

# EDITORIAL

This volume of the ANZJLE brings together a series of articles on issues of importance in the tertiary education sector. Universities are communities as well as institutions and our authors address a diverse range of legal matters relating not only to the university's institutional identity but also to the relationships which exist between the university and its staff, the university and its students and, indeed, between students themselves. Among the papers from Australian, New Zealand and United States authors, readers from the wider education and legal communities, and not just from universities, will find much of interest to stimulate thought and discussion.

Two articles concern the particularly topical legal and educational controversy of academic freedom of speech. The authors of these articles, Patrick Pauken, from Bowling Green State University in Ohio, and Edwina MacDonald and George Williams, from the University of New South Wales, are all new authors to the pages of ANZJLE. Dr Pauken teaches education law at BGSU and is a member of the Ohio Bar. His article canvasses the ramifications of several cases involving Australian and US academics who, while identifying themselves with their employing university, have made public their provocative political and social ideologies. Dr Pauken also provides a scholarly overview of how the courts in both countries have constructed the parameters of academic freedom. The key conflict to be resolved, according to the author, is between the academic's individual right to freedom of expression and the university's institutional right to 'guide and direct the teaching and scholarship of its students and faculty'.<sup>1</sup>

Ms MacDonald and Professor Williams are both attached to the Gilbert + Tobin Centre for Public Law at the University of New South Wales. Professor Williams is an eminent commentator on public law issues and his articles often appear in the pages of Australia's national press. Ms MacDonald is also developing a profile as a respected media commentator. Most recently, perhaps, Ms Macdonald and Professor Williams have co-authored many newspaper opinion pieces on the David Hicks imbroglio. They are, therefore, no strangers to the potential problems facing academics who 'speak out'. Their article in this issue of *ANZJLE* looks at a series of contemporary threats to academic freedom in Australia and provides, as such, an interesting companion piece to the more general overview of the Australian situation provided in the Pauken paper. Macdonald and Williams claim that the increasing trend towards the commercialisation of universities has had unintended ramifications for academic freedom in the conduct of their research. Academics may feel pressured, for example, to choose 'safe' research topics so as not to alienate potential funding sources. Further, the time available for the reflection needed to inform research is being eroded by the time taken for the writing of applications to fund research. The authors also contend that recent changes to the structure and operation of the Australian Research Council, the peak Australian body for the funding of university research, mean that the funding process may become politicised to an extent that 'will place even more pressure on academics to tailor their research projects to meet the political objectives of the government'. Finally, the authors address the threats to freedom of expression embedded in a new regime of Australian anti-terror laws. These laws, while designed to protect a democratic society, have the potential to erode expression rights considered fundamental in such a society.

Ralph Mawdsley is no stranger to the pages of ANZJLE. We are introduced in this volume, however, to his co-author, James Mawdsley, also from Cleveland State University in the US. The Mawdsley paper develops a theme touched on in Patrick Pauken's paper — the clash between student freedom of expression and university policy. Students have, perhaps, always value-added to their university experience by joining university based clubs. These clubs may be as benign as the 'chocolate appreciation society' or as subversive as 'the anarchy party'. When does a student club's 'right' to set its rules of membership, however, infringe the rights of students excluded from the club? What role should the university play in the resolution of such a right's clash? This paper considers this conflict within the context of religious student organisations which promulgate beliefs which may, prima facie, offend university non-discrimination policies. The conflict is made more complex by the fact that the potentially discriminatory views expressed by club members may be fundamental to their religious beliefs. The article provides detailed consideration of a recent decision of the US Seventh Circuit in a case involving allegations of discrimination by a student religious organisation on the basis of sexual orientation.<sup>2</sup> It is always of interest to follow legal developments in the US. We hope that an Australian or New Zealand writer may wish to provide a complementary piece for the journal on our legal perspectives on student freedom of expression.

Two papers in this issue give interesting accounts of how universities have responded – or should respond – to court decisions which have challenged the status quo in terms of university administration. The first paper is written by Julia Pedley and Virginia Goldblatt, new authors to ANZJLE who were both members of a Massey University team which developed an explicit University Student Contract. The Contract was developed in response to the decision of the New Zealand High Court, in *Grant v Victoria University of Wellington*,<sup>3</sup> that the law of contract governed the relationship between university and student. An important outcome of the Massey project has been the generation of a revamped Code of Student Conduct and an associated regime of Disciplinary Procedures for breaches of the Code. Although the relevance of contract law to the university student relationship is by no means settled worldwide<sup>4</sup> the papers by Pauken and Ralph and James Mawdsley, in this issue, illustrate the potential for student disputes and the need for a fair and enforceable scheme for the regulation of student behaviour. It is interesting, in the context of the Pauken and Mawdsley papers, that one of the concerns for the authors of the Massey Contract was to recognise student rights to protest and free speech while also taking 'account of the corresponding rights and responsibilities to others'.<sup>5</sup>

The second paper on this theme is by Mary Wyburn, from the University of Sydney, who was also published in the last issue of the journal. This paper was stimulated by the recent Victoria University intellectual property litigation.<sup>6</sup> The issue of who owns the intellectual property rights to university research is another problematic manifestation of the commercialisation of university activities, already identified by Edwina MacDonald and George Williams as a problem in terms of academic freedom. As well as providing a comprehensive overview of the complex litigation, Wyburn's article makes some interesting observations about the ramifications of the litigation for university administrative and academic staff alike. She concludes that this is yet another area where universities may need to update their policies and procedures.

The final paper in this volume, by Joy Cumming, concerns an issue of particular poignancy for students of law who must demonstrate that they are 'fit and proper' persons before being admitted to practice: what behaviour amounts to plagiarism? Joy Cumming writes in response to a recent Queensland decision involving a student seeking to challenge a finding of plagiarism so as to facilitate his application for admission as a legal practitioner.<sup>7</sup> Plagiarism is, of course, a

problem for all educators — particularly now that students have access to a seemingly limitless supply of resource material via the internet. It appears that there is little consistency between Australian universities in the way plagiarism is defined, detected and disciplined. This paper identifies the need, particularly, for clear guidelines to be established in regard to what amounts to plagiarism in an environment where students either do not appear to understand that copying another's work is wrong or argue that they were simply 'careless' or 'stressed' and not dishonest. The case also demonstrates occasions when courts will shed their traditional reluctance to engage in matters of academic substance, such as marking, to make a determination of the quality of student work.

The journal concludes with a review by Sally Varnham of the new higher education text by Dennis Farrington and David Palfreyman. We commend *The Law of Higher Education* to you as an essential addition to your education law library. While it is written from a UK perspective, it gives an insight into issues of importance for tertiary institutions around the world – including many of those raised by *ANZJLE* authors in the present volume.

#### ENDNOTES

1. Patrick Pauken, 'Academic Freedom and Institutional Autonomy in American and Australian Universities: a twenty-First Century Dialogue and a Call to Leaders' (2007) 12(1) *Australia and New Zealand Journal of Law and Education* 8.
2. *Christian Legal Society v Walker*, 2005 WL 1606448 (S.D. Ill. 2005).
3. *Grant v Victoria University of Wellington* [2003] NZAR 185.
4. In Australia see, for example, *Griffith University v Tang* (2005) 221 CLR 99.
5. Julia Pedley and Virginia Goldblatt, 'The Development of a Student Contract and Improvement in Student Disciplinary Procedures at Massey University' (2007) 12(1) *Australia and New Zealand Journal of Law and Education* 5.
6. See *Victoria University of Technology v Wilson* [2003] VSC 299; *VUT v Wilson* [2004] VSC 33; *Youseff v VUT* [2005] VSC 223; *VUT v Wilson* [2006] VSC 186.
7. *Re Humzy-Hancock* [2007] QSC 34.

Elizabeth Dickson  
Joy Cumming

