

# LAW, GOVERNANCE, AND ACADEMIC AND DISCIPLINARY DECISIONS IN AUSTRALIAN UNIVERSITIES: AN AMERICAN PERSPECTIVE

Fernand N. Dutille\*

## I. INTRODUCTION

On a bulletin board at the University of Queensland, in Brisbane, Australia, appears the following warning to students: "Please don't cheat in your exams; Senate is not inclined to be merciful." The emphasis in this entreaty on the role of the University governing board reflects a major difference, although only one of them, between the American and Australian treatments of student shortcomings, academic or disciplinary.

This Article will discuss, from an American perspective, the law affecting decisions regarding academic and disciplinary matters in Australian universities. This discussion will address not only internal university governance, but also the impact of Constitutional, statutory and case law as well. This analysis will implicate the many ways in which Australia treats its students differently—in some ways perhaps more wisely, in others perhaps less so—than American universities treat theirs.<sup>1</sup> The assessment will reveal a relationship between Australian students and their university quite different from that between American students and theirs.

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\* Associate Dean and Professor of Law, Notre Dame Law School; A.B., Assumption College, 1962; J.D., University of Notre Dame, 1965; Member of the Maine Bar.

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1. Comparisons with specific American universities appear principally in the footnotes. These comparisons focus on two large, public universities—the University of Michigan and Indiana University (at Bloomington)—that provide a suitable reference point for the large, public University of Queensland, my principal focus in the text, and many other Australian universities. In the fall of 1993, the University of Michigan enrolled 36,845 students, the fifteenth largest enrollment in the United States; Indiana University enrolled 35,551, the sixteenth largest enrollment in the United States. CHRON. OF HIGHER EDUC.: ALMANAC ISSUE, Sept. 1, 1995, at 13.

Australia's population of about 19,000,000 occupies a land area roughly equal to that of the continental United States. A federation since 1901, the country comprises six states<sup>2</sup> and two territories.<sup>3</sup> Australia has thirty-eight universities,<sup>4</sup> each with "its own character, its own ambience, its own areas of academic excellence, [and] its own social and cultural life . . ."<sup>5</sup> Only two of these universities are private.<sup>6</sup> Australia's universities enroll approximately 585,000 students.<sup>7</sup> About 20,000 live "on campus" at residential university colleges or hostels, most of which are now co-educational.<sup>8</sup> The universities employ the equivalent of 26,104 full-time academic staff members.<sup>9</sup> Universities in Australia are virtually totally funded by the federal government.<sup>10</sup>

2. New South Wales [hereinafter N.S.W.]; Queensland [hereinafter Queensl.]; South Australia [hereinafter S. Austl.]; Tasmania [hereinafter Tas.]; Victoria [hereinafter Vict.] and Western Australia [hereinafter W. Austl.].

3. Australian Capital Territory and the Northern Territory.

4. Of course, there are many other providers of tertiary education. TAFE (Technical and Further Education) provides a wide variety of diploma and associate-diploma courses relating to business, engineering, health support, nursing, and the like. Its institutions, some of which now offer degrees, increase in popularity daily, though many still think of TAFE "as training for the trades and manual occupations." *New Competitor Measures Up, Courses, Careers, Campuses: Good Universities Guide*, THE WEEKEND AUSTRALIAN, July 8-9, 1995, at 14. Moreover, Australia has some 2500 private providers of higher education. These "range from the private individual offering educational services through large companies . . . running registered training programs, to the larger, more traditional colleges." *Id.* Some of these too now grant degrees. *Private Colleges Gauge Their Success in Degrees, Course, Careers, Campuses: Good Universities Guide*, THE WEEKEND AUSTRALIAN, July 8-9, 1995, at 14. Nonetheless, universities remain the only avenue to "many courses and careers, including the 'pure' academic disciplines and the high-status professions." *New Competitor Measures Up, supra.*

5. See generally *Courses, Careers, Campuses: Good Universities Guide*, THE WEEKEND AUSTRALIAN, July 8-9, 1995, at 1.

6. Only Bond University and the University of Notre Dame Australia are private. *Private Colleges Gauge Their Success in Degrees, supra* note 4, at 14.

7. *Education only field falling in popularity, Courses, Careers, Campuses: Good Universities Guide*, THE WEEKEND AUSTRALIAN, July 8-9, 1995, at 8.

8. Matt Robbins, *Alma Mater a Good Mixer, Courses, Careers, Campuses: Good Universities Guide*, THE WEEKEND AUSTRALIAN, July 8-9, 1995, at 2.

9. *Male Staff Dominate, Courses, Careers, Campuses: Good Universities Guide*, THE WEEKEND AUSTRALIAN, July 8-9, 1995, at 8; Dorothy Illing, *Few Women in Academe's Upper Echelons*, THE AUSTRALIAN, June 28, 1995, at 23.

10. See 1995 UNIV. OF QUEENSL. CALENDAR 5, "The University receives the major portion of the funding for its general teaching and research operations by recurrent grants from the Commonwealth Government or by payments from the Higher Education Trust Fund which receives income in respect of students' liability under the Higher Education Contribution Scheme." *Id.*; Darrell Lumb, *Foreword*, in PHILIP DE LACEY & GABRIEL MOENS, *THE DECLINE OF THE UNIVERSITY* at vii (1990). This fact has drawn criticism: "The . . . solution of 100% Commonwealth funding, while appearing

## II. UNIVERSITY GOVERNANCE

### A. The Governing Board

Despite this federal funding, universities, except for those in the Australian Capital Territory,<sup>11</sup> are totally creatures of state law. A separate statute, bearing the name of the particular university, not only creates the institution, but also governs its operations meticulously.<sup>12</sup> These statutes, amended from time to time, establish the governing board and specify its membership,<sup>13</sup> set up other university organizations,<sup>14</sup> provide for the selection of the institution's officers,<sup>15</sup> detail the powers and responsibilities of campus actors,<sup>16</sup> delineate fiscal policy,<sup>17</sup> provide for the award of degrees<sup>18</sup> and for student discipline,<sup>19</sup> and in many other ways oversee the life of the institution.<sup>20</sup>

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to be a generous initiative at the time, has turned out indeed to be a Trojan horse. Localized State superintendence and control has now been superseded by Canberra-directed policies and initiatives." *Id.* at viii.

11. Universities in the Australian Capital Territory are created and controlled by the Commonwealth's Parliament. *See, e.g.*, The Australian National University Act of 1991 (A.C.T.) [hereinafter A.N.U. Act]. Like the state statutes, this statute closely controls the operation of the created institution.

12. *See, e.g.*, Macquarie University Act 1989 (N.S.W.) [hereinafter Macquarie Act]; Melbourne University Act 1958 (Vict.) [hereinafter Melbourne Act]; Monash University Act 1958 (Vict.) [hereinafter Monash Act]; University of Adelaide Act 1971 (S. Austl.) [hereinafter Adelaide Act]; University of Newcastle Act 1989 (N.S.W.) [hereinafter Newcastle Act]; University of Queensland Act 1965 (Queensl.) [hereinafter Queensland Act]; University of South Australia Act 1990 (S. Austl.) [hereinafter South Australia Act]; University of Sydney Act 1989 (N.S.W.) [hereinafter Sydney Act]; University of Tasmania Act 1992 (Tas.) [hereinafter Tasmania Act]; University of Western Australia Act 1911 (W. Austl.) [hereinafter Western Australia Act]; and University of Western Sydney Act 1988 (N.S.W.) [hereinafter Western Sydney Act].

13. *See, e.g.*, Melbourne Act § 5; Adelaide Act §§ 9, 12; Queensland Act §§ 5(2)(a), 6, and 11; and Sydney Act §§ 8(2), 9(1), and (2).

14. *See, e.g.*, Melbourne Act §§ 20A, 28(1); Adelaide Act §§ 3, 18; Queensland Act § 15; and Sydney Act §§ 14, 15.

15. *See, e.g.*, Melbourne Act §§ 11(1), 11(3), and 15; Adelaide Act §§ 5, 7(1), and 8(1); Queensland Act, §§ 12 and 14; and Sydney Act §§ 10(1), 12(1).

16. *See, e.g.*, Melbourne Act §§ 17, 21(d), and 28(2); Adelaide Act §§ 9, 23; Queensland Act §§ 11, 11A, 14, and 34; and Sydney Act §§ 12(3), 36(1).

17. *See, e.g.*, Queensland Act, § 27B.

18. *See, e.g.*, Melbourne Act §§ 19(1), (2); Adelaide Act § 22(1)(h); Queensland Act § 23; and Sydney Act § 16(a).

19. *See, e.g.*, Melbourne Act § 17(d), (i); Adelaide Act § 22(1)(b); Queensland Act § 34(1); and Sydney Act, § 36(1)(a), 36(1)(u).

20. *See, e.g.*, Melbourne Act § 42 (no religious test for student or officer); Adelaide Act § 24(3) (fine authorized for violation of library rules); Queensland Act § 37A (discrimination on basis of sex, religion or color prohibited); and Sydney Act § 27(1) (affiliated colleges established).

The university's governing board, variously called the Senate,<sup>21</sup> the Council,<sup>22</sup> or the Board of Governors,<sup>23</sup> provides a wider variety of representation than is likely on the typical board of trustees at an American university.<sup>24</sup> The Australian board is also likely to have more representatives from constituencies on campus, such as the faculty, the general staff and the student body.<sup>25</sup> Presumably, therefore, the Australian governing board will be more attuned to campus issues and more interested in academic matters than its American counterpart.<sup>26</sup>

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Compare the relatively brief statute governing the University of Michigan. MICH. COMP. LAWS ANN. § 390 et seq. (West 1995).

21. See, e.g., Queensland Act § 11.

22. See, e.g., Melbourne Act § 15.

23. See, e.g., Western Sydney Act § 10. The University of Tasmania has both a Council and an Academic Senate, but the latter advises the former, which wields the actual power. See Tasmania Act §§ 9(1), 13(1), and (2).

24. The trustees at public colleges and universities are usually popularly elected or appointed by governmental officials. Roberto P. Haro, *Choosing Trustees Who Care About Things That Matter*, CHRON. OF HIGHER EDUC., Dec. 8, 1995, at B1. At the University of Michigan, all of the governing board's voting members are elected by the general public. MICH. CONST. art. VIII, § 5. At Indiana University, three of the nine members are elected by alumni, and six are appointed by the State Governor. IND. CODE ANN. §§ 20-12-24-2, 20-12-24-3, and 20-12-24-3.5 (West 1995). At private universities, sitting members of the board choose new trustees; these sitting members often "clone" themselves, selecting people with "the same educational, business or social background," and people who are "wealthy or have access to affluent potential donors." Haro, *supra*.

25. In fourteen Australian universities, academic staff represent at least 15% of the governing board. (At all universities there, the average is four, the maximum eight). General staff account for from one to three members of the governing board. Governing boards in Australia average two students each, with the University of Adelaide having the most, five—about 15% of the governing board. Fiona Ward & Robert Smith, *Governing Bodies at 26 Australian Universities*, 14 J. TERTIARY EDUC. ADMIN. 61, 68 (1992).

At the University of Michigan, the only campus person specified by law for the governing board is the President, who has no vote. See MICH. CONST. art. VIII, § 5. (The same holds true for Michigan State University and Wayne State University. *Id.*) Indeed, students may be ineligible to stand for election to the Michigan board, even as members of the general public. 4679 Op. Mich. Att'y Gen. 98 (1968) (since a student has contractual relationship with University, service on governing board would constitute conflict of interest). At Indiana University only one student—and no member of the administration, faculty or staff—is legally specified for service on the board. IND. CODE ANN. § 20-12-24-3.5 (West 1995).

26. See Haro, *supra* note 24, at B1, B2. Professor Haro bemoans American trustees' preoccupation with "issues related to money, institutional prestige, and presidential searches, rather than issues involving academic quality or educational access." *Id.* at B1.

Fiona Ward and Robert Smith, in perhaps the most concise and yet complete analysis of these Australian boards,<sup>27</sup> noted that they are large, typically comprising over forty members, though some have fewer than twenty.<sup>28</sup> Some members are nominated by the government, though fewer than at some American universities,<sup>29</sup> while others are elected from among the alumni, from the academic staff, from the general staff, and from the student body.<sup>30</sup>

At the University of Queensland, for example, the Senate comprises the Vice-Chancellor of the University;<sup>31</sup> the Director-General of Education; the President of the Academic Board of the University; the President of the University of Queensland Staff Association; the President of the University of Queensland [Student] Union; the Anglican Bishop of Brisbane; the Roman Catholic Archbishop of Brisbane; eleven persons, two of them members of the Legislative Assembly of Queensland, appointed by the Governor; one member appointed by and from the Academic Board; three persons appointed by and from the full-time graduate staff; one person appointed from the rest of the full-time staff of the University; two students appointed by students; one person appointed by the Queensland Council of Churches; and eight persons appointed by Convocation.<sup>32</sup> Since the Senate itself may appoint up to two additional members, the total membership ranges from thirty-four to thirty-six members, seven of them *ex officio*. At least eight—and perhaps several more through, for example, the

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27. Ward & Smith, *supra* note 25.

28. The governing board of the University of Michigan has eight voting members. MICH. CONST. art. VIII, § 5. Only five must meet to constitute a quorum. MICH. COMP. LAWS ANN. § 390.20 (West 1995). Members serve staggered eight-year terms. MICH. CONST. art. VIII, § 5; MICH. COMP. LAWS ANN. § 390.691. The governing boards of Michigan State University and of Wayne State University also have eight members serving eight-year terms. MICH. CONST. art. VIII, § 5.

Indiana University's governing board has nine members, five of which constitute a quorum. *See supra* note 24 and IND. CODE ANN. § 20-12-23-4 (West 1995).

29. The trustees of public colleges and universities in the United States tend either to be appointed by the Governor or by the Governor and legislative leaders, or to be elected by popular vote. Haro, *supra* note 24, at B1. At the University of Michigan, Michigan State University, and Wayne State University, for example, the State Governor makes appointments to fill vacancies on the governing board, but those appointed serve only until an election can be held. MICH. CONST. art. VIII, § 5. The Governor of Michigan has recommended the termination of all direct election of trustees in favor of gubernatorial appointments. Patrick Healy, *Mich. Governor Would End Direct Election of Trustees*, CHRON. OF HIGHER EDUC., Oct. 20, 1995, at A30.

30. Ward & Smith, *supra* note 25, at 62.

31. The Chancellor and Deputy Chancellor are appointed from the membership of the Senate and therefore are not directly *ex officio* members of the Senate. Queensland Act § 12(1).

32. Queensland Act § 6(2)(a). The Convocation comprises, among others, all present and past members of the Senate, alumni, academic staff, and current student body. *Id.* § 15(1).

appointments of the Convocation—of the members will be drawn from the campus itself.

The founding statutes specify the plenary power of these boards. The Senate at the University of Queensland exercises “the entire management and control of the affairs, concerns, and property of the University . . .”<sup>33</sup> Statutes for other universities closely track this language.<sup>34</sup>

Many American governing boards, due in part to their membership, might remain fairly captive of the University president, at least until a major crisis or some other controversy arises;<sup>35</sup> the president controls the flow of information to the board<sup>36</sup> and, as a result, generally controls its agenda. The Australian governing board, however, perhaps in part because of the extent of campus representation, tends to operate as a “hands-on” committee; Australian governing

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33. *Id.* § 11. The governing board of the University of Michigan has “general supervision of [the] institution and the control and direction of all expenditures from the institution’s funds.” MICH. CONST. art. VIII, § 5 (applying the same to both Michigan State University and Wayne State University). *See also* MICH. COMP. LAWS ANN. § 390.3 (West 1995). The board of regents of the University of Michigan has the entire control and management of university affairs. Indeed, its control over expenditures is quite remarkable; the legislature may attach conditions only upon the money it appropriates to the University and, although these conditions bind the governing board once it accepts the money, such conditions may not interfere with the regents’ management of the University. *Sprick v. Regents of the Univ. of Mich.*, 43 Mich. App. 178, 204 N.W.2d 62 (1972).

For more specific allocations of power, see MICH. COMP. LAWS ANN. § 390.5 (West 1995) (power to enact ordinances, by-laws and regulations and to appoint academic staff and set their salaries); *id.* § 390.6 (power to remove the president or any professor or tutor); and *id.* § 390.891 (power to establish parking, traffic and pedestrian ordinances).

For the plenary powers of the board of trustees at Indiana University, see IND. CODE ANN. §§ 20-12-1-1 et seq., and §§ 20-12-23-2, 20-12-23-7 (West 1995). The board acts in the dual capacity of directors and managers of the University and as trustees of the trusts created by private donors. *Sendak v. Indiana Univ.*, 254 Ind. 390, 260 N.E.2d 601 (1970).

34. *See, e.g.*, A.N.U. Act § 9(1) (“the entire control and management of the University”); Melbourne Act § 15(1) (“the entire management and superintendence over the affairs, concerns and property [of the University]”); Adelaide Act § 9 (“entire management and superintendence of the affairs of the University”); and Sydney Act § 16(e) (“control and management”). *See also* Macquarie Act § 16; Monash Act § 22; Newcastle Act § 16 (1); South Australia Act § 10; and Western Australia Act § 13.

35. At West Virginia University, for example, the Board of Trustees rejected a plan to provide benefits to partners of homosexual and other unmarried employees. The plan had been adopted earlier by the administration but suspended when trustees became concerned. CHRON. OF HIGHER EDUC., Nov. 17, 1995, at A23.

36. Some trustees feel that they are deliberately swamped with paper or subjected to the “parade of the same old faculty members and campus executives brought in to ‘interpret’ campus events for the board.” Haro, *supra* note 24, at B2.

boards, which meet on average nine times a year,<sup>37</sup> involve themselves in the day-to-day operation of the institution. In Australian universities, for example, it was common for students faced with adverse academic or disciplinary decisions to have an appeal to the governing board itself or to one of its committees.<sup>38</sup> (The bulletin-board notice introducing this article also reflects this "hands-on" approach.) This would be rare indeed at large, state institutions in the United States.<sup>39</sup>

The Senate of the University of Queensland, "somewhere between a Board of Trustees and a Board of Directors,"<sup>40</sup> employs this "hands-on" approach. It has considered complaints that University medical students had misbehaved at a local restaurant and bar;<sup>41</sup> has investigated disruptions of a campus ceremony;<sup>42</sup> has devised specific rules for dealing with disciplinary situations;<sup>43</sup> has regularly heard reports on individual, routine disciplinary matters;<sup>44</sup> maintains its own committee

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37. See Ward & Smith, *supra* note 25, at 70. The number of meetings per year ranges from five to eleven. *Id.* at 74. Although state law does not require Indiana University's governing board to meet more than once per year, IND. CODE ANN. § 20-12-23-3 (West 1995), it in fact meets eight to nine times per year. Telephone interview with John Ryan, President Emeritus, Indiana Univ. (Dec. 7, 1995).

38. J.R. Forbes, *University Discipline: A New Province for Natural Justice?*, 7 U. QUEENSL. L.J. 85, 103 (1970).

39. At Indiana University, for example. Telephone interview with Pamela Freeman, Assistant Dean of Students and Director of Student Ethics and Anti-Harassment Programs, Indiana Univ. (Dec. 5, 1995). A former president said Indiana's board would not get involved in 99.9% of such cases. Interview with John Ryan, *supra* note 37.

40. The University's Role as a Major Corporate Organization, address of Brian Wilson, Vice-Chancellor of the University of Queensland, to The Australian Institute of Company Directors, February 20, 1992, *reprinted in* Agendum 8A, MINUTES OF THE SENATE OF THE UNIV. OF QUEENSL., Mar. 19, 1992.

41. MINUTES OF THE SENATE OF THE UNIV. OF QUEENSL., Mar. 25, 1993, at 35.

42. See UNIV. OF QUEENSL., REPORT OF THE COMMITTEE OF THE SENATE APPOINTED TO INQUIRE INTO THE EVENTS SURROUNDING THE 75TH ANNIVERSARY COMMEMORATIVE GRADUATION CEREMONY ON MAY 10, APPENDIX TO MINUTES OF THE SENATE OF THE UNIV. OF QUEENSL., Nov. 20, 1985. The prospective award of an honorary degree to the Premier of the State apparently occasioned the disruption, although the Premier ultimately did not attend the festivities. According to one member of the Senate, a similar situation "might not occur for decades." See MINUTES OF THE SENATE OF THE UNIV. OF QUEENSL., Nov. 20, 1985, at 152-54.

43. See UNIV. OF QUEENSL., STATUTE NO. 13: STUDENT DISCIPLINE AND MISCONDUCT, adopted by the Senate of the University of Queensland at its July 1995 meeting.

44. See, e.g., MINUTES OF THE SENATE OF THE UNIV. OF QUEENSL., Agendum 7, Feb. 23, 1995 ("Disciplinary Action for 1994"); *id.*, Feb. 24, 1994 ("Disciplinary Report for 1993"); and *id.*, Agendum 12, Mar. 25, 1993 ("Disciplinary Action: Report for 1992").

Until recently, the Senate involved itself in "first-instance" hearings of some disciplinary matters. See UNIV. OF QUEENSL., REPORT OF VICE-CHANCELLOR'S COMMITTEE TO REVIEW STUDENT DISCIPLINE AND MISCONDUCT STATUTE 14 (July 1995).

charged with reviewing the appeals of students unhappy with the academic decisions of deans and regularly hears its reports;<sup>45</sup> and has even addressed the "problem of cycle-riding on footpaths."<sup>46</sup> The Senate's close interest in non-cosmic campus events is not a new phenomenon: In 1966, it fell to the Senate itself to allow women to wear slacks to class—although only if the Head of Department agreed!<sup>47</sup> American academics might well find such immediate involvement, on the part of the governing board, in the affairs of the university unusual.<sup>48</sup>

### **B. The Chancellor and Vice-Chancellor**

In Australia, the chancellor,<sup>49</sup> chosen by the governing board,<sup>50</sup> is the ceremonial head of the university.<sup>51</sup> Typically, the chancellor chairs the governing board<sup>52</sup> and awards academic degrees.<sup>53</sup> The chancellor may also serve

At Griffith University, the governing body, called the Council, still hears appeals on disciplinary matters, although it may do so through a committee made up of no fewer than five of its members. See GRIFFITH UNIV., STATUTE 8.2—STUDENT GOOD ORDER § 33. At the University of Sydney, the full Senate may—but need not—hear a disciplinary appeal; the rules allow referral of such matters to a Senate committee. UNIV. OF SYDNEY, BY-LAWS CHAPTER 13—DISCIPLINE OF STUDENTS § 35.

45. See, e.g., MINUTES OF THE SENATE OF THE UNIV. OF QUEENSL., Feb. 23, 1995, at 24; *id.*, Nov. 24, 1994, at 162; and *id.*, Aug. 15, 1994, at 113.

46. MINUTES OF THE SENATE OF THE UNIV. OF QUEENSL., Apr. 10, 1986, at 25.

47. Statement of Malcolm Thomis, *In Praise of Senates Past*, MINUTES OF THE SENATE OF THE UNIV. OF QUEENSL., Apr. 30, 1990.

48. This is not to say that all close management by such boards is precluded. The regents of the University of Michigan have the formal power to choose the "books and authorities" used in instruction, MICH. COMP. LAWS ANN. § 390.11 (West 1995), although one trusts that the board does not often exercise that power. There are some signs that boards are becoming increasingly active. See *U. of Mass. Trustees Reject Tenure for 3 Professors*, CHRON. OF HIGHER EDUC., Sept. 8, 1995, at A27: "[B]eing recommended for tenure by the president no longer means that approval by the Board . . . is a fait accompli." See also *State Notes*, CHRON. OF HIGHER EDUC., Sept. 8, 1995, at A52.

49. Deputy chancellors and pro-chancellors are also provided for. See, e.g., A.N.U. Act § 33; Melbourne Act § 11(3); Queensland Act § 12(1); and Sydney Act § 11(1).

50. See, e.g., Adelaide Act § 7(1); Macquarie Act § 10(1); Melbourne Act § 11(1); Queensland Act § 12(1); Sydney Act § 10(1); Western Australia Act § 12.

51. Ward & Smith, *supra* note 25, at 63.

52. See, e.g., A.N.U. Act § 12(1); Adelaide Act § 11(1); Melbourne Act § 12; Monash Act § 18; Queensland Act § 13; Sydney Act, Schedule 1, § 7; Western Australia Act § 24(1).

53. Address of Brian Wilson, *supra* note 40, at 4.

on committees, represent the university to the public, and advise the vice-chancellor, usually at the latter's request.<sup>54</sup>

The vice-chancellor,<sup>55</sup> also chosen by the governing board,<sup>56</sup> normally serves as the university's chief executive officer<sup>57</sup> and thus parallels most closely the American university president.<sup>58</sup> Unlike in the United States, however, the executive and legislative functions in Australia are separated from the ceremonial: The Australian chancellor exercises a role that, in the United States, inevitably gravitates toward the president.<sup>59</sup> To a considerable extent, of course, the combination of chancellor and vice-chancellor mirrors the governmental set-up both at the Commonwealth level (with its Governor-General and Prime Minister) and at the state level (with its governors and premiers). All of these arrangements, in turn, echo that of ancestral England (with its monarch and prime minister).

Perhaps to the extent the nature of the president's role at American public universities evolves toward a position for fund-raising, legislative, public-relations, and other off-campus purposes, and the provost (or academic vice-president) becomes, at least *de facto*, the person "in charge" on campus, the American system approaches the Australian arrangement. Of course, the Australian vice-chancellor typically maintains a considerable off-campus presence. Moreover, many of the duties that the American president's public presence might increasingly preclude would likely be delegated to an executive vice-president—not the provost or academic vice-president.

54. Address of Brian Wilson, *supra* note 40, at 4.

55. Deputy vice-chancellors and pro-vice-chancellors are also provided for. *See, e.g.*, A.N.U. Act § 35(1); Melbourne Act § 5(f); and Queensland Act § 14.

56. *See, e.g.*, Adelaide Act § 8(1); Melbourne Act § 15(2)(a); Queensland Act § 14(1); Sydney Act § 12(1); and Western Sydney Act § 15(1).

57. *See, e.g.*, A.N.U. Act § 34(2)(a) ("chief executive officer"); Melbourne Act § 15(2)(b) ("chief executive officer"); Newcastle Act § 12(3) ("principal executive officer"); South Australia Act § 16(2) ("chief executive officer"); Sydney Act § 12(3) ("principal executive officer"); Queensland Act § 14(1) ("chief administrative officer"); Western Sydney Act § 15(3) ("chief executive officer").

58. *See, e.g.*, MICH. CONST. art. VIII, § 5; MICH. COMP. LAWS ANN. § 390.5 (West 1995). The president of the University of Michigan presides over the board of regents, though without a vote. MICH. CONST. art. VIII, § 5.

The formal distribution of power between the regents and the president at the University of Michigan seems anything but clear: The president (and the respective faculties) exercise the "immediate government of the several departments," but the regents have the power to "regulate the course of instruction, and prescribe, under the advice of the professorships, the books . . . to be used . . . and also to confer . . . degrees . . . and diplomas . . ." MICH. COMP. LAWS ANN. § 390.11 (West 1995).

59. Ward & Smith, *supra* note 25, at 63.

### C. The Visitor

To an American, the Visitor<sup>60</sup> holds perhaps the oddest position among the officers of Australian universities. The office and functions of the Visitor, who sometimes rates the top position in descriptions of a university's hierarchy,<sup>61</sup> stem from the English common law.<sup>62</sup> The Visitor represented the founder of the eleemosynary institution following the death of the founder. The Visitor had the power to inquire generally into the college's<sup>63</sup> activities (a power now obsolescent, if not dead) and, more familiarly, to resolve complaints.<sup>64</sup> The theory required that the Visitor be consulted concerning controversies arising within the institution; as the successor of the founder, the Visitor best reflected the wishes of the founder and thus best provided for the well-being of the institution.

The Visitor functioned to promote order by enforcing the institution's rules.<sup>65</sup> In so doing, the Visitor applied a law separate from the law of the land; accordingly, the founder's intentions, and not the common law, drove the Visitor's decisions.<sup>66</sup> "The old English institutions were 'private societies' subject to the law of the founder and the decrees of the founder's Visitor so that in their disciplinary affairs they were 'little Alsatias . . . where the King's writ did not run.'"<sup>67</sup>

Members of the community were bound by the decisions of the Visitor; as members of the *domus*—the house or dwelling—they presumably or impliedly

60. See, e.g., Adelaide Act § 20; Macquarie Act § 13; Melbourne Act § 47; Monash Act § 42; Newcastle Act § 13; South Australia Act § 23; Sydney Act § 13; Tasmania Act § 17(2); Western Australia Act § 7; and Western Sydney Act § 29.

61. See, e.g., UNIV. OF QUEENSL. CALENDAR, Vol. 1, 1995, at 227; UNIV. OF TECHN., SYDNEY, CALENDAR 1995, at 2; UNIV. OF WOLLONGONG, CALENDAR—UNDERGRADUATE 1994, at 7. Such a listing comports with ancient practice in England: At the apex of the totally intramural government of the university sat the Visitor. Robert J. Sadler, *The University Visitor: Visitorial Precedent and Procedure in Australia*, 7 U. TAS. L. REV. 2, 3 (1981).

62. *M. v. University of Tas.*, [1986] T.R. 74, 76 (Tas. S. Ct.)(citing BLACKSTONE, VOL. I, COMMENTARIES ON THE LAWS OF ENGLAND 467 (1765)).

63. Ancient English colleges, attached to universities but exercising teaching functions, were subject to visitation by the founder or an heir or appointee of the founder. As ecclesiastical entities, universities found themselves subject to episcopal visitation. Universities in Australia did not take on the collegiate teaching tradition. Furthermore, Australia's first university, the University of Sydney, totally separated secular education from the religious. Sadler, *supra* note 61, at 3-4.

64. Sadler, *supra* note 61, at 3-4.

65. *Ex Parte McFadyen*, [1945] S.R. 200, 202 (N.S.W. S. Ct.) (full court).

66. Sadler, *supra* note 61, at 8, 11. "The jurisprudence suitable for the regulation of society is sometimes unsuitable for the regulation of a microcosm of society." *Id.* at 15.

67. J.R.S. FORBES, DISCIPLINARY TRIBUNALS 11 (1990) (quoting Czarnikow v. Roth, Schmidt & Co., [1922] 2 K.B. 478, 488).

agreed to abide by the founder's intentions as implemented by the Visitor. Indeed, only a "corporator"—a member—of the institution could invoke the jurisdiction of the Visitor; in the case of a university, of course, this could be a student, a lecturer or the university itself.<sup>68</sup> Thus, for example, controversies between a student and a professor, both members of the *domus*, fell within the ken of the Visitor. Traditionally, the Visitor's jurisdiction was exclusive; one could not appeal to the courts from the Visitor's decision regarding the merits of the controversy.<sup>69</sup>

In *Re University of Melbourne; ex parte De Simone*,<sup>70</sup> the Visitor to the University of Melbourne emphasized the limits of this jurisdiction, at least in Victoria: It extends only to the internal management and domestic affairs of the university, not to the rights and liabilities of those not "corporators." But what constitutes a domestic or internal matter evades precise definition.<sup>71</sup> Obligations imposed by Parliament, for example, transcend the Visitor's authority if the statute involved is not the foundational instrument or, even if it is, creates a right or duty in favor of the public.<sup>72</sup> Thus those outside the *domus* fall beyond the Visitor's jurisdiction.<sup>73</sup>

Contracts entered into by the university fall within the court's jurisdiction, not the Visitor's, if they affect largely private rights or duties.<sup>74</sup> Of course, a contract between a university and one of its members might reflect the management or rules of the university as a whole;<sup>75</sup> the test in such a case is whether the matter relates "to the regular and fair execution . . . of [those] rules .

68. S. Robinson, *The Office of Visitor of an Eleemosynary Corporation: Some Ancient and Modern Principles*, 18 U. QUEENSL. L. REV. 106, 108 (1994).

69. The jurisdiction stems from the power recognized by the common law in the founder of an eleemosynary corporation to provide the laws under which the object of his charity was to be governed and to be sole judge of the interpretation and application of those laws either by himself or by such person as he should appoint as visitor. *Thomas v. University of Bradford*, [1987] A.C. 795, 814-15 (Lord Griffiths and Lord Ackner). See *Re La Trobe Univ.; Ex parte Wild*, [1987] V.R. 447, 448 (Visitor); *Re Univ. of Melbourne; ex parte De Simone*, [1981] V.R. 378, 386, 394 (Visitor); *Ex Parte McFadyen*, [1945] S.R. at 201. See, however, *Hazan v. La Trobe Univ.* [No.2], [1993] 1 V.R. 568, 570; *M. v. University of Tas.*, [1986] T.R. at 79-80; and text accompanying notes 106-07.

70. *De Simone*, [1981] V.R. 378 (Visitor).

71. *Murdoch Univ. v. Bloom & Kyle*, [1980] W.A.R. 193, 197 (W. Austl. S. Ct.) (full court). Of course, jurisdiction depends on the facts alleged, not on their truthfulness. *Id.* at 197.

72. *De Simone*, [1981] V.R. at 386.

73. *Ex Parte McFadyen*, [1945] S.R. (N.S.W.) at 203.

74. Sadler, *supra* note 61, at 5.

75. Sadler, *supra* note 61, at 5.

. . .”<sup>76</sup> Indeed, the same test controls, whatever the cause of action—whether abuse of authority, negligence or some other.<sup>77</sup>

*Murdoch University v. Bloom & Kyle*,<sup>78</sup> which indicates the delicacy of such judgments, involved a vice-chancellor’s limitation of an academic-staff member’s leave of absence to six months. The staff member argued that the action a) violated his contractual rights and b) constituted an abuse of the vice-chancellor’s discretion. The court held that the first claim, arising out of contract, requiring application of the law of the land, and evading resolution by reference to the “law of the house,” fell beyond the jurisdiction of the Visitor. The second claim, however, constituted a domestic or internal matter fit for resolution by the Visitor.<sup>79</sup>

In *De Simone*, undergraduates challenged payments made to the Australian Union of Students by the Students’ Representative Council at the University of Melbourne. That the payments went to an outside entity did not take the case out of the Visitor’s jurisdiction since the controversy affected only the actions of people within the University; therefore the matter was an internal affair.<sup>80</sup> Of course, one can seek judicial interference when the Visitor erroneously exercises, or erroneously fails to exercise, jurisdiction.<sup>81</sup>

Moreover, the Visitor’s authority traditionally did not trump the discretion vested in a body or person by the foundation instrument;<sup>82</sup> as a result, it was not enough for reversal of a decision within the institution that a reasonable person could have decided differently.<sup>83</sup> The Visitor might refuse to exercise jurisdiction if the applicant either failed to exhaust remedies within the institution, at least if recourse to those remedies was accessible and convenient,<sup>84</sup> or unduly delayed

76. *Bayley-Jones v. University of Newcastle*, [1990] 22 N.S.W.L.R. 424, 436 (quoting Kelly, L.J., in *Re Wislang’s Application*, [1984] N.I. 63, 80-81).

77. *Bayley-Jones*, [1990] 22 N.S.W.L.R. at 436.

78. *Murdoch Univ. v. Bloom & Kyle*, [1980] W.A.R. 193 (W. Austl. S. Ct.) (full court).

79. *Id.* at 198. The court added that the Visitor could, of course, conform to the solid view that the Visitor should not interfere with honestly exercised discretion. *Id.* at 199. Judge Wallace, who thought the Visitor had jurisdiction over both claims, suggested that both the court and the Visitor might have jurisdiction over some claims. *Id.* at 201.

80. *Ex parte De Simone*, [1981] V.R. 378, 393-94.

81. *Hazan v. La Trobe Univ.* [No. 2], [1993] 1 V.R. 568, 571. Mandamus will lie if the Visitor improperly declined jurisdiction; jurisdiction exercised beyond the foundation instrument is void and may be restrained by prohibition. *Ex parte McFadyen*, [1945] S.R. (N.S.W.) 200, 203; J.R.S. FORBES, *supra* note 67, at 12.

82. *Murdoch Univ. v. Bloom & Kyle*, [1980] W.A.R. 193, 199 (W. Austl. S. Ct.).

83. *Re Univ. of Melbourne*; *ex parte De Simone*, [1981] V.R. at 387, 395, 403, 407 and 408.

84. *Id.* at 395, 402.

applying for relief.<sup>85</sup> The Visitor was required to “abide by rules of procedural fairness.”<sup>86</sup> Within these limits and in an otherwise appropriate manner, the Visitor, with due regard for the welfare of the university, had the power to right the wrong done the claimant.<sup>87</sup>

The Visitor could act even in the absence of a petition.<sup>88</sup> The Visitor, like a court, could award damages, save to the extent the harm involved could be redressed by orders beyond a court’s ordinary competence.<sup>89</sup> Even costs could be awarded.<sup>90</sup> More so than a court, however, the Visitor must bear in mind the well-being of the institution.<sup>91</sup> In any event, the Visitor could proceed with more informality and more flexibility.<sup>92</sup> “The benefits of an inexpensive and expeditious procedure in a domestic forum of that kind can be seen . . .”<sup>93</sup> The process might also provide more privacy.<sup>94</sup>

Australian Visitors, consistent with their historic mandate, have attempted to balance the interests of the individual against the welfare of the university.<sup>95</sup> Although the Visitor may not delegate the duty to decide, the powers to conduct investigations and hearings may be delegated; in Australia, Visitors have enlisted the services of distinguished lawyers, often judges, as assessors.<sup>96</sup> When the Governor alone occupies the position of Visitor, even bias will not preclude the Visitor from deciding a case; there being no provision for a “substitute visitor,” if the Governor does not hear the matter, no one will.<sup>97</sup>

85. Sadler, *supra* note 61, at 8. There is no formal deadline for the petition. Robinson, *supra* note 68, at 108.

86. Hazan v. La Trobe Univ. [No. 2], [1993] 1 V.R. 568, 571; Re Macquarie Univ.; ex parte Ong, [1989] N.S.W.L.R. 113, 138-39 (N.S.W. S. Ct.).

87. Bayley-Jones v. University of Newcastle, [1990] N.S.W.L.R. at 429, 431 and 436.

88. Sadler, *supra* note 61, at 20. This has happened in Australia. *Id.*

89. Bayley-Jones v. University of Newcastle, [1990] 22 N.S.W.L.R. 424, 432, 436-37; Re Macquarie Univ.; ex parte Ong, [1989] N.S.W.L.R. at 118; Murdoch Univ. v. Bloom & Kyle, [1980] W.A.R. 193, 198 (W. Austl. S. Ct.). *But see* Lord Griffith’s statement, in Thomas v. University of Bradford, that the Visitor cannot award damages, [1987] A.C. 795, 823-24.

90. Re Macquarie Univ.; ex parte Ong, [1989] N.S.W.L.R. at 141.

91. Bayley-Jones [1990] 22 N.S.W.L.R. at 431. *Cf.* Re Macquarie Univ.; ex parte Ong, [1989] N.S.W.L.R. at 118-19.

92. Bayley-Jones [1990] 22 N.S.W.L.R. at 435.

93. Re Univ. of Melbourne; ex parte De Simone, [1981] V.R. at 386.

94. Robinson, *supra* note 68, at 111.

95. Sadler, *supra* note 61, at 19.

96. Sadler, *supra* note 61, at 22; J.R.S. FORBES, *supra* note 67, at 12. In Re La Trobe Univ.; ex parte Wild, [1987] V.R. 447 (Visitor), the Governor of the State, acting as Visitor to the university, appointed Chief Justice Young of the Victoria Supreme Court as assessor. *See id.* *See also* Re La Trobe Univ.; ex parte Hazan, [1993] 1 V.R. 7 (Visitor) and Re Univ. of Melbourne; ex parte De Simone, [1981] V.R. at 379.

97. Sadler, *supra* note 61, at 25.

Whatever their traditional power, the status of Visitors in modern-day Australia is more problematic. To be sure, the founding statutes of many of Australia's universities list a Visitor, usually allocating the duty to the state Governor.<sup>98</sup> Allocated duties, however, vary widely. Many such statutes apparently assign to the Visitor the traditional plenary power. The Visitor at the University of Tasmania, for example, wields the "authority, as he or she thinks fit, to do all things pertaining to that office."<sup>99</sup> Several statutes mirror that language.<sup>100</sup>

Other founding statutes, reflecting a different regard for the office, designate a Visitor but severely limit that person's functions. At the University of Sydney, for example, the Governor serves as Visitor but carries ceremonial duties only.<sup>101</sup> Indeed, in 1994 the Parliament of New South Wales adopted legislation specifying a purely ceremonial role for the Visitor at each of ten state universities.<sup>102</sup>

At institutions like the Australian National University and the University of Queensland, no Visitor is statutorily ordained.<sup>103</sup> Nonetheless, the Senate at the

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98. See, e.g., Adelaide Act § 20; Macquarie Act § 13; Melbourne Act § 47; Monash Act § 42; Newcastle Act § 13; South Australia Act § 23; Sydney Act § 13; Tasmania Act § 17(2); Western Australia Act § 7; and Western Sydney Act § 29.

As Visitor, the Governor acts as "persona designata," not as the representative of the Crown. Sadler, *supra* note 61, at 5 n.19.

99. Tasmania Act § 17(2).

100. See Adelaide Act § 20 ("with the powers and functions appertaining to that office"); Melbourne Act § 47 (with "authority to do all things which appertain to Visitors as often as to him seems meet"); Monash Act § 42 (with "authority to do all things which appertain to Visitors as often as to him seems meet"); South Australia Act § 23 ("with the powers and functions appertaining to that office"); and Western Australia Act § 7 (with "the authority to do all things which appertain to Visitors as often as to him shall seem meet").

101. Sydney Act § 13(1).

102. Charles Sturt University, Macquarie University, Southern Cross University, University of New England, University of New South Wales, University of Newcastle, University of Sydney, University of Technology—Sydney, University of Western Sydney, University of Wollongong. See University Legislation (Amendments) Act 1994 (N.S.W.). It has been suggested that the Governor's discomfort in sitting in judgment on university officials contributed to this development. Interview with David Bowan, Manager, Student Centre, University of Sydney, in Sydney (Aug. 2, 1995).

103. In 1981, Robert J. Sadler stated that only six Australian universities had no statutory Visitor: The University of Queensland, James Cook University, Griffith University, The University of New England, The University of New South Wales, and the Australian National University. Sadler, *supra* note 61, at 4. Sadler suggests that the visitatorial power at each of such universities, unless previously delegated, remains with the founder, i.e., the Parliament. *Id.* But see T.G. Matthews, *The Office of University Visitor*, 11 U. QUEENSL. L. REV. 152, 154 (1980), suggesting that the Crown might be the Visitor in the absence of a statutory Visitor.

University of Queensland, having assured itself that the appointment would be purely ceremonial and therefore involve none of the "juridical functions customarily associated with the office of Visitor," has invited the Governor of the State to fill the role.<sup>104</sup>

In other respects, the traditional authority of the Visitor has eroded in Australia. In 1986, the Victoria Parliament adopted legislation reducing the exclusivity of the Visitor's jurisdiction.<sup>105</sup> In 1990, in *Bayley-Jones v. University of Newcastle*,<sup>106</sup> the New South Wales Supreme Court overturned a Visitor's refusal to award damages commensurate with the harm done. Judicial willingness to place the construction of contracts, even those between the university and a member of the *domus*, within the jurisdiction of the courts<sup>107</sup> significantly reduces the Visitor's authority.

In particular, the public nature of Australian universities may increase legislative or judicial undermining of the traditional breadth of the Visitor's mandate. The role of the Visitor, it has been argued, is unjustified in virtually all Australian universities, since they are public, not private, creations;<sup>108</sup> the traditional notion, therefore, that the Visitor applies the founder's private law loses its efficacy.<sup>109</sup> In any event, the argument continues, the Governor—the usual Visitor in Australia—is not necessarily versed in the applicable law and does not possess the special knowledge of the institution that the position of Visitor originally presumed.<sup>110</sup> In *M. v. The University of Tasmania*,<sup>111</sup> the Tasmania Supreme Court subordinated the Visitor's jurisdiction to that of the court. It was one thing, said the court, to vest jurisdiction in the Visitor with regard to the private institutions of Oxford and Cambridge; another entirely to do so with regard to corporations created by Parliament as public institutions to promote public values through expenditure of public funds.<sup>112</sup> Still, the court

104. See MINUTES OF THE SENATE OF THE UNIV. OF QUEENSL., Oct. 8, 1992; Aug. 27, 1992; Nov. 20, 1986; and Nov. 20, 1985.

105. The Administrative Law (University Visitor) Act 1986 (Vict.). See *Hazan v. La Trobe Univ.* [No.2], [1993] V.R. 568, 570-71, in which the court refused to decide just how much the statute reduced that exclusive jurisdiction, since the grievant in fact invoked the Visitor's jurisdiction.

106. [1990] 22 N.S.W.L.R. 424 (N.S.W. S. Ct.).

107. See *Murdoch Univ. v. Bloom & Kyle*, [1980] W.A.R. 193, 198 (W. Austl. S. Ct.), discussed at text accompanying notes 78-79.

108. Sadler, *supra* note 61, at 30.

109. Sadler, *supra* note 61, at 20.

110. Sadler, *supra* note 61, at 31-32.

111. [1986] T.R. 74 (Tas. S. Ct.).

112. *Id.* at 79-80. The court relied heavily on *Norrie v. Auckland Univ. Senate*, [1984] 1 N.Z.L.R. 129 (New Zealand App.)(Woodhouse P.). But see *Bayley-Jones v. Univ. of Newcastle*, [1990] 22 N.S.W.L.R. 424, 433 (N.S.W. S. Ct.) (specious, in light of the many publicly funded universities in the United Kingdom today, to distinguish relevant common law in England from that in Australia on the basis that Australian universities are publicly funded).

recognized that grievances regarding internal matters—even if some matters of law are involved—should generally go to the Visitor before resort to any judicial remedy.<sup>113</sup> Indeed, as recently as 1993, a Visitor decided a controversy regarding a university's revocation of a degree and termination of a student's enrollment; neither the university nor the student challenged the Visitor's jurisdiction.<sup>114</sup>

To whatever extent the influence of the Visitor in Australia has declined, a marvelous vehicle for the settling of disputes has eroded. Especially as an alternative to judicial intrusion into the educational enterprise, the Visitor provides a relatively quick, inexpensive and perhaps knowledgeable evaluation of the student's complaint. Perhaps equally important, a valuable opportunity may have been missed; the Visitor over time could develop an image of informed objectivity. This image could grow from the fact that the Visitor occupies a position high in the structure of the university without being its employee or student. This role of the Visitor could be promoted if universities and students invoked the Visitor's authority more often and if courts deferred more to the role of the Visitor.

Consideration should be given to appointing as Visitors persons other than high-ranking governmental officials. The Governor of a State, the typical Visitor, might remain fairly uninformed about the university, resist involvement in controversial disputes, spare little time to see to their resolution, and, further, be seen as part of "the establishment." Retired members of the judiciary, or persons of similar esteem, may over time provide more satisfactory resolution of university disputes. It is important as well that the proceedings before the Visitor remain relatively simple; the inevitable tendency for such a process to become as cumbersome—and therefore as slow and expensive—as that of the courts must be resisted.

### III. COLLEGES<sup>115</sup>

Australia did not adopt England's model of teaching colleges. University colleges in Australia primarily function, usually at the periphery of the university campus, as residential centers. In the bargain, they provide tutors, libraries and, presumably, social and even spiritual guidance. Indeed, even though virtually all

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113. *M. v. The Univ. of Tas.*, [1986] T.R. 74, 82-83 (Tas. S. Ct.).

114. *Re La Trobe Univ.; ex parte Hazan*, [1993] 1 V.R. 7, 13 (Visitor). *But see* subsequent proceedings in the case, *Hazan v. La Trobe Univ.* [No. 2], [1993] 1 V.R. 568 (Vict. S. Ct.).

115. Much of this information concerning colleges stems from interviews with David Bowan, *supra* note 102; Denis Brosnan, Deputy Master, King's College, University of Queensland, in St. Lucia, Queensland (July 26, 1995); Roger Byrom, Legal Officer, Univ. of Queensland, in St. Lucia, Queensland (June 9, 1995); Selwyn Cornish, Dean of Students, Austl. Nat'l Univ., in Canberra (Aug. 4, 1995); Kevin Sharman, Associate Registrar, Univ. of Melbourne, in Melbourne (Aug. 7, 1995).

of Australia's universities are public institutions, many of the satellite colleges at these universities are religiously affiliated, living a relationship with the public institution whose entanglement would be impossible under the American Constitution.

Sometimes owned by the "parent" university but very often merely affiliated,<sup>116</sup> Australian colleges enjoy a level of autonomy wholly dependent upon the terms of the instrument of foundation.<sup>117</sup> At the University of Queensland, for example, discipline in the residential colleges remains purely a matter of contract between the student and the college.<sup>118</sup> Governed by a board (called the Council<sup>119</sup> at the University of Queensland) and headed by a master, warden, principal or director,<sup>120</sup> the college generally has no control over the student's standing in the university; the college does not control the student's courses, cannot alter the student's grades and, no matter the student's department, cannot expel or suspend the student from the university or even put that student on university probation. The college's only leverage is to deny the student its chief service: residence in the college.

The leverage seems to work, primarily because students perceive residential conditions in these colleges as desirable: Usually the accommodations surpass those otherwise available, the location is ideal, the cost is attractive,<sup>121</sup> and the college setting provides an organized network of friends, social opportunities,

116. At the University of Queensland, St. Lucia campus, ten residential colleges, housing 1950 of the University's students, are associated "in mutual relationship" with the University under its statutes. 1995 UNIV. OF QUEENSL. CALENDAR 19.

Under the University of Queensland Act of 1965, the University Senate may from time to time recommend to the Governor in Council the establishment of colleges. *Id.* § 27(1). Such colleges function "as part of the University of Queensland," *id.* § 27(3), and, with regard to these colleges, the University Senate may exercise all the powers conferred on it with regard to the University itself. *Id.* § 27(4). The constitution of each college must be approved by the University Senate and one member of the college's governing board is designated by the Senate. UNIV. OF QUEENSL. STATUTE NO. 39, THE RESIDENTIAL COLLEGES, §§ 3, 4.

Unlike the colleges on the St. Lucia campus, the halls of residence at Gatton College, a separate campus of the University of Queensland, are run by the University. Discipline in these halls of residence is a matter of contract. *See* UNIV. OF QUEENSL., REPORT OF VICE CHANCELLOR'S COMMITTEE TO REVIEW STUDENT DISCIPLINE AND MISCONDUCT STATUTE, at 26 (July 1995).

117. HALSBURY'S LAWS OF AUSTRALIA 160-10.

118. *See* UNIV. OF QUEENSL., REPORT OF THE VICE-CHANCELLOR'S COMMITTEE TO REVIEW STUDENT DISCIPLINE AND MISCONDUCT STATUTE, at 26 (July 1995).

119. *See* Queensland Act § 27(5), providing for an "advisory council" for each college.

120. These in turn have deputy masters, wardens, principals or directors, as the case may be.

121. Even aside from the fact that the student need commit only for the nine-month period during which classes are in session; off-campus apartments frequently require a full-year lease. *See* 1995 UNIV. OF QUEENSL. CALENDAR 19.

athletic activities and, especially at religiously oriented colleges, spiritual development. Often a particular college targets a particular clientele.<sup>122</sup> The fact that such campus housing can accommodate only a fraction of the university student body underscores the appeal.<sup>123</sup> That a parent or other relatives once lived in the same college strengthens the pull and the college's concomitant leverage; under such circumstances, the student knows, it would not do to be expelled.

The relationship between the college and the university with regard to disciplinary matters emerges less than precise. On the whole, colleges seem to worry little about what their students do on the university campus, while the university essentially disregards what the student does on college property.<sup>124</sup> Nonetheless, no one rules out the possibility that in truly egregious situations each would take notice of conduct theoretically within the geographic control of the other.<sup>125</sup>

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122. At the University of Queensland, for example, one college targets foreign students while another accommodates married students. *See id.* at 19. Of course, Queensland's many religiously affiliated colleges would be especially attractive to co-religionists.

123. Overall, only about 20,000 of Australia's 585,000 students live "on campus." *See* text accompanying notes 7 and 8. At the University of Queensland, only 1950 of the University's 24,590 students can be accommodated in its affiliated colleges. At the University of Sydney, only 2000 of the University's approximately 27,000 undergraduates live in such colleges or university residence halls. Australian National University boasts the country's highest incidence of "on-campus" residence—twenty-five percent. Australian National University has a mix of affiliated and owned facilities, with a majority of housed students living in University-owned residence halls.

At the University of Michigan, approximately 9412 (26%) of the University's 36,200 students currently live on campus; 2534 (7%) reside in off-campus fraternities and sororities. Letter from Barbara Olender, Assistant to the Judicial Advisor, Univ. of Mich., Dec. 7, 1995 (on file with author). At Indiana University, about 9000 students live in residence halls; about 6000 live in fraternities or sororities, which, at Indiana University, are "campus-supervised housing." (These 15,000 students constitute about 42% of Indiana University's approximately 35,500 students). Interview with Pamela Freeman, *supra* note 39.

124. Interestingly, a committee at the University of Queensland recently urged residential colleges on the flagship campus "to formulate a common code of conduct in relation to the behavior and discipline of residents." *See* UNIV. OF QUEENSL., REPORT OF THE VICE-CHANCELLOR'S COMMITTEE TO REVIEW STUDENT DISCIPLINE AND MISCONDUCT STATUTE, at 4 (July 1995). That same committee, however, concluded against any attempt to bring college premises within the definition of "University site." *Id.*

125. A recent committee report reflected this nebulous relationship: "Actions such as divulging confidential information and making a false representation will be misconduct wherever they occur. However, there must be doubts as to whether the University's power extends to control of private student activities carried out on [the colleges'] private property." UNIV. OF QUEENSL., REPORT OF THE VICE-CHANCELLOR'S COMMITTEE TO REVIEW STUDENT DISCIPLINE AND MISCONDUCT STATUTE, at 26 (July 1995).

#### IV. INTERNAL PROCEDURES

##### A. Academic

The procedures governing the application of academic rules at Australian universities tend toward the "student-friendly," to say the least. The University of Queensland presents an apt illustration. Students denied initial enrollment may appeal to the Academic Registrar.<sup>126</sup> Upon first enrollment students sign an undertaking to "comply with the Statutes and Rules and with the decisions of the constituted authorities . . ."<sup>127</sup> A student may apply to the Dean of Faculty for a waiver or variance with regard to prerequisite or companion subjects.<sup>128</sup> Certain denials of readmission occasion appeals to the Senate.<sup>129</sup> Anyone whose enrollment has been denied or vis-à-vis whom any other action has been taken on the basis of the person's medical fitness has an appeal to the Senate.<sup>130</sup> So too has anyone "specifically affected" by any decision of the Academic Board or any of its committees.<sup>131</sup> Anyone whose borrowing privileges have been withdrawn by the Library may appeal to the Library Appeals Committee.<sup>132</sup>

Candidates may "query"—demand an explanation of—the results of an examination and a dean may, with the concurrence of the head of department, alter those results. A candidate unhappy with the dean's resolution may appeal to the Senate Appeals Committee.<sup>133</sup> To facilitate these procedures, examination scripts must be kept six months.<sup>134</sup>

Supplementary examinations may be available to persons who have received either a failing or otherwise "unsatisfactory" result.<sup>135</sup> A special examination may be administered to those who, "for medical or compassionate reasons or as a result of exceptional circumstances or hardship," were unable to sit for the regular examination. Indeed, in such circumstances, a special examination is available when there is "good reason" to disregard the results of an examination for which the candidate did in fact sit.<sup>136</sup> Any person "whose performance in an

126. *See Procedures for Students*, 1995 UNIV. OF QUEENSL. CALENDAR 9.

127. UNIV. OF QUEENSL., STATUTE NO. 44, MISCELLANEOUS PROVISIONS § 1(2). To the same effect: AUSTL. NAT'L UNIV., FACULTY HANDBOOK 1993, at 34.

128. *Enrollment Rules*, § 5(4), 1995 UNIV. OF QUEENSL. CALENDAR 39.

129. UNIV. OF QUEENSL., ENTRY RULES FOR UNDERGRADUATE COURSES § 6.

130. *Enrollment Rules*, § 8(3), 1995 UNIV. OF QUEENSL. CALENDAR 39.

131. UNIV. OF QUEENSL., STATUTE NO. 7, THE ACADEMIC BOARD § 25. The Academic Board is the Senate's principal academic adviser. *See id.* § 15.

132. UNIV. OF QUEENSL., STATUTE NO. 37, THE UNIVERSITY LIBRARY §§ 2-4.

133. *Examinations*, 1995 UNIV. OF QUEENSL. CALENDAR 14; UNIV. OF QUEENSL., EXAMINATION RULES § 37.

134. *Examinations*, 1995 UNIV. OF QUEENSL. CALENDAR 14.

135. UNIV. OF QUEENSL., EXAMINATION RULES § 7(1) & (2). The new grade may not be higher than a "4" (out of "7"). *Id.* §§ 32(1) and 32(5).

136. *Id.* § 8. The new grade may not be higher than a "4" (out of "7"). *Id.* § 32(1) and (5).

examination has been adversely affected by illness, disability, or other exceptional circumstances" may apply for "special consideration," that is, a grade adjustment.<sup>137</sup>

Any student who is denied further enrollment under the University's Exclusion Rules must be so notified by the Registrar.<sup>138</sup> An excluded person may nonetheless "apply for permission to enroll for cause shown."<sup>139</sup> Moreover, anyone "dissatisfied" with any action taken under the Exclusion Rules also may appeal to the Senate, which refers the matter to its Appeals Committee.<sup>140</sup> Further, students are represented on that Committee.<sup>141</sup>

Clearly, the procedures governing academic decisions that affect individual students at the University of Queensland take full account of student interests, often at the price of other interests such as efficiency, finality, and the convenience of academic-staff members. Similar procedures prevail at other Australian universities.<sup>142</sup>

137. *Id.* § 11. If the dean endorses the application, it is forwarded to the examiners for such special consideration. *Id.* § 11(2).

138. UNIV. OF QUEENSL., EXCLUSION RULES § 4.

139. *Id.* § 5(1).

140. *Id.* § 7(1).

141. *See Committees of Senate*, 1995 UNIV. OF QUEENSL. CALENDAR 229.

142. The University of Wollongong provides detailed rules and procedures. (Over seven paragraphs, comprising a special section, regulate the use, during examinations, of foreign-language-translation dictionaries. *See Procedure for the Use of Foreign Translation Dictionaries in Examinations*, UNIV. OF WOLLONGONG, CALENDAR: UNDERGRADUATE 1994, at 33-34). Wollongong provides, under various circumstances, for "special consideration" (even for conflicts between scheduled assessments and certain sporting activities), reconsideration of work, additional work or supplementary examinations. *See Special Consideration and Supplementary Examinations*, §§ 3 and 7. *Id.* at 34. A student who believes that a mark for a piece of assessable work or for a subject does not reflect that student's attainment is entitled to an explanation. *See Code of Practice—Assessment*, § 10. *Id.* at 50-51. A student who feels that a grade for a subject misrepresents that student's performance or is otherwise in error may seek satisfaction through successive appeals to the lecturer, the head of the unit, the dean of the faculty, and then the dean of students. If still unsatisfied, the student may appeal to the Academic Review Committee, but only on the grounds of a lack of due process. *Amendments to Academic Records, Reassessment of Grades*, § 3. *Id.* at 37. Any student may appeal to the Vice-Principal (Administration) against any decision made under the University's "course rules." *University of Wollongong Course Rules*, § 018. *Id.* at 79.

At the Australian National University, decisions on academic status or on exemption from certain requirements may be appealed to a "Status Appeal Committee." *Status and Exemption Rules*, § 6(1), THE AUSTRAL. UNIV., UNDERGRADUATE RULES BOOK 16. That university's rules allow for additional examinations before a grade is recommended. *Examinations (The Faculties) Rules*, § 4(3). *Id.* at 11. A faculty may provide a special examination to a student who failed to attend the regular sitting. § 5(1), *id.* at 11. Detailed provisions are made for special consideration in the case of a student whose performance with regard to a unit or an examination has been

## B. Disciplinary

Disciplinary procedures in Australian universities are also "student-friendly."<sup>143</sup> At the University of Queensland, which recently reviewed and rewrote its code of discipline,<sup>144</sup> the broad definition of "misconduct" includes behavior that a) impairs the reasonable freedom of others to pursue their academic or other activities; b) circumvents "proper procedures in relation to student assessment or research"; or c) makes improper use of University facilities or information or of the property of other persons "on the site."<sup>145</sup> Fleshing out this rather nebulous statement, the code then provides fourteen instances of misconduct, but specifies that the list in no way purports to be exhaustive.<sup>146</sup>

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adversely affected by "illness or other cause." In this situation too, a special examination is possible, § 6, *id.* at 12. Adverse decisions under the "Academic Progress Rules" entitle the student to appeal to the Board of the Faculties. *Academic Progress Rules*, § 5.(1), *id.* at 30.

For similar procedures at the University of Technology, Sydney, see UNIV. OF TECHN., SYDNEY, 1995 CALENDAR 20, 21, and 224. Most interesting provision: A student is charged a fee for appealing an assessment, but the money is refunded if the assessment is revised upwards. *Id.* at 225.

For similar procedures at the University of South Australia, see UNIV. OF S. AUSTL., 1993 CALENDAR, Vol. 2, at 10 ("Academic Review of Student Progress"), 18 ("Student Appeals Against Academic Review Decisions"), and 19 ("Student Appeal Against Final Grades"). See also LA TROBE UNIV., INFORMATION FOR STUDENTS: 1991, Vol. 3, at 7, 33.

143. Though to a different extent, the procedures at Indiana University too manifest a "student-friendly" approach. The disciplinary set-up appears in a statement that stresses rights as well as responsibilities. See IND. UNIV., CODE OF STUDENT ETHICS, PART I (1995). The procedures for determining violations and sanctions were "designed to provide students with the guarantees of due process and procedural fairness . . ." *Id.* at Part IV.

144. See UNIV. OF QUEENSL., STATUTE NO. 13: STUDENT DISCIPLINE AND MISCONDUCT, adopted by University of Queensland Senate, July 1995. For disciplinary codes at other Australian universities, see, e.g., AUSTRAL. NAT'L UNIV., DISCIPLINE RULES; GRIFFITH UNIV., STATUTE 8.2—STUDENT GOOD ORDER; UNIV. OF MELBOURNE, STATUTE 13.1—STUDENT DISCIPLINE; UNIV. OF SYDNEY, BY-LAWS CHAPTER 13—DISCIPLINE OF STUDENTS.

145. See UNIV. OF QUEENSL., STATUTE NO. 13: STUDENT DISCIPLINE AND MISCONDUCT (July 1995), § 1 of Schedule. An attempt to commit such misconduct is also itself misconduct. *Id.* § 2.

At the University of Michigan, the Statement of Student Rights and Responsibilities "sets forth the standard for student behavior on and within a 30 mile radius" of the campus, as well as at official University activities. OFFICE OF THE VICE PRESIDENT FOR STUDENT AFFAIRS OF THE UNIV. OF MICH., THE STUDENT JUDICIAL PROCESS 4 (1995). (A new code will go into effect in 1996. See Letter from Barbara Olender, *supra* note 123). Indiana University also addresses off-campus conduct. See *infra* note 146.

146. UNIV. OF QUEENSL., STATUTE NO. 13: STUDENT DISCIPLINE AND MISCONDUCT § 4. At the University of Michigan, "prohibited actions" under the Statement of

One of these "instances" incorporates behavior made "misconduct" by other statutes or rules.<sup>147</sup> Other universities reflect a wide range of precision in their definition of proscribed conduct.<sup>148</sup>

At Queensland, the code vests various "decision-makers," including heads of department, deans, the Librarian,<sup>149</sup> the Secretary-Registrar, the President of the

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Student Rights and Responsibilities include a list of specifics ranging from "intentional interference with teaching" through "murder." A shorter list of offenses restricts conduct off-campus than on-campus. OFFICE OF THE VICE PRESIDENT FOR STUDENT AFFAIRS OF THE UNIV. OF MICH., THE STUDENT JUDICIAL PROCESS 4 (1995).

"Student Misconduct" at Indiana University includes three categories. "Academic misconduct" is defined as "any activity which tends to compromise the academic integrity of the institution and undermine the educational process." Academic misconduct includes cheating, fabrication, plagiarism, interference with another student's work, violation of course rules, and facilitating academic dishonesty. IND. UNIV., CODE OF STUDENT ETHICS, PART III, § A. The second category, "Personal Misconduct on University Property," sets out twenty-four subcategories of proscribed conduct, themselves including disorderly conduct, arson, unauthorized possession of firearms, sexual harassment, verbal abuse and violations of federal or state law. *Id.* § B. The third category, "Personal Misconduct Not on University Property," applies to off-campus acts that occur during university activities or that "relate to the security of the university community or the integrity of the educational process." *Id.* § C. This wonderfully broad definition includes—but is not limited to—arson, battery, fraud, and sexual assault. *Id.* Interestingly, the category also includes "altering academic transcripts" and "trafficking in term papers," *id.*, conduct which might better fit within "academic misconduct."

147. UNIV. OF QUEENSL., STATUTE NO. 13: STUDENT DISCIPLINE AND MISCONDUCT § 13. This clause currently encompasses "Statute 43—Site By-Laws; Statute 46—Traffic on University Sites; Examination Rules; Library Rules; Medical Students Rules; and Traffic Rules." *Id.* at n.2.

For parallel provisions at other universities, see AUSTL. NAT'L UNIV., DISCIPLINE RULES § 3A(1) and (2); GRIFFITH UNIV., STATUTE 8.2—STUDENT GOOD ORDER § 2; UNIV. OF MELBOURNE, STATUTE 13.1—STUDENT DISCIPLINE § 13.1.1; UNIV. OF SYDNEY, DISCIPLINE OF STUDENTS § 1(a) and (b).

148. For example, Griffith University defines misconduct as an act "prejudicial to the reasonable freedom of other members of the University to pursue their studies . . . or to the orderly work and conduct of the affairs of the University." GRIFFITH UNIV., STATUTE 8.2—STUDENT GOOD ORDER § 2. To be sure, proscribed behavior relating to cheating and plagiarism, which might be dealt with under STATUTE 8.2, receives fairly detailed treatment, including examples, in Griffith's POLICY ON ACADEMIC MISCONDUCT § 1.0.

The University of Sydney sets out a general definition of "misconduct." UNIV. OF SYDNEY, BY-LAWS CHAPTER 13—DISCIPLINE OF STUDENTS § 1. At the University of Melbourne, a "breach of discipline or good order" is fleshed out in fourteen subsections of the disciplinary statute. See UNIV. OF MELBOURNE, STATUTE 13.1—STUDENT DISCIPLINE § 13.1.1(i) through (xiv). A similar treatment occurs in AUSTL. NAT'L UNIV., DISCIPLINE RULES § 3A.(1) and (2).

149. "Librarian" includes the University Librarian and Branch librarians. UNIV. OF QUEENSL., STATUTE NO. 13: STUDENT DISCIPLINE AND MISCONDUCT § 2.

Academic Board, and the Disciplinary Board itself, with various levels of jurisdiction and the authority to impose various levels of penalty.<sup>150</sup> A head of department may address any matter relating to the facilities, teaching, assessment, or other activities of the department. A head of department who makes a finding of misconduct may order a fine not exceeding one penalty unit (currently \$60);<sup>151</sup> suspension from departmental activities for up to a week; reduction or cancellation of the mark for the assessment related to the misconduct; further work within the subject related to the misconduct; restitution not exceeding two penalty points; or any combination of these.<sup>152</sup> The code grants deans and the Librarian corresponding levels of authority.<sup>153</sup>

The Secretary-Registrar and the President of the Academic Board may address any matter and, among other things, impose fines not exceeding two penalty units; two-week suspensions from the University (or any part of it) or of campus driving privileges; a maximum grade or refusal of credit in the subject relating to the misconduct; community service not exceeding twenty hours; restitution not exceeding five penalty units; counseling; or any combination of these.<sup>154</sup> Moreover, the Secretary-Registrar and the President of the Academic Board may

150. *See id.* § 7. (For a similar approach, *see* UNIV. OF MELBOURNE, STATUTE 13.1—STUDENT DISCIPLINE § 13.1.2(2)).

Generally, at the University of Queensland, penalties that are academic in nature should result only from misconduct occurring in an academic context. UNIV. OF QUEENSL., STATUTE NO. 13—STUDENT DISCIPLINE AND MISCONDUCT § 6. Any decision-maker may refer a matter to any other decision-maker. *Id.* § 9(1). For the procedures to be followed by decision-makers, *see id.* §§ 4-9.

At the University of Michigan, under the relatively simple procedures provided by the Statement of Student Rights and Responsibilities, the “accused” chooses one of three adjudicatory devices: 1) mediation, available only if the “complainant” agrees (the “judicial advisor” enforces any solutions agreed to by the parties); 2) a student-panel hearing, involving a group of six students (chaired by a non-voting faculty or staff member) who determine both responsibility and any sanctions; or 3) an administrative hearing held before a single member of the faculty or staff, who also determines both responsibility and any sanctions. OFFICE OF THE VICE PRESIDENT FOR STUDENT AFFAIRS OF THE UNIV. OF MICH., THE STUDENT JUDICIAL PROCESS 1 (1995). Of 98 such choices made from January 1, 1993, to April 1, 1995, 23 favored mediation; 24 a student-panel hearing; and 51 an administrative hearing. UNIV. OF MICH., SUMMARY OF JUDICIAL ACTIVITY: STATEMENT OF STUDENT RIGHTS AND RESPONSIBILITIES (Jan. 1, 1993, to Apr. 1, 1995). For procedures at Indiana University, *see* note 156.

151. All “dollars” referred to in this piece are Australian dollars. On November 27, 1995, the Australian dollar was worth 74 American cents. CHICAGO TRIB., Nov. 28, 1995, Section 3, at 4.

152. UNIV. OF QUEENSL., STATUTE NO. 13—STUDENT DISCIPLINE AND MISCONDUCT § 7(1).

153. *Id.* § 7(2) and (3).

154. *Id.* § 7(5).

make any of the orders available to the Disciplinary Board if the student involved either admits the misconduct or consents to their handling the matter.<sup>155</sup>

Among the decision-makers, the Disciplinary Board, made up of two members of the academic staff and two students,<sup>156</sup> carries the greatest authority. Able to address any matter, the Board may (through its Chair, whom the Board advises) order a fine not exceeding five penalty units; the reduction or cancellation of the mark for any item of assessment; the refusal of credit for any subject; community service not exceeding fifty hours; restitution not exceeding five penalty units; counseling; suspension of campus driving privileges for any length of time; and suspension for any period—or even expulsion<sup>157</sup>—from the University.<sup>158</sup>

155 *Id.* § 8.

156 *Id.* § 10(1). The Chair, a senior academic-staff member appointed by the Senate, has both a deliberative vote and a casting vote. *Id.* § 10(3).

At Griffith University, the Student Good Order Committee, sitting as a tribunal, counts three students among its seven members; the Student Good Order Panel, an alternative tribunal, includes two students among its five members. GRIFFITH UNIV., STATUTE 8.2—STUDENT GOOD ORDER §§ 12 & 15. The Student Proctorial Panel at the University of Sydney includes one student among its three members. UNIV. OF SYDNEY, BY-LAWS CHAPTER 13—DISCIPLINE OF STUDENTS § 18(1).

At the University of Michigan, a “student panel hearing” comprises six students and a non-voting faculty or staff chair. An “administrative hearing” is before a single faculty or staff member. OFFICE OF THE VICE PRESIDENT FOR STUDENT AFFAIRS OF THE UNIV. OF MICH., THE STUDENT JUDICIAL PROCESS 1 (1995). For more on the disciplinary procedures at the University of Michigan, see notes 150 and 162.

At Indiana University, the Campus Review Board reviews appeals from decisions of individual faculty members and the dean or director of a unit with regard to “academic misconduct related to a course.” That Board comprises three members of the faculty or administration and two members of the student body. The Dean of Faculties may appoint additional members, but students must constitute at least two-fifths of the membership. IND. UNIV., CODE OF STUDENT ETHICS, Part IV, § B(6).

Formal hearings regarding allegations of personal misconduct or of “academic misconduct unrelated to a course” take place before a “hearing commission” made up of one student and two faculty members. *Id.* § D(5)(b). Appeals from the decisions of the hearing commission are to a review board made up of a student, a faculty member and an administrative officer. *Id.* § 6(c). For more on the disciplinary procedures at Indiana University, see note 162.

157. Expelled students may re-enroll only with permission of the Senate. UNIV. OF QUEENSL. STATUTE NO. 13—STUDENT DISCIPLINE AND MISCONDUCT § 21(2).

158. *Id.* § 7(6). Certain employees of the University are empowered to impose summary fines not exceeding one penalty unit for the breach of various University statutes or rules (whether amounting to “misconduct” or not). Appeals from such fines are to the Disciplinary Board. *Id.* § 16.

Under the Statement of Student Rights and Responsibilities at the University of Michigan, possible sanctions include a formal reprimand; community service; attendance in a course that addresses issues relating to the violation; restitution; transfer within, or removal from, University housing; suspension from a course,

Other universities have boards like Queensland's Disciplinary Board.<sup>159</sup> Still others, like the Australian National University and the University of Melbourne, rely on a single person for the first-instance determination of even serious offenses.<sup>160</sup> (Since students on appeal from such determinations often receive a full-blown hearing—perhaps even with witnesses—before a committee,<sup>161</sup> the process seems invulnerable to charges of unfairness). Whether effected by a disciplinary board or an individual person, the first-instance adjudication of serious allegations in Australian universities often occurs amidst a wide panoply of rights for the accused student.<sup>162</sup> Nonetheless, some universities provide more rights on appeal than at the initial determination.<sup>163</sup>

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activity, classes, housing or university events; and expulsion from the University. OFFICE OF THE VICE PRESIDENT FOR STUDENT AFFAIRS OF THE UNIV. OF MICH., THE STUDENT JUDICIAL PROCESS 4 (1995).

At Indiana University, sanctions available with regard to personal misconduct include: reprimand and warning; disciplinary probation; restitution; participation in a specific education or counseling program; expulsion from, or transfer within, University housing; suspension; and expulsion. IND. UNIV., CODE OF STUDENT ETHICS §§ IV.D.(4)(e) and (5)(h).

159. Griffith University has a Student Good Order Committee (*see* GRIFFITH UNIV., STATUTE 8.2—STUDENT GOOD ORDER §§ 11-21); the University of Sydney has a Student Proctorial Board (*see* UNIV. OF SYDNEY, BY-LAWS CHAPTER 13—DISCIPLINE OF STUDENTS §§ 16-22).

160. *See* AUSTL. NAT'L UNIV., DISCIPLINE RULES § 6 (summary inquiry before the Vice-Chancellor or the Vice-Chancellor's nominee). Academic misconduct is addressed under a different set of rules, but there too the first-instance decision-maker is a single person. *See* AUSTL. NAT'L UNIV., MISCONDUCT IN EXAMINATION RULES §§ 2(1), 5 and 6. *See also* UNIV. OF MELBOURNE, STATUTE 13.1—STUDENT DISCIPLINE § 13.1.2(2)(b) and (3) (Vice-Chancellor or a delegate). A committee hears academic-misconduct allegations but cannot itself impose penalties of suspension or expulsion; these may only be recommended to the Vice-Chancellor or the Vice-Chancellor's delegate. *Id.* § 13.1.3.

At the University of Sydney, the Vice-Chancellor may hear such serious cases or refer them to the Student Proctorial Board. *See* UNIV. OF SYDNEY, BY-LAWS CHAPTER 13—DISCIPLINE OF STUDENTS § 14(1)(c).

Indiana University provides for an informal disposition by the Dean of Students. *See* note 162.

161. *See* AUSTL. NAT'L UNIV., DISCIPLINE RULES §§ 11 through 14; and UNIV. OF MELBOURNE, STATUTE 13.1 at § 13.1.4.

162. *See, e.g.,* GRIFFITH UNIV., STATUTE 8.2—STUDENT GOOD ORDER § 24; UNIV. OF QUEENSL., STATUTE 13—STUDENT DISCIPLINE AND MISCONDUCT § 4; and UNIV. OF SYDNEY, BY-LAWS CHAPTER 13—DISCIPLINE OF STUDENTS § 28.

Under the University of Michigan's Statement of Student Rights and Responsibilities, a written complaint triggers a "letter of investigation" to the accused within ten class days of that complaint. The letter directs the student to arrange a meeting with the "judicial advisor." If the judicial advisor's investigation reveals insufficient evidence, the matter is dropped. Otherwise, a "charge letter" goes to the accused, in response to which the accused chooses a method of resolution. *See* note 150. An "Advisor"—faculty or staff member, friend, relative, attorney, or

At Queensland, a decision-maker decides, on a standard of "reasonable satisfaction,"<sup>164</sup> whether the student has committed misconduct and, if so, which

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advocate—may accompany the accused (or the complainant) to any ensuing hearing (but may not speak for or represent either party).

The accused (and the complainant) are entitled to notice of "the finding of the hearing." The accused is entitled to written notice of any sanctions, as is the complainant in cases of assault and sexual harassment. The burden of proof is that of "clearly convincing," which lies somewhere between a "preponderance of evidence" and "beyond a reasonable doubt." The judgment that an accused was "responsible" must be unanimous. OFFICE OF THE VICE PRESIDENT FOR STUDENT AFFAIRS OF THE UNIV. OF MICH., THE STUDENT JUDICIAL PROCESS 2-3, 5-6 (1995). For the appeals process, see note 168.

At Indiana University, proceedings relating to allegations of personal misconduct or of "misconduct unrelated to a particular course" may be initiated by any student or any member of the University faculty, administration, or staff. Such complaints come before the Dean of Students, who decides whether disciplinary proceedings should ensue. Full notice of the charges are provided to the charged student, who is ordered to appear before the Dean for an informal conference. The student may be accompanied by an advisor, whose participation at the conference is severely limited. The student's choice not to answer questions will not be taken as an admission of guilt. If the Dean of Students does not dismiss the charge, the Dean proposes a penalty, which may range from a simple reprimand through expulsion from the University.

The student may accept that penalty or, by rejecting it, elect to take the case to a hearing commission, made up of one student and two faculty members. This formal hearing carries with it full due-process protections: renewed notice of the charges, discovery of witnesses' names (the student must in turn furnish a list of witnesses the student might offer), the right to a public hearing on request, the right to representation at the hearing, the right to examine and cross-examine witnesses, and a privilege against self-incrimination. A transcript of the hearing is made. The University has the burden of proof—"clear and convincing evidence"—and a majority of the hearing commission must agree. If the commission finds the student guilty, it may choose any of the sanctions that had been available to the Dean of Students. (These procedures do not govern the alleged violation of campus motor-vehicle or residence-hall regulations). IND. UNIV., CODE OF STUDENT ETHICS, Part IV, §§ C and D (1995). For the appeals process, see note 168.

163. See AUSTL. NAT'L UNIV., DISCIPLINE RULES §§ 6.(1), 6.(2) and 13; UNIV. OF MELBOURNE, STATUTE 13.1—STUDENT DISCIPLINE §§ 13.1.2(2)(b), 13.1.2(3), and 13.1.4; and UNIV. OF QUEENSL., STATUTE NO. 13—STUDENT DISCIPLINE AND MISCONDUCT §§ 4 and 13.

164. At the University of Sydney, the Student Proctorial Board must be "satisfied" that misconduct occurred. UNIV. OF SYDNEY, BY-LAWS CHAPTER 13 § 31(b). The Vice-Chancellor (or nominee) at the University of Melbourne labors under no specified burden of proof. See UNIV. OF MELBOURNE, STATUTE 13.1—STUDENT DISCIPLINE § 13.1.2(3). The Vice-Chancellor (or nominee) seems to have no allocated burden of proof for serious offenses at the Australian National University, although lesser decision-makers must be "satisfied" that misconduct occurred. See AUSTL. NAT'L UNIV., DISCIPLINE RULES §§ 4(1), (2), (3), and 6. Tribunals at Griffith University also seem to labor under no specified burden of proof. See GRIFFITH UNIV., STATUTE 8.2—STUDENT GOOD ORDER § 25(1).

orders should be made.<sup>165</sup> Either the student or the University (through the Secretary-Registrar) may appeal a) the “first instance decision” of any decision-maker or b) the decision of the Disciplinary Board on appeal from the decision of a decision-maker, if the order involved reduction of an assessment mark or refusal of credit for a subject.<sup>166</sup> Generally, the Disciplinary Board handles all appeals from the decisions of other decision-makers; in turn, the Discipline Appeals Committee, made up of two members of the Senate who are not members of the academic staff, one member of the Academic Board and two students,<sup>167</sup> hears all appeals from decisions of the Disciplinary Board.<sup>168</sup>

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Under the Statement of Student Rights and Responsibilities at the University of Michigan, the burden of proof for the student panel’s judgment of responsibility is that of “clear and convincing,” which lies somewhere between a “preponderance of evidence” and “beyond a reasonable doubt.” OFFICE OF THE VICE PRESIDENT FOR STUDENT AFFAIRS OF THE UNIV. OF MICH., THE STUDENT JUDICIAL PROCESS 6 (1995). The same burden of proof obtains at proceedings before the hearing commission at Indiana University. IND. UNIV., CODE OF STUDENT ETHICS § IV.D.5(g).

165. UNIV. OF QUEENSLAND, STATUTE NO. 13—STUDENT DISCIPLINE AND MISCONDUCT § 4(2)(e).

166. *Id.* § 11(1).

167. *Id.* § 14(1). The Chair, appointed by the Senate, has both a deliberative vote and a casting vote. *Id.* § 14(3).

168. *Id.* § 12(1) and (2). If the student has admitted the misconduct or agreed to have the matter dealt with by the Secretary-Registrar or the President of the Academic Board, see text accompanying note 155, appeal is to the Discipline Appeals Committee. *Id.* § 12(1).

Appeals proceed by way of a new hearing. *Id.* § 12(1) and (2). For the procedures attending appeals, see *id.* §§ 11-15.

The drafters of the rules contemplated a change to an “inquiry model” for the Disciplinary Board, but the retention of an adversarial process for the Discipline Appeals Committee. See UNIV. OF QUEENSL., REPORT OF VICE-CHANCELLOR’S COMMITTEE TO REVIEW STUDENT DISCIPLINE AND MISCONDUCT STATUTE 3 (July 1955).

For appeals procedures at other universities, see, e.g., AUSTL. NAT’L UNIV., DISCIPLINE RULES §§ 10-14; GRIFFITH UNIV., STATUTE 8.2—STUDENT GOOD ORDER §§ 30-34; UNIV. OF MELBOURNE, STATUTE 13.1—STUDENT DISCIPLINE §§ 13.1.4 and 13.1.5; and UNIV. OF SYDNEY, BY-LAWS CHAPTER 13—DISCIPLINE OF STUDENTS §§ 33-41. At the University of Sydney, the Senate may refer an appeal to the Student Disciplinary Appeals Committee or hear the appeal itself. *Id.* § 35.

At the University of Michigan, under the Statement of Student Rights and Responsibilities, a student may request an appeal within ten class days after receiving written notice of the decision. Grounds for appeal are limited to a failure to follow appropriate procedures, lack of sufficient evidence, newly available evidence, inappropriate sanctions, or a favorable finding in criminal or civil court. The appeals board comprises one student, one faculty member and one administrator. No new evidence is taken, and the board’s finding is final. OFFICE OF THE VICE PRESIDENT FOR STUDENT AFFAIRS OF THE UNIV. OF MICH., THE STUDENT JUDICIAL PROCESS 2 (1995).

At Indiana University, appeals from decisions of the hearing commission lie to a “review board,” consisting of one student, one faculty member and one administrative

As indicated earlier, discipline on the campuses of affiliated colleges often remains independent of the processes obtaining on the site of the central university. At King's College, University of Queensland, discipline is a matter of contract between the college and the student. Minor infractions garner a "quiet chat" with a Senior Resident or, for relatively more serious matters, with the Deputy Master or even the Master.

Truly serious misconduct comes before a "Disciplinary Advisory Committee," made up of two doctoral students, two undergraduates, and the Deputy Master, who chairs the group. The Master normally follows the recommendations of this committee. Penalties include fines, community service, and—the ultimate penalty—loss of residency at the College. Among the most effective penalties is probation with notice to the miscreant's parents. Results of disciplinary proceedings are publicized within the college.<sup>169</sup> Thus does the college seek to "shame" the transgressor as part of its punishment; deter the potential violator; and educate the community with regard to the enforcement of community standards. As with most such devices, effectiveness eludes any meaningful measurement.

## V. THE COURTS AND THE CULTURE

### A. The Paucity of Litigation

As one Australian commentator has noted, challenges to disciplinary and academic decisions of colleges and universities in the United States—unlike in Australia—have become almost commonplace.<sup>170</sup> "We get sued all the time, or at least threatened with a suit," confirmed one campus official at an American university.<sup>171</sup> This inclination toward litigation presents a significant distinction between the treatment of academic and disciplinary matters in the United States and that treatment in Australia. Even in light of the great difference in student populations, one finds Australian students relatively unlikely to sue academic and disciplinary decision-makers. Australia's 585,000 students,<sup>172</sup> compared with the United States' 14,305,658,<sup>173</sup> would suggest a ratio of litigation of approximately one to twenty-four. Yet since 1980, for example, only five Australian cases involving students' court challenges to adverse academic and

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officer, who presides. No additional evidence is taken. Decisions are by majority vote and are final. IND. UNIV., CODE OF STUDENT ETHICS, § IV.D.6.

169. Interview with Denis Brosnan, *supra* note 115.

170. Forbes, *supra* note 38, at 85.

171. Interview with Pamela Freeman, *supra* note 39.

172. This number does not include the thousands of students in TAFE or other institutions providing various forms of higher education in Australia. See *supra* note 4.

173. CHRON. OF HIGHER EDUC.: ALMANAC ISSUE, Sept. 1, 1995, at 8. The figures are for fall, 1993.

disciplinary decisions appear in the reports, versus 231 such cases in the United States; this reflects a ratio of approximately one to forty-six. In fact, the ratio over a longer period is still more revealing, for *no* such cases appear in the Australian reports from 1965 through 1980, and only one from 1946 to 1964. In over a half century, in sum, only about seven such cases have appeared in the various Australian law reports, state or federal.<sup>174</sup> Of course, the very small number of cases reported in Australia and the different reporting practices of the two countries involved lend to such ratios a fairly large margin of error. Nonetheless, the numbers and time spans clearly describe a dramatically disparate propensity to sue. This seems especially so in light of the fact that a greater proportion of American students (about twenty-two percent)<sup>175</sup> than of Australian students (about three-tenths of one percent) attend private schools, against which possible causes of action remain much more restricted. Indeed, the two countries' disparity in emphasis on a litigative remedy may be less reflected in their reported opinions than in their levels of threats to sue, lawsuits filed but not pursued, settlements and the like; these matters, however, do not lend themselves to easy statistical analysis.

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174. See *McLean v. James Cook Univ. of N. Queensl.*, [1994] 1 Q.R. 399 (Queensl. S. Ct.); *Hazan v. La Trobe Univ.* [No.2], [1993] 1 V.R. 568 (Vict. S. Ct.); *Sweeney v. University of Sydney*, [1992] 27 A.L.D. 214 (N.S.W. S. Ct.); *Bayley-Jones v. University of Newcastle*, [1990] 22 N.S.W.L.R. 424 (N.S.W. S. Ct.); *M. v. University of Tas.*, [1986] T.R. 74 (Tas. S. Ct.); *Ex Parte Forster*; *Re Univ. of Sydney*, [1964] N.S.W.R. 1000 (N.S.W. S. Ct.) (full court); and *Ex Parte McFadyen*, [1945] S.R. (N.S.W.) 200 (N.S.W. S. Ct.) (full court).

Of course, universities have also been parties to cases not involving an individual student's direct challenge of an adverse academic or disciplinary decision. These have involved, for example, a journalist's freedom-of-information challenge, see *The Univ. of Melbourne v. Robinson*, [1993] 2 V.R. 177 (Vict. S. Ct.—App. Div.); various challenges regarding the powers and activities of student unions, see *Harrison v. Hearn*, [1972] 1 N.S.W.L.R. 428 (N.S.W. S. Ct.); and *Flynn v. University of Sydney*, [1971] 1 N.S.W.L.R. 857 (N.S.W. S. Ct.); elections to the university council, see *Graeme-Evans v. University of Adelaide*, [1973] 6 S.A.S.R. 302 (S. Austl. S. Ct.); and the power of a university council to impose student fees, see *Clarke v. University of Melbourne* (No. 2), [1979] V.R. 66 (Vict. S. Ct.) (full court).

Some reported decisions involving universities issued from Visitors rather than from courts. See *Re La Trobe Univ.*; *Ex parte Hazan*, [1993] 1 V.R. 7 (Visitor); *Re La Trobe Univ.*; *Ex parte Wild*, [1987] V.R. 447 (Visitor); *Re Macquarie Univ.*; *Ex parte Ong*, [1989] N.S.W.L.R. 113 (Visitor); *University of Melbourne*; *ex parte McGurk*, [1987] V.R. 586 (Visitor); and *Re Univ. of Melbourne*; *ex parte De Simone*, [1981] V.R. 378 (Visitor).

The Victorian Small Claims Tribunal recently awarded damages of almost \$9,300 to three former students who brought complaints against Deakin University over a badly run foreign program. *University to Pay For Course Bungle*, THE AUSTRALIAN, June 21, 1995, at 3.

175. If only four-year institutions are considered, the proportion of private-university students rises to thirty-three percent.

We do know that in Australia even cases that go little farther than the filing of the complaint or otherwise end up unreported seem scarce; in interviews, university personnel recall almost no litigation whatever.<sup>176</sup> Reflective of this situation is the fact that Australia publishes no journal dedicated exclusively to the law of education; the United States produces many such journals, ranging from the standard scholarly magazine to the newsletter.<sup>177</sup>

As indicated, lawsuits by students against educational decision-makers, though rare, do occur. Indeed, some legislation specifically authorizes them. Queensland's Judicial Review Act of 1991, which supplements any other rights the individual might have,<sup>178</sup> authorizes court review of any "decision of an administrative character . . . whether or not in the exercise . . . of discretion."<sup>179</sup> An allegation that the decision complained of violated principles of "natural justice" triggers the act.<sup>180</sup> Of course, aggrieved students may challenge disciplinary decisions of academic institutions through use of a prerogative writ or an action in contract.<sup>181</sup>

Of the five cases reported over the last decade, two involved admissions matters. In *Sweeney v. The University of Sydney*,<sup>182</sup> a court rejected a prospective student's challenge of the university's evaluation of his credentials. In *M. v. University of Tasmania*,<sup>183</sup> a court held that a university's professorial board had improperly delegated an admissions matter to a committee; accordingly, the committee's decision against admitting the student-plaintiff was null and void. Two other cases involved the role of Visitors regarding student complaints. In *Hazan v. La Trobe University [No. 2]*,<sup>184</sup> the Victoria Supreme Court found that a Visitor had authority to address the complaint of a student

176. Interview with David Bowan, *supra* note 102 ("Students in Australia don't sue"); Interview with Roger Byrom, *supra* note 115 (could recall only one suit in last ten years); interview with Selwyn Cornish, *supra* note 115 (could recall no such suits); interview with Stafford Hiller, Solicitor, Students' Legal Service, University of Queensland, in St. Lucia, Queensland (July 7, 1995) (could recall none in last five years); interview with Margaret Lavery, Freedom of Information Officer, University of Queensland, in St. Lucia, Queensland (June 16, 1995) (could recall none in three years); telephone interview with Teck Ong, Legal Liaison Officer, Griffith University (July 18, 1995) (could recall none in his year-and-a-half tenure); interview with Kevin Sharman, *supra* note 115 (could recall "very few lawsuits" of any kind against the University").

177. *See, e.g.*, THE B.Y.U. EDUC. AND L.J. (Provo, Utah); J.C. & U.L. (Notre Dame, Ind.); J.L. & EDUC. (Columbia, S.C.); and SCH. L. BULL. (Chapel Hill, N. C.).

178. Judicial Review Act of 1991 (Queensl.) § 10(1).

179. *Id.* § 4(a). For the parallel at the Commonwealth level, *see* Administrative Decisions (Judicial Review) Act of 1977 (Cmwth).

180. Judicial Review Act of 1991 (Queensl.) § 20(2). For more on the concept of "natural justice," *see* notes 260-67.

181. J.R.S. FORBES, *supra* note 67, at 11.

182. [1992] 27 A.L.D. 214 (N.S.W. S. Ct.).

183. [1986] T.R. 74 (Tas. S. Ct.).

184. [1993] 1 V.R. 568 (Vict. S. Ct.).

regarding a university board of inquiry. In *Bayley-Jones v. University of Newcastle*,<sup>185</sup> a court decided that a Visitor had awarded insufficient damages to a doctoral student to whom the university had misapplied its rules. The fifth case involved exclusion. In *McLean v. James Cook University*,<sup>186</sup> the Queensland Supreme Court invalidated a graduate student's exclusion from both a course and a subject; the university, said the Court, had used the wrong set of rules.

## **B. Reasons for Paucity of Litigation**

Why do Australian students so rarely sue in the face of adverse academic and disciplinary decisions? Several reasons suggest themselves.

### **1. Restrained Exercise of Jurisdiction and Sanctions by Universities**

It seems clear that Australian universities take jurisdiction over relatively few disciplinary incidents. Australian universities tend to exercise an authority largely constrained by geography, therefore rarely seeking to punish students for off-campus misdeeds.<sup>187</sup> This is especially telling since many incidents that might trigger disciplinary action occur in or around the student's housing—after all, it is in student housing that week-end parties occur or to which students return after an evening of celebration. Relatively few Australian students live “on campus,”<sup>188</sup> however, and many of those students live in affiliated colleges, of whose activities the university takes little notice.<sup>189</sup>

Furthermore, Australian universities apparently proclaim little responsibility for moral inculcation with regard to their students. One campus official put it thus: “As an extension of the state, the University sees what students do in their personal lives as their own business.”<sup>190</sup> This attitude, unlike that at many private and some public institutions in the United States, restricts the range of

185. [1990] 22 N.S.W.L.R. 424 (N.S.W. S. Ct.).

186. [1994] 1 Q.R. 399 (Queensl. S. Ct.).

187. This is the case at the University of Queensland, for example. Interview with Carolyn Sappideen, Deputy Dean, University of Queensland School of Law, and member of the Vice-Chancellor's Committee to Review Student Discipline and Misconduct Statute, in St. Lucia, Queensland (July 28, 1995); interview with Roger Byrom, *supra* note 115. Mr. Byrom stated that it was possible, though unlikely, that the University would exercise jurisdiction over off-campus conduct that reflected badly on the reputation of the institution.

188. *See* note 123.

189. *See* text accompanying note 124.

190. Interview with David Bowan, *supra* note 102. *But see* THE UNIVERSITY OF WESTERN AUSTRALIA, YEARBOOK 1994, at 9: “The University fosters the values of openness, honesty, tolerance, fairness and responsibility in social and moral, as well as academic, matters.”

"misconduct" to which the university responds. For example, many incidents of drunkenness or sexual activity that might capture official attention at American universities escape attention in Australia; unless the drunkenness occasioned vandalism, for example, or the sexual activity involved an unwilling victim, little university notice ensues. Indeed, some feel discipline at Australian universities is simply too lenient.<sup>191</sup>

Moreover, the university generally defers to local prosecutorial authorities, even for conduct occurring on its premises, whenever that conduct constitutes a possible crime.<sup>192</sup> Illustrating this philosophy, the Vice-Chancellor at the University of Queensland stated recently: "If . . . illegal activity [in this case, relating to condom machines] occurred on campus, members of the University community were subject to the laws of the land, as were members of the [State of] Queensland community generally. It was the responsibility of the State authorities, rather than the University, to enforce laws affecting the citizens of Queensland."<sup>193</sup> Regarding disruption at a campus event, the University of Queensland took the position that the event's sponsor should have sought assistance from the police: "It was not the role of University Security Officers to act as policemen."<sup>194</sup> Not everyone approves: The women's officer of the

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191. Interview with Carolyn Sappideen, *supra* note 187.

192. Interview with David Bowan, *supra* note 102. As one campus official put it, "We don't do double jeopardy." Interview with Kevin Sharman, *supra* note 115. He conceded that the university and not the state might act, even regarding conduct that is a crime, if the victim chose the university forum. In any event, he states, the university would move to protect a victim in cases of danger.

But see R.H. Potter, *Crime on Australian Campuses: Is There an Emerging Social Issue?*, 16 J. OF TERTIARY EDUC. ADMIN. 210 (1994), observing that many crimes on campus receive institutional sanctions and that criminal prosecutions are rare.

At the University of Michigan, students may face a disciplinary hearing even as they confront criminal charges (or civil suits) for the same conduct. The University does not routinely defer hearings pending federal or state investigation or trial. Nonetheless, the University does try to make reasonable arrangements with the student in such cases. The University is more likely to defer a hearing—for a short time—for an alleged offense that is nonviolent. Interestingly, under its new Code (effective Jan. 1, 1996) students will have the option to defer their University resolution pending criminal or civil proceedings, but in such a case the student will automatically be suspended until that University resolution. Letter from Barbara Olender, *supra* note 123.

The process of the University of Indiana does not await action by the court. It addresses not only on-campus situations, but most likely even an off-campus sexual assault if it comes to the attention of campus authorities. When the alleged conduct also constitutes a crime, the campus authorities try to accommodate the request of a student's lawyer to await the trial's outcome. Nonetheless, if danger to the community is involved, the campus process addresses the situation without delay. Interview with Pamela Freeman, *supra* note 39.

193. MINUTES OF THE SENATE OF THE UNIV. OF QUEENSL., Sept. 7, 1987, at 132.

194. MINUTES OF THE SENATE OF THE UNIV. OF QUEENSL., Oct. 12, 1987, at 151.

National Union of Students has complained that most universities in Australia "turn a blind eye" to campus violence.<sup>195</sup>

Whatever the reasons, the statistics confirm the relatively low number of cases of which tertiary institutions take cognizance. The Student Disciplinary Board at the University of Queensland, which enrolls 24,590 students, heard only seven cases in 1994, four in 1993 and one in 1992; from 1988 through 1990, it heard none.<sup>196</sup> With regard to disciplinary action taken by actors other than the Student Disciplinary Board, the Secretary and Registrar reported to the Senate a total of 124 such matters over the ten-year period from 1985 through 1994. These data reflect an annual high of twenty-two in both 1987 and 1992, and an annual low of four in 1993.<sup>197</sup> Comparisons with representative American universities show these numbers to be relatively low, indeed.<sup>198</sup>

195. *Class Action Threatened Over Security After Series of Sydney Student Rapes*, AUSTL. CAMPUS REV. WEEKLY, Jan. 28-Feb. 3, 1993, at 2.

196. UNIV. OF QUEENSL., REPORT OF DECISIONS OF DISCIPLINARY BOARDS ON CHARGES OF MISCONDUCT UNDER STATUTE 13 (on file with author).

197. MINUTES OF THE SENATE OF THE UNIV. OF QUEENSL., Aug. 1, 1985; Sept. 11, 1986; Mar. 2, 1987; Feb. 29, 1988; Feb. 27, 1989; Feb. 5, 1990; Mar. 21, 1991; Mar. 19, 1992; Feb. 25, 1993; Feb. 24, 1994; and Feb. 23, 1995. The yearly breakdown: 1985: 15; 1986: 7; 1987: 22; 1988: 19; 1989: 9; 1990: 10; 1991: 7; 1992: 22; 1993: 4; 1994: 9. *Id.*

Of the 124 matters so reported, 36 involved fraudulent use of parking stickers and related matters; 26 involved vandalism; 11 involved cheating, plagiarism or related matters; 10 involved theft or fraud (other than with regard to parking stickers); 5 involved mischief of one kind or another, for example throwing chalk in a lecture hall or climbing on a construction site; 4 involved assault; 3 involved alcohol and another 29 involved miscellaneous items such as wearing inadequate footwear in a designated safety area. *Id.* (For the purposes of this listing, the few matters involving two separate categories were put into the one most descriptive of the event; for example, one matter involving both assault and alcohol appears in the assault category).

198. At the University of Michigan, from January 1, 1993, to April 1, 1995, a total of 434 "contacts and inquiries" were reviewed by the Judicial Advisor. No action was undertaken regarding 134 of these. In 97, the complaint was referred to other University units; in 16, after consultation with the Judicial Advisor, the complainant decided not to file a complaint; in 59, a "substance abuse warning letter" was sent; and, in 128, the Office of the Judicial Advisor formally investigated. The 203 allegations of misconduct involved in these 128 cases included 31 allegations of "harassment"; 29 of "unauthorized taking or possessing of property/services"; and 27 of "physical assault, battery or endangerment."

Ultimately, 150 violations were charged (46 alleged violations were dropped during the investigation and seven remained under investigation). Of the 150 violations charged, 75 yielded a finding of "responsible"; 28 yielded a finding of "not responsible"; and 26 were mediated (21 charged violations were yet unresolved). UNIV. OF MICH., SUMMARY OF JUDICIAL ACTIVITY: STATEMENT OF STUDENT RIGHTS AND RESPONSIBILITIES (Jan. 1, 1993, to Apr. 1, 1995).

At the University of Indiana, there were, during the 1994-95 academic year, 3183 violations of the Code of Student Ethics. There were 2497 cases of personal

The University of Sydney, an institution with some 30,000 students, processes only about thirty to forty disciplinary cases per year. Of these, only one or two go to the Proctorial Board; the Registrar handles the rest.<sup>199</sup> Griffith University, with a student population of about 20,000, brings only about eight cases before its Student Good Order Committee each year.<sup>200</sup> Obviously, the fewer the cases the university addresses, the fewer the adverse decisions rendered and, ultimately, the still fewer lawsuits filed to challenge those adverse results.

Even when a university does take adverse action against a student, the severity of that action must play a role in the likelihood of any further challenge of that action. A look at sanctions imposed at the University of Queensland reveals some willingness to take serious action against a few students. Especially in light of the relatively small number of cases pursued, however, one gets the impression of relative leniency.

In the ten-year period between 1985 and 1994, thirty-three cases came before disciplinary boards at the University. Of these cases, presumably the most serious at the University, about ninety-five percent involved cheating.<sup>201</sup> Three of the fourteen cases resulted in expulsion from the university. In eleven other cases, the student was suspended from the University for a period of at least one

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misconduct processed through the campus judicial system. These cases represented 3183 alleged violations of the Code of Student Ethics (some cases involved more than one such violation—for example disorderly conduct and assault). (There were 2022 alleged "Residence Hall Handbook Violations"). Sixty of these 2497 cases ended up before a Hearing Commission (all others reached final resolution in other fora).

Of the 3183 violations, the greatest number, 1107, involved "alcohol." In second place, with 393 violations: "actions which endanger." In third place, with 357 violations: "failure to comply."

Interestingly, there were no reported cases of racial or sexual harassment. There were 144 cases of "dishonest conduct"; 46 cases of physical abuse; 131 cases of "unauthorized possession of drugs"; and 208 "violations of any Indiana/Federal Criminal Law." IND. UNIV., 1994-95 COMPARATIVE REPORT OF PERSONAL MISCONDUCT BY ACADEMIC YEAR.

During the 1994-95 academic year, Indiana University processed 68 cases of academic misconduct, reflecting 83 instances of cheating (43), plagiarism (24) and other academic dishonesty (16). IND. UNIV., 1994-95 COMPARATIVE REPORT ON ACADEMIC MISCONDUCT BY ACADEMIC YEAR.

199. Telephone interview with David Bowan, *supra* note 102.

200. There were 6 cases in 1995, 8 in 1994, and 10 in 1993. Letter from Margaret Stringer, Secretary, Student Good Order Committee, Griffith University, to author (July 20, 1995) (on file with author). She did state, however, that this number has risen from one or two cases annually just a few years ago. At Griffith, cheating and plagiarism tend to be handled not by the Good Order Committee, but by the faculty involved. Telephone interview with Marguerite Stringer, Secretary, Student Good Order Committee, Griffith University (July 18, 1995).

201. Interview with Linda Bird, Academic Administration, Univ. of Queensland, at St. Lucia, Queensland (July 25, 1995).

semester. (One suspension was lifted on appeal).<sup>202</sup> In three cases, the student received only a fine (\$50). Another student received a fine and a letter from the University Senate emphasizing the seriousness of the offense. Another offense was met with only a notation on the student's academic record. Often, cheating was punished by a refusal of credit for the assignment or subject(s) involved (and sometimes for other subjects as well). Many cases earned a combination of the various sanctions.<sup>203</sup>

Predictably, in cases not brought to a disciplinary board students fared much better, even though some of the violations reflected considerable seriousness. Over a ten-year period (1985 through 1994), eleven incidents of cheating or related conduct brought only fines, one for \$100, three for \$50, and seven for \$20; ten incidents of theft or false pretenses brought three fines of \$50 and seven of \$20.<sup>204</sup> Judicial or other challenges will not likely follow in the wake of such lenient treatment.<sup>205</sup>

## 2. Students' Ample Access to Information and Extra-Judicial Redress

Students who feel fairly treated will less likely sue. In Australia, students might feel so treated in part because they have access to specific information relating to their treatment. Access to information might not only provide an explanation that the student finds acceptable, but also reassure the student that the decision-maker at least remains accountable.

202. UNIV. OF QUEENSL., CONSIDERATION OF APPEALS AGAINST DECISIONS OF THE DISCIPLINARY BOARDS BY DISCIPLINARY APPEALS COMMITTEE (on file with author). The suspension was replaced with a fine of \$100. (The student was denied credit for the subject).

203. UNIV. OF QUEENSL., REPORT OF DECISIONS OF DISCIPLINARY BOARDS ON CHARGES OF MISCONDUCT UNDER STATUTE 13 (on file with author). The results in two of the cases are unknown. *Id.*

204. MINUTES OF THE SENATE OF THE UNIV. OF QUEENSL., Aug. 1, 1985; Sept. 11, 1986; Mar. 2, 1987; Feb. 29, 1988; Feb. 27, 1989; Feb. 5, 1990; Mar. 21, 1991; Mar. 19, 1992; Feb. 25, 1993; Feb. 24, 1994; and Feb. 23, 1995.

205. At the University of Michigan, sanctions imposed in 89 cases, by either a student panel hearing or an administrative hearing officer, included 28 "community services"; 27 "restitution"; 14 "class attendance"; 3 "suspension from the University"; and 2 "expulsion" (one of which was reduced, on appeal, to "suspension"). UNIV. OF MICH., SUMMARY OF JUDICIAL ACTIVITY: STATEMENT OF STUDENT RIGHTS AND RESPONSIBILITIES (Jan. 1, 1993, to Apr. 1, 1995).

At Indiana University, where all 2497 cases were processed through the campus judicial system, the disposition included 527 "not responsible"; 46 "administrative error dismissal"; 717 "reprimand and warning"; 757 "disciplinary probation"; 108 "restitution"; 4 "expulsion from University housing"; 24 "suspension from the University"; and 2 "expulsion from the University." IND. UNIV., 1994-95 COMPARATIVE REPORT ON PERSONAL MISCONDUCT BY ACADEMIC YEAR.

With regard to academic decisions, students at the University of Queensland, for example, are permitted access to such information. Students have the right to see examination marks and scripts.<sup>206</sup> The policy of the University of Queensland cites the students' right "to have access to their individual examination marks, to know on what basis they [were] evaluated (including the application of non-numerical judgments), and to be able to challenge, in the appropriate fora, what they [consider] to be an incorrect assessment."<sup>207</sup> Accordingly, students may request "more detail" regarding their performance and, indeed, even a written statement; examiners "should comply" with such requests.<sup>208</sup> Students have access to the distribution of grades and a variety of other details attending the grading of examinations.<sup>209</sup> More broadly, Queensland's Judicial Review Act of 1991 requires decision-makers, upon request, to provide a written statement of their reasons for administrative decisions.<sup>210</sup>

Students might also gain satisfaction through the wide avenue of redress that Australian universities themselves provide. The availability of redress may satisfy even if the challenged decision ultimately stands; after all, an aggrieved may be at least as interested in being heard as in securing a change of result.

Decisions both academic and disciplinary, as indicated earlier,<sup>211</sup> evoke ample accommodation, several tiers of review and back-up systems aplenty: waivers, variances, special examinations, supplementary examinations, special consideration, readmissions, appeals—often involving a whole new hearing or even the governing board itself—and so forth. Networks of rights often attend these processes.

The procedure for grade challenges at the University of Wollongong illustrates this point vividly. Students there who are unhappy with a grade for a subject may seek redress from, *seriatim*, the lecturer, the head of the unit, the dean of the faculty, the Dean of Students and, ultimately, the Academic Review Committee.<sup>212</sup> At the University of Technology, Sydney, a simple allegation of cheating may involve a "Monitoring Staff Member," an "Examination Supervisor," the "Officer-in-Charge—Examinations Section," the "Coordinating Examiner," an "Academic Conduct Committee," the Vice-Chancellor and—finally—the governing board itself.<sup>213</sup>

206. An exception is made for examination questions that will be used again. *Examinations*, 1995 UNIV. OF QUEENSL. CALENDAR 13.

207. *Id.*

208. *Id.*

209. *Id.*

210. Judicial Review Act of 1991 (Queensl.) §§ 32(1) and 33(1).

211. *See* text accompanying notes 126-169.

212. *Amendments to Academic Records, Reassessment of Grades*, § 3, UNIV. OF WOLLONGONG, CALENDAR—UNDERGRADUATE 1994, at 37.

213. *Rules of the University Relating to Students*, §§ 2.23 to 2.24.9, UNIV. OF TECH., SYDNEY, CALENDAR 1995, at 224-25. At the same University, one who fails a subject for the second time is warned that a third failure will yield exclusion. Of course, such an exclusion can be appealed—first to the Dean and then to the Academic

Of course, formal appeals may be unnecessary in most cases. The University of South Australia undergirds its academic processes with a written policy encouraging the settlement of disputes without resort to appeal, thus inclining decision-makers to conciliate.<sup>214</sup> The University of Melbourne has few formal appeals from academic decisions—students “tend to work things out internally.”<sup>215</sup> At the University of Queensland, disciplinary matters tend to resolve themselves informally and lenient sanctions make appeals much less likely.<sup>216</sup> In fact, only one appeal from decisions of the Student Disciplinary Board at Queensland has occurred over the last ten years,<sup>217</sup> and that appeal was largely successful.<sup>218</sup> Exclusion, the penalty most likely to be challenged in court, is rarely invoked there.<sup>219</sup> At the University of Sydney, only one or two disciplinary cases reach the Proctorial Board annually; in the others, students “plead guilty,” leaving only the severity of the sanction as possible grounds for

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Board. Even if exclusion ensues, the student may petition for readmission and appeal any denial. *Id.* at §§ 3.1.15.2 through 3.1.20.

214. See *Student Appeals Against Academic Review Decisions*, § 1, UNIV. OF S. AUSTL. 1993 CALENDAR, Vol. 1, at 19; and *Student Appeals Against Final Grades*, § 2, *id.* at 19.

215. Interview with Kevin Sharman, *supra* note 115.

216. Interview with Carolyn Sappideen, *supra* note 187. For more on leniency, see text accompanying notes 201-204.

217. Interview with Linda Bird, *supra* note 201. Ms. Bird believes that students do not appeal because “they’re glad to get it over with.” *Id.*

218. Although the student was fined \$100 and denied credit for the subject, a suspension was lifted. University of Queensland, *Consideration of Appeals Against Decisions of the Disciplinary Boards by Disciplinary Appeals Committee* (on file with author).

Disciplinary appeals in American universities may also be well received. At the University of Michigan, the Appeals Board reviewed two cases in a fifteen-month period. Although in one case it upheld a sanction of suspension from the University, in the other it reduced a sanction of expulsion to one of suspension. UNIV. OF MICH., SUMMARY OF JUDICIAL ACTIVITY: STATEMENT OF STUDENT RIGHTS AND RESPONSIBILITIES (Jan. 1, 1993, to Apr. 1, 1995). At Indiana University, during the 1994-95 academic year, 60 of the 2497 cases processed through the campus judicial system were ultimately reviewed by a hearing commission. In 38 of those cases, the hearing commission reversed the original decision or imposed a weaker sanction. (It upheld the original decision in 10 of the cases and imposed stronger sanctions in the remaining 12). Six cases were ultimately reviewed by a Review Board. In all six cases, the original finding of responsibility was upheld, but in two the sanction was lessened. IND. UNIV., 1994-95 COMPARATIVE REPORT ON PERSONAL MISCONDUCT BY ACADEMIC YEAR.

In light of the large number of cases processed, however, these figures reflect a relatively low reversal rate.

219. Interview with Stafford Hiller, *supra* note 176. For more on sanctions at the University of Queensland, see text accompanying notes 201-04.

appeal.<sup>220</sup> A similar phenomenon prevails at the Australian National University.<sup>221</sup>

Australia's "legal policy to discourage unnecessary litigation" makes it desirable that "disciplinary questions within public . . . organizations be resolved, if possible, without resort to public courts of law."<sup>222</sup> The intricate network of informal and formal methods of adjudicating complaints within Australian universities reflects, at least in part, this policy.

Australian universities appear quite responsive to students' pursuit of accommodation or redress. At the University of Queensland, the activities of the Senate's Appeals Committee, which oversees academic decisions, are instructive. During the ten-year period from 1985 through 1994, that Committee heard a total of 628 appeals brought by students, actual or prospective. These appeals complained of, among other things, deans' decisions, refusals of enrollment, exam results, refusal of special consideration regarding an examination or rejection of an application to withdraw from a subject without penalty. Of these 628 appeals, 48% were successful, including an astounding 54% of the 127 challenges to deans' decisions.<sup>223</sup> Of the fourteen requests for special consideration, ten (or 71%) were upheld.<sup>224</sup>

For first-semester (1995) examinations at the Australian National University, 287 applications for special examinations were approved, with only twenty-one such applications denied.<sup>225</sup> At the University of Sydney, it is estimated that about 50% of appeals in academic cases succeed.<sup>226</sup> At the Australian National University, up to 40% of students' appeals succeed.<sup>227</sup>

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220. Telephone interview with David Bowan, *supra* note 102.

221. Interview with Selwyn Cornish, *supra* note 115.

222. J.R.S. FORBES, *supra* note 67, at 1.

223. One wonders whether this state of affairs reflects a dramatically different view of the role of dean. In twenty-five years at the University of Notre Dame, for example, the author remembers no overturning of any decision of the Dean of the Law School relating to the academic or disciplinary treatment of a student. It may be the case that the dean of a department in an Australian university functions as just one layer, although an important one, of the many layers of governmental administration. In American universities, deans, while not beyond control from above, operate much more autonomously and would likely deeply resent the rate of reversal seen at the University of Queensland.

224. MINUTES OF THE SENATE OF THE UNIV. OF QUEENSL., *passim*.

225. Memo, *First Semester Examinations 1995: Summary of Special Considerations, Special Examinations and Special Examination Arrangements*, from Mary McCullagh, Assistant Registrar (Student Administration), The Australian National University, p.1 (Aug. 1, 1995)(on file with author). The results of applications with regard to 38 other examinations are unknown. *Id.* In addition, "special examination arrangements" were made for 85 students with regard to 161 examinations. *Id.* at 4.

226. Interview with David Bowan, *supra* note 102.

227. Interview with Selwyn Cornish, *supra* note 115.

Within the university system, the attention paid to student views may well soften student attitudes towards institutional authority. In Australian universities, vice-chancellors apparently look upon students as a "political constituency" whose favor must be sought.<sup>228</sup> Students, furthermore, find solid representation on university committees. The University of Queensland boasts at least three students on its governing board.<sup>229</sup> Students there also serve on the Senate Appeals Committee, the Disciplinary Board, and the Discipline Appeals Committee, among others.<sup>230</sup> At the University of Technology, Sydney, the Academic Board, the leading academic organization on campus, counts twelve students among its approximately eighty members.<sup>231</sup> Importantly, students are represented on that Board's Appeals Committee and on several other committees, as well.<sup>232</sup> At La Trobe University, students sit on most committees, including the Council, the Schools' Board of Studies, the Academic Board, and over sixty others.<sup>233</sup> Such representation goes far towards promoting among students a feeling of fairness, if not toward the ultimate result, at least toward the process.

Other devices lend further support to this atmosphere of accommodation. The University of Technology, Sydney, provides a Student Ombudsman to deal with students' complaints against the University.<sup>234</sup> At the University of Melbourne, the student union employs a full-time Student Liaison Officer. The Officer, serving "more as mediator than ombudsman," helps steer the student through the administrative process if, for example, the student is unhappy with an academic assessment.<sup>235</sup> For graduate students, the Australian National University deploys a Grievance Resolution Panel, which includes a student, "to facilitate the workable resolution of [certain] grievances in a manner which is fair and equitable to all parties . . . ."<sup>236</sup> A university's student union may employ lawyers to help students with legal problems on and off campus; at the University of Queensland, Students' Legal Service makes available two solicitors.

The office of Visitor,<sup>237</sup> where not merely ceremonial, provides the opportunity for relatively informal resolution of students' concerns. As recently as 1986, the Tasmania Supreme Court stated that within the university community the Visitor generally provides the proper remedy for grievances,

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228. Ward and Smith, *supra* note 25, at 65.

229. *See* text at notes 31-32.

230. *See* text at notes 141, 156, and 167.

231. UNIV. OF TECH., SYDNEY, CALENDAR 1995, at 34.

232. *Id.*

233. LA TROBE UNIV., INFORMATION FOR STUDENTS, Vol. 3, at 8 (1991). It has been said that universities met criticism of disciplinary tribunals' secrecy by placing students on such panels. Forbes, *supra* note 38, at 87.

234. UNIV. OF TECH., SYDNEY, 1991 CALENDAR 33. Created in 1989 as a one-year experiment, the office has been continued. *Id.*

235. Interview with Kevin Sharman, *supra* note 115.

236. Grievance Procedures for Graduate Students, §§ 8 & 10, THE AUSTRALIAN NAT'L UNIV., THE GRADUATE SCHOOL HANDBOOK (Part B 1995).

237. *See* text accompanying notes 60-114.

whether they relate to fact, fairness, or discretion, and even if they involve some questions of law.<sup>238</sup> Nonetheless, the Visitor's jurisdiction seems to receive relatively little exercise in Australia. In 1981, Robert J. Sadler, noting only five such instances, observed that refusals of jurisdiction on the part of the Visitor were more common.<sup>239</sup> Visitors have been involved in cases since then, of course,<sup>240</sup> and perhaps more frequently.<sup>241</sup> Over the years, Visitors have ordered reinstatement, removal from office, examination of a candidate's thesis and committee consideration of a supervisor's report on a candidate,<sup>242</sup> and have even awarded compensation<sup>243</sup> and costs.<sup>244</sup>

Still, the paper record may not reflect the total impact of university Visitors. Although Australian Visitors have tended to issue full explanations of their decisions, nothing requires them to do so.<sup>245</sup> Thus, many invocations of Visitors' authority, and even informal intercessions by them, may have occurred but remain beyond our ability to tally. In any event, their mere availability amplifies an already obliging system.<sup>246</sup>

Even outside the university structure, avenues of recourse continue. Australian students have access to an ombudsman, sometimes called a parliamentary commissioner, statutorily provided by the state or territory in which the university operates.<sup>247</sup> Queensland's statute, remarkably similar to the

238. *M. v. The Univ. of Tas.*, [1986] T.R. 74, 82-83.

239. Sadler, *supra* note 61, at 8.

240. *See, e.g.*, *Re La Trobe Univ.*; *ex parte Hazan*, [1993] 1 V.R. 7 (Visitor), appeal refused, *Hazan v. La Trobe Univ.* [No. 2], [1993] 1 V.R. 568 (Vict. S. Ct.); *Bayley-Jones v. University of Newcastle*, [1990] 22 N.S.W.L.R. 424 (N.S.W. S. Ct.) (appeal from Visitor's determination); *Re Macquarie Univ.*; *Ex Parte Ong*, [1989] N.S.W.L.R. 113 (Visitor); *Re La Trobe Univ.*; *ex parte Wild*, [1987] V.R. 447 (Visitor).

241. Interview with Roger Byrom, *supra* note 115.

242. Robinson, *supra* note 68, at 107.

243. *See Bayley-Jones*, [1990] 22 N.S.W.L.R. 424. In *Bayley-Jones*, the court confirmed the power of the Visitor to award damages, faulting the Visitor for not awarding sufficient damages in this case. *Id.* at 430.

244. *Re Macquarie Univ.*; *ex parte Ong*, [1989] N.S.W.L.R. at 141-42.

245. Sadler, *supra* note 61, at 27-28.

246. Some do not consider the Visitor, so often listed within the university hierarchy, part of the institution. The Associate Registrar at the University of Melbourne treats a student's mere mention of possible recourse to the Visitor like a threat to sue—negotiations end. "If the student doesn't want the community to deal with the problem, then why cooperate?" Interview with Kevin Sharman, *supra* note 115.

247. *See Ombudsman Act 1974* (N.S.W.); *Ombudsman Act 1972* (S.A.); *Ombudsman Act 1973* (Vict.); *Parliamentary Commissioner Act 1974* (Queensl.); *Parliamentary Commissioner Act 1971* (W.A.); *Ombudsman Act 1976* (Cmwlth); and *Ombudsman Act 1980* (N.T.).

others, creates a Parliamentary Commissioner for Administrative Investigations, appointed by the Governor for a term not to exceed five years.<sup>248</sup>

The Commissioner implements an Act that applies to all Queensland agencies and their officers.<sup>249</sup> Although the Act prohibits the Commissioner from investigating administrative decisions that the aggrieved could challenge in certain other venues, broad exceptions apply.<sup>250</sup> Investigating upon a complaint or *sua sponte*,<sup>251</sup> the Commissioner notifies the principal officer of the agency involved.<sup>252</sup> The Commissioner has the power to compel evidence.<sup>253</sup> If the Commissioner concludes that the administrative action was wrong and a) that the matter should be referred, rectified, mitigated or reconsidered; b) that reasons should be given for the action; or c) that any other steps should be taken, the Commissioner so reports to the principal officer, sending a copy to the

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248. Parliamentary Commissioner Act 1974 (Queensl.) § 5(1),(2), and (3). The Commissioner may be reappointed, *id.* § 5(6), unlike the Ombudsman in Victoria, whose ten-year term cannot be renewed. Ombudsman Act 1973 (Vict.) § 3(4). For appointment provisions in other jurisdictions, see Ombudsman Act (N.S.W.) § 6; Ombudsman Act 1972 (S.A.) §§ 6(1) and 10(1); Ombudsman Act 1973 (Vict.) § 3(2) and (4); Parliamentary Commissioner Act 1971 (W.A.) § 5(2) and (3); and Ombudsman Act 1976 (Cmwlth) §§ 21(1) and 22(1).

Queensland's Commissioner must approve any reduction in salary during the appointed term, but may not accept any other remuneration without the permission of the Premier. Parliamentary Commissioner Act 1974 (Queensl.) §§ 5(7) and 7(2). For remuneration provisions in other jurisdictions, see Ombudsman Act 1972 (S.A.) § 27; Ombudsman Act 1973 (Vict.) § 12; and Parliamentary Commissioner Act 1971 (W.A.) § 5(5) and (9).

249. Parliamentary Commissioner Act 1974 (Queensl.) § 12(1).

250. *Id.* § 13(3) and (4). Even when the specified recourse exists, the prohibition does not apply when the aggrieved could not reasonably have been expected to use that recourse or an investigation is needed to avoid injustice. *Id.* § 13(4). For similar provisions, see, e.g., Ombudsman Act 1974 (N.S.W.) § 13(5); Ombudsman Act 1972 (S.A.) § 13(3); Parliamentary Commissioner Act 1971 (W.A.) § 14(4) and (5); and Ombudsman Act 1976 (Cmwlth) § 6(2) and (3).

251. Parliamentary Commissioner Act 1974 (Queensl.) § 15(1). Absent unusual circumstances, a complaint must be brought within one year of the challenged action. *Id.* § 16(5). Moreover, the Commissioner may refuse to investigate if the matter is trivial, the complaint is frivolous, vexatious, or not made in good faith, or an investigation is otherwise unnecessary or unjustifiable. *Id.* § 17(1).

For similar provisions, see, e.g., Ombudsman Act 1972 (S.A.) § 13(2); Ombudsman Act (Vic.) §§ 13A.(2), 14(1) and 15(b); Parliamentary Commissioner Act 1971 (W.A.) §§ 16(1) & (5), and 18(1); and Ombudsman Act 1976 (Cmwlth) §§ 5(1)(b) and 6(1)(a) and (b).

252. Parliamentary Commissioner Act (Queensl.) § 18(1).

253. *Id.* at § 19(1). For similar provisions, see Ombudsman Act 1974 (N.S.W.) §§ 18(1) and 19; Parliamentary Commissioner Act 1971 (W.A.) § 20(1); Ombudsman Act 1976 (Cmwlth) § 9.

responsible governmental Minister.<sup>254</sup> If appropriate measures are not taken within a reasonable time, the Commissioner sends a copy of the report to the Premier and perhaps to the Legislative Assembly. The Commissioner notifies any complainant of the results of the investigation.<sup>255</sup>

Although lacking the power directly to overturn an administrative decision, the Commissioner, through the investigative and reporting functions, wields immense influence. So do the ombudsmen and parliamentary commissioners in other jurisdictions. Students at the Australian National University apparently consult the Commonwealth Ombudsman, located but a few blocks from the University, relatively often.<sup>256</sup> Students at other universities also have recourse to such officials.<sup>257</sup>

### 3. Other Factors

Other factors in the Australian legal system contribute to the relative rarity of recourse to litigation by individual students. Unlike the United States Constitution, Australia's Constitution has no Bill of Rights and no Due Process Clause; neither do the constitutions of the individual states.<sup>258</sup> Moreover, the

254. Parliamentary Commissioner Act (Queensl.) § 24(1),(2) and (3). For similar provisions, see Ombudsman Act (N.S.W.) § 27; Ombudsman Act 1972 (S.A.) § 25(2)-(4); Ombudsman Act 1973 (Vic.) § 23(2) and (3); Parliamentary Commissioner Act 1971 (W.A.) § 25; and Ombudsman Act 1976 (Cmwlth) §§ 12(3), 12(5) and 15.

255. Parliamentary Commissioner Act (Queensl.) §§ 24(5), (6), and 25. For similar provisions, see Ombudsman Act (N.S.W.) § 27(1); Ombudsman Act 1972 (S.A.) § 25(5) and (6); Ombudsman Act 1973 (Vic.) §§ 23(5), (6), and 24(1); Parliamentary Commissioner Act 1971 (W.A.) §§ 25(5), (6), and 26; and Ombudsman Act 1976 (Cmwlth) §§ 12(5)(a), 15(1),(2), (3), 16(1) and 17.

256. Interview with Selwyn Cornish, *supra* note 115. Since the Australian National University is federally administered and financed, officials there are responsive to the Ombudsman. *Id.*

257. Interview with Roger Byrom, *supra* note 115. At the University of Melbourne, the State Ombudsman has been used for admissions cases, but not significantly for other academic or for disciplinary matters. Interview with Kevin Sharman, *supra* note 115.

Students at the University of Sydney have used the New South Wales Ombudsman, and University officials have responded. Nonetheless, the University apparently takes the position that the Ombudsman lacks jurisdiction over the disciplinary results at the University because it constitutes a "tribunal" that statutorily preempts the Ombudsman's investigation. Interview with David Bowan, *supra* note 102. See Ombudsman Act 1974 (N.S.W.) § 13(5) and text accompanying note 250.

For an account of one ombudsman's investigation of the award of a grade at Macquarie University Law School, see G. Warburton, *Taking Student Rights Seriously: Rights of Inspection and Challenge*, 8 U. N.S.W. L.J. 362, 376 (1985).

258. P.H. LANE, AN INTRODUCTION TO THE AUSTRALIAN CONSTITUTIONS 225 (1994). See also JAMES CRAWFORD, AUSTRALIAN COURTS OF LAW 197 (3d ed. 1993).

Australian Constitution's express guarantees of civil liberties have not traveled much beyond the commercial area.<sup>259</sup> To be sure, Australia's concept of "natural justice," taken from the common law, conveys a concept very similar to due process.<sup>260</sup> That concept, "at heart a matter of morality and policy,"<sup>261</sup> requires basic fairness.<sup>262</sup> Like due process, natural justice is not a rigid concept; "what natural justice . . . requires depends upon the circumstances and the nature of the case . . ." <sup>263</sup> With regard to a tribunal's decision, natural justice generally calls for a neutral decision-maker, an opportunity to be heard and reasonable notice of the reasons for the decision.<sup>264</sup> Reminiscent of American due-process doctrine, whether procedural protections evoked by natural justice apply might depend on whether the claimant had a "legitimate expectation" that is, a vested right—not a mere expectancy—in something.<sup>265</sup> Courts in Australia have recognized that university actions might be judicially challenged as violative of natural justice.<sup>266</sup> Just as with due process in the United States, the procedural dictates of natural justice will more likely apply to disciplinary decisions than to academic ones.<sup>267</sup> One striking contrast between natural justice and American due process: Under the U.S. Constitution due process trumps legislation; in Australia, legislation

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259. CRAWFORD, *supra* note 258, at 197.

260. *Id.* at 304; Ex Parte Forster; Re Univ. of Sydney, [1964] N.S.W.L.R. 1000, 1007 (N.S.W. S. Ct.). Bad faith or improper motivation bespeaks a lack of natural justice. *Id.* As early as 1970, Professor J.R.S. Forbes called natural justice a "concept potentially no less 'open-ended' than 'due process'" and noted the "likelihood of natural justice expanding to resemble American 'due process.'" Forbes, *supra* note 38, at 90. In Re La Trobe Univ.; Ex Parte Hazan, [1993] V.R. 7 (Visitor), the Visitor's opinion specifically refers to due process, as well as to natural justice and procedural fairness. *Id.* at 8, 12-13. Queensland's Judicial Review Act lists, as a grounds for application, a breach of the rules of "natural justice." Judicial Review Act of 1991 (Queensl.) § 20(2).

261. Forbes, *supra* note 38, at 99.

262. Brell v. Wilmot, [1988] 17 A.L.D. 462, 467-68 (Fed. Ct. of Austl.).

263. Re Macquarie Univ.; Ex Parte Ong, [1989] N.S.W.L.R. 113, 131, 139 (Visitor).

264. CRAWFORD, *supra* note 258, at 304.

265. Douglas v. Allen, [1984] F.C.R. 287, 296 (Fed. Ct. of Austl.). Compare, e.g., Board of Regents v. Roth, 408 U.S. 564 (1972).

266. See M. v. University of Tas., [1986] T.R. 74, 80 (Tas. S. Ct.). In Univ. of Melbourne; ex parte McGurk, the Visitor assumed that the petitioners, students challenging the governing board's resolution relating to the student union, were entitled to "natural justice." [1987] V.R. 586, 593. The Visitor to Macquarie University noted that a university decision contrary to natural justice is void. Re Macquarie Univ.; Ex Parte Ong, [1989] N.S.W.L.R. at 118 (reviewing the removal of a head of department). Courts might respond to a denial of natural justice on the part of the university Visitor, as well. See Hazan v. La Trobe Univ. [No.2], [1993] 1 V.R. 568, 572 (Vict. S. Ct.); Sadler, *supra* note 61, at 23.

267. Forbes, *supra* note 38, at 94. For an assessment of the procedural protections "natural justice" calls for in disciplinary hearings, see *id.*

can specify that natural justice will not apply.<sup>268</sup> In short, American judicial decisions in the educational area not only implicate constitutional doctrines unknown to Australian law, but also "evinced a judicial breadth of reference not to be found in [Australian] courts."<sup>269</sup>

Moreover, Australian students may not be well informed of whatever rights they do have. Although, for example, disciplinary rules constitute a contract among university members,<sup>270</sup> the notion of suing on contract has not played an important role among Australian students; since virtually all public education comes from the government, students do not sense much of a contractual relationship between them and the university. As fees increase, however, this attitude could change.<sup>271</sup> An increased judicial sense that social norms and economic realities have made university membership more of a right than a privilege would undoubtedly fuel that change.<sup>272</sup> The very increase in the number of rules surrounding university tribunals escalates the likelihood of judicial intervention.<sup>273</sup> In any event, there remains in Australia this "tension between the American 'bill of rights' philosophy and the more modest English view of the limits of judicial control."<sup>274</sup>

Still other devices make litigation in Australia more problematic. For all practical purposes, the class action, for example, is virtually useless.<sup>275</sup> Moreover, contingent fees, which might afford better access to Australian courts, are not permitted.<sup>276</sup> Although lack of the class action probably inhibits little student litigation, the absence of the contingent fee undoubtedly does deter such litigation.

Everyone agrees that the system for assessing costs in Australian courts strongly restrains litigation.<sup>277</sup> In Australia, courts have discretion regarding the award of costs, but their settled practice calls for indemnification of the winner's costs by the loser: "[C]osts follow the event."<sup>278</sup> Accordingly, even if one

268. *Brell v. Wilmot*, [1988] 17 A.L.D. 462, 467-68 (Fed. Ct. of Austl.); *Robinson*, *supra* note 68, at 109 n.52.

269. *Forbes*, *supra* note 38, at 105.

270. *Id.* at 100.

271. Interview with Kevin Sharman, *supra* note 115. See *Class Action Threatened Over Security After Series of Sydney Student Rapes*, *supra* note 195, at 2.

272. *Forbes*, *supra* note 38, at 104.

273. *Forbes*, *supra* note 38, at 108.

274. *Forbes*, *supra* note 38, at 108.

275. BERNARD C. CAIRNS, *AUSTRALIAN CIVIL PROCEDURE* 267 (3d ed. 1992).

276. DAVID WEISBROT, *AUSTRALIAN LAWYERS* 222 (1990). In Australia, such fees are not only unethical, but may constitute "champerty and maintenance" and a civil wrong. *Id.* at 221.

277. *E.g.*, interview with Roger Byrom, *supra* note 115; interview with Stafford Hiller, *supra* note 176; telephone interview with Teck Ong, *supra* note 176.

278. CAIRNS, *supra* note 275, at 490. See, *e.g.*, *Sweeney v. University of Sydney*, [1992] 27 A.L.D. 214, 220 (N.S.W. S. Ct.)

maintains the action *pro se*, the legal costs of the other side—who has hired counsel—loom large.<sup>279</sup> The solicitor-barrister system prevailing, formally or informally, in much of Australia exacerbates the matter.<sup>280</sup> Indeed, under the “two-counsel” rule, Queen’s Counsel (who make up about ten percent of the bar) almost always serve as barrister with “junior counsel” (who make up the rest). Consequently, three counselors—solicitor, Queen’s Counsel and junior—may

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The court must make an individualized ruling; the winner has no automatic right to costs. CAIRNS, *supra* note 275, at 491, 493. A court might decline to award costs if the plaintiff could have sued in a lower court, made an unreasonable claim or rejected a reasonable offer of settlement, or if the defendant was prepared to concede the relief sought. *Id.* at 492-93.

The harshness of the rule, at least in the context of student suits, has been recognized. In *Ex Parte Forster: Re Univ. of Sydney*, the court awarded costs against the losing student, but, given the nature of the case, urged the University to consider forbearance from enforcing them. [1964] N.S.W.R. 1000, 1010 (N.S.W. S. Ct.).

Of course, the University might be called upon to pay the costs of the prevailing student. See *Bayley-Jones v. University of Newcastle*, [1990] 22 N.S.W.L.R. 424, 438 (N.S.W. S. Ct.). In *McLean v. James Cook Univ. of N. Queensl.*, [1994] 1 Q.R. 399, 401 (Queensl. S. Ct.), the court declined to order costs to the prevailing student merely on the basis of the university’s unfortunate administrative error.

Under Queensland’s Judicial Review Act of 1991, “party and party” costs are available, but only from, not to, the decision-maker. Judicial Review Act of 1991 (Queensl.) § 49(1).

In the United States, the court will normally award to the prevailing party “costs” that include fees “paid to the court or one of its officers for particular charges that typically are delineated by statute.” CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, 10 FEDERAL PRACTICE AND PROCEDURE 173 (1983). These will usually include docket fees, clerk’s and marshal’s charges, and witness fees. Unless a special statute so provides, however, see, e.g., 42 U.S.C. § 1988(b) (West 1994), or an “exceptional exercise of judicial discretion” occurs, attorney’s fees, travel expenses and investigatory expenses are borne by the litigants. WRIGHT, MILLER & KANE, *supra*, at 173-74.

279. Of course, even the winner will not have all costs of litigation reimbursed. CRAWFORD, *supra* note 258, at 70. The winner’s “party and party” costs are reimbursed by the loser, but “solicitor and client” costs normally are borne by the party in question, no matter who prevails. *Id.* at 83 n.76. For more on this distinction, see CAIRNS, *supra* note 275, at 494.

280. New South Wales and Queensland have a system formally divided into solicitors and barristers. In Victoria, lawyers are fused by law but divided in practice. In other states and territories, a lawyer serves as a composite barrister and solicitor. Even in these jurisdictions, however, a small percentage act just as a barrister would while others refer to themselves as solicitors, thus indicating “no advocacy work.” WEISBROT, *supra* note 276, at 273.

While the split profession was promoted on the bases of efficiency and quality, *id.* at 175, 273, “[l]awyers themselves think it probable that division is inherently more expensive.” J.R.S. FORBES, *THE DIVIDED LEGAL PROFESSION IN AUSTRALIA: HISTORY, RATIONALIZATION AND RATIONALE* 256 (1979).

well appear on the payroll of the opposing party (and perhaps on one's own).<sup>281</sup> In short, Australians, and especially middle-income earners—who are not eligible for legal aid—often can ill afford to bring suit.<sup>282</sup>

Whatever the other inhibitions to litigation, potential plaintiffs must recognize the likelihood that courts (and others) will defer to the decisions of university officials, just as, especially in academic cases, they have done in the United States.<sup>283</sup> As one commentator recently stated, “[S]cholarly decisions[,] where made bona fide[,] are still free from attack whether in the courts or in the forum of the visitor.”<sup>284</sup> In *Ex Parte Forster: Re University of Sydney*, for example, the Supreme Court of New South Wales stated: “It is difficult to conceive of an institution’s being given the title of University which has not the power . . . to preclude or defer the further participation in a course of study of a student whose past performance . . . has repeatedly proved unsatisfactory.”<sup>285</sup> Indeed, a court might refuse even to respond unless the plaintiff first had recourse to the university Visitor.<sup>286</sup> Finally, at least one state statute immunizes the University, the governing board, members thereof, and anyone acting under their direction, from any claim, action or liability for any act done in good faith.<sup>287</sup>

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281. WEISBROT, *supra* note 276, at 175-76.

282. WEISBROT, *supra* note 276, at 222. See also FORBES, *supra* note 280, at 257. See STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS, *THE COST OF LEGAL SERVICES AND LITIGATION IN AUSTRALIA TODAY* 3604 (1991) (often stated that only the very rich or the very poor in Australia can go to court). Of course, as one commentator put it, “[A] decent joust with the legal system will soon have you eligible for legal aid.” Chris Schnacht, *The Senate Inquiry into the High Cost of Justice: The “Money or the Gun,”* in 3 *IMPROVING ACCESS TO JUSTICE* 22.

It requires perhaps \$20,000 to \$40,000 to take a campus issue into the courts. STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS, *THE COST OF LEGAL SERVICES AND LITIGATION IN AUSTRALIA TODAY* 3604 (1991); interview with Stafford Hiller, *supra* note 176. Moreover, the higher the court, the higher the costs. CRAWFORD, *supra* note 258, at 116.

283. See Warburton, *supra* note 257, at 363: “Courts historically have adopted a non-interventionist approach in education cases.” (citing *Ex Parte Forster*; *Re the Univ. of Sydney*, [1964] N.S.W.R. 1000 (N.W.S. S. Ct.)). For the situation in the United States, see Karen M. Porter, *Trend Favors Summary Adjudication of Lawsuits Challenging Academic Decisions*, IV *HIGHER EDUC. L. BULL.* 3 (1995).

284. Robinson, *supra* note 68, at 111.

285. [1964] N.S.W.L.R. at 1004. The court held that determining whether the student “failed” more than once under the institution’s rules fell within the discretion of University officials. *Id.* at 1010.

286. *Ex Parte McFadyen*, [1945] S.R. (N.S.W.) 200, 204 (N.S.W. S. Ct.). In *Re Univ. of Melbourne*; *ex Parte De Simone*, the Visitor stated that visitorial jurisdiction was exclusive and therefore could not co-exist with that of the court. [1981] V.R. 378, 394.

287. Western Sydney Act 1988 (N.S.W.), Schedule 1, § 6. Other statutes require the university to indemnify such actors. See, e.g., Melbourne Act § 16A; Tasmania Act 1992 § 22. At the University of Queensland, official actions of members of the

All of the factors regarding the relatively low incidence of litigation brought by Australian students against their universities both reflect and promote a cultural disinclination to resort to the courts for relief. The university community generally tends not to be litigation-minded, but rather to seek accommodation within the community.<sup>288</sup> Universities have sought to encourage this accommodation, not only to avoid the expense and delay of litigation but also to preserve their autonomy.<sup>289</sup> Unsurprisingly, therefore, Australian students have been relatively non-militant. Increases in student fees and, through a more open society, better information increasingly induce students to see themselves as educational consumers, willing to challenge the product they receive; an ascending concern about post-university employment enhances that willingness.<sup>290</sup> Of course, the constant and pervasive impact of American culture on all aspects of Australian life gently but steadily fans the fires of this change. The willingness to sue accordingly increases.<sup>291</sup>

## VI. CONCLUSION

Individualized statutes closely dictate the organizational structure and many other facets of Australia's thirty-eight universities. Pursuant to these statutes, the universities operate under governing boards that reflect more campus presence and exercise more "hands-on" supervision than do governing boards of American universities. Students facing adverse academic or disciplinary decisions have a plethora of avenues to travel for information or redress, ranging from individual officials, through committees, and sometimes to the governing board itself. In

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governing board are expressly covered by a university liability and professional-indemnity insurance policy. MINUTES OF THE SENATE OF THE UNIV. OF QUEENSL., Nov. 20, 1985, at 151.

288. Interview with Roger Byrom, *supra* note 115.

289. A 1989 report to the Senate of the University of Queensland stated that the then-current officers of the Student Union saw the courts as a satisfactory avenue for the resolution of disputes. The University, the report emphasized, disagreed: Litigation is too expensive and too time-consuming; internal and neutral procedures for such resolution should be possible. *Report to Senate on Problems in the University of Queensland Union*, AGENDUM NO. 13, MINUTES OF THE SENATE OF THE UNIV. OF QUEENSL., May 22, 1989. When the Academic Staff Association at the University of Queensland sought to bring the University within the jurisdiction of the Criminal Justice Act 1989 (Queensland), the University Senate responded that it wished "to continue its practice of maintaining the autonomy of the University." MINUTES OF THE SENATE OF THE UNIV. OF QUEENSL., Sept. 3, 1990.

290. Interview with Carolyn Sappideen, *supra* note 187.

291. Interview with Selwyn Cornish, Dean of Students, *supra* note 115. For example, in June of 1995 one law student at the University of Queensland threatened legal action after it became necessary to regrade an entire class of 300 students in a third-year subject. *Students at Sixes and Sevens Over Marks*, THE AUSTRALIAN, June 14, 1995, at 25.

some situations, recourse to a university Visitor remains an option, an option whose attractiveness should be amplified. Outside the university structure, the student might seek satisfaction from the jurisdiction's ombudsman (or parliamentary commissioner) or the courts.

Australian students have rarely challenged in court these adverse academic or disciplinary decisions. This fact results from some mixture of the relatively low incidence of such decisions, satisfaction with internal processes, an inclination to settle matters within the community, the costs of litigation, judicial deference to university decisions, and cultural attitude. An increase in litigation may well occur, however, due to an escalating "consumer" approach to educational services, an approach buoyed by rising fees, *i.e.*, purchase price. This approach will bring a focus on the contractual relationship between the student and the university, a relationship given to judicial implementation. Further fueling the movement are students' employment concerns and the influence of American litigiousness.

If Australian universities are to avoid the flood of litigation (and threats thereof) that have inundated and inhibited American universities, Australian courts must early and often establish two critical and interrelated points. First, Australian universities provide generously fair internal processes for the adjudication of both academic and disciplinary disputes. Second, courts present largely unsatisfactory fora for the resolution of such problems except in the most egregious situations. Amplification of the role of the university Visitor could play an important part in slowing any rush to judicial settlements of university quarrels.

