

# COMPARING LITIGATION IN HIGHER EDUCATION: THE UNITED STATES AND AUSTRALIA IN 2007

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*Comparative analysis of all reported litigation in 2007 involving institutions of higher education in the United States and Australia identified important similarities as well as some differences. Results for both nations include greatly expanded numbers of cases that appear to track on major periods of change and commonalities in terms of who sues, for what and in which court system. Interestingly, reported litigation involving universities in Australia would appear to occur with greater frequency than in the United States. However, this finding may reflect anomalies in the organisation of the judicial and the reporting systems in each nation. For attorneys and practitioners responsible for managing the risks of litigation for institutions of higher education, the methods and findings in this comparative case study suggest strategies for expanding understanding of the dynamics of litigation as well for designing policies and programs to minimise the growing costs and impact on their institutions of this pattern of increasing litigation.*

## I INTRODUCTION

The so-called ‘explosion’ in litigation in higher education has generated debate in the United States (US) over several decades.<sup>1</sup> More recently, this debate, often characterised as a peculiarly American phenomenon, has surfaced in other countries and extended the controversy.<sup>2</sup> This study begins to address this question with evidence from one policy sector, postsecondary education, in two nations, the US and Australia. Comparison of legal systems and outcomes is useful but complex.<sup>3</sup> Numerous differences in the organisation of both the judicial and the postsecondary education systems in the US and Australia constrain generalisations about study findings. Nonetheless, comparative analysis may also point to commonalities in problems as well as broaden the range of policy options and solutions available to those interested in managing the risks of litigation for postsecondary institutions.

This study reviews all reported litigation over a one-year period, 2007, involving higher education in the US and Australia. It surveys reported decisions found in the case law databases as available in each country and identifies those implicating postsecondary education. These cases are then analysed to develop categories that allow for some assessment of similarities and differences in the litigation reported for both nations and to generate a framework for comparing the risks of litigation encountered in a common policy sector, higher education.

To provide context for a comparative analysis of litigation, this article begins with an overview of similarities and differences between the US and Australia in two areas: higher education systems and current literature on litigation and higher education. It then proceeds to review judicial reporting systems and methods of case law data gathering used for each country

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as well as the categories of analysis employed in identifying the findings in this research. This is followed by a presentation of study findings. The article concludes with a discussion of these findings in terms of an understanding of similarities and differences in litigation involving postsecondary institutions in the two nations as well as drawing implications for policymakers, attorneys and administrators concerned about managing the risks of litigation.

## II COMPARATIVE CONTEXT

### *A Postsecondary Sector: United States*

The postsecondary education sector in the US may be characterised as a market-based system that operates under an evergrowing burden of state and federal regulatory control. Variation by state of incorporation and by organisational form, whether public or private, for-profit or not-for-profit, complicates any description of the organisation and delivery of postsecondary education in the US.

Postsecondary education is organised at the state level, with 50 different systems and approaches to controlling authority, funding, and policy. Generally, each state regulates three different institutional types in the postsecondary sector: public, private non-profit, and private for-profit. These take different forms including: community colleges which offer a wide range of vocational and technical coursework as well as the first two years of collegiate coursework leading to an associates' degrees; colleges or universities which offer four years of undergraduate studies leading to a bachelor's degree; and postgraduate and professional programs, often provided through a 'flagship' and/or other 'comprehensive' public and private institutions within a state. The last provide specialised programs and advanced degrees beyond the bachelor's and often supply state and regional workforce needs.<sup>4</sup> The federal government plays a major role in funding higher education by subsidising a substantial proportion of enrollments through grants and loans to individual students and by support for research and other activities lodged within postsecondary institutions deemed important to the national interest. Funding is the proverbial carrot for the ever larger stick of federal regulations with which postsecondary institutions must comply.

In terms of numbers, there were 4,314 institutions in the postsecondary sector in 2007. In addition to institutions offering baccalaureate and postgraduate degrees, this number includes community colleges and a wide array of proprietary institutions offering training beyond high school. Of this total, there were 2,629 colleges and universities in the US offering undergraduate (baccalaureate) and postgraduate degree programs.<sup>5</sup> Six hundred and forty-three (643) of these were public, or state-sponsored institutions, and 1986 private, with 1533 of these non-profit. and 453 for profit.<sup>6</sup>

In 2007, American colleges and universities enrolled approximately 11,240,000 undergraduates and 2,575,000 graduate or professional students out of a population of 301 million. Approximately 26.9 per cent of Americans have attained a bachelor's degree, with 9.9 per cent of that group having received a graduate or professional degree. Enrollments were 57.3 per cent female, 31.5 per cent minority and 3.4 per cent international students. Nearly sixty-two per cent (61.7%) were enrolled on a fulltime basis. Approximately 19.7 per cent of students across all institutional types in the postsecondary sector came from homes where a language other than English is spoken. Graduation rates averaged over a six year period of enrollment across all, four year, baccalaureate institutions were 56.4 per cent.<sup>7</sup>

## B *Postsecondary Sector: Australia*

Australia is also organised as a federation with six states and two territories within the Commonwealth. Authority over higher education is shared between the central government and the various states. Most institutions are organised under state law but funded, and almost entirely regulated, by the federal government.<sup>8</sup> There are three types of higher education providers: self-accrediting; non-self-accrediting; and, university. All three require approval by the Department for Education, Science and Training of the Australian Government. Such approval confers institutional eligibility for grant funding and access to financial assistance for students and, in turn, requires compliance with federal accountability standards.

Universities dominate the postsecondary sector. A university is organised as a statutory corporation, a body that is ‘established...or recognized...by or under a law of the Commonwealth, a state, the Australian Capital Territory (ACT) or the Northern Territory, and meets nationally agreed criteria for the university’.<sup>9</sup> Universities are established through legislation whether Commonwealth, state or territorial and are considered to be self-accrediting. Universities receive substantial funding from the central government in the form of grants both to institutions and to students directly under the provisions of the *Higher Education Support Act*.<sup>10</sup> In addition to the universities, there are other, more difficult to characterise, institutions including one Australian branch of an overseas university, four self-accrediting higher education institutions, and 150 or more non-self-accrediting higher education providers accredited by state and territorial authorities that offer a range of degrees and certificates. These include several registered in multiple states that offer courses in fields such as business, accounting, information technology, hospitality, natural therapies, etc. A separate public educational system, termed Technical and Further Education (TAFE), is organised by state or territory into a series of institutions charged with delivering technical and vocational training, including in some instances fields such as engineering and accounting, to students. Another layer of higher education providers, Vocational Education and Training or VET system, is jointly managed by state, territorial and Commonwealth governments in partnership with industrial and institutional providers to offer industry-specific credentialing programs from certificates through doctorates.

Beginning with the ‘Dawkins reforms’ in 1987, higher education in Australia was reorganised to make higher education more competitive, entrepreneurial, and financially self-sufficient. Since then, there has been a steady erosion of public funding for Australian universities from approximately 90 per cent to less than half<sup>11</sup> as well as growth in the numbers of universities from 19 in 1985 to 39 at present.<sup>12</sup> This increase resulted both from the creation of new universities and from the merger of 51 advanced education institutions with existing universities.<sup>13</sup> Of the 39 universities, 37 are public and two private. In 1989, a Higher Education Contribution Scheme (HECS) shifted much of the cost by replacing fees with income contingent levies so that students assumed a greater proportion of the burden of funding for higher education from the state. Between 1995 and 2004, public funding for tertiary education actually fell by 4 per cent while enrollment increased by a third.<sup>14</sup> In the search to replace public funding, universities have sought to expand revenue sources by commercialising research, capitalising on royalties, trademarks and licences, and recruiting ‘fee-paying’, mostly international, students. Australia is now the fifth largest exporter of education services with higher education the third largest sector of foreign earnings. These reforms stimulated much analysis, much of it critical, about the impact on universities and academia.<sup>15</sup> In March 2008, the Government commissioned a review to assess and make recommendations about reforms to the Australian postsecondary education sector. In response to the Bradley Review, the Government announced in May 2009 that it will provide an

additional \$5.4 billion to support higher education and research over the next four years.<sup>16</sup> These proposals include extensive and systematic efforts to broaden access and enhance articulation between TAFE and other vocational and technical institutions with university providers.

Australia's population was 21 million in the 2006 census, with immigration playing an important role in recent population growth. Twenty-four per cent (24%) of Australians were not born in country.<sup>17</sup> The indigenous population is estimated to be 2.5 per cent of the total. More than 19 per cent of Australians hold a bachelor's degree, a number that has almost doubled over the past two decades. Of those with a bachelor degree, 26 per cent have some form of an advanced degree beyond the bachelor's. Another 29 per cent have some form of advanced diploma, qualification or certificate. According to government data, 960,892 undergraduate and postgraduate students were enrolled in Australian universities in 2007. Of these, 273,099 (28.4%) were international students.<sup>18</sup> Approximately 72 per cent of university students graduate.<sup>19</sup> At the same time 428,000 Australians (9.3%) and 171,246 international students were enrolled in TAFE institutions.

### C *Research on Litigation: United States*

Issues implicating litigation and higher education have long commanded attention from scholars and practitioners in the US. Most colleges and universities now employ counsel, whether on staff or retainer. There is an extensive academic literature on the implications of various statutes and judicial decisions for institutional practitioners.<sup>20</sup> Most scholarship, however, reflects traditional legal scholarship with a detailed focus on the evolution and implications of a particular statute or of a reported case in light of some aspect of the environment in which colleges and university function. Such articles appear with some regularity in the numerous journals devoted to legal scholarship.

Scholars and practitioners interested in the law of higher education in the US enjoy substantial support. The National Association of College and University Attorneys (NACUA), a professional association, was organised in 1960 to provide research, educational and networking services for its members and to represent the legal concerns of postsecondary institutions in various public policymaking processes, especially at the federal level. NACUA supports the *Journal of College and University Law* (JCUL), the chief scholarly journal for attorneys in the field. In addition, West Publishing, the group that developed and manages Westlaw, a major source of computerised legal databases for attorneys in the US, publishes the *Education Law Reporter* (ELR), an annotated, biweekly compendium of all reported case law decisions involving postsecondary, elementary and secondary education in any way. This compendium includes judicial opinions involving all public and private, for-profit and not-for-profit institutions involving postsecondary education in any manner.

Scholarship about patterns of litigation involving post-secondary institutions first emerged in the late 1980s. Early studies adapted methodologies first developed in the elementary and secondary education sector.<sup>21</sup> The first research studies examining patterns of litigation in higher education involved reviews of all litigation in a single state (Iowa and Texas) over long periods of time and were published in 1987.<sup>22</sup> The introduction of computer searching technologies into legal research expanded the scope and facilitated this research methodology. This resulted in two types of studies: one involving two separate analyses of reported litigation involving institutions of higher education over different one year periods of time<sup>23</sup> and the other providing longitudinal analyses of trends in the volume of litigation in higher education, using the decade as the unit of time.<sup>24</sup> Both approaches demonstrated substantial growth in litigation into the 1990s but confirm

moderated rates of increase,<sup>25</sup> even actual decline in numbers of cases<sup>26</sup> during the first decade of this century.

#### D *Research on Litigation: Australia*

To date, most research on higher education in Australia is found in institutes and graduate or certificate programs that concentrate primarily on the areas of teaching and learning rather than on administrative and policy related issues. The Centre for Study of Higher Education at the University of Melbourne occupies a central role in research on public policy initiatives at both the national and international levels. The Australian Universities Quality Assurance Agency occasionally provides data relevant to managing risks that give rise to litigation.<sup>27</sup> The study of law and higher education is gathering momentum in Australia. In terms of law, many, if not most, Australian universities employ counsel with responsibilities for policy interpretation and compliance and assistance with dispute resolution, in addition to more traditional legal matters. In contrast with the US, however, there appear to be no basic texts<sup>28</sup> or coursework on the general topic of law and higher education in Australia or educational programs designed specifically to prepare university administrators.

There is an emerging body of scholarship addressing various aspects of the law and education in Australia including universities. Many of these are found in the *Australia and New Zealand Journal of Law and Education* (renamed the *International Journal of Law and Education*), other law-related journals and in the *Journal of Higher Education Policy and Management*. A distinct body of literature on litigation in higher education approaches this topic from perspectives from the field of alternative dispute resolution and may be found in the journals such as the *Australasian Dispute Resolution Journal* and the *Australian Journal of Administrative Law*. In part, this latter approach arises from a broader pattern of the gradual devolution of adjudicatory authority for dispute resolution from courts to ombudspersons or tribunals with jurisdiction and responsibilities specified through legislation.<sup>29</sup> Within universities, this approach may also be derived, in part, from the historic role of ‘Visitor’ in Australian and English universities and its relationship to debates over the potential role for university ombudspersons in resolving disputes that arise both within universities and in states across Australia.<sup>30</sup>

Several organisations of scholars and others interested in law and (higher) education may be identified. One, the Australia and New Zealand Education Law Association (ANZELA), was formed in 1991 to encourage and communicate research on legal issues in education generally. ANZELA organises an annual conference and has links to other national organisations interested in the law and education. Risk management as a topic of interest to lawyers specialising in educational law would appear to be on the agenda in Australian universities as ANZELA will focus on ‘Education: A Risky Business’ as its 2009 conference theme. The Society of University Lawyers (SOUL), an organisation of attorneys employed in advising universities, also holds a yearly conference for its members as well as provides networking resources.<sup>31</sup> A third group, Ombuds and Deans of Students in Higher Education in Australasia Association (OMDOSHEAA), organised through the University of South Australia, gathers university staff, scholars and others every other year to discuss problems of grievance handling and dispute resolution in university settings.<sup>32</sup>

### III RESEARCH METHODS

This research replicates methodology developed for and employed in several, previously reported studies assessing the impact of litigation on various groups and issues across the postsecondary sector in the US.<sup>33</sup> However, important differences in the organisation and delivery of postsecondary education as well as in the legal reporting systems limit the direct comparison and implications of study findings between the US and Australia.

#### *A Data Sources: United States*

This study surveys all cases reported for the year 2007 in West's *Education Law Reporter* (ELR) that involved the postsecondary education sector in some way.<sup>34</sup> The ELR is a unit of West's Publishing, a Thomson Reuters group, the leading publisher of legal resources for attorneys, and a key provider of electronic case law reporting systems (WESTLAW) in the US. The ELR has been available to education attorneys and reference collections since 1982. It includes the full text of *all* published cases involving elementary and secondary schools, postsecondary institutions (including public and private community colleges, private providers of vocational and technical educational programs, colleges and universities), students, programs as well as other educational associations and interest groups. It also includes cases reported in bankruptcy courts that often arise long after students' enrollment in postsecondary education as well as any education case addressed in decisions about federal rules. However, it does not include cases that are generally not published in the US legal system — that is, with some exceptions, most federal and state trial court opinions or state appellate court decisions which simply affirm trial court rulings without written opinions. Such decisions are not reported, do not serve as precedent and do not form part of this database. Court orders, memoranda, and other interim decisions are not generally published in the reporting systems and do not have precedent value. Nor are agency adjudications published in the ELR. The ELR is a primary source of case law from federal and state courts in the US available to practitioners, attorneys and scholars alike. It is published and distributed in paperback form biweekly. At the end of each year, the volumes of the ELR are bound and made available for permanent reference collections.

To identify cases from the US, the researcher reviewed all cases in each of the 26 issues published in 2007. The index in the ELR provides a brief summary for each case. The editors then add an asterisk in the index to distinguish all cases involving postsecondary education.<sup>35</sup> In addition, federal circuit court decisions reported in the Federal Appendix (F App'x) format are published in the ELR and so, are counted in this review of cases for 2007, despite the fact that such opinions are technically 'unpublished' cases with limited value as precedent.<sup>36</sup> In total, 315 cases reported in the ELR for 2007 formed the database for this research.

#### *B Data Sources: Australia*

The online databases of reported opinions published by the Australian Legal Information Institute (AUSTLII) served as the primary source of decisions included in this survey. AUSTLII provides a free online, readily searchable collection of primary materials, legislation and case law reported from Commonwealth, State and Territorial courts and tribunals. AUSTLII reports decisions for each court in separate databases as well as in the aggregate. In addition, a separate search of reported decisions on the individual web-sites of all relevant Australian courts and tribunals was conducted to identify cases that may not have been included in the AUSTLII data base so as to ensure completeness.

For this research decisions from 2007 for each court and relevant tribunal were accessed separately. This included all reported decisions cases from the federal courts and tribunals: the High Court, the Federal Court of Australia issued both en banc and with a single judge, the Federal Magistrates Court and decisions by the Administrative Appeals and Industrial Relations Tribunals. Decisions by the Family Court and other federal tribunals were excluded as an abbreviated review identified no cases with subject matter germane to this analysis. In addition, the same procedure was followed for the courts and relevant tribunals in each Australian State and Territory.

The search strategy was framed to be broadly inclusive and applied to all decisions reported from each court and tribunal in all databases. The search was limited to cases involving universities in any way and so did not extend to decisions involving TAFE or other VET providers in the tertiary sector.<sup>37</sup> The search employed 'key words' to identify all cases that incorporated the terms universit! and 2007 anywhere in the text of reported decisions. The search engine then rank-ordered the results in terms of the frequency with which those terms appeared. Where multiple decisions were identified for the same case in the same year, a common occurrence, all were read but only the latest decision from the highest level of court or tribunal involved (whether state or Commonwealth) was included so as to eliminate double-counting.<sup>38</sup> In total, 2848 cases were initially identified for further review.<sup>39</sup> Of these 111 met all search criteria.<sup>40</sup>

### *C Categories for Analysis*

This research replicates methodology employed in several previous studies assessing the impact of litigation on various groups within the postsecondary sector in the US.<sup>41</sup> After each case was identified for further analysis, each opinion was carefully reviewed to identify the following information:

- The court, court system or tribunal making a decision in the case;
- The parties involved in the litigation;
- The fact patterns giving rise to the dispute; and
- The issue(s) being litigated.<sup>42</sup>

Once this information was compiled from each reported decision, the data on parties to the litigation and issues litigated were aggregated and grouped into appropriate categories. Analysis was then based on frequency counts of the case law data. Finally, comparison with existing research on patterns of litigation and on demographic differences was developed whenever possible.

### *D Study Limitations*

This initial attempt to create a baseline perspective comparing the risks of litigation involving institutions of higher education in two nations over a one year period has important limitations. These arise from differences in courts and court reporting systems, in the organisation and delivery of postsecondary education between the US and Australia and from the fact that findings represent 'snapshot' rather than longer term trend data.

First, although the judicial systems in both countries share some commonalities of origin (common law) and of structure (federalism), in practice there are important differences in the organisation, allocation of authority and jurisdiction, procedures, and remedies that all shape the work and decisions of each court system. One involves the role of tribunals within

Australian court systems at state and territorial as well as Commonwealth levels. The question of ‘fit’ between tribunals, which are executive and administrative, as opposed to judicial, in nature remains a topic of debate in Australia as does that of judicial oversight of tribunal decisions.<sup>43</sup> While ‘the objective of administrative review on the merits is to improve the quality of decision-making, both in the particular case and, by precept, generally’,<sup>44</sup> what weight a decision reported from a tribunal is accorded in terms of future practice or policymaking, especially at institutional levels in Australia is less clear. There is no direct counterpart to the tribunal system in the US as administrative agencies perform adjudicatory functions.

The study design has further limitations attributable to differences in reporting decisions. In terms of the data for the US, this study includes only reported court decisions, that body of law available to guide future judicial reasoning and application. It does not reflect the actual number of cases related to litigation involving postsecondary institutions across the US. That number cannot be determined given existing technologies and the dynamics of the litigation process, although it may be substantial. Cases filed can be withdrawn or settled by motion or agreement at multiple points in the discovery and pre-litigation phases. Some estimates are that only 10 per cent of cases ever end in a hearing in the US. Such estimates are currently challenged as too low, however.<sup>45</sup> Further, records of motions, interim orders, and other matters related to case preparation prior to hearing are generally not available or published. Decisions by trial courts, whether bench or jury, are usually not reported in a form accessible to researchers interested in the factual details and claims developed in the case. Finally, where district court decisions are included in the Westlaw reporting system, there are differences between federal and state court cases as well as between states. In summary, one tentative estimate, based on data from one state twenty years ago, was that as few as 1 per cent of cases filed in court ever reach the appellate level where a formal opinion might be included in the legal reporting system.<sup>46</sup>

The reporting of judicial and tribunal decisions in Australia would appear to be much broader than in the US. As in the US, only some proportion of disputes involving universities in some way is eventually heard by a tribunal, magistrate or judge. The Australian Law Reform Commission estimated in 2000 that, depending on jurisdiction, between 4-35 per cent of civil cases filed in Australia end up in a hearing.<sup>47</sup> Furthermore, ‘not all courts and tribunals report their decisions’.<sup>48</sup> After a limited search, this author found no explanatory rationale for the inclusion or exclusion of court and tribunal decisions in the various databases. As a consequence, although decisions included in this data set also underrepresent any estimate of disputes involving universities in Australia, they may be more numerous than those reported for courts in the US in part because interim orders and other decisions related the development of a case appear to be more broadly reported. What can be said is that those directly involved with dispute resolution within Australian universities are concerned about growing numbers, as well as the increasing complexity, of complaints involving universities and suggest needs for reforms to the complaint resolution processes.<sup>49</sup>

Finally, differences in the numbers and types of postsecondary institutions included in this analysis further limit the findings in this study. The data from the US is based on all stakeholders in the postsecondary sector including all institutions (4,314) classified as offering some form of postsecondary education whereas that from Australia is limited to the 39 institutions classified as universities (see endnotes 5 and 37). This research did not seek to identify decisions involving TAFE or VET institutions in Australia, thereby limiting direct comparison with the database employed to identify cases in the US.

For both nations, the cases identified in this study of litigation in 2007 represent the tip of the litigation iceberg of disputes involving postsecondary institutions.

## IV FINDINGS

### A *Volume of Litigation*

In the US, 315 cases involving postsecondary institutions in some way were reported in 2007. In Australia, 111 cases involving universities were reported over the same time period. The literatures on volume of litigation involving postsecondary institutions in the US and Australia provide some baseline for analysis. In the US two different approaches have been developed to date to examine trends in litigation. Both point to a stabilisation, even decline, in litigation reported over the past decade. Since ‘exploding’ in the 1970s by 300 per cent, the rate of growth stabilised,<sup>50</sup> and then decreased in the 1990s and 2000s.<sup>51</sup> In 1988 based on the same methodology as that for this study, 431 cases were reported.<sup>52</sup> Another source reports that the number of cases in the US varies but has declined from a high of 495 in 1996 to a low of 292 in 2003.<sup>53</sup>

Evidence about the exposure to, or volume of, litigation involving Australia’s higher education institutions between 1985 and 2006 also offers a baseline for comparison. That research identifies a ‘very significant increase in litigation over that period’ with marked growth during the last half of the 1990s, peaking in 2005 with over 90 reported cases involving courts and tribunals.<sup>54</sup> The author concludes that the litigation data ‘mirrors the increase in complaints received by ombuds and confirms their concerns, and the concerns of academics and other observers, that university disputing is increasing markedly’.<sup>55</sup> The findings for 2007 point to continued, if not accelerated, growth in numbers of cases.

### B *Court System*

The court in which a dispute is resolved provides a starting point for comparing patterns of litigation. Table 1 summarises these findings for each country by court system and court or tribunal issuing the decision.

The distribution of cases reported between federal and state court systems in the US and Australia would appear to be similar. In the US, this confirms a continuing pattern of growing recourse to federal courts.<sup>56</sup> In 1988, based on a similar methodology, 44 per cent of all postsecondary cases were reported by federal courts.<sup>57</sup> In Australia different rules as to forum for litigation apply. Tribunals issued about 35 per cent of the reported decisions for Australia.

Table 1: Number of reported cases by court system and level

United States		Australia		United States		Australia	
Federal Courts		Commonwealth Courts		State Courts		State/Territorial Courts	
Supreme Court	= 0	High Court	= 0	State Supreme Courts	= 37	State Courts	= 17
Circuit Courts	= 63	Federal Court	= 23				
District Courts	= 107	Magistrates Courts	= 32	State Appellate Courts	= 108	Tribunals	= 31
		Tribunals	= 8				
Total = 170 (53%)		Total = 63 (57%)		Total = 145 (47%)		Total = 48 (43%)	

Not unexpectedly, frequency of reported litigation is roughly tied to population and urbanisation in both nations. In the US, approximately 40 per cent of the decisions were reported from 5 states and the District of Columbia (the venue for most challenges to federal agency decisions): New York (45), Texas (20), Pennsylvania (15), California (15), the District of Columbia (15) and Ohio (14). There were no reported decisions in 2007 in three states, West Virginia, Wyoming and Utah. The distribution of the 48 decisions reported by states and territories in Australia during 2007 was: New South Wales (17), Victoria (8), Western Australia (8), Southern Australia (5), Queensland (3), the Australian Capitol Territory (3), Tasmania (3), and the Northern Territory (1). The locus of the dispute giving rise to the 63 decisions in Australian federal courts and tribunals could not be consistently determined and so was not counted.

### *C Parties to Litigation*

The data were reviewed to determine the complainant in the litigation. Table 2 divides complainant into five major categories: students, employees (faculty and staff), commercial and private interests, governmental agencies and institutions themselves. Wherever possible within the description of facts within the written opinion, the researcher sought to identify subcategories within these major groups.

Not unexpectedly, in both countries most litigation involves complaints by students and faculty/staff — about three-quarters of all litigants. In most of these two categories of cases, students and employees initiated litigation. In both nations, challenges to university disciplinary actions and the appropriateness of evaluations, claims of various forms of discrimination or unfairness, to questions about the availability of resources and funding, and to university practices in managing information were common to both groups of litigants. However, differences between the two were also discernible.

In 2007, proportionately more reported cases in Australia than in the US were brought by students. These findings for Australia in 2007, however, are not consistent with the results reported by Astor in her groundbreaking research on litigation in Australia.<sup>58</sup> With the exception of 2004 when student cases outnumbered those brought by employees, that research identified employees (academic and non-academic staff combined) as claimants in over half of the cases included in her data set since 2000. However, her findings document increasing proportions of student claimants since 2001. The findings in this research for 2007 include substantially greater

Table 2: Complainants

<b>Party</b>	<b>United States</b>	<b>Australia</b>
Students	112 (36%)	54 (49%)
Employees	121 (38%)*	34 (30%)**
Commercial or private interests	51 (16%)	13 (12%)
Higher education institution	24 (8%)	6 (5%)
Governmental entity	7 (2%)	4 (4%)
<b>Totals</b>	<b>315</b>	<b>111</b>

\* Of these employees (United States) 51 (42%) were faculty and 70 (58%) were staff.

\*\* Of these employees (Australia) 15 (44 %) were faculty and 19 (56%) were staff

numbers of cases brought by students for reasons attributable to differences of definition and of methods of data collection. This finding would appear to reflect the fact that, as discussed in the findings reported in Table 5, 36 of the 54 cases identified involved issues of immigration. The remaining 18 cases involved more or less equal numbers of cases addressing disciplinary measures for serious misconduct, disputes over credentials and evaluation, efforts to discover information held by a university, conflicts over financial aid, allegations of discrimination and unfairness, and issues related to litigation procedures. In terms of the findings on litigation brought by students in the US, these cases increased from 21 per cent (1988) to 38.6 per cent (2007), as a proportion of total reported litigation. Yet, in terms of actual numbers, reported cases remained relatively stable, decreasing from 117 in 1988 to 112 in 2007, despite increasing growth in enrollments.<sup>59</sup> Among the cases involving students in the US, 42 of the 112 involved issues of whether student loans could be discharged in bankruptcy, with the remaining cases reflecting disputes arising from similar problems (dismissals, discrimination, and misconduct) as those evidenced by students' claims in Australia but often litigated in a different legal framework. For both nations, the litigation in both nations reflected more claims by graduate and professional than by undergraduate students when viewed proportionately.

In the US, challenges by employees to the actions of American postsecondary institutions remained a relatively constant proportion of total reported litigation, comprising 40.6 per cent in 1988 and 38.4 per cent in 2007.<sup>60</sup> Within this general group, the proportion of challenges brought by faculty decreased from 53 per cent to 42 per cent between 1988 and 2007 whereas those by staff increased from 47 per cent to 58 per cent over the same time period. These results reflect general patterns of realignment in the workforce in academe across both the US and Australia. More staff is required to manage the growing burden of state and federal regulations.<sup>61</sup> The American Association of University Professors described major shifts in employment status between 1976 and 2005 when the numbers of fulltime, non-faculty professional staff increased by 281 per cent whereas numbers of fulltime, tenured and tenure track faculty grew by only 17 per cent. These numbers for faculty were offset somewhat by an increase of 200 per cent in growth of 'contingent,' or full and part time but non tenure-track faculty.<sup>62</sup> Between 1987 and 2005, the proportion of fulltime tenure-track faculty in postsecondary institutions in the US fell from 66 per cent to 52 per cent.<sup>63</sup>

The data on Australia for 2007 show faculty/academic staff to comprise about 30 per cent of litigants with more or less similar proportions of faculty to staff litigants as in the US. Again, this finding is not consistent with those reported by Astor for 2000-2006 where the numbers of employee cases, academic and non-academic staff combined, comprised the largest group of cases except in 2004.<sup>64</sup>

The remaining three groups identified in this study comprise about a fourth of all cases in both nations and include a broad spectrum of complainants. These are classified as commercial and private, institutional or governmental. Those identified as commercial and private represent litigants pursuing claims involving a wide array of business interests, from claims to ownership rights to patents or other forms of intellectual property to suits by parents, visitors, interest groups, individuals and donors. In the U.S, although not in Australia, the latter grouping regularly includes disputes arising from claims of medical malpractice occurring in academic medical centres and parents who co-sign loans to finance their children's education but later default and seek bankruptcy protection. Postsecondary institutions as well as governmental entities, including federal, state and municipal agencies, also seek redress in the courts of both nations with some degree of regularity.

## D Claims

Table 3 categorises the cases litigated in the one year period according to the primary claim or issue decided in the case.

Differences in the American and Australian constitutional systems become apparent upon review of the reported decisions as to claim litigated. These are partially attributable to role of Bill of Rights in American constitutional law. Of the 47 federal constitutional cases reported in 2007, 44 arose under some aspect of the rights protected under the Bill of Rights: 22 under the provisions of the First Amendment; 17 under the Fourteenth Amendment; three under the Eleventh; and two under arguments about protections for privacy rights. These findings reflect similar proportions in the numbers of federal cases bringing constitutional claims between 2007 (28%) and 1988 (26%).<sup>65</sup> In contrast, no constitutional claims were identified among the Australian cases, where many of the same basic protections for citizens are provided by statute instead. There is no Bill of Rights in the Australian Constitution or in any of the state constitutions, although two states (ACT and Victoria) have enacted legislative bills of rights. One of the arguments raised in the long-running debate in Australia about the desirability of adding bills of rights to state and Commonwealth constitutions is that they would create ‘an explosion of litigation that clogs up the courts’<sup>66</sup> or ‘a ‘lawyers’ picnic and a wave of frivolous cases’.<sup>67</sup> Clearly, the availability of a ‘bill of rights’ does distinguish the findings, at least for this data set and comparison.

There would appear to be substantial differences between the proportion of statutory claims identified in 2007 in the US (53%) and in Australia (80%), especially as evidenced in the tribunal systems in Australia. Again, many of these differences would appear to be attributable to the source of basic authority protecting the rights of citizens: constitutional in the US and statutory in Australia. In both nations statutory claims were primarily federal, 71 per cent (118 of 167, US) and

Table 3: Legal claim

United States	Australia
Constitutional.....62 (19.7%) Federal constitution (47) State constitutions (15)	
Statutory.....167 (53%) Federal statute (118) State statute (49)	Statutory.....90 (81%) Federal (45) Federal-Tribunal (8)* State (10) State-Tribunal (27)*
Contract/common law.....64 (20.3%)	Contract/common law.....13 (12%)* Federal (5) State (5) Tribunal (3)*
Procedure/jurisdiction/remedy.....22 (7%) Federal (5) State (17)	Procedure/jurisdiction/remedy.....8 (7%) Federal (5) State (2) Tribunal (1)*
Total.....315	Total.....111

\* Issue decided in tribunal assigned subject matter jurisdiction

59 per cent (53 of 90, Australia), although the importance of tribunals in Australia in addressing these claims is evident in these data. Common law and contract cases, more commonly litigated in state court systems in the US, were more evident in federal courts and state tribunals in Australia whereas cases turning on issues of procedural and jurisdictional questions were reported in all court systems in both nations. Cases reflecting issues of costs of litigation as well as intermediate orders would appear to be more frequent in Australia, where pro se litigation, especially before tribunals, and publication of holdings relating to various motions are more commonly reported than in the US.

### E *Substance of the Dispute Litigated*

Direct comparison of the substantive claims between the United States and Australia is more complex, especially given the prominent role of tribunals with authority over specialised sectors of law that implicate the administration of universities in Australia in some way. For these reasons the findings that describe the nature of the dispute for each country are separately organised and presented. In general, however, while the distribution of substantive disputes differs somewhat between the two nations, with limited exceptions, postsecondary institutions are exposed to similar categories of risk.

Table 4 divides the claims classified in Table 3 as statutory for the US into identifiable subcategories.

In 2007 in the US, claims arising under federal statutes were concentrated in two areas: civil rights and financial aid/bankruptcy. At the state level, the reported litigation reflected a greater emphasis on disputes involving industrial relations that are primarily the responsibility of

Table 4: Statutory claims litigated - United States

<b>Federal Courts (n = 118)</b>		<b>State Courts (n = 49)</b>	
Civil Rights	n = 65 (55%)	Civil rights	n = 6 (12%)
Race/national origin	n = 23		
Sex	n = 19		
Disability	n = 10		
Age	n = 7		
FMLA*	n = 4		
Religion	n = 2		
Finance	n = 43 (36%)	Finance	n = 5 (10%)
Bankruptcy	n = 32		
Other	n = 11		
Patent/trademark	n = 4 (3%)	Collective bargaining, arbitration, etc.	n = 11 (22%)
		Workers compensation, unemployment	n = 7 (14%)
Other	n = 6 (5%)	Other	n = 20 (40%)

\* Family Medical Leave Act. 20 U.S.C. §2601 et seq. (1993).

state governments in the US. These involve laws regulating issues such as collective bargaining, arbitration of employment disputes, workers' compensation and unemployment.

Over the past two decades in the US, civil rights cases increased as a proportion of litigation involving federal statutes from 43 per cent in 1988<sup>68</sup> to 55 per cent in 2007. Claims alleging discrimination based on race and national origin, especially the latter, were most common in 2007 followed by claims alleging some form of discrimination based on sex. In 1988, claims of discrimination based on sex were more than twice as common as those based on race/national origin.<sup>69</sup> Despite evolving limits placed by a more conservative Supreme Court over the past decades on access to federal courts by plaintiffs seeking money damages for discrimination based on disability and age, these cases continued to reach federal courts in 2007 with some regularity.

The proportion of litigation involving bankruptcy proceedings reflects the basic framework for financing higher education in the US. 29 per cent of the reported cases in 2007 involved bankruptcy proceedings attributable to the mechanisms for funding (loans) and repaying debt incurred by students for their education. Such issues often arise long after school-leaving and generate a long tail of litigation.<sup>70</sup> Most of these cases implicate postsecondary institutions if indirectly. Yet, in response to this litigation and the large number of student bankruptcies in the 1980s and early 1990s, policymakers required postsecondary institutions to ensure that the proportion of their former students who default on their loans not exceed minimums set by the Department of Education so as to preserve their eligibility for various forms of federal student aid. The proportion of reported cases involving bankruptcy proceedings has since decreased — resulting from laws to restrict options allowing discharge of student debt in bankruptcy proceedings — and fallen from 40 per cent reported in 1988.<sup>71</sup> The number of cases that implicate the regulatory role accompanying the growth of federal funding for postsecondary education increased in comparison with 1988.<sup>72</sup>

The distribution of statutory claims in state courts differed markedly from that in federal courts and was less amenable to categorisation. However, within the categories of claims, the role of states in organising (and funding) postsecondary education and in regulating the terms and conditions of employment in most instances was clear. The 40 per cent of cases classified as 'other' were dispersed over varied types of disputes including issues related to transparency (public meetings and open records laws), resource and development issues, and conflicts with municipal laws as well as those arising from commercial regulations, licensing standards and criminal law.

Table 5 provides similar data on the types of statutory disputes reported over the same time period in Australia. These findings are also organised by court system reporting the case.

The largest category of statutory/administrative disputes (40%) in Australia involved challenges related to immigration. All of these cases were brought by students, and comprised 36 of the 54 cases (67%) of student complainants as reported in Table 2. This group challenged university or administrative action under federal statutes requiring the expulsion of international students who fail to maintain standards for visa eligibility. These cases reflect national policy and incentives for universities to attract full-paying, international students but require universities to report on the failure of international students to meet standards for academic progress. This group comprised 57 per cent of the decisions reported in Commonwealth courts and tribunals. Finally, while most of these opinions routinely denied student claims, seven cases contained evidence that suggests occasional success by students in challenging university practices and fairness, whether in terms of policy or procedure, in assessing students' reasons for failing to fulfill statutory requirements and provides feedback to those responsible for managing such issues.

Table 5: Substance of statutory/administrative disputes - Australia

<b>Substance of claim</b>	<b>Commonwealth Courts (45)</b>	<b>Federal Tribunals (8)</b>	<b>State Courts (10)</b>	<b>State Tribunals (27)</b>
Immigration -36 (40%)	36			
Industrial relations/employment - 27 (30%)	6	8	2	11
Challenges to compliance with policies/ procedures - 12 (15%)	1		6*	5**
Discrimination -10 (12%)				
Disability - 4	1		1	2
Race/national origin - 4				4
Sex -2	1			1
Resources/planning/development - 4 (4%)				4
Funding -1(1%)			1	

\* 2 disputes under provisions of freedom of information acts

\*\* 3 disputes under provisions of freedom of information acts

Twenty-seven cases (30%) involved disputes between universities as employers and faculty or staff as employees. These cases were almost equally divided between state and federal levels with most decisions reported by specialised tribunals. Twenty cases (22%) implicated university compliance across a range of federal and state administrative and statutory provisions with unions representing faculty or staff in many instances. Five of these involved denial of access to information or records retained by universities under the various provisions of freedom of information acts. Disputes over transparency would appear to be contentious at this point in time, whether brought by students, faculty or staff seeking access to records held by universities. Disputes over issues related to discrimination and civil rights were found across all reporting entities but appear to be somewhat less frequent in Australia. Claims of discrimination are more often addressed in state courts and tribunals. Similarly, there were several decisions issued by tribunals related to resources, planning and development, often in the form of challenges by institutions to municipal decisions or regulations. Again, all of these were decisions by tribunals. One dispute over funding was identified.

In the aggregate, the results presented in Tables 4 and 5 reflect similarities in types of problems addressed under the statutes of both countries despite differences in the allocation of authority between federal and state governments and in jurisdiction of courts responsible for resolving disputes. Each system reflects anomalies, however. For the US, this is most apparent in the cases arising in bankruptcy, whereas in Australia it is cases related to immigration.

## V DISCUSSION

How does a comparative analysis of reported litigation add to the body of knowledge that informs policy and practice related to higher education? More specifically, what information does this research comparing reported litigation in two nations, the US and Australia, over a one year

period offer to lawyers, attorneys and practitioners responsible for managing the risks of litigation involving their institutions.

### *A Similarities*

First, there are important similarities in the patterns of litigation in both nations. The reported case law suggests that modern institutions of higher education share common problems and challenges in implementing their broadening mandates.

Most striking are the results on volume of litigation. When considered in the aggregate, Australian universities would appear to have greater exposure to litigation than do American institutions. Whether the basis of comparison used is ratio of institutions (39 in Australia: 4,314 in the US), population (21 million Australians: 301 million Americans), or numbers of students (960,892 in Australia: 13,815,000 in the US) the discrepancy in reported rates of litigation in 2007 between Australia (111 cases) and the US (315 cases) is substantial. Australia would appear to be experiencing its own ‘explosion’ in litigation, at least in terms of frequency of cases implicating universities. The findings for 2007 extend initial research by Astor and confirm continuing growth in litigation since the mid-1990s.<sup>73</sup> The differences between these two studies would appear to be primarily attributable to the inclusion of the group of student immigration cases. In contrast, reported litigation involving institutions of higher education in the US has stabilised, even declined, over the past several years.<sup>74</sup>

When the findings for Australia in 2007 are viewed in longitudinal context, data on the ‘explosion’ of litigation involving the postsecondary sectors in the US and Australia offer a more nuanced perspective. Litigation involving postsecondary institutions in the US increased by 41 per cent in the decade of the 1950s, by 115 per cent in the 1960s, 300 per cent in the 1970s, but then began to level off in the 1980s and 1990s with rates of growth of 8 per cent and 22 per cent respectively.<sup>75</sup> Litigation would appear to track on the transformation and major expansion of American higher education that occurred between 1950 and 1980 when states founded new institutions and systems to accommodate the initial influx of veterans after World War II, followed by the arrival of the ‘baby boomer’ generation and finally minorities, long denied access. In tandem, the federal government injected very substantial resources for research, for institutional capacity-building, and, most importantly for financial aid to expand student enrollments. Those initiatives were all designed to support a student-driven, market-oriented postsecondary system built on a complex mix of institutional providers and of public and private resources. American higher education has continued to grow since the 1980s but incrementally. The litigation reflects these changes, especially in the skewing effects of an ongoing and continuing ‘tail’ of bankruptcy cases which are a direct result of a system characterised by open-admissions and easy access to loan-based student aid.

In contrast, litigation involving Australian universities through the early 1980s was infrequent. The Dawkins reforms in the late 1980s, which trebled the numbers of students and doubled the numbers of universities in Australia, may also be viewed as transformative, and even disruptive, to long-established patterns of stakeholder relationships. Again, as evidenced by the skewing effects of the group of student immigration cases, litigation would appear to be a transaction cost directly or indirectly associated with, although not necessarily proportional to, policy initiatives and reforms. For both nations, although at different periods of time, litigation rates have increased at rates that exceed any measure of the magnitude of reforms.<sup>76</sup> If comparison with the US is relevant, Australia may expect continued litigation to accompany changes to its higher education

system, especially if new rounds of proposed reforms to expand participation and better integrate all components of the tertiary education sector, as set forth in the Bradley Review, gain traction.<sup>77</sup>

Next are similarities in the role of federal courts. Despite major differences in structure and jurisdiction, the data for 2007 point to the substantial involvement of the federal courts in litigation involving postsecondary institutions in both nations. This suggests the growing role of central government in policymaking affecting higher education especially in the US. This increase in reported litigation provides evidence of the expanding role of federal regulation and oversight and its corollary, ever-growing numbers of staff responsible for compliance and reporting.<sup>78</sup> In Australia, the finding that 57 per cent of litigation was reported by Commonwealth courts does not fit with results reported by Astor who identified fewer federal cases (approximately 10 per year).<sup>79</sup> Astor found litigation in the federal courts in Australia to be a recent phenomenon with no cases reported prior to 1999.<sup>80</sup> For example, claims alleging discrimination or violations of employee rights are addressed primarily by tribunals. However, since the Brandy decision,<sup>81</sup> decisions by tribunals have no adjudicatory effect in terms of statutory interpretation. Nonetheless, in 2007 seven of ten reported decisions in Australia were reported for tribunals. In contrast, in the US, claims alleging discrimination are usually based on federal statutes and litigated in federal courts after procedural review, usually by the Equal Employment Opportunity Commission (EEOC). Recourse to the EEOC is a procedural prerequisite for access to courts. The EEOC serves as a forum for review on whether that agency will exercise its option to represent the complainant in litigation. Such review only occasionally becomes an effective venue for resolving disputes before litigation. Finally, these findings may again be due to differences in research design and data gathering methods, especially related to the inclusion in this data set of student-generated immigration cases.

Not unexpectedly, similarities were also found in the analysis of complainants. Despite some differences in proportions, the general categories of stakeholders involved in litigation are the same. In the aggregate and over time, claims by students, faculty and staff, primary stakeholders in this sector, account for most litigation in both countries (Australia, 79%; US, 74%). In terms of student cases, American cases are much more likely to allege due process claims against public institutions and contract violations against private institutions whereas Australian cases reflect claims of unfair treatment often grounded in a statute, or occasionally in 'human rights'. In terms of faculty/staff, traditional norms of collegiality have been displaced by managerialism and consumerism as characterising the culture in contemporary postsecondary institutions in both nations.<sup>82</sup> Both nations have experienced growing casualisation in the academic workforce. The small difference in the somewhat lower proportion of employee cases in Australia (30%) than in the US (38%) may be evidence perhaps of a greater emphasis in Australia on alternative dispute resolution and, perhaps, some degree of effectiveness in resolving disputes through the tribunal systems.

Finally, the cases from both nations illustrate commonalities of litigants and problems involving issues of administrative discretion in the application of policies and regulations, of similarities in commercial and other types of contractual relationships, of the network of partnerships with external organisations, of common issues associated with transactions involving municipalities, with rights to intellectual property and the commercialisation of research, and of other claims associated with operating a public entity. Interestingly, unlike litigation regularly reported from the US, there were no cases in Australia in 2007 arising from fundraising initiatives to solicit gifts and funding from alumni and other sources of private support — sources of revenue perhaps not yet fully exploited by Australian universities.

## B Differences

Despite similarities in trends, problems and litigants, there are important, if subtle, differences. Most of these would appear to be related to the differences in judicial and litigation reporting systems between the US and Australia. These are discussed below.

First are differences in the design of legal systems. In the US, fewer ‘bites of the apple’ of litigation are available. No independent tribunals sit in-between decisions of postsecondary institutions or, in some instances, agencies and access to courts. In the US complainants must exhaust all dispute-resolution procedures within an institution but then may file directly in a court if they meet the requirements set forth for claims under constitutional, statutory and common laws that determine access and remedies in courts of law. In only a few areas, as for example civil rights and collective bargaining, do statutes require an intermediate step, review by an agency assigned responsibility for administering that law. When required, the logic of intermediate review is agency and policy-based, not victim-based. That is, the agency is given an opportunity to extend its policymaking authority by litigating on behalf of complainants where a decision may move the interpretation of policies in directions deemed desirable by that agency.

Tribunals in Australia, in comparison, add another ‘bite of the apple’. They provide direct, low-cost alternatives, an intermediate layer, of external dispute resolution in-between institutions and the judiciary. Tribunals are ‘quasi’ courts of specialised jurisdiction. Originally established over three decades ago as an external source of redress for individual grievances, tribunals were designed to improve administrative accountability in agencies and ensure substantive justice for individuals.<sup>83</sup> There is extensive discussion, however, about their impact and fit within the judicial system as well as their impact on agency decisions.<sup>84</sup> Findings from this study suggest some need to address these questions.

In terms of fit, this study provides evidence of an increasing volume of litigation in Australia, with thirty-five percent (39) of the total for 2007 from tribunals. Tribunal systems may have resulted in a reallocation in jurisdiction over how disputes are resolved and reduced some of the burden of litigation carried by courts. They may also increase litigation in the aggregate.<sup>85</sup> By increasing access, tribunals invite complaints and make systems of dispute resolution more complex. Further, study findings raise questions about impact: that is the degree to which university administrators pay attention to tribunal decisions? Do tribunal decisions provide feedback for administrators in Australian universities responsible for managing the risks of litigation, or, more minimally, for revising flawed policies and procedures? This study does not address larger questions of impact and accountability but does provide some evidence of the costs imposed on university personnel of participation in numerous tribunal proceedings.

Second are differences in reporting systems. Structural differences between the legal systems in the US and Australia affect how cases are reported and what consideration policymakers in higher education must accord to such decisions. Clearly, more ‘cases’ appear to be included in the reporting systems in Australia than in the US. This suggests a need for overall scepticism as to the finding of greater rates of litigation in Australia. It also raises questions about precedent and the value to assign to opinions included in a reporting system, especially those reported by tribunals.

In the US reporting would appear to be somewhat streamlined and limited — perhaps indeed because of overburdened court systems and voluminous litigation. Cases proceed slowly through American courts but, with some exceptions, do not enter reporting systems for publication unless and until, there is a formal written opinion, usually when review completed through the appellate level. At that point, an appellate opinion may be cited as precedent and included in a reporting

system to be viewed as notice to attorneys and policymakers alike. Few, if any, motions or other interim rulings are ever found in a reporter.

In Australia, however, the value of a case, in terms of information that can be derived for policymakers, appears to be more loosely linked to the system for reporting litigation. Opinions are issued and reported at multiple times during the litigation in response to the many interim issues raised in defining the evidence, law and procedures to be applied in that case.<sup>86</sup> As a consequence, the ‘weight’ to be accorded a reported case is not clear — especially in decisions reported from tribunals — and the impact or value of tribunal decisions on improving institutional practices or accountability may be diminished. Again, the breadth of the reporting systems in Australia, while ensuring transparency, may lessen the value and impact of adjudication on institutional practice and practitioners.

## VI CONCLUSIONS

What value does comparison of litigation in one policy sector in two nations have? First it creates an introductory framework for comparing data on litigation and higher education in two countries. Second, it provides some evidence to contribute to a discussion about the volume and role of litigation in two different systems. It identifies basic trends in litigation involving postsecondary institutions in the United States and Australia. In both countries reported litigation is increasing, apparently in response to government initiatives, but at different time periods when major transformation and restructuring occurs in systems of higher education. Similarly, with exceptions for system ‘anomalies’, participants in and disputes giving rise to litigation are similar. However, this study also identifies important differences in the design of formal systems of dispute resolution and of ‘information systems’ for creating feedback for institutions and practitioners. These differences inject a real note of caution about comparing the findings from this research. There are clear differences between adjudication in the US and in Australia. In the former where adjudication may be less focused on ‘justice’ than on compliance, the results of adjudication may produce more readily available, policy relevant information for practitioners. In Australia, greater access to venues for dispute resolution and greater transparency in reporting may produce greater numbers of decisions, and in turn, undermine the impact and utility of information derived from adjudicatory processes in terms of feedback to practitioners.

## ACKNOWLEDGMENTS

The author wishes to acknowledge the assistance provided by Donald Ford, Research Librarian for International Collections of the Library of the College of Law at the University of Iowa, Iowa City, Iowa, the advice provided by Hilary Astor, Professor in the Faculty of Law at the University of Sydney, David Weisbrodt, Professor Emeritus and Chair of the Australian Law Reform Commission, and Anthony Welch, Professor in the Faculty of Education and Social Work of the University of Sydney and the support provided during the period of her development leave (January – June, 2009) through the Faculty of Education and Social Work of the University of Sydney, Sydney, Australia.

*Keywords:* litigation; comparison; universities; outcomes; Australia; United States.

## ENDNOTES

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- 5 Ibid. Because of the differences between the higher education sectors in the U.S. and Australia, community colleges are not included in the discussion in this paragraph. However, there are 1,045 public, 107 private (not-for-profit) and 533 private (for profit) 2 year community college programs plus numerous, minimally-regulated, educational entities in the United States. These institutions enrolled 6,518,000 students in 2007. Community colleges in the United States serve dual functions which, when compared with Australian institutions, combine TAFE and VET functions as vocational training programs responsive to local workforce needs. and programs to transition students into four year baccalaureate programs upon completion of an associate of arts or sciences degree program.
- 6 Ibid.
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- 8 All materials in this section draw on information from the Department of Education, Science and Training website <[www.dest.gov.au/sectors/higher\\_education](http://www.dest.gov.au/sectors/higher_education)> at 30 January 2009.
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- 31 Including a link to the website of the National Association of College and University Attorneys (NACUA) <<http://www.soul.edu.au>> at 20 April 2009.
- 32 See <<http://www.unisa.edu.au/ombud/Omdosheea>> at 20 April 2009.
- 33 See Helms above n 23. For studies employing this methodology see, Lelia Helms and Charles Helms, 'Forty Years of Litigation Involving Medical Students and their Education: Part I, General Educational Issues' (1991) 66(1) *Academic Medicine* 1; Lelia Helms and Charles Helms, 'Forty Years of Litigation Involving Medical Students and their Education: Part II, Issues of Finance' (1991) 66(2) *Academic Medicine* 71; Lelia Helms and Charles Helms, 'Forty Years of Litigation Involving Residents and Programs of Graduate Medical Education: Part I. General Programmatic Issues' (1991) 66(11) *Academic Medicine* 649; Lelia Helms and Charles Helms, 'Forty Years of Litigation Involving Residents and Programs of Graduate Medical Education: Part II. Malpractice Issues' (1991) 66(12) *Academic Medicine* 718; Lelia Helms and Charles Helms, 'Litigation Involving Medical Faculty and Academic Medical Centers (1950-1991)' (1993) 68(1) *Academic Medicine* 7; Lelia Helms, Selden Biggs and Charles Helms, 'Litigation in Medical Education: Retrospect and Prospect' (1995) 11 *Journal of Contemporary Health Law and Policy* 317; Oren Griffin, Alan Henkin, and Lelia Helms, 'Systematizing Information for Public Sector Risk Management: A Perspective from Higher Education' (2000) 24(2) *Educational Research Quarterly* 21; Christopher Pierson and Lelia Helms, 'Liquor and Litigation: Forty Years of Litigation over Alcohol on Campus' (2000) 142(2) *Education Law Reporter* 609; Becky Elkins, Lelia Helms, and Christopher Pierson, 'Greek Letter Organizations, Alcohol and Courts: A Risky Business' (2003) 44(1) *Journal of College Student Development* 67; and, Lelia Helms, Christopher Pierson and Katherine Streeter, 'The Risks of Litigation: A Case Study of Resident Assistants' (2003) 180(1) *Education Law Reporter* 25.
- 34 That is, all cases reported in volumes 214(2), published from 11 January 2007 through volume 225(1), published 27 December 2007 of the *Education Law Reporter*.
- 35 This notation was double-checked by the researcher as occasionally the asterisk is missing.
- 36 The cases reported for 2007 include more decisions from the Federal Appendix reporter than in previous years. This may be because the Supreme Court made a change in 2006 that federal circuit courts may not prohibit citation of unpublished opinions issued after January 1, 2007 (Rule 32.1 of the Federal Rules of Appellate Procedure). See also Scott E. Gant, 'Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1' (2006) 47 *Boston College Law Review* 705.
- 37 The year 2007 was selected in large part because the numbers of reported opinions for that year appeared to have stabilised in the AUSTLII online data base. Repeated searches over a period of several weeks identified the same number and list of cases, whereas the numbers for 2008 could not be consistently replicated. The search strategy for Australia was limited to the term university! and so includes only litigation reported involving the 39 self-accrediting institutions in Australia in which the terms university! and 2007 appear in some way. This limitation may be attributed to the varied and inconsistent terminology employed to describe TAFE and other VET providers. For evidence of this, see the lists of Australian providers of tertiary education available through the website of the Department of Education, Employment and Workplace Relations at <<http://www.goingtouni.gov.au/Main/CoursesAndProviders/ProvidersAndCourses/HigherEducation>> or alternatively at the website of the Australian Qualifications Framework, <<http://www.aqf.edu.au/AbouttheAQF/Pathways/tabid/156/Default.aspx>>. As a consequence, no keyword search strategy that was both reliable and comprehensive could be formatted for tertiary providers not designated as universities. In contrast, the case law data

for the US is broadly comprehensive and includes all stakeholders in the postsecondary sector involved in litigation in any way as identified by the editorial staff at Westlaw (not by this researcher). Much as in other areas of law (e.g., employment, health, business, etc) Westlaw compiles and publishes comprehensive collections of reported litigation. For higher education, this compilation is broadly framed. The two different search strategies employed in this study led to important differences in the numbers of cases identified. The litigation totals reported for Australia in 2007 are more narrowly focused by institutional type than those for the United States.

- 38 Multiple reported decisions involving the same set of operative facts and dispute but addressing somewhat different procedures and issues were commonly identified during the one year period encompassed by this research. For example, one case, *McGuirk v University of New South Wales*, alternatively titled *McGuirk v NSW Ombudsman* and *McGuirk v Vice Chancellor, University of New South Wales*, involved a challenge to university policies and practices under freedom of information acts. In 2007 alone, there were 11 different reported opinions in this case — four by the Administrative Decisions Tribunal for New South Wales (NSWADT – 13/8, 6/9, 26/10, 22/11), four in the Administrative Decisions Tribunal Appeal Panel (NSWADTAP – 1/4, 26/4, 21/6, 11/7 ) and three in the Supreme Court of New South Wales (NSWSC – 29/4, 25/7, 13/11). In another example, a case, *Gray v Cancer Research Institute, Inc*, alternatively titled *University of Western Australia v Gray* and *Gray v Hill*, litigated ownership and patent rights to research and systems developed by a university researcher/physician. In 2007, there were 12 opinions, ten of which were issued by the Federal Court of Australia (FCA – 9/2, 13/2, 2/3, 20/3, 23/3,2/5, 31/5, 19/6, 5/7, 3/8 ), one by the Federal Court of Australia – Full Court Decisions (FCAFC – 2/8) and one, involving the appropriateness of transfer to the federal courts by the Western Australia Supreme Court (WASC – 13/1).
- 39 Of the 2848 decisions initially identified, 794 were reported by Commonwealth courts and tribunals and 2054 by various State and Territorial court and tribunal systems.
- 40 Numerous cases in which the terms university and 2007 appeared in the context of descriptions of the qualifications of expert witnesses and of the background of parties to the dispute or in the context of citations to legal precedent. These were excluded upon subsequent review.
- 41 See above n 33.
- 42 In that many cases involved interim questions of jurisdiction, procedure or narrow issues of law, a final outcome for the litigants could not systematically be determined. For this reason findings about the outcome of a case were not included in this research.
- 43 John McMillan, ‘Administrative Tribunals in Australia — Future Directions’ (2006) Paper delivered to the International Tribunals Workshop, Australian National University, Canberra, AU, April 2006.
- 44 Citing Gerard Brennan, ‘The Future of Public Law — the Australian Administrative Appeals Tribunal’ (1979) 4 *Otago Law Review* 286, in R Balmford, ‘Administrative Tribunals and Sir Gerard Brennan: Some Specific Topics’ in R Creyke and P Keyzer (eds), *The Brennan Legacy: Blowing the Winds of Legal Orthodoxy* (2002) 92, 97.
- 45 See G. Galanter, ‘Reading the Landscape of Disputes: What we Know and Don’t Know (and Think we Know) About our Allegedly Contentious and Litigious Society’ (1983) 13 *Law and Society* 891, as a source for the estimate that 90 per cent of cases filed are never litigated in the United States. More recent analyses challenge these findings by suggesting that in federal courts in the United States more cases survive to reach litigation, that ‘survival rates’ vary by location (28.4% for the Eastern District of Pennsylvania and 42.2% for the Northern District of Georgia) and that ‘survival’ rates vary by type of claim. Theodore Eisenberg and Charlotte Lanvers, ‘What is the Settlement Rate and Why Should we Care?’ (November 21, 2008) *Cornell Legal Studies Research Paper No.08-30*. Available at SSRN <<http://ssrn.com/abstract=1276383>> at 21 April 2009. For another estimate see Gauri Prakesh-Canjels, ‘Trends in Patent Cases: 1990-2000’ (2001) 41(2) *IDEA- the Journal of Law and Technology* 288 finding that out of 2,500 cases filed each year, barely one in seven terminates in a judgment by a court.
- 46 Helms and Helms, above n 33, ‘Forty years of Litigation; Involving Residents and their Training: I. General Programmatic Issues’.

- 47 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* Report No 89 (2000).
- 48 Astor, above n 12, 162.
- 49 Olliffe and Stuhmcke, above n 30 and Astor, above n 30. See also New South Wales Ombudsman, *Complaint Handling at Universities: Best Practice Guidelines*, December 2006; Victorian Ombudsman, *Review of Complaint Handling in Victorian Universities*, 2005; B. O'Keefe, 'Disputes Spark Calls for Uni Ombudsman', *The Australian* (Sydney), 27 April 2005, 34; M. Reddy, 'The Office of the Independent Adjudicator for Higher Education: Preparing for the Statutory Scheme' (2004) 5(4) *Education Law Journal* 214; R Field and M Barnes, 'University Ombuds: Issues for Fair and Equitable Complaints Resolution' (2003) 14 *Australasian Dispute Resolution Journal* 198; Senate Employment, Workplace Relations, Small Business and Education Reference Committee, *Universities in Crisis: Report into the Capacity of Public Universities to Meet Australia's Higher Education Needs*, 2001.
- 50 Donoso and Zirkel, above n 24.
- 51 See information on the number of cases reported each year since 1988 in the annual overview of cases published under the title 'Recent Developments in Public Education Law: Postsecondary Education'. These articles appear in the fall issues of the *Urban Lawyer*, published quarterly by the American Bar Association and the College of Law of the University of Missouri at Kansas City. Each annual review since 1988 contains a rough count of the number of cases reported for that year. These may be accessed at Lelia Helms and others, 'Recent Developments in Public Education Law: Postsecondary Education' *Urban Lawyer* (2008) 40(3):663; (2007) 39(4):1071; (2006) 38(4):1201; (2005) 37(4):951; (2004) 36(4):867; (2003) 35(4):795; (2002) 34(4):995; (2001) 33(4):1025; (2000) 32(4):913; (1999) 31(4):973; (1998)30(4): 1063; (1997) 29(4):837; (1996)28(4):895; (1995)27(4) 897; (1994) 26(4):877; (1993)25(4):941; (1992) 24(4):933; (1991)23(4):879; (1990) 22(4):833; (1989) 21(4):867. Each article reviews the litigation reported in West's *Education Law Reporter* for the previous year. With one exception, these articles appear in the fall issues of the *Urban Lawyer*. In recent years these articles have been slightly revised, retitled, 'Litigation and Postsecondary Education: A Year in Perspective' and published in the *Education Law Reporter*. See (2008) 236(1):1; (2007) 225(1):23; (2006) 206(3):17; and (2005)195(2):443.
- 52 Helms, above n 23.
- 53 Lelia Helms, 'Recent Developments in Public Education Law: Postsecondary Education' (2003) 35(4) *Urban Lawyer* 795, 795.
- 54 Astor, above n 12. Comparison is based on findings presented by Astor, in Figure 5 which report combined litigation for Australian universities and amalgamated higher education institutions between 1985-2006. Amalgamated institutions are characterised by Astor as those formed through merger between 51 advanced education institutions and the 19 universities existing in 1987 attributable to the Dawkin Reforms and which, by 2007, had been combined to form some part of the 39 universities in Australia. While this distinction may be important in the first decade of implementation of the Dawkins reforms, it would appear to be of limited importance in 2007.
- 55 Ibid 162.
- 56 Donoso and Zirkel, above n 24, 553.
- 57 Helms, above n 23, 3.
- 58 Astor, above n 12, 165, Figure 3.
- 59 Helms, above n 23, 6 is the source of comparative data from the United States for 1988.
- 60 Ibid.
- 61 Jeffrey Brainard, Paul Fain and Kathryn Masterson, 'Sticker Shock: Support-Staff Jobs Double in 20 Years, Outpacing Enrollment' *Chronicle of Higher Education*, Washington DC, 21 April 2009, Vol. 55, Issue 33, A1.
- 62 See AAUP Research Office, '2007-08 Report on the Economic Status of the Profession' *American Association of University Professors* <[http://aaup.org/AAUP/CMS\\_Templates/GeneralArticle.aspx](http://aaup.org/AAUP/CMS_Templates/GeneralArticle.aspx)> at 31 March 2009.
- 63 'Almanac Issue 2008-09,' above n 4, 24-25.
- 64 Astor, above n 12, 165, Figure 3.

- 65 Helms, above n 23.
- 66 Bob Carr, 'The Rights Trap: How a Bill of Rights Could Undermine Freedom' (2001) 17(2) *Policy* 20, 36.
- 67 Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (2009), 65.
- 68 Helms, above n 23, 9.
- 69 Ibid.
- 70 The current rate default rate for students with federal student loans is 6.9 per cent. That is the rate at which all students who entered the repayment period on their student loans in fiscal year 2007 defaulted. The rate of default was higher for those students who attended for-profit institutions (11.3%) as opposed to those who attended public (6.1%) and private, not-for-profit (3.8%) colleges. March 26, 2009, 'New Default-Rate Data Fuel Fight Over Ending Bank-Based Lending' *Chronicle of Higher Education*, Washington DC, 26 March 2009. News Blog < <http://chronicle.com/news/article/6205>> at 28 March 2009.
- 71 Helms, above n 23.
- 72 Helms, above n 51. Each of the yearly reviews provides some perspective on cases in bankruptcy for that year. For example, in 1988 40 per cent of all reported student cases arose in bankruptcy proceedings. See Helms, above n 23, 7, 9.
- 73 Astor, above n 12.
- 74 Helms, above n 23, 795.
- 75 See Zirkel and others, above n 24.
- 76 As developed by Astor, above n 12 since the Dawkins reforms, litigation levels have increased eight-fold whereas student enrollments have trebled and numbers of universities have more than doubled. Based on the data provided by Donoso and Zirkel, above n 24, litigation levels in the United States grew nine-fold between the 1950s and 1970s in the first two decades of reform and by another 50 per cent between the 1970s and 1990s.
- 77 Simon Marginson, 'Australia: Bradley: a Short-term Political Patch-up,' *University World News*, 11 January 2009 <<http://www.universityworldnews.com/article.php?story=20090108192939538>> at 12 January 2009.
- 78 Brainard, Fain and Masterson, above n 57.
- 79 Astor, above n 12, Figure 4.
- 80 Ibid.
- 81 *Brandy v Human Rights and Equal Opportunity Commission* [1993] HCA 10 (23 February 1993). Decision finding that under the constitutional doctrine of separation of powers, the Human Rights and Equal Opportunity Commission could not be constituted as a court under the provisions of the Racial Discrimination Act 1975 (Cth) and therefore was not able to exercise judicial power in the form of an enforceable decision.
- 82 See Naomi Rosh White, 'The Customer is Always Right?': Student Discourse about Higher Education in Australia' (2007) 54 *Higher Education* 593; Harmon, above n 15; and Brainard, Fain and Masterson, above n 61.
- 83 Pearson, above n 30.
- 84 Ibid. See also John McMillan, Commonwealth Ombudsman, 'Administrative Tribunals in Australia — Future Directions' (2006) Paper delivered to the International Tribunals Workshop, Australian National University, Canberra ACT, April 2006.
- 85 For a conclusion based on a series of studies to assess the interface between alternative dispute resolution procedures, institutions and courts in terms of complaints involving employment discrimination in the United States, see Lauren B. Edelman, Christopher Uggen and Howard S. Erlanger, 'The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth' (1999) 105(2) *American Journal of Sociology* 406.
- 86 For examples, see above n 38.