

# UNFAIR, UNLAWFUL, OR JUST UNHAPPY? ISSUES SURROUNDING COMPLAINTS OF DISCRIMINATION MADE BY STUDENTS AGAINST THEIR UNIVERSITIES IN AUSTRALIA

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I think it is most unfortunate that the appellant has engaged in such a barren exercise. He is clearly a person of some ability. One would hope that hereafter he concentrates on furthering his career rather than sparring at shadows.<sup>1</sup>

*Unfair treatment, discrimination or unsatisfactory results? Recent years have seen a significant increase in complaints of discrimination made to external bodies by students against Australian universities. Some complaints start and finish in specialist tribunals, others move to re-examination in the courts. Whatever course the actions take, they have many factors in common. Overwhelmingly, the complaints are precipitated by a decision of academic judgement. Almost universally, the students represent themselves while universities retain legal counsel. Frequently the tribunals concerned pay heed to the difficulties faced by a student in such a position, expressly recognising the possibility of a miscarriage of justice and stressing the need to ensure against this occurring. Invariably, while the members of the tribunal or the judge may show sympathy for the student in his or her plight, they are not satisfied that there was unlawful discrimination. Almost always, the complaints are dismissed or the actions are unsuccessful.*

*Most universities now have detailed policies and procedures in relation to both review of academic decisions and equity and diversity. Why is it then that many of these matters take on 'a life of their own', far away from the pursuit of teaching and learning? In almost all cases, many hearings later and poorer in terms of energy and educational achievement, the students fail to achieve the result they seek. Is this because their claims are lacking in merit, is it that the disadvantages they face in complying with procedural requirements are insurmountable, or is it that the complainants wrongly see that a discrimination complaint is an easier path to justice than any other type of action?*

*This article examines a sample of these complaints and considers why it is that students take this path.*

## I INTRODUCTION

Unfair, discriminatory or unhappy with results? The reports of courts and tribunals in Australia contain a significant number of discrimination complaints made by students against their universities. This is despite the fact that these universities have, almost universally, detailed policies and procedures for appeals and reviews, and to ensure equal opportunity. In addition, in relation to disability, all education providers are required to comply with the *Commonwealth*

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*Disability Standards for Education 2005* (Cth). Universities are also subject to Commonwealth anti-discrimination legislation, the *Disability Discrimination Act 1992* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Racial Discrimination Act 1975* (Cth) and the *Age Discrimination Act 2004* (Cth). In addition each state and territory has anti-discrimination and equal opportunity legislation with which universities must also comply, examples are the *Anti-Discrimination Act 1977* (NSW), the *Equal Opportunity Act 1995* (Vic) and the *Anti-Discrimination Act 1991* (Qld).

In Australia, because anti-discrimination and equal opportunity laws are provided in both state and federal legislation, grievances may be heard in the courts and specialist tribunals provided for in each jurisdiction. Federal (Commonwealth) legislation prohibits discrimination on the grounds of disability, race, sex and age,<sup>2</sup> and state anti-discrimination and equal opportunity legislation makes similar provision and, in some cases, widens the grounds.<sup>3</sup> In the case of disability, the forum concerned may find there to be direct discrimination if it is satisfied that the complainant, because of his or her particular characteristics, was treated differently to others in the circumstances and that he or she was deprived of a benefit or suffered a detriment. Furthermore, a forum may find there to be indirect discrimination where the complainant proves that he or she was required to comply with a condition which is not reasonable having regard to his or her circumstances, and with which they are not able to comply.<sup>4</sup> There are similar provisions in the *Sex Discrimination Act 1984* (Cth), the *Racial Discrimination Act 1975* (Cth) and the *Age Discrimination Act 2004* (Cth).<sup>5</sup>

Where a student alleges that the university acted in a way which was discriminatory and in breach of the relevant legislative provision, the complaint is generally lodged with a state or federal board or commission<sup>6</sup> and then it may eventually be heard in a tribunal which has jurisdiction pursuant to the relevant anti-discrimination or equal opportunity statute.<sup>7</sup> In most cases the time from the initial complaint to final resolution is a number of years. From a reading of the reports of these matters, it would be easy to dismiss a significant number of these complaints as trivial but clearly they are far from that to the students concerned.

What is behind these complaints and why do they get this far? The aim of this paper is to consider a sample of the decisions in these cases in order to identify commonalities which may assist in reaching an answer.

## II AVENUES FOR RESOLUTION

It is clear from reading the reports of these actions, that an allegation of discrimination in most cases thinly disguises student dissatisfaction with grades, academic progress, suspension of enrollment or postgraduate candidature, or a failure to be offered a place on a university course. Many of these battles have a long history before they are heard in an external tribunal. In many cases the students have exhausted internal procedures and are still aggrieved. In a few cases students go directly to external agencies and tribunals without first seeking a resolution internally. Many times it is not the initial problem that becomes the focus of the dispute but the actions and reactions of both parties as time goes on. Often it is hard to discern from the facts whether initially the student may have had a genuine cause for complaint. The manner in which both parties react, spurred on by frustration, anger and impatience, tends to polarise them and makes any sensible resolution of the dispute almost impossible.

The path a complaint takes depends upon whether it is pursued under state or federal legislation. For example, in New South Wales, the complaint may be taken to the Anti-Discrimination Board constituted under the *Anti-Discrimination Act 1977* (NSW), or in Victoria, the complaint may

be taken in the first instance to the Victorian Equal Opportunity and Human Rights Commission constituted under the *Equal Opportunity Act 1995* (Vic) and the *Racial and Religious Tolerance Act 2001* (Vic). Most state and territory anti-discrimination procedures make provision for the matter to be investigated and referred for a conciliation conference.<sup>8</sup> In some cases, such as in Victoria, a party may be required to attend compulsory conciliation if they refuse to attend voluntarily, and in New South Wales, a party who fails to attend a conciliation conference may be fined. If conciliation is unsuccessful, the matter may then progress to the relevant state tribunal, for example in New South Wales, the Equal Opportunity Division of the Administrative Appeals Tribunal, with a right of appeal to the state Supreme Court. The other states and the two territories have equivalent legislation, agencies, tribunals and courts.

Students may alternatively elect to complain to the Australian Human Rights Commission (AHRC), the national statutory government body<sup>9</sup> responsible for investigating allegations of discrimination on the grounds of race, colour or ethnic origin, racial vilification, sex, sexual harassment, marital status, pregnancy, disability or age.<sup>10</sup> Complaints of unlawful discrimination must first be made to AHRC, which similarly to state legislation places conciliation at the forefront.<sup>11</sup> If the parties fail to reach an agreement or the complaint is terminated by AHRC, the complainant may then apply to either the Federal Magistrates Court of Australia (FMCA)<sup>12</sup> or the Federal Court of Australia (FCA) to hear the matter.

Figures showing the numbers of matters that are successfully conciliated are not available. However, reports of the complaints that do progress to adjudication reveal that whatever the jurisdiction the complainants are hard-pressed to prove unlawful discrimination. In some cases this result is despite some administrative bungling, lack of communication or unfair treatment on the part of the university. Almost invariably the student complainants fail to satisfy the forum concerned that the university treated them in a particular manner because of their disability, their race or whatever the grounds of disability alleged, and that their treatment was different to any others in the same or similar circumstances.

### III WHEN IS IT UNLAWFUL DISCRIMINATION?

#### A *Unfair Treatment in Academic Decisions*

Almost universally, the facts of these cases reveal an academic decision as the precipitating factor. The case of *Yonis v Vice-Chancellor, University of New South Wales*<sup>13</sup> provides a clear demonstration of the difficulties faced by a student, so aggrieved, seeking to prove discrimination. It is not unusual that members of a tribunal or court show a degree of sympathy for the student's position and even criticise the university for its actions. However, they find themselves constrained by the legal requirements for proving discrimination under the relevant legislation.

Mr Yonis was a Somali student enrolled in a Master of Engineering Science, Process Engineering degree. As a result of an earlier accident he suffered a disability in the use of his right arm. The facts showed that allowances had been made for problems arising from his disability in terms of extensions of time limits for submission of his written work. However, during 2001 and 2002, he failed to make progress, either failing to attend class or failing to achieve a pass in the assignments he did submit. His complaints of racial and disability discrimination arose from a sequence of missed communications from the university relating to his applications for special consideration and his status of 'Discontinuance Without Fail'. Essentially, the university communicated with him through his university email address, which he did not access, rather than his Yahoo email address of which the university was aware. Consequently, the final decision

to exclude him from the university was made before he had been properly notified of the action proposed and the reasons for it. The Tribunal concluded that the complainant had suffered seriously unfavourable treatment as a result of this mismanagement.

In deciding whether this treatment amounted to unlawful discrimination under section 5(1) of the *Disability Discrimination Act 1992* (Cth) however, the Tribunal considered itself bound to follow the interpretation of the ‘comparator’ provision used by the High Court in *Purvis v NSW (Department of Education and Training)*.<sup>14</sup> The *Purvis* case concerned the exclusion from school of a boy with disabilities who demonstrated severe behavioural difficulties. In deciding whether the exclusion amounted to unlawful discrimination on the grounds of the boy’s disability, the court compared the action taken by the school to action that would have been taken in similar circumstances against a person without the disability but who displayed similar behaviour. The view of the court in *Purvis* was that notwithstanding the fact that the behaviour exhibited by Daniel was part of his disability it could nonetheless be taken into account in assessing what amounted to the same or similar circumstances. Accordingly, the majority decided that because the school’s action in excluding Daniel would have been the same for any student who behaved in a similar manner regardless of how it was caused, there had been no disability discrimination by the school.<sup>15</sup> An application of this rationale to the situation of Mr Yonis led to an equivalent result. Even though his disability was in part responsible for the problems which led to his discontinuance, the university had not treated him any differently to how other students in a similar situation as regards course requirements would be treated.

Thus, the Tribunal in *Yonis* said:

This conclusion of the Tribunal is not sufficient to enable the Tribunal to conclude that the adverse treatment was discriminatory unless the adverse treatment would not have occurred in the same or similar circumstances if the applicant was a person who did not have a disability.

And

... the question of whether the way in which the University dealt with the appeal of Mr Yonis was discriminatory, requires a comparison with the manner in which in the same circumstances the University treated or is likely or would have treated a similar application [for special consideration] by a person who did not have a disability.<sup>16</sup>

So, despite ‘administrative blunders’ of the university which led to ‘considerable detriment’ to the student and had a ‘catastrophic’ effect on his postgraduate studies, the Tribunal considered that it must dismiss the complaint of discrimination. It did however make the following remarks in conclusion:

The Tribunal has found it necessary in this decision to be critical of aspects of the administration by the respondent in the manner in which it deals with and treats applications for special consideration, and decisions to exclude students, especially in the School of Chemical Engineering. It is only in that School that failures in the administration were examined by this Tribunal. This inquiry into the complaints of the applicant demonstrates that serious failures in the manner in which students are dealt with in the administration of their affairs, in some cases can lead to serious unfair and unreasonable consequences to the student. It beholds a University of the standing of the respondent to take every step to ensure that its administrative staff at all times act to ensure that a student is not dealt with in a way that causes such detriment as was experienced by the applicant in this matter. The fact that the University has such a large student population as the respondent does not detract from the need to ensure that individually each student is treated fairly, or that the

rules of expulsion are not applied axiomatically as they were in this case. The Tribunal requests that the legal representatives of the University ensure that a copy of this decision is placed for the attention of the Vice-Chancellor of the University.<sup>17</sup>

In addition to the criticism levelled by the Tribunal at the university concerned, this case also serves to highlight the pitfalls for the self-represented student complainant. Clearly, the Tribunal considered that the treatment of the student by the university had been hugely detrimental to him academically and personally. However, it was constrained from assisting the student by the interpretation of the s 5(1) of the *Disability Discrimination Act 1992* (Cth) adopted by the High Court in the *Purvis* case.

Had the student pursued an alternative cause of action, for example, an application for judicial review of the university's decision or breach of contract, may the result have been different?

### B *Post Graduate Students and Academic Ability*

Many actions are pursued by students following university decisions relating to their doctoral candidature. There is clearly much at stake for these post graduate students. The facts almost invariably detail a long sequence of events leading to the final decision and their strength of feeling is such that these students are driven to pursue satisfaction for many years. During this time various judicial bodies are called upon to determine essentially, whether on the facts, the true reason for the student's failure to achieve is discrimination, or whether the failure is a matter of academic judgement in that it could be attributed more properly to academic inadequacy on the student's part. One such case was *Huang v University of New South Wales & Ors*.<sup>18</sup>

Ms Huang's PhD candidature was terminated by the university following a protracted period of interaction with university academics. She had been involved in research for a Masters degree and then applied to transfer to a PhD candidature. Initially she was unsuccessful in that application but it was approved in 1999 on reconsideration by the Higher Degrees Committee (the HDC) at the request of her supervisor. The judgment of the Federal Magistrates Court<sup>19</sup> chronicles a long history of withdrawal, deferment, failure to meet progression requirements and generally unsatisfactory progress despite, it would seem, strenuous efforts being made by university personnel to accommodate her difficulties which were attributable to medical problems. In the meantime, Ms Huang had made allegations of sexual harassment, plagiarism and fraud against various of the academics with whom she was connected and these were concurrently under investigation.<sup>20</sup>

In 2002 the HDC advised Ms Huang that she had to show cause as to why her candidature should not be terminated. It considered her submissions but made the decision to terminate notwithstanding. This decision was reversed on appeal by the Appeal Sub-Committee of the Academic Board on the basis that the HDC had not been fully apprised of her medical condition and the extent to which this had affected the progress of her research. In 2003 Ms Huang was asked by the Deputy President of the Academic Board to consider whether her situation was such that would enable her to commit herself to her research. Instead of seeking reenrolment, she pursued a complaint of discrimination based on the allegation that her candidature had been cancelled because the academics concerned assumed that her English was 'too poor to complete a PhD'. The Magistrate, in holding that this claim failed, said:

I accept that Ms Huang was required by the respondents to work in English. I am not persuaded that Ms Huang was unable to comply with that requirement. Neither am I satisfied that the requirement was unreasonable. Ms Huang was attempting a higher degree at an Australian university where English is the normal language of instruction and submission.<sup>21</sup>

Her further claim, of disability discrimination, was founded predominantly on her mental problems and the resultant disabilities she suffered during her period of enrolment. This claim was defeated by her blaming these problems on the actions of the university. In the Magistrate's view, the defect in this allegation was that if it was argued that the university's conduct *caused* the disability then it could not be said that this was the *basis* for the allegedly discriminatory conduct. Furthermore, in his view, it was not proven in evidence that the university academics concerned were aware of her disabilities. He concluded by saying:

Ms Huang's inadequacies as a PhD candidate were evident before the incidents she alleges. Despite encouragement by her supervisors, extensions of time for the submission of work, assistance of Faculty staff, commentary on her draft work and the invitation to re-submit work she was unable to demonstrate to her supervisors that she could realise the potential they thought she had. That outcome was undoubtedly disappointing for Ms Huang and for her supervisors. The fact is however, that the respondents are not responsible for Ms Huang's failure. The causes for that failure were personal to her. It is most unfortunate that Ms Huang has demonstrated a preparedness to make baseless accusations against people who had attempted to help her (whether effectively or not) rather than accept her own failure and causes.<sup>22</sup>

Below are set out many similar actions with similar results. One complaint, described by the New South Wales Administrative Decisions Tribunal Appeals Panel as having a 'tortuous' history,<sup>23</sup> is *Tu v University of Sydney (No 2)*.<sup>24</sup> Mr Tu was a student of Chinese background who was enrolled in an orthodontics master's degree at the respondent university. He had failed some of the assessments and deferred his enrolments for several years and finally he was advised that his candidature would be discontinued unless he undertook to fulfil several conditions. His complaint was of racial discrimination and he contended that he was treated differently to an Australian citizen. The University argued both that the setbacks suffered by the complainant in his degree were due to his lack of competency, and that the breaks he had taken from the course destroyed the continuity with his patients which was essential for his coursework requirements. The complaint was summarily dismissed.<sup>25</sup>

The events leading to *Liu v University of Melbourne*<sup>26</sup> related to the complainant's PhD candidature at the respondent university, his dispute with his supervisor and the suspension of his programme. The threatening emails and letters sent by the student to the university had led the academics concerned to conclude that the student needed psychiatric help. They required him to attend counselling and a psychiatrist for examination and assessment. He alleged racial discrimination based on his Taiwanese race and he sought redress unsuccessfully from a variety of sources, the Ombudsman of the State of Victoria, the Human Rights and Equal Opportunity Commissioner, the Post Graduate Union and the Commonwealth Minister for Education, before complaining to the Equal Opportunity Commission and the hearing in the Tribunal. While the Tribunal dismissed his complaint of discrimination on the University's application, it did have some sympathy with Mr Liu whom it considered had been treated unfairly. It said however that this did not necessarily, without evidence to that effect, amount to discrimination:



The Equal Opportunity Act 1995 does not mean that any person who suffers adverse treatment, perhaps treatment which is in breach of the rule of natural justice, tortious, criminal, or otherwise wrongful has suffered discrimination merely because that person has a particular attribute. All of us have some of those attributes. Here it is clear that Dr Liu has been the subject of adverse treatment. The question is, is there substance to the contention ...that the adverse treatment derives from a particular attribute, namely his race or the imputive disability.<sup>27</sup>

A doctoral student's dispute with her university over supervision was also the subject of the complaint in *Torres v Monash University (Anti-Discrimination)*.<sup>28</sup> Ms Torres had withdrawn from the programme 'in good standing' due to ill health. She then applied to be re-admitted into the programme within the four year period required by the regulations pursuant to the exemption provided by the 'in good standing' status of her withdrawal. By this time her previous supervisor had left the university and there was no other academic suitable to be appointed supervisor. Despite various suggestions made by the complainant regarding outside supervision, the university declined her application to be readmitted. She alleged discrimination based on her physical condition. The tribunal found that while the complainant had a number of complaints relating to the university's treatment of her, and it may have been that the university had imposed a requirement relating to the time for her readmission which was not reasonable at the time, the evidence did not substantiate the claim that she was treated less favourably than a student unimpaired by her physical problems.

*Elmaraazy v University of NSW, Professor Dennis, Professor Heseltine and Professor Richards*<sup>29</sup> concerned a PhD student in the Department of Electrical Engineering, located within the Australian Defence Academy. His complaint of racial discrimination was based on the termination by the University of his PhD candidature and his employment there. In common with most of the complaints, the facts reveal an unhappy sequence of events which led to the University's actions. In the view of the Inquiry Commissioner, none of the elements of the complaints were able to be substantiated.

A question, posed by the Inquiry Commissioner<sup>30</sup> hearing Mr Elmaraazy's complaint may well be asked in many of these cases: if discrimination was not the cause, as had been determined, what was behind the termination of the student's postgraduate research? This question led to his making this point in his conclusion:<sup>31</sup> if it was the student's lack of ability which was the cause of the termination then why were not any of the academics involved prepared to make that judgement? In the Commissioner's view, this failure pointed to an important lesson in such cases. Had that judgement been made, it may have deterred the student from searching for other causes and thus it could have acted in the university's defence to the allegations. These words point to a lack of honest communication between the university personnel concerned and the student, a factor which may be said to characterise the previous cases, and many others.

### C A Hostile Environment

The decision in *Metwally v University of Wollongong*<sup>32</sup> shows that educational authorities may be held liable for the discriminatory behaviour of their staff, and that an official tolerance for an environment of hostility and abuse may result in liability under anti-discrimination legislation. This is as it should be and is clearly in fulfilment of the legislative purpose. Mr Metwally, a postgraduate student in the Department of Metallurgy at the defendant university, complained that he had been the subject of less favourable treatment because of his race. He was Egyptian and he claimed that he had been forced to study in an environment in which he was subjected to

racial verbal abuse and harassment by members of the university community. His complaint was upheld by the Equal Opportunity Tribunal and he was awarded damages.<sup>33</sup> However, an appeal by the university on constitutional and jurisdictional grounds was upheld.<sup>34</sup>

Be that as it may, a tribunal, even while expressing criticism of a university's lack of action in such circumstances, will look carefully at such a complaint where it follows a student's failure to achieve. An action was taken on similar grounds to Mr Metwally by a Mr Sekhon, a Sikh engineering student at Ballarat University College following his exclusion for unsatisfactory academic performance. The Equal Opportunity Tribunal<sup>35</sup> hearing the matter noted the difficulties in controlling student behaviour in a university environment and encouraged the university to implement more effective internal grievance procedures speedily. However these words did not assist the complainant as on the facts it found that the cause of the student's exclusion was his failure to achieve academically and that the defendant's failure to deal effectively with his complaints was not racially motivated.<sup>36</sup> This later finding led to an unfortunate result for Mr Metwally but it does not detract from the finding of the previous tribunal on the principles relating to such an allegation of discrimination.

#### D *Failure to Accept Enrolment*

A case which demonstrates the difficulties a student faces in substantiating an allegation of racial discrimination in circumstances relating to enrolment is *Jandruwanda v University of South Australia (No 2)*,<sup>37</sup> *Jandruwanda v University of South Australia*,<sup>38</sup> and *Jandruwanda v University of South Australia*.<sup>39</sup> Here, the complainant alleged that the university had discriminated against her on the grounds of her race by not accepting her enrolment to a particular course. The Federal Magistrate dismissed the application, as he found that there was no link between the behaviour alleged by the complainant and any breach of the *Racial Discrimination Act 1975* (Cth). He found that even though the evidence showed that she had been treated unfairly and inappropriately, it was not sufficient on its own to say that because she was an Aboriginal person this treatment amounted to racial discrimination. Leave to appeal was refused.<sup>40</sup>

#### E *Failure to Accommodate Special Needs*

In relation to students with disabilities, all universities have in place comprehensive policies and procedures for ensuring their equal access to educational services. This is now in compliance with the entitlements and responsibilities contained in the Commonwealth *Disability Standards for Education 2005* (Cth). Nevertheless it is inevitable that there will be situations where a student considers the measures taken by the university to be insufficient and he or she will allege discrimination. The majority of school disability discrimination cases fall within this area.<sup>41</sup> Although the potential for this kind of 'discrimination per se' complaint against universities is supported by anecdotal evidence<sup>42</sup> there are very few reported cases. Whether this suggests that the universities are quick to respond to these situations, or alternatively, that the students concerned discontinue their studies is open only to conjecture here. Open to speculation also is the effect of the provisions relating to 'reasonable adjustments' contained in Part 3 of the *Disability Standards for Education* which came into effect after the facts giving rise to the below actions all arose. Clauses 3.3 and 3.4 of the *Standards* require education providers to make 'reasonable' adjustments where necessary in each individual case. The notes accompanying the *Standards* direct that this is to be determined by independent expert assessment. Following such determination providers are still able to argue that such adjustments would cause them 'unjustifiable hardship'. In addition,



Clause 3.4(3) provides that the test for what adjustments may be considered 'reasonable' may take into account the maintenance of 'academic requirements of the course or program, and other requirements or components that are inherent in or essential to its nature'. This provision would enable a university to justify declining to make adjustments as required by a particular student where it can be demonstrated that this would compromise the integrity of its course or program in its representation of those who have achieved the particular award as having the appropriate knowledge, expertise and experience.

A case which demonstrates the importance of the university's response to a complaint of discrimination, not just for this student but in terms of standard university practice, is that of *Kinsela v Queensland University of Technology*.<sup>43</sup> The venue and the procedure which the university used for its graduation ceremonies meant that the wheelchair-bound plaintiff student/graduand was unable to take part fully in the ceremony. The court upheld the student's complaint and required the university to change the venue in order that he could take part in the procession.<sup>44</sup>

However, in *Hinchcliffe v University of Sydney*<sup>45</sup> the student did not meet with similar success. Ms Hinchcliffe was a student with a vision disability which meant that she required special assistance with the course materials. Her requirements, that the material was printed on A4 large print format on light green paper and was recorded on audio disk, were stated on her enrolment and on several occasions later when she discussed them with disability services officers at the university. She alleged that, in variance with these requirements, the university had provided the material in large print on A3 paper and on computer disk. She alleged discrimination under sections 6 and 22 of the *Disability Discrimination Act 1992* (Cth) which was both direct and indirect. The complainant's argument was that, because the university was aware of her requirements, it was unreasonable of them to fail to accommodate her preferences by not supplying the course material in the form she required. She complained that the university had denied or limited her access to benefits, had subjected her to other detriment (direct discrimination), and had required her to comply with a condition that she was unable to comply with and which was not reasonable in the circumstances (indirect discrimination). There was a long history leading up to the judgment, all of which is included in its 94 pages.<sup>46</sup> The university considered that it had responded adequately to her needs and the court agreed.

The judge referred to the view of Emmett J of the Federal Court of Australia in *Purvis* (referred to above)<sup>47</sup> that a failure to give special treatment to a student is not necessarily subjecting that student to a detriment or denying them a benefit as it does not involve treating the person with the disability differently from a person without the disability. In relation to the allegation of indirect discrimination, the court said that the onus is on the complainant to prove that the condition with which they are required to comply is unreasonable and this must be decided in the circumstances of each case. The argument of the university was that it is incorrect to assume that the *Disability Discrimination Act 1992* (Cth) imposes an obligation on it to accommodate the preferences of the complainant and it was supported in this argument by the view of the High Court in *Purvis*. Furthermore, the university argued the correct test for reasonableness required a balancing of 'her interests and the operational requirements of the university' and this she had not done.<sup>48</sup> The *Disability Standards for Education*, in particular Clause 3 would arguably today lend weight to these propositions.

The judge found that the complainant had not proved that, in relation to most of the course material supplied, the inconvenience suffered by her approached the standard necessary to establish an 'inability to comply with the university's requirement or condition'. Accordingly he found that there was no indirect discrimination. He also found that there was no direct discrimination as she

had not been ‘denied a benefit’ or ‘suffered a detriment’ as required by section 22 of the *Disability Discrimination Act 1992* (Cth).

Where a student complains that the university failed to make ‘reasonable adjustment’, a court may find that his or her own actions contributed sufficiently to the hardship so as to defeat their case. The case of *Sluggett v Flinders University of South Australia*<sup>49</sup> concerned a student who had mobility difficulties as a result of contracting polio at a young age. Her complaints of direct and indirect discrimination related to her difficulties in accessing the university campus and her work placement premises. In common with most of the cases discussed previously, the complaints were precipitated by the student failing to meet course requirements and being excluded from the course. HREOC found her complaints of direct discrimination to be unsubstantiated largely because she had not informed the university of her disability. In considering the claim of indirect discrimination, HREOC found that in relation to neither the university campus nor the work placement did she have a requirement imposed on her with which she was unable to comply. There was alternative access by way of lifts at the university and she was under no obligation to accept that particular work placement.<sup>50</sup> The decision of HREOC was affirmed by Drummond J in the Federal Court and later by the Full Federal Court.<sup>51</sup>

#### IV THE COST TO THE UNIVERSITY AND THE STUDENT

An overwhelming majority of complainants and plaintiffs in the above cases are self-represented. The reasons for this, apart from the obvious financial considerations, raise interesting questions beyond the scope of this paper. Nevertheless, it may be that had the students taken the advice of counsel, things would have been different for them. They may have been advised not to pursue a cause of action so clearly incapable of success. Alternatively, in some cases, the students may have been advised to frame their challenges to university decisions differently, in public law or in contract or tort, for example.

A striking factor in all cases is the inevitable and significant expenditure of time, energy and finance involved. In most cases universities engage counsel and students appear in person through numerous applications, hearings, re-hearings and appeals, often over long periods of time. While the financial expense is undoubtedly much greater for universities,<sup>52</sup> for all parties the cost in all respects is considerable. The below cases illustrate the lengths to which some students have been prepared to go.

##### A *The Cost to Teaching and Learning*

A case which presents a clear picture of this expenditure, to the detriment of teaching and learning, is *Z v University of A & Ors*.<sup>53</sup> The claim of discrimination appears to have been precipitated by the student’s dissatisfaction with his having been awarded an upper second class honours degree rather than a first class honours degree. Interactions with many members of the university staff feature in the evidence of the student in support of his allegations. The student began his action in 1997, alleging discrimination, victimisation and vilification on the part of the university on the basis of his ‘presumed’ homosexuality. It was 2005 when the final application for costs was dismissed by the Tribunal. There were eight years’ worth of time and energy expended by both parties, in addition to the cost for the respondents in retaining counsel. Because the student had joined as co-defendants the academics whose conduct was specifically in question, there were also applications for suppression of name and applications for costs.<sup>54</sup> The Tribunal found that the student had failed to establish that he had been treated less favourably because

of his presumed homosexuality than someone who is not presumed to be homosexual and his complaint was dismissed.

The final words of the Tribunal were:

We are inclined to the view that the Applicant was so aggrieved by his failure to gain first class honours that he convinced himself of the accuracy of the various incidents and conversations which formed his case. We are satisfied that the Applicant mistakenly but genuinely believed that he was widely perceived to be a homosexual and that he was the victim of an 'anti-gay' conspiracy. The fact that we found that his allegations were entirely unsubstantiated does not detract from the genuineness of his belief.<sup>55</sup>

In 2003 the same student brought a simultaneous action against the university, this time his allegations related to the university's rejection of his application for enrolment in the course of Doctor of Philosophy-Economics and he argued that the university discriminated against him because of his previous complaint. Primarily, he sought an order that he be admitted as a PhD candidate. In that decision,<sup>56</sup> while remarking that, despite lacking 'legal background' the complainant had presented his case in an 'efficient manner', the Tribunal said:

To establish that aspect of his complaint he [the student] required the Tribunal to infer from the evidence and the material before the Tribunal that there was a causal link between the rejection of his application and the actions and allegations that he had made concerning contraventions of the Act [*Anti-Discrimination Act 1977 (NSW)*] by the university and others. The Tribunal found that the evidence did not support the inferences that the applicant sought the Tribunal to draw.<sup>57</sup>

It dismissed this claim also on the basis that the student had not been able to demonstrate a causal link between the 'disadvantage' and the alleged discriminatory act on the part of the university.<sup>58</sup>

*Margan v University of Technology, Sydney*,<sup>59</sup> arose similarly out of a complaint of discriminatory treatment as a result of the student's sexual orientation. It related to two matters. The first concerned the initial refusal of the university to 'upgrade' his Masters programme to a Doctoral programme, and the later advice that he would not be given the possibility of enrolling in a PhD course which he said amounted to an effective exclusion from further study. The second allegation related to the university's decline of his application for funding of a float in the Gay and Lesbian Mardi Gras. The university applied to have the complaints on both grounds dismissed as 'frivolous, vexatious, misconceived or lacking in substance ...'.<sup>60</sup> Mr Margan, who represented himself, failed to produce evidence of the alleged statements made to him by university staff members relating to his homosexuality which he used in support of his first allegation. Similarly, due to the lack of legal experience perhaps of the complainant, his failure to mention any of these statements in his complaints did, in the view of the Tribunal, 'impact[s] heavily upon its weight'.<sup>61</sup> The Tribunal dismissed the claim. However, an appeal by the student against this dismissal was upheld by the Tribunal Appeal Panel who ordered that the complaint be reheard before a differently constituted Tribunal. This re-hearing resulted in the second Tribunal decision cited above.<sup>62</sup> Here evidence was heard that prior to attempts to mediate this dispute in 1999 the complainant had taken a computer which belonged to the university and on which was stored the work of the academic and various other post graduate students, and he had destroyed it. Civil action had been taken against the complainant for restitution, and disciplinary proceedings were commenced against him, resulting in his exclusion from the university for four years.

The Tribunal members considered evidence relating to the substance of Mr Margan's allegations and reached the conclusion that the university's actions had been plausible and dismissed the complaint. It is important however to note that the Tribunal devoted some time to discussing the lack of action of the university at the initial stages of the student's discontent. The members were of the view that the university had contributed to the escalation of the dispute, and they pointed to pre-emptive action which may have been sensible. They said:

The Tribunal was somewhat surprised that the University did not pursue the allegations of discrimination included in these complaints, and attempt to determine what ground of discrimination was being alleged. Staff at the University would be aware of the difficulty experienced by some people who are the victims of discrimination in clearly enunciating the basis on which they allege discrimination is occurring. This is particularly true for gay men who have not "come out". Had the University staff demonstrated a little more sensitivity or preparedness to investigate at this early stage, then perhaps this matter may not have reached the point which it has. However, such fault is not what the Tribunal is required to investigate.<sup>63</sup>

It was the view of the members of the Tribunal that, whilst the complainant was able to demonstrate a list of unfortunate circumstances which had occurred to him, neither party was completely blameless.

Notable for its duration also is the path followed by Kathleen Harding in her discrimination complaint against the University of New South Wales.<sup>64</sup> In 1983, Ms Harding enrolled in the Bachelor of Medicine and Bachelor of Surgery course at the respondent university. For various reasons, largely to do with her health, she failed some subjects and discontinued others during the years that followed. She first complained of discrimination in 1989 and again in 1998. Her case is a long litany of complaints, determinations and appeals. She applied for readmission in 2000 and when this was refused she complained again of discrimination on the grounds of disability, age, sex, and victimisation to the Anti-Discrimination Board of New South Wales. The Tribunal which heard this matter dismissed it as lacking in substance.<sup>65</sup> Again in 2001, when her application for admission was declined, she complained of discrimination. This complaint she characterised as 'indirect gender discrimination', based on her argument that her problems arose from a thyroid condition which is more prevalent in women than in men. The Tribunal dismissed this complaint also as lacking in substance.<sup>66</sup> Running alongside her discrimination complaints were actions commenced by her in the New South Wales Supreme Court in 2001 and 2002. There she sought an order for enrolment and damages for alleged lost opportunity. In these actions she made a large number of allegations of breaches of principles of administrative law, particularly that the university had acted in a manner which was procedurally irregular and that it had acted unreasonably. These actions were similarly dismissed.<sup>67</sup>

### *B The Obstacles for the Self-Represented Student*

At the hearing the Complainant elected to proceed without legal representation. He has presented his own case to the Tribunal. The Complainant is not legally experienced. This has contributed to the difficulties of determining the issues to be addressed by the inquiry and to elucidate the evidence which supports his allegations. The Tribunal has endeavoured to assist the Complainant in this task in a manner which was not unfair to the respondent.<sup>68</sup>

It is a reality that there are, rightly or wrongly, many pitfalls for a student conducting his or her own case. In addition, the self-represented complainant or plaintiff poses considerable difficulties for the judicial bodies concerned. Generally, these bodies are careful to pay heed to the risk of a miscarriage of justice where claims and evidence are defective due to lack of professional knowledge.<sup>69</sup> It is clear from the cases discussed above that more often than not the student adduces evidence to satisfy the court or tribunal that he or she has been subjected to unfair treatment, but not that the university has acted in a manner which amounts to unlawful discrimination under the appropriate legislation.

The difficulties faced by these students are frequently referred to by courts and tribunals hearing their actions. They were bought into stark relief in *Rabel v Swinburne University of Technology*.<sup>70</sup> The student's complaint there was set out in a 37-page hand-written document which contained ten allegations of discrimination and victimisation under the *Equal Opportunity Act 1984* (Vic), the then-existing legislation. The complaints were based on a range of allegations, including the failure of the university to send his degree certificate by post, 'marking down' an assessment to 74%, the conduct of the lecturer and the failure to give the complainant special consideration. The Tribunal said that in entertaining the university's application to strike out the complaint the Tribunal must be satisfied that the case is 'obviously hopeless' or 'could on no reasonable view justify relief'.<sup>71</sup> The members of the Tribunal said:<sup>72</sup> 'The Tribunal must be cautious before striking out a complaint. [It must be] undoubtedly hopeless before it can be struck out...'. The order of the Tribunal was that some of the allegations should be struck out as failing to indicate any discriminatory conduct on the part of the university, while others were to proceed to a full hearing. As there is no later report, it may be assumed that the matter was settled.

Frequently and understandably, attention is paid by tribunal members or judges to defects in the students' pleadings and evidence. For example, in *Z v University of A & Ors (No 9)* the Tribunal said:

The Applicant is clearly intelligent, industrious and well educated. However it was evident that he did not fully grasp the complexities of many of the legal issues in the proceedings. Nor did he appear to appreciate the importance of confining his cross-examination to matters relevant to the issues in the case. This significantly extended the time taken to complete the hearing. Had the applicant been represented by an experienced barrister and solicitor, the hearing would no doubt have been conducted very differently.<sup>73</sup>

In the case of Hanna against the University of New England<sup>74</sup> Malpass AJ referred to the many problems encountered by the student and the court relating to procedural requirements not adhered to, evidentiary deficiencies, absences of entitlement to relief and jurisdiction. In his view: 'The aim seemed to be to pursue the prospect of unearthing error, mistake or inconsistency (whether or not they were the subject of claims for relief) in the mistaken belief that they gave rise to a cause of action at law'.<sup>75</sup> The judge referred to the history of dealings between the parties as being one which could be thought to have imposed an 'onerous administrative burden' and having given the multitude of matters raised by the student due consideration, he dismissed the proceedings. Importantly, the judge drew attention to the fact that the plaintiff had chosen not to pursue remedy through the university's internal procedures before embarking upon his claims before the court. He said: 'Indeed, it seems to me that if an approach must be made to this court, it should have been seen as a last resort to deal with such matters'.<sup>76</sup>

## V CONCLUSION

This paper has discussed some of the cases involving student allegations of discrimination against universities. There are many more. Because many of the events detailed in the judgments it could perhaps be easy to dismiss many of them as vexatious and unwarranted. To the students concerned however, this is far from the case. Many reports bear witness to a considerable strength of feeling at the actions of the universities and a deep disappointment with their lack of academic progress.

There is now a well-settled reluctance on the part of courts in the comparative jurisdictions to revisit decisions of academic judgement. This judicial view is reinforced in the United Kingdom by the express exclusion of such matters from investigations of the Independent Adjudicator for Higher Education.<sup>77</sup> Are discrimination complaints then, seen by students in Australia at least, to offer the chance to circumvent this reluctance?

There are common threads to these complaints. First, the student is almost invariably self-represented. Secondly, the complainant is frequently a postgraduate student who has thus demonstrated ability and success in university studies up to that level. Not surprisingly, students for whom English is not their first language appear over-represented among the complainants. Many actions show that university personnel were slow to react or reacted inappropriately to the student's initial concerns. Almost universally in a court or tribunal, the student is hard-pressed to achieve the outcome he or she seeks. This is after huge expenditure in terms of time and energy of both parties, diversion from study for the student, and financial and other costs to the universities involved.

Aside from the cases of *Hinchcliffe* and *Kinsela*, the facts generally indicate that it is not the alleged discrimination which is at the root of the dissatisfaction. Rather, the student's perception of wrongdoing begins in most cases with the actions or decisions of the university as regards grades, admission or progression through courses of study. It is then exacerbated by a perceived lack of concern on the part of university personnel, often borne out of an absence of honest and clear communication

The climate of higher education today places increasing emphasis on the student as a customer. Much attention is paid to universities having published and transparent processes which enable students to seek reconsideration of marks and other academic decisions, and for equality and diversity. What then goes wrong? Some cases indicate a need for more clear and accessible processes. Almost all support a call for administrative and academic staff with appropriate training and guidance in dealing with students from differing backgrounds and cultures. The facts in many cases reveal what is perhaps a mismatch in expectations and a lack of communication. Certainly, a significant number of cases reveal an underestimation by university staff of the strength of the feeling of discrimination. Whether or not the students' complaints are warranted at the outset, they are hugely important to all of them. Each case perhaps provides a valuable lesson for academic and administrative personnel and university policy makers and managers.

*Keywords:* discrimination; student; university; academic judgment; self-represented litigant.

## ENDNOTES

- 1 *Loizou v University of Melbourne* [2000] VSC 1 at [34] p (Beach J).
- 2 The *Disability Discrimination Act 1992* (Cth), *Racial Discrimination Act 1975* (Cth) and *Sex Discrimination Act 1984* (Cth).



3 For example, *Anti-Discrimination Act 1977* (NSW), *Equal Opportunity Act 1996* (Vic), *Anti-*  
4 *Discrimination Act 1991* (Qld).  
5 s 5(1), s 6 *Disability Discrimination Act 1992* (Cth) and there are generally equivalent provisions in  
6 state and territory legislation.  
7 s 5 *Sex Discrimination Act 1984*, but indirect discrimination is subject to the ‘reasonableness’ test  
8 provided in s 7B, and s 9 *Racial Discrimination Act 1975* (Cth).  
9 Dependent on whether the complaint is pursued under state or federal legislation, see below.  
10 This is generally failing successful conciliation, or when conciliation would be inappropriate in the  
11 circumstances, pursuant to most state, territory and federal legislation, see below n 8 and n 11.  
12 s 91A *Anti-Discrimination Act 1977* (NSW); ss 112 *Equal Opportunity Act 1996* (Vic), and s 113  
13 (procedure when the Commission considers conciliation would be inappropriate).  
14 Established by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). The name of the  
15 agency was changed in September 2008 from the Human Rights and Equal Opportunity Commission  
16 (HREOC).  
17 HREOC has responsibilities under five anti-discrimination laws: the *Racial Discrimination Act 1975*  
18 (Cth); the *Sex Discrimination Act 1984* (Cth); the *Disability Discrimination Act 1992* (Cth); the *Age*  
19 *Discrimination Act 2004* (Cth) and the *Human Rights and Equal Opportunity Commission Act 1986*  
20 (Cth).  
21 s 46PJ *Human Rights and Equal Opportunity Commission Act 1986* (Cth).  
22 It should be noted that the future of the Federal Magistrates Court is in doubt and a review of the  
23 federal court system, ordered by Attorney-General Robert McClelland, is currently being undertaken:  
24 ‘*The Federal Magistrates Court is facing abolition at the end of the year as part of an overhaul of the*  
25 *federal court system*’ *The Australian*, 9 May 2008.  
26 *Yonis v Vice-Chancellor, University of New South Wales* [2005] NSWADT 109 (17 May 2005)  
27 [2003] HCA 62. For a comprehensive discussion of this case, see E. Dickson ‘Disability discrimination,  
28 unjustifiable hardship and students with disability-induced problem behaviour’ (2004) 9 (2) *Australia*  
29 *and New Zealand Journal of Law and Education* 37.  
30 There was a strong dissent by Kirby and McHugh JJ in whose view the behaviour could not be  
31 separated from the disability with the result that the action taken for the boy’s behaviour amounted to  
32 discrimination on the ground of his disability. In their view the majority decision served to defeat the  
33 very purpose of the Act – *Purvis v NSW (Department of Education and Training)* [2003] HCA 62 at  
34 [16-21] (Kirby & McHugh JJ).  
35 *Yonis v Vice-Chancellor, University of New South Wales* [2005] NSWADT 109 (17 May 2005) at [30]  
36 [33].  
37 *Yonis v Vice-Chancellor, University of New South Wales* [2005] NSWADT 109 (17 May 2005) at  
38 [44].  
39 [2008] FMCA 11 (1 February 2008).  
40 *Huang v University of New South Wales & Ors* [2008] FMCA 11 (1 February 2008).  
41 These allegations were investigated by the University and were, in the main, dismissed. The  
42 investigation did however find that one academic had been at fault and in breach of the University’s  
43 code of conduct in not acknowledging the contribution of his students, including Ms Huang, to a poster  
44 he had presented – *Huang v University of New South Wales & Ors* [2005] FMCA 463 (16 May 2005)  
45 at [43].  
46 *Huang v UNSW & Ors* [2008] FMCA 11 at [112].  
47 *Huang v UNSW & Ors* [2008] FMCA 11 at [128-129].  
48 *Tu v University of Sydney (No 2)* [2002] NSWADTAP 25 (13 August 2002) at [23] (O’Connor K, Rees  
49 N & Alt M).  
50 *Tu v University of Sydney* [2002] NSWADTAP 19 (31 May 2002); *Tu v University of Sydney (No 2)*  
51 (EOD) [2002] NSWADTAP 25 (13 August 2002).  
52 *Tu v University of Sydney* [2002] NSWADTAP 19 (31 May 2002)  
53 [2002] VCAT 896 (28 August 2002).  
54 [2002] VCAT 896 (28 August 2002) at [19].

28 [2006] VCAT 1208 (9 May 2006).  
29 [1996] HREOCA 17 (17 July 1996).  
30 John Basten Q C.  
31 [1996] HREOCA 17 (17 July 1996) at [9].  
32 *Metwally v University of Wollongong* (1984) EOC ¶92-030 (Equal Opportunity Tribunal); (1984) 158 CLR 447.  
33 *Metwally v University of Wollongong* (1984) EOC ¶92-030 (Equal Opportunity Tribunal).  
34 *Metwally v University of Wollongong* [1985] HCA 28; (1985) 60 ALR 68; (1985) ALJR 481 (17 April 1985).  
35 At this time this was the body with jurisdiction to determine matters under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth.)  
36 *Sekhon v Ballarat University College* (1993) EOC 92-552.  
37 *Jandruwanda v University of South Australia (No 2)* [2003] FMCA 233.  
38 *Jandruwanda v University of South Australia* [2003] FCA 1456.  
39 *Jandruwanda v University of South Australia* [2004] FCA 219.  
40 *Jandruwanda v University of South Australia* [2004] FCA 219.  
41 For example, *Catholic Education Office v Clarke* [2004] FCAFC 197; *Hills Grammar School v Human Rights and Equal Opportunity Commission* [2000] FCA 658.  
42 For example, 'University students take complaints to Anti-Discrimination Commissioner' ABC 7.30 Report 16<sup>th</sup> February 2002, retrieved from <http://www.abc.net.au/7.30/content/2002/s460046.htm>.  
43 [1997] HREOCA 5.  
44 The graduation ceremonies for that university have now been changed in order to ensure the participation of all graduands. For a discussion of this case see E. Dickson 'Disability Standards for Education and Reasonable Adjustment in the Tertiary Education Sector' (2007) 12(2) *Australia and New Zealand Journal of Law and Education*, 25.  
45 *Hinchcliffe v University of Sydney* [2004] FMCA 85.  
46 *Hinchcliffe v University of Sydney* [2004] FMCA 85.  
47 This was the judgment of the court of first instance in *Purvis*, the case then proceeded on appeal to the High Court of Australia.  
48 *Hinchcliffe v University of Sydney* [2004] FMCA 85 at [212].  
49 [2000] HREOC No H96/2 (Unreported, Commissioner McEvoy, 14 July 2000).  
50 [2000] HREOC No H96/2 (Unreported, Commissioner McEvoy, 14 July 2000).  
51 *Sluggett v Human Rights and Equal Opportunity Commission* [2002] FCA 987 (Unreported, Federal Court of Australia, Drummond J, 9 August 2002); [2003] FCAFC 27 (Unreported Full Court Federal Court of Australia, Spender, Dowsett, Selway JJ, 5 March 2003).  
52 While costs orders are generally made against the unsuccessful students is it not known whether payment is pursued by the universities.  
53 [2004] NSWADT 81 (29 April 2004).  
54 *Z v University of A & Ors* [2001] NSWADT 110 (18 June 2001), (No 7) [2004] NSWADT 81 (29 April 2004), (No 8) [2004] NSWADT 100 (26 May 2004), (No 9) NSWADT 25 (17 February 2005), *Z v University of A, Dr B, and Professor E* [2003] NSWADT 258 (5 December 2003), *Z v University of A, Dr D & B* (No 4) [2002] NSWADT 14 (8 February 2002), (No 6) [2003] NSWADT 260.  
55 *Z v University of A & Ors* (No 9) NSWADT 25 (17 February 2005) at [17].  
56 Known as *Fainstein v University of New South Wales and Professor Piggott* [2004] NSWADT 26 (10 February 2004).  
57 *Fainstein v University of New South Wales and Professor Piggott* [2004] NSWADT 26 (10 February 2004).  
58 This was also the case in an earlier complaint by an Iraqi student which was similarly dismissed – *Abdulla v The University of Sydney (No 1)* [1997] NSWEO, No 130/1996 (18 April 1997).  
59 [2003] NSWADT (5 June 2003) and [2005] NSWADT 194 (19 August 2005).  
60 s 111 *Anti-Discrimination Act 1977* (NSW).  
61 *Margan v University of Technology, Sydney* [2003] NSWADT (5 June 2003) at [23] ( Needham J,

Antonioz Z & Nemeth de Bikel L).

- 62 *Margan v University of Technology, Sydney* [2005] NSWADT 194 (19 August 2005).
- 63 *Margan v University of Technology, Sydney* [2005] NSWADT 194 (19 August 2005) at [44].
- 64 *Harding v University of New South Wales*, Matter No 10289/98 [1998] NSWSC 439 (2 October 1998) (an application by the university for security for costs and a claim for privilege); [2001] NSWADT 75, [2001] NSWSC 1198 (29 November 2001), [2002] NSWADTAP 36, [2002] NSWSC 113 (1 March 2003), [2003] NSWADT 75 (15 April 2003).
- 65 *Harding v University of New South Wales* [2001] NSWADT 75
- 66 *Harding v University of New South Wales* [2002] NSWADTAP 36; [2003] NSWADT 75 (15 April 2003).
- 67 [2001] NSWSC 1198 (29 November 2001) - application dismissed by Adams J; [2002] NSWSC 113 (1 March 2003) - application dismissed by Wood CJ.
- 68 *Abdulla v University of Sydney (No.1)* [1997] NSWEOOT.
- 69 The risk of a student being denied access to justice in such situations was stressed by Spender J in the Federal Court of Australia in *Mathews v University of Queensland* [2002] FCA 414 (8 April 2002).
- 70 [1997] VADT 56 (16 June 1997).
- 71 *Rabel v Swinburne University of Technology* [1997] VADT 56 (16 June 1997) at [6] (Walker J, Dawson J & Tchen T).
- 72 *Rabel v Swinburne University of Technology* [1997] VADT 56 (16 June 1997) at [9] (Walker J, Dawson J & Tchen T).
- 73 *Z v University of A & Ors (No 9)* NSWADT 25 (17 February 2005) at [17].
- 74 *Hanna v University of New England* [2006] NSWSC 122. Discrimination was only one of the numerous allegations levelled by the student against the university in what was described by the Court as 'omnibus litigation'.
- 75 *Hanna v University of New England* [2006] NSWSC 122 at [23].
- 76 *Hanna v University of New England* [2006] NSWSC 122 at [71].
- 77 Pursuant to s 12 (2) *Higher Education Act 2004* (UK).

