33] The Visitor was competent to act on individual petitions, as well as what might be called 'own motion' visitations. In many Australian public universities that officer was (and remains) a statutory appointment under the governing enactment, held e*x officio* by the State Governor. It was a classic 'hybrid' tribunal.[34] Although it provided a form of quasi-judicial[35] recourse capable of some authority and transparency,[36] it must be conceded that it was practically unwieldy and, arguably, an instrument of an earlier, less bureaucratic and 'industrialised' institution.[37] A 1996 Western Australian Parliamentary inquiry, for instance, found the Visitor's role to be 'inefficient' and 'inappropriate, outdated and unnecessary',[38] recommending the abolition of this jurisdiction. The circumstances in which contemporary internal tribunals operate (include appeal bodies) are substantially different to those of three or four decades ago, let alone further back. The quasi-judicial landscape of universities has moved far beyond a dichotomy of the Vice-Chancellor's *magisterium*[39] and *ad hoc* and/or 'anomalous' quasi-courts (including the Visitor). We are now dealing with high-volume, specialist tribunals, operating under a range of regular procedural obligations of greater or lesser formality.

Decision-making: the practical terrain

It is likely that the greatest volume of quasi-judicial or tribunal decisions affecting students are hearings for misconduct (discipline) and for unsatisfactory academic performance ('show cause'). There is little publicly-available data on those volumes. Federal government data shows that, in 2010, 15 per cent of commencing undergraduates did not pass at least one unit of study.[40] The proportion of students required to 'show cause' for unsatisfactory performance would be much narrower than this, as the Federal data includes student withdrawals and the trigger for some kind of administrative action would commonly be failure of a majority of units across two periods of study. However, where even a small fraction of the Federally-reported failure rates crystallises into formal internal action, it is arguable that this translates into a substantial volume of proceedings.

In their 2009 study of student grievances and discipline, Jim Jackson, Sally Varnham and Helen Fleming found that nearly 80 per cent of students had complained or needed assistance with a problem and around 10 per cent had reported that the university had raised a 'problem' with them.[41] The latter may fall into the academic progress or disciplinary category.

In a study of seven Australian public universities,[42] the average level of hearings was put at around 1 per cent of the total student body. The proportion per institution ranged from 0.4 per cent to 2.7 per cent of students. Just over 1,600 students at those 7 universities were subject to disciplinary hearings in 2006. These figures suggest a substantial volume of work for decision-makers in the higher education sector, the single largest proportion are for academic misconduct and, in particular, for plagiarism.

Disciplinary hearings in universities might generally be said to be a form of adjudicative inquiry with an accusatorial character. Academic progress and complaints hearings, by contrast, might be said to be inquisitorial, without the accusatorial element, and often with more of an academic (or even pastoral) focus. The combination of inquisitorial and accusatorial factors in disciplinary hearings potentially lends to confusion or complexity in respect of procedure. The tendency to accusation implies a prospect of wrongdoing and/or transgression, as distinct from mere intellectual shortcoming or failure of academic capacity or effort, and lends itself, for example, to imposition of the legal burden on the authority or person bringing the accusation.[43] Additionally, quasi-criminal language (eg reference to 'offence') may be used in relevant rules and has been used in judicial decisions.[44] There is clearly an adversarial dimension in accusation, yet it is entirely appropriate and typically the case that such proceedings are inquisitorial[45] and eschew legal technicalities and formalities. In that case, it may be necessary to strike a careful balance between a generally inquisitorial method and the operation of adversarial techniques and modes as appropriate to the circumstances.

Quality of decision-making

One ground for proposing reform to the system and operation of university tribunals is the problematic standards of decision-making. Documented evidence as to the quality of decision-making of this type in the sector is scarce.

Three sources of information as to decision-making quality were considered in the doctoral study noted above: university rules, internal cases, and experience of student advocates in hearings.[46] 'Qualitative' standards were measured against basic administrative law standards, primarily procedural fairness.[47]

In respect of procedural standards, the study concluded: 'In respect of the 'bedrock' of procedural safeguards, as well as more arguable legal entitlements, universities generally are not exemplary decision-makers.'[48]

Base standards, such as the right to a hearing, are typically accorded. In respect of more diverse, subtle or complex procedural questions, as may arise from time to time, the situation is more mixed. Among the problem areas were:

- provision of adequate notice, especially sufficient particularisation of charges or allegations of rule breaches;
- provision of adequate disclosure of information that may be adverse to the student;
- entitlement to, and guidance of, witness examination, especially cross-examination;
- provision of written reasons, notably in practice rather than under institutional rules;
- inflexibility in relation to a right to representation (whether legal or otherwise);
- reversal of onus of proof or failure to apply the legal burden correctly;

- the making of necessary inquiries; and

- impartiality, both in respect of actual and apprehended bias.

The study found there were identifiable problems and/or shortcomings in the present handling of these quasi-judicial roles.

The study also found that there were problems associated with the organisation of disciplinary action, especially the distinction between investigative and adjudicative functions and how and by whom these might be carried out. This issue relates, in part, to the scope and extent of the inquisitorial function of tribunals themselves. It is noteworthy that, in relation to professional discipline for instance, the statutory model has tended to operate with a clear, institutional separation of investigatory and adjudicative bodies (eg investigations by regulators and adjudication by statutory tribunals). While not advocating replication of this approach in the universities, the issue of operational separation of 'investigators' from tribunals ought seriously to be contemplated and may parallel or be coordinated with the now well-established complaint-handling operations of higher education institutions.[49]

The post-institutional student

Critique of university tribunals is not solely founded upon practical problems. Long-term historic changes in the university sector are also significant. These changes have been substantially affected by public policy.

First, the paradigm of the university has changed, toward commercialisation and market-based subjects. Concepts of educational services and educational 'industries' suggest the following key lines of sectoral development:

- the emerging dominance of economic (commercial or market) paradigms in sectoral organisation;[50]

- an analogy between intellectual capacities and forms (eg knowledge, skill) and raw materials ('human resources'), mobilised in service of the economy;[51]

- the service-provider function of the institution as consistent with 'supply chains' of (post) industrial production (eg skilled labour-power, 'knowledge industries');[52] and

- the individual (student) as a type of 'micro-entrepreneur', investing in themselves and their cognitive capacities, in pursuit of 'positional advantages'.[53]

Under these general conditions, it has been argued that the university has come to be reconstituted as an 'enterprise university',[54] a particular type of commercial corporation.

Secondly, with respect to the principal subject of internal decision-making, the realities of being a student have fundamentally changed. This is manifest, among other things, in the

- diversification of backgrounds, ages, motivations, expectations of the student population;

- so-called disengagement of students from the institution;

- integration of education with (paid) work and other forms of work (eg family responsibilities), or in other words the decline of the student as a discrete subject, distinct from other spheres of life (eg labour force, home); and

- economic character of the student, ie as 'consumer', and also the substantial costs associated with studying.

In this general context, it is correct in my opinion to view the contemporary university as an administrative entity in a cultural as well as legal sense. The language of 'service delivery' is tailored to that end.

Bill Readings[55] grasped this trajectory when he talked of the present marginalisation of the 'idea' of the university and its national-cultural function, eclipsed by the 'empty notion of excellence'[56] – that is, the content-less and fluid indicia of 'performance' in academic operations.

The university is now about the administration of knowledge and the deployment of academic judgment and expertise to that end. The paradigm of higher education is founded on its *performative* or *operative* qualities with respect to knowledge, such as optimising value.[57]

This is quite a different phenomenon from the *raison d'etre* of the institution at least from the Enlightenment to the second half of the twentieth century, which was posed in the concept of *Bildung* or moral development of the self, especially the character and competence of an elite.[58]

The difference may be grasped in the historic concept of the student *in statu pupillari*,[59] or the student-as-pupil in the course of moral, emotional and social development as well as intellectual development, and the present condition of the student as consumer, client or economic acquirer of human capital. From the perspective of the institution, the domestic sphere – the analogy of the institution to 'household' (*domus*) or internal 'society' – which continues to be prominent in the law applicable to this relationship, is surely now 'emptied' as well. It is not, at a formal level at least, abolished: the student often remains a member of the corporation. The *domus* of the university, not quite capitulating to contract and the cold realities of commercial relations, is retained somewhere in the proliferation of 'support services' and scholarly authority. The *in statu pupillari* model was framed within a master-pupil relationship, a form of social and intellectual apprenticeship, situated in the web of informal, familiar, hierarchical and quasi-private relationships.[60]

It is reasonable to posit that such a set of arrangements no longer exists, or is generally marginal to the actual conditions of university life. 'Educational services' operate generally in a web of legal, administrative and regulatory relations, with academic discretion playing its part, as reflected in the density and complexity of administrative rules, policies, guidelines and procedures, now prolific in a space that was at one time, it is submitted, generally governed by informality and unwritten rules.[61]

It is not correct to assert that the relationship now is wholly or even primarily commercial (student-as-consumer). Rather, it is, first and foremost, administrative, or a particular mix of administrative, academic and economic characteristics. Materially, the student is a particular type of administrative subject,[62] one with economic and social qualities, and one that is a figure of public policy and administration. Juridically, the student exists in the interplay of contract and status, as both consumer and corporator,[63] albeit without the residues of 'pupilage', and functioning on a ground of (at least) formal equality with the institution.[64]

That is the context in which quasi-judicial decision-making now operates and it is the context in which the status of university tribunals ought properly to be reconsidered.

University tribunals as public-administrative tribunals

The foregoing analysis suggests that the proper benchmark for university tribunals is the system of public-administrative tribunals: tribunals as an instrument of public policy and administration. Disciplinary tribunals, in this context, generally administer integrity, order and 'good governance' in the sector. Progress committees administer academic standards. Complaints or disputes committees administer the orderly resolution of disputes. That such bodies are administrative tribunals merely takes the long-term tendency of governmental intervention in academic relations to a logical conclusion: why should governance of the student-university relationship in individualised cases differ from the application of administrative (or indeed consumer) justice in other circumstances?

What I suggest is not that 'domestic features' and a semblance of self-regulating societies be entirely abolished; rather, that they ought not to be considered exceptional to the general 'tribunal system'. The professions, as self-regulating entities, have long since been subject to control under the ordinary administrative tribunal system in the interests of public policy; universities, if they ever were, are not 'little Alsatias' outside public law.[65]

Legislated procedural standards

It is paradigmatic that tribunals balance the judicial model and the exercise of discretion. In the present case, the discretion may include academic judgment or evaluations as to the 'good order' or integrity of the institution. Judicialisation of disciplinary and other university decisions is well-established, and many standards of statutory tribunals already apply to university decision-makers.[66] There is greater judicialisation of disciplinary decisions than other forms of decision-making. The process is characteristic of the 'tribunal system' generally,[67] as it sustains court-like features but is distinguishable from the judicial system and also from Executive government, forming part of the distinct 'integrity' branch of government.[68] Tribunals, it might be said, are 'hybrid', stand-alone entities in the sphere of formal decision-making.[69] University disciplinary decisions are, of course, first-instance, not review, decisions.

Judicialisation of university bodies means application of the judicial model of fairness, impartiality and rationality to decision-making in the academic context. Hitherto this development has occurred in an *ad hoc* fashion, according to cases before the courts and universities' own interpretation and development of rules. Obviously, as the doctrine strongly emphasises, flexibility is essential. With a view to the quality of decision-making and a policy of comparable standing of university tribunals to other statutory tribunals, there should be legislative minimum procedural standards. These might be instituted in a code of procedure, or, perhaps better, in the form of model default rules forming a base standard. Such a mechanism might be legislated pursuant to the so-called 'fairness requirements' under Subdivision 19D of the *Higher Education Support Act 2003* (Cth), and incorporated into *Higher Education Provider Guidelines 2007* (Cth) pursuant to that part of the Act.

The content of such a code ought to include, in primary legislation, requirements for procedural fairness, provision of written reasons, right of internal appeal, the duty to undertake inquiries, the right to call and/or question witnesses, the place of the rules of evidence, and right to representation. Such a framework is not substantially dissimilar to that operating in many institutions. The objective of a legislated framework is to provide clear base standards and guidance under Parliamentary and/or Executive authority.

Tribunals generally are distinguishable by their inquisitorial nature and, in this respect, legislative guidance ought also to be provided as to the inquisitorial nature of university tribunals, especially the balance to be struck in disciplinary action between adversarial (accusatorial) features and duties of inquiry. This balance might be struck in requirements for

institutions to have distinct organisational areas that receive disciplinary complaints, handle preliminary investigations and/or file[70] allegations of breaches of disciplinary rules, and the tribunals themselves. The guidance might also expressly relate to the scope of inquiries a tribunal might make and the application of the tribunal's own expertise in decision-making.

Openness and accountability

Generally tribunals are considered a cornerstone of accountable administration and hence openness and transparency are viewed as important and desirable attributes. These are more relevant for merit review tribunals than first-instance tribunals but the quasi-judicial character suggests a presumption of openness and accountability.

Openness is qualified or undesirable in some tribunals, eg guardianship, Ombudsman and social security jurisdictions. Public, administrative justice in university cases may be problematic, due to the sensitivity of accusations of misconduct, the regulatory character of universities, and the lack of privilege accompanying statements or utterances made.[71] There is no clear dividing line between public and private hearings, and 'privacy' is not to be equated with isolation or secrecy.[72] If university hearings are to be 'in private' hearings, this does not necessarily mean that every aspect of their conduct and outcome is to be inaccessible to the public. However, it would mean that members of the public generally cannot access the proceedings.

It is appropriate that universities retain power to handle 'internal' matters. However, this mode of 'privacy' is not inconsistent with, for instance, allowing an affected student to be accompanied by a person assisting them or invited by them to attend a hearing; nor would it be inconsistent for decisions and reasons to be published where a student's personal information is redacted. Alternatively, case summaries could be prepared, as occurs in the UK Office of the Independent Adjudicator for Higher Education.[73] The mix of public and private elements in university tribunal decision-making is clearly not unique, nor especially problematic, as for instance consumer dispute resolution jurisdictions attest.[74] Indeed, tertiary student-provider disputes have been resolved in those jurisdictions and publicly reported in full. Published reasons would also facilitate the consistency of decision-making and the development of 'guidance' cases, such as may occur in the ordinary statutory tribunal system and have been held to be 'generally desirable'.[75]

Review

Universities uniformly have some form of internal appeal or review of disciplinary (or other) decisions. They are required to have a means of external review.[76] In the case of overseas students, where external review leads to a beneficial outcome to the student, the institution is required to implement it.[77] There is limited structure and regulation of external review arrangements. It is possible, as many institutions do, to refer request for review to the relevant Ombudsman, although this may not be the most appropriate course of action. For example, complaints may be forthcoming beyond the statutory time-bar, and the Ombudsman's role is arguably more focused on proper administration rather than administrative justice in individual cases. No data on external review cases or decisions across the sector seem to exist. It appears likely that this is an entitlement that few students are aware of,[78] and the system of external review seems generally opaque and inaccessible. External review is a cornerstone of responsive and accountable decision-making, which is one reason the Office of the Independent Adjudicator for Higher Education was established in the UK. The approach to external review in Australia leaves much to be desired and revisiting this issue, with clear policy and procedural objectives in mind, is appropriate.

Professionalisation

Finally, greater professionalisation of tribunal members is necessary. In universities, this does not necessarily mean development of an entirely independent occupation or strata of officials within the university. Rather, it might be met in requirements for training decision-makers, providing satisfactory recognition and remuneration of staff in these roles and/or staff deployments, supported by appropriate professional and administrative support. The issue of adequate training has been raised in respect of statutory tribunal members generally,[79] and in relation to complaints handling in universities.[80] The Administrative Review Council has produced useful materials in relation to tribunal member conduct that may be instructive in the issue of professionalisation in the university context.[81] Clearly, the issue of training (and experience) is central to the quality of decision-making. It is noteworthy that in some circumstances universities presently second senior staff into, for example, internal Ombudsman roles. A disciplinary tribunal chair might, likewise, be a seconded appointment, preferably on a full-time basis. Consideration might also be given to appointment of Chairs or senior members with legal training. Robin Creyke has made the important point that 'Tribunal members are expected not just to have specialist skills but also to be able to operate effectively in a legal environment'.[82]

Professionalisation and efficiency in the operation of tribunals might also be achieved in establishing a single disciplinary tribunal at the institutional level, as distinct from the present common practice of establishing student disciplinary bodies at Faculty or School level. The tribunal would function under the authority of a single chair and with access to a wide pool of tribunal members (at greater or lesser fractions of appointment), thus enhancing the perception of its independence. It is acknowledged that among the major practical constraints on university tribunals are the volume of hearings and the typically short period of time in which a large volume of matters need to be heard (influenced by the academic semester system). In these circumstances, it seems reasonable to 'pool' human and administrative resources in such a way, for instance, that hearings can be held concurrently in relatively large numbers, as single-, 2-member or at most 3-member panels.

Conclusion

There are no compelling policy or principled reasons that university tribunals (and student disciplinary tribunals in particular) ought not to be brought within the practical scope of the ordinary statutory 'tribunal system'. There are, indeed, good reasons, such as 'quality assurance', greater independence, and promotion of good practice in first-instance decision-making, for regulatory and practical steps to be taken to, as far as practicable, bring them into line with the general standards applicable to the wider administrative tribunal system. Students are no longer an anomaly within the sphere of public policy and administration, best left to the supervision and tutelage of academic self-government. Legislative and judicial regulation of the student-university relationship has been proceeding apace for decades. It is appropriate that attention now turn to the standards and practices of their internal tribunals.

Endnotes

1 *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'. See generally, Robert Sadler 'The University Visitor: Visitatorial Precedent and Procedure in Australia' (1982) *University of Tasmania Law Review* 2. The office of Visitor has been abolished or reduced to a mere ceremonial role in most Australian jurisdictions. In Victoria, the jurisdiction was abolished by the *University Acts (Amendment) Act 2003* (Vic). The jurisdiction to deal with student complaints was also abolished in relevant UK universities by the *Higher Education Act 2004* (UK), s 20.

2 There was something of a revival of its exercise in the 1980s-1990s: see eg *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; *Re La Trobe University; Ex parte Wild* [1987] VR 447.
3 James Williams, 'The Law of Universities' (1908-1909) 34 *Law Magazine and Review* 1 136; Francis Cripps-Day, 'Cambridge University Jurisdiction' (1894) 19 *Law Magazine and Law Review* 4 271.
4 *University of Ceylon v Fernando* (1960) 1 All ER 631.
5 See *Griffith University v Tang* (2005) 221 CLR 99, [165] (Kirby J).
6 D J Farrington *The Law of Higher Education* (Butterworths, 1994), 319.
7 *R v Aston University Senate; Ex parte Roffey* (1969) 2 QB 538, 556.
8 Department of Education, Employment and Workplace Relations, *Students 2010 Full Year: Selected Higher Education Statistics* (2011), http://www.deewr.gov.au/HigherEducation/Publications/HEStatistics/Publications/Pages/2010StudentFullYear.aspx (accessed 14 May 2012).
9 Australian Education International, *Export Income to Australia from Education Services in 2010-2011* (Research Snapshot, 2011), at https://aei.gov.au/research/Research-Snapshots/Documents/Export%20Income%202010-11.pdf (accessed 11 April 2012).
10 See eg *University of Melbourne Act 2009* (Vic), s 4; *University of Sydney Act 1989* (NSW), s 4; *University of Tasmania Act 1992*(Tas), s 5; *University of Western Australia Act 1911*(WA), s 4.
11 *Clark v University of Lincolnshire and Humberside* [2000] EWCA Civ 129, although not necessarily in the same decision: *Griffith University v Tang* (2005) 221 CLR 99, [81]: 'If the decision derives its capacity to bind from contract or some other private law source, then the decision is not "made under" the enactment in question'.
12 As eg in the case of the Australian Catholic University or Bond University; cf *Herring v Templeman* [1973] 3 All ER 569.
13 *Thomson v University of London* (1964) LJ Ch 625.
14 *Sammy v Birkbeck College* (1964) *The Times* 3 November.
15 *Herring v Templeman* [1973] 3 All ER 569; *Clark v University of Lincolnshire and Humberside* [2000] EWCA Civ 129; *Bayley-Jones v University of Newcastle* (1990) 22 NSWLR 424; *Moran v University College Salford* (1994) ELR 187.
16 (2005) 221 CLR 99.
17 See Patty Kamvounias and Sally Varnham, 'Doctoral Dreams Destroyed: Does *Griffith University v Tang* Spell the End of Judicial Review of Australian University Decisions?' (2005) 10 *Australian and New Zealand Journal of Law and Education* 1 5.
18 H W R Wade 'Judicial Control of Universities' (1969) 85 *Law Quarterly Review* 468; see also *Clark v University of Lincolnshire and Humberside* [2000] EWCA Civ 129, [11]-[12]:
But ULH is simply a statutory corporation with the ordinary attributes of legal personality and a capacity to enter into contracts within its powers. The arrangement between a fee-paying student and ULH is such a contract: see *Herring v Templeman* [1973] 3 All ER 569, 584-5. Like many other contracts, it contains its own binding procedures for dispute resolution, principally in the form of the Student Regulations.
19 That is, a (statutory) member of the corporation: as to use of the term 'corporator', see *Re University of Melbourne; ex parte De Simone* (1981) VR 378, 386 (Governor Sir Henry Winneke sitting as Visitor).
20 Law Book Company, *Laws of Australia* Vol 2 (at 1 October 2006) 2 Administrative Law; '2.7 Other Forms of Review and Appeal', [2.7.920].
21 *Administrative Law Act 1978* (Vic) s 2.
22 Denis Galligan, *Due Process and Fair Procedures: a Study of Administrative Procedures* (Clarendon Press, 1996), 235-236.
23 Id, 236.
24 Ibid.
25 Id, 246-7.
26 *University of Ceylon v Fernando* [1964] 3 All ER 865; *Glynn v Keele University* [1971] 1 WLR 487.
27 *R v Aston University Senate; Ex parte Roffey* [1969] 2 All ER 964.
28 See *Ivins v Griffith University* [2001] QSC 86, [42].
29 J R S Forbes, *Justice in Tribunals* (Federation Press, 3rd ed, 2010), [2.17]. Hybrid tribunals being '… entities that formerly exercised purely consensual jurisdiction, and retain certain "domestic" features, but which now have statutory support. Their social importance has attracted the attention of the legislature, domestic remnants notwithstanding'.
30 See also n 1-2 above.
31 *Page v Hull University Visitor* (1993) 1 All ER 97, 109f.
32 The classic cases dealing with the nature and scope of the Visitor's 'exclusive' jurisdiction include *Philips v Bury* [1694] All ER 53 and *Thompson v University of London* (1864) LJCh 625. For contemporary application in the Australian jurisdiction, see *Murdoch University v Bloom and Kyle* (1980) WAR 193; *Andreevski v Western Institute Students' Union Inc* [1994] IRCA 49; *Nadjarian v University of Tasmania* [1986] TASSC 26; *Bayley-Jones v University of Newcastle* (1990) 22 NSWLR 424. The ancient origins of the Visitor, as an office inherent at common law, in the establishment of particular types of charitable (eleemosynary) corporations and an incident of the powers of the corporation's 'founder' (including, in the

case of public universities, the relevant Parliament), are elaborated in *Philips v Bury* [1694] All ER 53, *Page v Hull University Visitor* (1993) 1 All ER 97, and in Sadler, n 1 above.

33 Sadler, note 1 above, 11-13.

34 Forbes, n 29 above, [2.23]-[2.27].

35 As to its quasi-judicial character, among the limits on the exercise of the Visitor's discretion was the requirement to accord natural justice: see *Page v Hull University Visitor* (1993) 1 All ER 97, 109j (Lord Browne-Wilkinson).

36 There was a trend to public reporting of Visitor decisions in the law reports from the 1970s and 1980s: see eg *Re University of Melbourne; ex parte McGurk* [1987] VR 586; *Re La Trobe University; ex parte Wild* (1987) VR 447; *Re Macquarie University, ex parte Ong* [1989] 17 NSWLR 113; *Re University of Melbourne; ex parte De Simone* (1981) VR 378.

37 Perhaps more consonant with the university in the 'social club' or elite mode, as suggested in *Roffey's* case: see n 7 above.

38 Legislative Council Standing Committee on Public Administration, Parliament of Western Australia *The Appeals and Review Processes for Western Australian Universities* (1996), 12. In the UK inconsistency with human rights standards played a significant part in its decline: see Tim Kaye 'Academic Judgement, the University Visitor and the *Human Rights Act 1998'* (1999) 11 *Education and the Law* 3 165.

39 See n 60 below.

40 Department of Education, Employment and Workplace Relations, *Student 2010 Full Year: Selected Higher Education Statistics*, Appendix 4.6.

41 Jim Jackson, Sally Varnham and Helen Fleming, *Student Grievances and Discipline Matters Project – Final Report* (Australian Learning and Teaching Council, 2009), [6.2.3].

42 Bruce Lindsay, 'Rates of Student Disciplinary Action at Australian Universities' (2010) 52 *Australian Universities Review* 2 27; Bruce Lindsay, 'Student Discipline: a Legal and Empirical Study of University Decision-making' (unpublished PhD thesis, Australian National University, 2010), 94-99.

43 See eg *Secretary, Department of Social Security v Willee* (1990) 96 ALR 211, 220 (Foster J): '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'.

44 Eg *Flanagan v University College Dublin* [1988] IEHC 1, [20]: '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'.

45 *Simjanoski v La Trobe University* [2004] VSC 180, [22].

46 Lindsay, n 42 above, chs 6, 7, and 8 respectively.

47 Also other legal standards as they were appropriate to consider, including the duty to make inquiries, the burden and standard of proof, and jurisdictional facts.

48 Lindsay, n 42 above, 214.

49 That is, the establishment of offices such as University Ombudsman: see generally, Rachael Field and Michael Barnes, 'University Ombuds: Issues for Fair and Equitable Complaints Resolution' (2003) 14 *Australasian Dispute Resolution Journal* 198; Hilary Astor, 'Improving Dispute Resolution in Australian Universities: Options for the Future' (2005) 27 *Journal of Higher Education Policy and Management* 1 49.

50 See eg Simon Marginson, *Markets in Education* (Allen and Unwin, 1997).

51 The marshaling and economic realization of intellectual or cognitive capacities on the market is the central theme of 'human capital theory', generally associated with the so-called Chicago School and writers such as Milton Friedman and Gary Becker: see eg Milton Friedman *Capitalism and Freedom* (University of Chicago Press, 1962), Ch 6; Gary Becker *Human Capital: A Theoretical and Empirical Analysis, with Special Reference to Education* (University of Chicago Press, 1993 [1964]); see also Simon Marginson *Education and Public Policy in Australia* (Cambridge University Press, 1993), 38:
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.

52 The notion of 'industrialisation' of knowledge famously goes back at least to University of California President Clark Kerr's famous analysis of the 'multiversity': Clark Kerr, *The Uses of the University* (Harvard University Press, 1963).

53 On 'positional goods' and 'positional advantage' in relation to higher education, see Simon Marginson, n 50 above, 50.

54 Simon Marginson and Mark Considine, *The Enterprise University: Power, Governance and Reinvention in Australia* (Cambridge University Press, 2000).

55 Bill Readings *The University in Ruins* (Harvard University Press, 1996).

56 Ibid, 39.

57 Jean-Francois Lyotard, *The Postmodern Condition: A Report on Knowledge* (University of Minnesota Press, 1984), 41ff; Franco Piperno, 'Technological Innovation and Sentimental Education' in Paulo Virno and Michael Hardt (eds), *Radical Thought in Italy: a Potential Politics* (University of Minnesota Press, 1996), 123-132.

58 Cf Lyotard, n 57 above, 4:

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.

59 See eg Oxford Dictionaries, http://oxforddictionaries.com/definition/in%2Bstatu%2Bpupillari (accessed 2 May 2012): '1 under guardianship, especially as a pupil: *we are not children in statu pupillari, but adults*… 2 in a junior position at university; not having a master's degree'. See also eg University of Cambridge *Statute K: Commencement, Interpretation, Invalid Proceedings* (2011), http://www.admin.cam.ac.uk/univ/so/pdfs/statutek.pdf (accessed 11 July 2012), cl 3(h):
the term person *in statu pupillari* shall mean a member of the University (in which term shall be included a member of a College, or of an Approved Society, resident in the University with a view to matriculation) who has not been admitted to an office in the University (or to a post in the University Press specially designated under Statute J, 7 or to an appointment approved by the University for the purpose of Statute A, III, 7(*e*)), or to a Fellowship or office of a College, or to a degree which qualifies the holder for membership of the Senate under Statute A, I, 6(*c*), and is of less than three and a half years' standing from admission to his or her first degree (if any)…

60 The *de facto* private internal authority of the British universities was somewhat reluctantly curtailed and subject to judicial power in *Glynn v Keele University* [1971] 1 WLR 487, in which Pennycuik VC identified the relationship in terms of 'tutor and pupil' and with the 'upbringing and supervision of the pupil under tuition': at 494. The power of the (University) Vice-Chancellor was, in his Honour's opinion, 'regretfully' not 'magisterial': at 495, and therefore limited by public law. The sentiment of the noted administrative lawyer Sir William Wade at around the same time was comparable: see Wade, n 18 above.

61 Eg consider present trends to rules governing preparation and organisation of syllabus and course content, codification of 'graduate attributes' (ie the character of the university-trained), rules and procedures governing research, operational and strategic planning, auditing, etc.

62 It is instructive that, as a matter of law, decisions 'of an administrative character' have been held to include decisions with educational content or character: *Evans v Friemann* (1981) 53 FLR 229.

63 See Francine Rochford 'The Relationship Between the Student and the University' (1998) 3 *Australian and New Zealand Journal of Law and Education* 1 28, especially 43-45.

64 As application of the principles of contract would suggest.

65 Cf Mark Lewis, 'An Alsatia in England' (1984) 47 *Modern Law Review* 171, who argues that, aside from the English Bar, there probably is no genuinely domestic private tribunal, subsequent to judicial interventions to supervise and control voluntary associations.

66 Eg the standards of bias applying to university tribunals, namely that apparent as well as actual bias, must be avoided, are comparable to (other) statutory tribunals: see *Simjanoski v La Trobe University* [2004] VSC 180; *R v Cambridge University; Ex parte Beg* [1998] EWHC Admin 423.

67 See eg John McMillan, 'Administrative Tribunals in Australia – Future Directions' in Robin Creyke (ed), *Tribunals in the Common Law World* (Federation Press, 2008), 237; Heather MacNaughton, 'Future Directions for Administrative Tribunals: Canadian Administrative Justice – Where Do We Go from Here?' in Robin Creyke (ed), *Tribunals in the Common Law World* (Federation Press, 2008), 206-208.

68 See eg Robin Creyke, 'Administrative Justice – Towards Integrity in Government' (2007) 31 *Melbourne University Law Review* 705; Robin Creyke, 'The Special Place of Tribunals in the System of Justice: How Can Tribunals Make a Difference? (2004) 15 *Public Law Review* 220.

69 Cf Nick Wikely, 'Future Directions for Tribunals: a United Kingdom Perspective' in Robin Creyke (ed), *Tribunals in the Common Law World* (Federation Press, 2008), 185-190, where he identifies the 'distinctive ethos of tribunals'.

70 The language here might be instructive or even determinative of the role to be played by such an internal body. For example, reference to 'prosecuting' or even 'informing' of breaches has resonances of criminal action. The term 'file' is used for the sake of neutrality, although it may seem excessively administrative in nature.

71 See J R Forbes, 'University Discipline: a New Province for Natural Justice?' (1971) 7 *University of Queensland Law Journal* 85, 86-88.

72 *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 49, [23]; see also Zac Chami 'The Scope and Meaning of "in private" Hearings: the Implications of SZAYW' (2006) 51 *Australian Institute of Administrative Law Forum* 67.

73 See Office of the Independent Adjudicator for Higher Education, 'Recent Decisions of the OIA', http://www.oiahe.org.uk/decisions-and-publications/recent-decisions-of-the-oia.aspx (accessed 9 May 2012).

74 Eg *Fair Trading Act 1999* (Vic) s 108.

75 *NABM of 2001 v Minister for Immigration & Multicultural Affairs* [2002] FCA 335, [66] (Beaumont J).

76 Higher Education Provider Guidelines 2007 *(Cth), sub-para 4.5.2;* National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007 *(Cth) (*ESOS National Code*), standard 8.3.*

77 *ESOS National Code*, standard 8.5.

78 By way of comparison, it has been noted that student complaints procedures and associated information are relatively inaccessible to students: Jackson *et al*, n 39 above, [11.2]-[11.3].
79 Creyke, 'The Special Place of Tribunals in the System of Justice', n 68 above, 233-234.
80 Jackson, et al, n 41 above, [11.4.2]; Jim Jackson, Helen Fleming, Patty Kamvounias and Sally Varnham *Student Grievances and Discipline Matters Project: Good Practice Guide* (Australian Learning and Teaching Council, 2009), 24-27.
81 Administrative Review Council, *A Guide to Standards of Conduct for Tribunal Members* (2009), http://152.91.15.12/agd/WWW/arcHome.nsf/Page/Publications_Reports_Downloads_A_Guide_to_Standards_of_Conduct_for_Tribunal_Members_-_Revised_2009 (accessed 8 May 2012).
82 Creyke, 'The Special Place of Tribunals in the System of Justice', n 68 above, 233.