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University careers and their legal background in Australia

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Workshop

**„Personalrecht, Personalentwicklung und Berufungspolitik
unter den Vorzeichen des Universitätsgesetzes 2002“**

der Österreichischen Forschungsgemeinschaft

University Careers and their Legal Background in Australia

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Introduction

It is my understanding that following the *Universities Act 2002* (Austria) that universities in your country are undergoing quite fundamental reforms. Academics are no longer civil servants but employees of the university: section 97, and universities will have their autonomy: section 4 and section 5 (though this appears to be curtailed by sections 8 and 9.) For an Australian these are *not* novel concepts and, as will be soon discussed, the university as a separate legal entity existed from the beginning of our university system. On the other hand such independence carries its own risks and I allude to some of these in my conclusions.

We have much to learn from each other, for example, I note that you have statutory guarantees of academic freedom for individual academics: sections 105 and 113. In Australia we do not, and rely more on tradition or industrial agreements to reach that position. Academic freedom is still prized and valued among Australian academics though, sadly, I doubt whether modern Australian vice chancellors would enthusiastically agree to either section your 105 or 113 because the breadth of those sections may frighten them. Furthermore, the Australian Government's recent review of higher education, obsessed about workplace flexibility (covered below) does not discuss academic freedom. Could it be that the quest for more entrepreneurial and "efficient" universities in Australia is at the loss of such fundamental values? I applaud their iteration in your statute and regret that our statutes do not include a similar statement. Indeed we might have had it in Australia but for our vice chancellors: an inquiry in the 1980s in Australia was leading academics to a statutory right to academic freedom, similar to that obtained in the United Kingdom and New Zealand at about the same time. In the end it did not occur because the Australian Vice Chancellors Committee did not support it.¹

Your students are entitled to freedom of study: section 59. Such rights are not contained in Australian university statutes though individual universities may have rights and obligations in codes covering such matters. Unlike your provision, such codes have dubious legal effect in Australia.

Your statute in section 12 states that the "universities shall be funded by the Federal Government". In Australia the Federal Government provides significant university funding (approximately 42%) but the notion that the government shall accept responsibility for providing the funding is long gone, and significant pressure is placed on universities to find their own funding sources. Appendix 3 gives some details regarding the breakdown of this funding.

Your legislation set up autonomous universities and defines its membership in section 94, in terms not unlike provisions in Australia. Your Act goes into far more detail than acts establishing Australian universities where many of the matters described would be included in an enterprise agreement (also called a certified agreement). I shall return to enterprise agreements shortly. Examples would include your legislative provisions on hours of work: section 110; provisions on dismissal: section 113; the use of short term contracts, appointment procedures: section 98; and intellectual property: section 106, and the structuring of the academic year: section 52.

I now turn to a discussion of the Australian university system in its historical and legal context. This will be followed by a brief discussion of the modern situation, and in particular, workplace reform, and a review of dismissal processes in Australian universities.

Historical Overview

The first universities in Australia, the Universities of Sydney and Melbourne were established in the 1850s. This was followed by the development of universities in Adelaide (1874) and Tasmania (1890) and then universities in Queensland (1909) and Western Australia (1911) in the first part of the twentieth century. The historian Auchmuty claims that the real development of Australian universities did not take

¹ Hambley F, *Comments on Academic Charter for Financial Review*, Australian Vice Chancellors' Committee 18 May, 1990.

place until after the second world war,² and before that “research was not a major activity in any university except possibly Melbourne...”³ He indicates that by 1963 there had been considerable growth in the size of university departments, suggesting that departments with a professor and one assistant in 1939 had 25 to 30 members by 1963.⁴ By 1966 there were 14 universities in Australia, all public universities established by act of parliament. Federal funding for universities had been introduced in 1958; though universities were generally established by State governments, the exception being the Australian National University created by the Commonwealth Government.

The 1970s saw the development and rapid growth of a binary higher education model, with the growth of many colleges of advanced education and a number of new universities. This model was abandoned in the late 1980’s, and the colleges were merged into existing or new universities. The 1990’s saw the establishment, again under state law, of the first private universities, Bond University and Notre Dame University. In Australia public and private universities are established by an act of parliament and legislation prevents the use of the word “university” in the name of a company unless ministerial permission is obtained.

The universities play a vital role in the Australian economy, for example, in 2001 they generated revenue of A\$10.2 billion and contributed 1.5% to GDP.⁵

There were 929,639 students at Australian Universities in 2003, this included 719,228 domestic and 210,411 international students.⁶ There are 39 Universities in Australia of whom 38 receive government funded student places. The system employs nearly 90,000 staff, see Appendix 4.

Legal Overview

A university in Australia is a corporation and this goes back to the very first university in Australia, the University of Sydney in 1850 incorporated under the New South Wales statute, 14 Vic. No 31 of 1850. This law was based on the Bill for the foundation of London University and did not follow the Oxbridge model. Other universities established in Australia are based on a similar corporate structure.

An Australian university possesses the right to sue and be sued, it has perpetual succession and an independent legal existence. In some cases power is reserved to the minister for education in relation to property and investment matters. The university governing bodies are their councils (in some universities these are called senates) and their membership is defined as academic staff and students. In this sense Australian public universities are like other corporations formed by governments for some public good, such as schools, hospitals, or other statutory corporations established to render a public service, for example, the distribution of power, telephone and railway services.

In 1998 a Full Bench of the Australian Industrial Relations Commission discussed the nature of an Australian university. Using Griffith University as an example the Commission commented on s 4 of the *Griffith University Act 1971*(Qld):

The passages quoted from *Halsbury* identify the character of a university as an incorporated charitable foundation of a distinctive rank. The characteristics of the foundation include the status and personality of a corporate body, established by an instrument of foundation emanating in those times from the Crown. The staff and students are the primary constituents of the corporate body together with the organs of management of it ... It may be noted that the State therefore performs a primary role in the foundation of all Australian universities.

² Auchmuty JJ “The Idea of the University in Australia” (1963) 1 *The Australian University* 150 at 161

³ Note 2 at 162

⁴ Note 2 at 162

⁵ Nelson, Dr Brendan *Higher Education Report for the 2004 to 2006 Triennium*, Department of Education, Science and Training, January 2004 at 8

⁶ Note 5 at 9

The statutes to which we were referred reflected the multipartite constitution of the university ... subsection 4(1) of the *Griffith University Act 1971* is relatively typical...

Similarly, the statutes generally establish each university as a body corporate with the powers incidental to that form of legal personality, and to the university's function as a body politic for the self governance of those who constitute the university from time to time. The functions of universities are accurately summarised in the following passage:

“The objects or functions of a university are to provide facilities for teaching and research in such branches of learning as the statute may determine, to confer degrees and generally to promote university education and the advancement of knowledge.”⁷

From early times university governing bodies were given significant power. For example, Section VIII 14 Vic. No 31 of 1850 conferred on the Senate:

- full power to appoint and dismiss all professors, tutors, officers and servants;
- the entire management of and superintendence over the affairs, concerns and property of the said University;
- power to act in such manner as appeared to them to be best calculated to promote the purposes intended by the said University; and
- power to make and alter statutes, by laws and regulations not repugnant to existing laws or to the provisions of the Act.

This was a significant grant of independence to the University, which was to set an important precedent and tradition of *de jure* institutional autonomy for all new Australian universities in years to come. Control over Sydney University could at best be exercised through its finances for which the University was largely dependent upon government, setting another important precedent for Australian universities. Governments give themselves the right to appoint members to the governing boards, and the incorporating statute defines how many of these appointed positions exist and the categories for the balance of council members. Councils normally have a number of members of parliament, community representatives, alumni representatives and staff elected positions (unlike the position in Austria, Australian university academics can and do hold appointments on the governing body). The chair of academic board and the vice chancellor hold positions on council by virtue of their office. The average size of Australian university councils is 21 members.⁸

Councils are chaired by a chancellor elected by, but not necessarily from, the council. The role of the chancellor has somewhat diminished over time, from that of almost chief executive office in the very early history of universities, to a role more like a king or queen or president of a country who is given little power under the country's constitution. They still play a critical role in matters such as appointment re-appointment or dismissal of the vice chancellor. Normally they do not have a day to day role in the management of the university, though most universities could give examples of chancellors intervening particularly in matters of controversy.

The senior academic body is its academic board, and by tradition council takes its academic advice from that body though, depending on the individual university statute, it is not legally bound to do that. The academic advisory role of academic board is not always described in the university statute, or may be the

⁷ *National Tertiary Education Industry Union and Australian Higher Education Industrial Association 526/98 N Print Q0702*

<<http://www.osiris.gov.au/html/decisions/98/MISC-98/2/IA011590.htm>>.

at para 2.3.3 citing *Halsbury's Laws of Australia* Vol 10 Chapter 160 at 302 – 411

⁸ Nelson B *Our Universities Backing Australia's Future* Commonwealth of Australia 2003

http://www.dest.gov.au/highered/programmes/workplace_reform/guidelines_roundtwo_wrp.htm#5

subject of a by-law or council resolution. As an example the *University of Canberra Act 1989* (Cth) provides in s 19:

19 (1) There is to be an Academic Board.

(2) The Board-

subject to the Statutes, is responsible under the Council for all academic matters relating to the University; and may advise the Council on any matter relating to education, learning or research or the academic work of the University.

Officers and staff of the university are not public servants or servants of the Crown or state, and there is no basis for, or tradition of, regarding universities as an extension of government or part of a government department.⁹

In addition to the separation of state and university Australian universities have always had a complete separation from religion. The legislation establishing the University of Sydney provided a high level of independence from church control. Section XX stated:

That no religious test shall be administered to any person in order to entitle him to be admitted as a Student of the said University, or to hold any office therein, or to partake of any advantage or privilege thereof ...

Such a guarantee could not be taken for granted in the middle of the 19th Century. Indeed, only 18 years earlier, in 1831, a Royal Commission appointed to visit the Scottish Universities was still urging oaths of allegiance, the Confession of Faith, and worship in the one established church in those universities.¹⁰ This concept of “subscription” to the one established state religion still prevalent in British Universities at the time the University of Sydney was established would never find its way into Australian universities and the above provision remains in many university statutes.

Modern Context

Much has been said about Australian universities in the last few years. Two recent books “Why Universities Matter”¹¹ and the “The Enterprise University”¹² give a rather depressing picture, that of a university system where collegiality has been replaced by corporatism,¹³ where universities are seen more as businesses providing services to clients run by executives rather than academics¹⁴ and where the division between those executives or “management” on the one hand and academics or “staff” on the other has never been greater.¹⁵

The recent 2001 Australian Senate Inquiry *Universities in Crisis* into higher education in Australia also paints a sad picture of Australian universities. It found a system with a “corporate” rather than a “collegial” focus¹⁶ generating a “deterioration of the intellectual climate” and a “victimisation of critics or

⁹ *Clarke v University of Melbourne* [1979] VR 66 at 73; see also *National Tertiary Education Industry Union and Australian Higher Education Industrial Association* 526/98 N Print Q0702 <http://www.osiris.gov.au/html/decisions/98/MISC-98/2/IA011590.htm>,

¹⁰ *Report of the Royal Commission of Inquiry into the State of the Universities in Scotland*, 7 October, 1831 at 33.

¹¹ Coady T (Editor) *Why Universities Matter* Allen and Unwin Sydney 2000

¹² Marginson S and Considine M *The Enterprise University* Cambridge University Press Cambridge 2000

¹³ Note 12 at 52; Coady T “Universities and the Ideals of Inquiry” in Coady T (Editor) *Why Universities Matter* Allen and Unwin Sydney 2000 at 15

¹⁴ Note 12 at 49, 62, 64 and Ch 4; Millar S “Academic Autonomy” in Coady T (Editor) *Why Universities Matter* Allen and Unwin Sydney 2000 at 111 - 113

¹⁵ Note 12 at 68 - 70

¹⁶ Senate Employment, Workplace Relations, Small Business and Education References Committee *Universities in Crisis*, Canberra, 27 September 2001, at para 9.33

dissenters and a reduction in academic freedom and transparency.”¹⁷ The Inquiry criticised university management for over concern with image rather than with reputation¹⁸ and a “declining respect for the ideal of academic freedom”.¹⁹ More worrying was the conclusion that “dissident academics feel more threatened now from within the halls of academe than from without”.²⁰

In relation to the workplace, the Senate Inquiry also expressed concerns about the doubling of teaching loads,²¹ increased casualisation²² (and note Appendix 4), the effects of over enrolment,²³ difficulties in attracting and retaining staff,²⁴ decline in work satisfaction,²⁵ the loss of scholars to universities in other countries,²⁶ wage increases without government supplementation, tensions between administrative staff and academics,²⁷ and the negative effects of enterprise agreements and the bargaining process.²⁸ Every three years 37 of the 39 Australian universities goes through individual enterprise bargaining rounds where management and staff, represented by the National Tertiary Education Industry Union (NTEU) and other unions, engage in often bitter and protracted industrial disputes.²⁹ This exacerbates the tensions between management and staff, “a process that has pitched university managers against academic and administrative staff.”³⁰ The Committee claimed that “the ideological goal of ‘squeezing’ efficiencies out of the system is achieved at the cost of quality of education.”³¹ The Committee findings do not paint a healthy picture of Australian universities.³² I now turn to a discussion of the agreements in more detail.

Enterprise Agreements

As noted above the basic legal regime controlling industrial conditions in nearly all Australian Universities is the enterprise agreement. This agreement contains a collectively agreed set of conditions governing employment conditions at a specific university. The agreements are negotiated at the individual university level, but because of the presence of the NTEU, and to a lesser extent a national employer body, the Australian Higher Education Industrial Association (AHEIA), there is a reasonable level of similarity in these agreements across different universities. However, they are not uniform as to salary or other content and they are likely to become less similar over time. The agreements have as a common parent the *Australian Universities Academic Staff (Conditions of Employment) Award 1988* and a further award made in 1995. These awards were argued and made centrally through the Australian Industrial Relations Commission and applied to *all* universities. Enterprise agreements (which have replaced the awards) are made and applied individually at *each* university.

Typically the enterprise agreement will contain clauses relating to salaries, organisational change, types of employment, redundancy and retrenchment, disciplinary procedures, leave arrangements (including sabbatical leave), professional development, equity issues, job security, workloads, disputes settlement, and a range of miscellaneous matters such as reimbursement of accommodation and meals costs.

¹⁷ Note 17 at para 3.223

¹⁸ Note 17 at para 5.50

¹⁹ Note 17 at para 9.33

²⁰ Note 17 at para 9.35

²¹ Note 17 at para 9.1

²² Note 17 at para 9.2

²³ Note 17 at para 9.8

²⁴ Note 17 at para 9.17

²⁵ Note 17 at para 9.15

²⁶ Note 17 at para 9.23

²⁷ Note 17 at para 9.27

²⁸ Note 17 at para 9.46

²⁹ The National Tertiary Education Industry Union website summarises industrial action taken at universities around Australia. This includes strikes at many universities, stop work meetings, bans on the release of examination results and management lock outs. In many cases this activity took place over many months. <http://www.nteu.org.au/home>

³⁰ Note 17 at para 9.46

³¹ Note 17 at para 9.47

³² It should be noted that the Committee was dominated by opposition members, nevertheless its findings should not be discounted too severely for that reason.

Let me now address some of these matters because they are central to Australian university conditions.

(1) Salary

Until relatively recently salary levels were virtually the same across all Australian public universities. At one stage these were set and determined by an independent academic salaries tribunal. Salaries for the various academic classifications, Levels A (associate lecturer), B (lecturer), C (senior lecturer), D (associate professor) and E (professor) are agreed in the enterprise agreement process and are then included as a schedule to the agreement. The enterprise agreements are not decided at the same time at each university, accordingly the amounts awarded at the first universities to reach an enterprise agreement with their staff will be influential upon those other universities that follow.

A university could choose to offer a staff member a higher salary in an individual contract of employment unless this is expressly or impliedly prohibited in an enterprise agreement. This does happen, particularly at Level E, though the extent is unclear. Salaries and other conditions for executive levels higher than Level E, for example dean, pro vice chancellor, deputy vice chancellor and vice chancellor are not usually governed by the enterprise agreement and are a matter for individual negotiation.

In making a new appointment it is up to the selection panel to make a recommendation to the dean or pro vice chancellor regarding the point an academic is to be appointed to on the salary scale.

(2) Tenure and workplace security

The *Orr case* discussed later in this paper made it very clear to Australian academics that they were mere employees of their universities, and did not hold an office for life allowing removal only upon the most serious cause. The enterprise agreement process reinforces that position. For example, a typical university enterprise agreement clause provides:

Continuing Employment

21.1 "Continuing" employment shall mean and refer to an employee who has ongoing employment with the University, subject to termination pursuant to the unsatisfactory performance, serious misconduct, or the termination and redundancy provisions contained in this Agreement. It may be offered on a full-time or part-time basis.^{32a}

It should be noted that this clause confers no special job tenure on the academic beyond that found in other industries.

A subsequent clause in this particular enterprise agreement regarding job security again offers no special security for academics and could also be found in enterprise agreements in other industries:

The University recognises that a sense of job security for its employees is important, particularly if they are to contribute in a significant way to the achievement of the goals and strategic priorities of the School, Faculty and University. To this end, the University will:

- (i) seek to maintain the size of its workforce by facilitating income raising, maintaining a competitive course profile and by prudent management of its resources;
- (ii) explore options to avert any reductions in employee levels that might occur during the life of the Agreement; and

^{32a} *Charles Sturt University (Academic Staff) Enterprise Agreement 2000-2003* Australian Industrial Relations Commission Workplace Relations Act 1999 s.170LJ certification of agreement Charles Sturt University-and-National Tertiary Education Industry Union

(iii) manage any job reductions through natural attrition, redeployment, training, voluntary separation or, as a last resort, through retrenchment.^{32b}

As will be seen in detail later in the section on “Dismissal in Australian Universities”, protection against arbitrary dismissal does exist in Australian universities, and these procedures operate to best protect academic freedom rights.

(3) Types of employment

A matter which unions have tried to restrict is the use of fixed term contracts. The following clause indicates the limited ways in which these contracts can be used:

Fixed-Term Employment

21.4.1 "Fixed-Term" employment shall refer to and mean:

- (i) employment for a specified term or period which expires through the effluxion of time and upon its own terms; or
- (ii) employment in connection with a specific task or project and which will terminate upon the occurrence of a specified contingency related to the task or project; and
- (iii) employment that is not terminable by the University during the term of employment, other than during the probationary period or for cause based on serious misconduct.

21.4.2 Fixed-term employment may be offered where the following circumstances arise and in no other circumstances without the express agreement of the parties.

(i) Specific Task or Project

Where a position is created for a definable work activity that has a starting time and which is expected to be completed within an anticipated timeframe. Without limiting the generality of that circumstance, it shall also include a period of employment provided from identifiable funding external to the University. This shall not include funding that is part of an operating grant from government or the payment of fees made by, or on behalf of, students directly to the University.

(ii) Replacement Employee

To replace an employee who is absent on an extended period of approved leave (eg: long service leave; maternity leave; parental leave, leave without pay; special leave) or on secondment or acting in another position.

(iii) Research-Only Position

Where employment is to be offered in a research-only position. In these circumstances, a fixed-term appointment not exceeding five (5) years may be offered.

(iv) Professional Practice

Where a curriculum in professional or vocational education requires such work to be undertaken by an employee who has the requisite recent practical or commercial experience. In these circumstances, and in recognition of the regional nature of the University, a fixed-term appointment not exceeding three (3) years may be offered, except where the parties agree to a longer period.

^{32b} Note 32a

(v) Pre-Retirement Contract

Where a full-time or part-time employee on continuing employment declares their intention to retire. In these circumstances, a fixed-term appointment not exceeding five (5) years may be offered, except where the parties agree to a longer period.

(vi) Undergraduate and Postgraduate Students

An undergraduate or postgraduate student may be employed for a fixed-term, provided that:

(a) the work to be performed by the student is within their academic unit or an associated research unit and is generally related to a degree course being undertaken;

(b) the period of the appointment does not extend beyond the end of the academic year in which the person ceases to be a student, including any period that the person is not enrolled as a student but is still completing undergraduate or postgraduate work or is awaiting results; and

(c) the offer of fixed-term employment is not made on the condition that the person to whom the offer is made undertake the studentship.^{32c}

Enterprise agreements containing such restrictions have been criticised by the government and university management for lack of flexibility. This matter is addressed below in the section on workplace reform.

(4) Organisational change

Like their Austrian counterparts, Australian academics have undergone substantial organisational change in the past. This is such an important issue that it is covered in our enterprise agreements in clauses such as the following:

19.2 Workplace change includes significant changes in the composition, operation or size of the workforce or in the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure, including outsourcing; the alteration of hours of work, the need for retraining or transfer of employees to other work or locations and the restructuring of jobs.

19.3 The parties agree that where significant workplace change is to occur the Vice Chancellor (or nominee) will notify the employees likely to be affected and the union.

19.4 Where the Vice Chancellor has taken an initial decision to effect workplace change of a significant nature referred to in subclause 19.2, the Vice Chancellor (or nominee) shall consult with the employees likely to be affected and discuss with the union, with a view to reaching agreement, the nature of the proposed changes and the effects the changes are likely to have on employees. Such consultation and discussion shall commence as early as practicable.^{32d}

The clause requires significant workplace change to be discussed with affected employees and the union.

(5) Disciplinary procedures

These procedures relate to two matters, unsatisfactory performance and misconduct. The latter is considered below in the context of dismissal. The former typically puts in place a series of procedures for dealing with unsatisfactory performance including the giving of notice to the employee of the unsatisfactory performance, counselling and reasonable opportunities to improve. If there is no improvement the academic may face:

- (i) Counselling.
- (ii) Formal censure.
- (iii) Withholding of a salary step.
- (iv) Demotion by one or more salary steps.
- (v) Demotion by one or more classification levels.
- (vi) Termination of employment.

^{32c} Note 32a

^{32d} Note 32a

(6) Redundancy and retrenchment

Enterprise agreements allow for redundancy and retrenchment of staff. This would normally relate to matters such as a decrease in student demand or enrolments, a decision to cease offering a course on a particular campus, financial exigency or technological change. Where redundancy and retrenchment is proposed the vice chancellor has to enter into discussions with employees and the union to discuss measures which could avert the need for retrenchment or mitigate its effects such as redeployment, secondment or voluntary separation.

(7) Leave arrangements

In addition to standard holiday leave (usually 20 days in Australia) most enterprise agreements recognise a right in an academic to apply for (not an entitlement to receive) sabbatical leave, normally 6 months each 3 years. Other clauses recognise rights to apply for maternity leave and long service leave. In the last twelve months the right to receive maternity leave has been an issue across many sectors of the Australian workplace.

(8) Workloads

A recent matter which has achieved prominence in Australian universities is the establishment of consistent, transparent and fair workloads policies. Enterprise agreements are at an early stage in the development of such policies but at this stage typically require union and employee consultation through working parties.

Workplace Reform

In 2003 the Australian government released the Nelson Report,³³ a review by the Commonwealth Minister for Education of Australian Higher Education. It accepted the need for further resources. It advocated reform in administration of universities at the state and federal bureaucratic level, in the internal governance of universities (particularly in relation to the size of governing bodies, the professional development of their members, the transparency and accountability of their operations) and in relation to workplace practices. The Report identified four key elements in addressing the identified reforms: Long term sustainability, quality, equity and diversity.

In this conference the emphasis is on the academic workplace, and I will concentrate on the Government's recommendations in relation to that.

The present Australian government has made much of workplace reform across all industries. In relation to universities it has used rhetoric such as "the implementation of flexible working arrangements and a focus on direct relationships with employees and improved productivity and performance".³⁴ The government has provided additional funds available to universities if they can satisfy the government they have achieved certain matters "intended to provide funding for higher education institutions upon the adoption of flexible and more efficient governance and management structures."³⁵ This was justified on the basis that "it will enable institutions to respond to the emerging student, employer and community demands."³⁶

Of interest to Austrians is the fact that it is precisely arrangements such as those contained in your section 109 preventing the use of continued short term contracts which have upset Australian university management and the government alike. These arrangements are perceived as limiting managerial flexibility. A previous award in Australia was written in similar terms to section 109, and probably contributed to an increase in casualisation of the Australian academic workforce as management moved to avoid term contracts and replace them with short term casual appointments where staff are paid by the

³³ Note 8

³⁴ Note 8 at 37

³⁵ Note 8

³⁶ http://www.dest.gov.au/highered/programmes/workplace_reform/guidelines_roundtwo_wrp.htm#5

hour. This increased casualisation is evident in the Table reproduced in Appendix 4. Similarly, your section 110 on hours of work would attract a similar criticism of inflexibility, I am not aware of any such conditions in Australian universities. As indicated above enterprise agreements still typically contain restrictions similar to those in the previous award.

Universities have to meet 9 of 14 criteria to obtain the additional funding. These criteria are listed in Appendix 1 and reflect a broader government ideology designed to *decrease* the role of unions and of centralised industrial awards applying to the whole university sector, and to require very controversial, union despised individual employment contracts, known as Australian Workplace Agreements (or AWAs). Other criteria include programmes to increase fee paying courses, and governance reform, including the reduction of committee and governing body size and the replacement of merit based promotion schemes with those based on organisational need.

Dismissal in Australian Universities

In this section I concentrate on the development of dismissal processes in Australian universities. From our experience it is in this area that the greatest threat lies to academic freedom and this is the most likely justification for the sophisticated procedures that have developed. It is my suspicion that as you move from a civil employment system to one based at the university level, that you will have cause to develop processes if this has not already been done. The history of this development in Australia may be of interest.

(i) Early history

In 1956 an event took place in the island state of Tasmania which shocked Australian academics. This was the summary dismissal of Professor Orr on 16 March 1956 by the University Council of the University of Tasmania following complaints to the Vice Chancellor regarding a number of matters including an allegation that Professor Orr had seduced an 18 year old student. Summary dismissal was destined to cause an outage. Dismissal of academics in Australia had been a rarity until that time, though there had been a number of instances of academics resigning under pressure or not having their contracts renewed.³⁷

Orr challenged his dismissal in the Supreme Court of Tasmania as a breach of his contract and sued the University for wrongful dismissal. Mr Justice Green of the Supreme Court found that Orr's contract was one of employment and the relationship of master and servant applied between the University and him.³⁸ This finding dismayed many professors at the time who regarded themselves more as people holding a form of public office in life time tenure.³⁹ The notion that they might be regarded as merely the employees of their universities was not an easy one to accept. Nevertheless, in the longer term, it was an important

³⁷ Such as Professor Read, University of Adelaide (1878); Professors Irvine (1922) and Brennan (1924) at Sydney University; Professor Marshall-Hall at Melbourne University (1900). A detailed examination of these and other matters is contained in Jim Jackson, *Legal Rights to Academic Freedom In Australian Universities* Unpublished PhD thesis, University of Sydney, 2002

³⁸ *Orr v University of Tasmania* [1956]Tas SR 155 at 158

³⁹ For example the Orr supporters Professors Stout and Wright: see Pybus C, *Gross Moral Turpitude: The Orr Case Reconsidered* (Australia: William Heinemann, 1993) at 74, 75. These academics had difficulty reconciling the notion of academic community with the concept of university as master and academic as servant. Had they been aware that many university statutes confer university membership status on academics so that at law academics are *both* employees and members of their corporate body or community their concerns would have been removed. This issue, ignored in *Orr*, was debated after the case. Bartholomew and Nash argued that these dual roles mean that the dismissal of a academic who is both an employee and member of the university under its statute requires the application of the rules of natural justice: Bartholomew CW and Nash PG "Tenure of Academic Staff" (1959) Vol 1 No 5 *Vestes* 10 at 11. Similarly Professor Montrose argues that Professors are members of the University, and dismissal requires proper notice and participation by the professor in a proper inquiry to establish whether grounds exist: Professor Montrose "The Legal Relation of University and its Professors" (1958) 29 *Universities Review* 44 at 46.

step in the application of the industrial relations system to, and the development of, unionisation in Australian universities.⁴⁰

Green J went on to find that Orr had used his position to seduce his student and this justified Orr's summary dismissal. Orr unsuccessfully appealed to the Australian High Court. Over the next 10 years, indeed until his death, Orr maintained his innocence. The combined Australian staff associations organised a black ban on the filling of the Chair of philosophy at the University of Tasmania and in 1966 a settlement was finally reached resulting in compensation to Orr.

The Orr case brought about a more focused approach from both the Australian Vice Chancellors' Committee and staff associations to the problem of dismissal of academics in Australian universities as they sought to introduce proper procedures protecting academics from arbitrary dismissal.

(ii) Unionisation and an academic "award"

The next most significant development occurred in the 1980s. This was the registration of Australia wide university employer and employee industrial bodies⁴¹ culminating in the handing down of a federal award by the Australian Industrial Relations Commission. Under Australian law an "award" is a court determined arbitration binding parties (namely a union and an employer or group of employers) to a set of employment conditions. The award was the *Australian Universities Academic Staff (Conditions of Employment) Award 1988*.⁴² That 1988 Award covered a range of matters including very comprehensive procedures for disciplining academics. In the most serious cases, it allowed for dismissal following a misconduct investigation committee (MIC) recommendation. For reasons discussed below the Award no longer applies, nevertheless its procedures regulating dismissal are highly relevant predecessors to current procedures and warrant discussion.

Clause 9 of the Award dealt with serious misconduct:

(a) In the context of these procedures serious misconduct shall mean:

- (i) serious misbehaviour of a kind which constitutes a serious impediment to the carrying out of the member's duties or to other members carrying out their duties; or
- (ii) serious dereliction of the duties required of the member's office; or
- (iii) conviction by a court of competent jurisdiction of an offence of a kind which constitutes a serious impediment to the carrying out of the member's duties or to other members carrying out their duties.

The Clause then provided that where there was "any question that a staff member may have been guilty of serious misconduct", the matter was to be "investigated and reported on solely in accordance with these procedures, notwithstanding anything to the contrary in the staff member's terms of employment or any of the procedure(s) that may currently be in operation at any University."

⁴⁰ Professor Anderson in commenting on the Orr case agreed with John Kerr that the master / servant issue had been lost earlier when staff at the New South Wales University of Technology (now the University of New South Wales) had sought the intervention of the Arbitration Court in a matter. This, Anderson agreed "conceded, in effect, that the academics were not the University, that they were mere employees of it, and it was something different. I would go further and say that the mere existence of Staff Associations concedes the same thing..." Professor J Anderson, *The University and the Community, Implications of the Orr Case*, WEA 19 September, 1958, in Anderson papers, University of Sydney Archives, P042, Series 20, Range 1956 – 59 Box 46. Many academics on American campuses would no doubt agree, though unionisation is so entrenched and institutionalised through enterprise bargaining agreements in Australian universities that the issue rarely is raised.

⁴¹ This followed from the decision in *Queen v. Coldham; Ex Parte Australian Social Welfare Union* (1983) 153 CLR 297 which ultimately allowed federal registration of an academic union.

⁴² referred to herein as the 1988 Award.

The procedures required allegations of serious misconduct to be investigated first by the chief executive officer (CEO).⁴³ If he or she believed that an allegation of serious misconduct warranted further investigation, the CEO was required to notify the staff member in writing of the nature of the acts or omissions which constituted the alleged serious misconduct “in sufficient detail to enable the staff member to know the precise nature of the allegations” and to properly consider and respond.

In the interim the Award allowed the CEO to suspend the staff member from duty, with pay, and exclude him or her from the University.

Where the CEO decided that a prima facie case for serious misconduct existed the CEO was required to refer the matter to a committee of investigation consisting of a senior member of the legal profession or a person with appropriate experience in industrial relations appointed by agreement between the CEO and the president of the local branch of the union, as chair, a nominee of the CEO, and a nominee of the president of the local branch of the union.

This committee had to investigate any case referred, hear and consider evidence and submissions, and report, with reasons, whether it was satisfied that each of the facts or matters alleged had been proven and whether the facts as proven constituted serious misconduct.

Subject to any required ratification by the governing body of the university, the CEO was then required to act on its finding:

....by proceeding forthwith to exercise one or more of the following powers, namely to:

- (i) dismiss the case and remove any suspension previously placed upon the staff member; or
- (ii) censure the staff member, withhold an increment of salary for a period not exceeding twelve months, demote the staff member, or dismiss the staff member from the employment of the University.

An important decision on the operation of the 1988 Award is *Rice v University of Queensland*.⁴⁴ Dr Rice had been dismissed by the University of Queensland for a range of matters following a Committee of Investigation. Madgwick J of the Industrial Relations Court found that the Committee’s report was not lawfully made out and accordingly there were not valid reasons for termination of his employment. In so finding he described the legal effect of the disciplinary provisions in the Award:

It takes the independent powers and functions of fact-finding and discretionary judgment of the comparative seriousness of such infractions out of the hands of the administrative officers of the employing university and vests them in an independent and senior Committee, which represents the interests of the university and its staff.

The requirement in subclauses (n) and (o) that the relevant administrative organs of the university must apply the findings of the Committee denudes them of the power even of charitably-intended indulgence; the powers of the administrators are thereby greatly reduced. Among other things, the Award stringently removes any capacity for a purely subjective approach by a Vice Chancellor.

⁴³ normally the vice chancellor, though some Australian vice chancellors now also use the exalted American term “president”

⁴⁴ *Rice v University of Queensland* (980009), <http://www.austlii.edu.au/au/cases/cth/irc/980009.html>, QI 1042 of 1995, 13 March 1998

In another case under the 1988 Award, *Chambers v James Cook University of North Queensland*⁴⁵ Boulton JR examined the operation of a committee formed to investigate allegations of sexual harassment. The academic had been dismissed by the Vice Chancellor following adverse findings by the committee. Boulton JR determined that the academic should be reinstated because the committee's decision was vitiated by errors of law. Specifically he found that there is a requirement that the matters constituting the alleged serious misconduct must be specifically defined,⁴⁶ and the employee must be informed of precisely what he is charged with.⁴⁷ Failure to do so denied natural justice to the employee. Furthermore the committee did not apply the correct definition of serious misconduct as provided in Clause 9(i) of the Award, specifically the test was not the one applied: "professionally grossly negligent in his conduct".⁴⁸

In his judgment in *Rice* Madgwick J provided a rationale for the 1988 Award:

When framing the Award, the parties to it evidently had in mind such matters as the intrinsic social importance of the work of academic staff of universities, and the historical phenomenon that some with much to contribute to such work may not necessarily behave in particularly orthodox ways. It is evident that the parties were intent on doing a number of things aimed, on the one hand, at respect for academic freedom while, on the other, at distinguishing between the legitimate scope of such freedom and behaviour which would make it practically intolerable for the continuation of an academic's employment.⁴⁹

This statement is a very important recognition of academic freedom. Madgwick J also recognised that academic freedom is not an absolute and the concept will be balanced against other "intolerable" behaviour. Interpreted in this academic freedom context and strictly by judges such as Boulton JR and Madgwick J, the 1988 Award disciplinary procedures provided powerful protection for academic freedom, though without once mentioning those words.

Two other matters of longer term importance emerge from *Rice*. The first is a recognition of the academic role to be played by the misconduct investigation committee. Speaking of this Madgwick J said:

As to matters where academic standards are involved, it would be right, in any case, for the Court to accord respect to the expertise possessed by the Committee: see *T C N Channel 9 Pty Ltd v Australian Broadcasting Tribunal* (1992) 28 ALD 829.

The 1988 Award was replaced by *the Universities and Post Compulsory Academic Conditions Award 1995* (known as the Bryant Award). However political events weakened the award system. The election of a Liberal National party government in 1995 intent on workplace reform would see a serious reduction in the importance of the award system itself, and its partial replacement by a system of enterprise bargaining.

(iii) The advent of enterprise bargaining

For universities this has meant the replacement of the national and uniform 1995 Award with "certified agreements" made at the individual university level⁵⁰ every three years and the inclusion, if the parties so wish, of disciplinary and serious misconduct procedures in the agreement. The national union, the NTEU, which supports individual university branches in their negotiations with each university insists on the inclusion of disciplinary procedures, and as demonstrated below, these owe much to the 1988 and 1995 Awards.

⁴⁵ *Chambers v James Cook University of North Queensland* Industrial Relations Court of Australia, Queensland Registry, no QI158 of 1994, 10 Feb, 1995, <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/irc/950033.html>?

⁴⁶ Note 45 at 24

⁴⁷ Note 45 at 18

⁴⁸ Note 45 at 23

⁴⁹ Note 44 at 13

⁵⁰ Enterprise bargaining had in fact commenced under the previous Labor government, but the first University agreements began appearing in 1995 and were certified under s 170MAS of the *Industrial Relations Act, 1988* (Cth).

Appendix 11 examines certified agreements in Australian Universities and reveals reasonable rights protecting academics against arbitrary dismissal in Australian universities which have entered into enterprise agreements. The examination of dismissal processes in enterprise agreements in Australian public universities reveals reasonable levels of legal protection for academics facing dismissal in 37 Australian universities.

The legal protection include rights to:

- written allegations;
- answer and be present before the committee;
- examine witnesses;
- natural justice;
- a misconduct investigation committee to investigate the matters leading to dismissal or other penalty; and
- an in camera process where the academic may be represented, though not usually by a lawyer.

As noted the sources of the misconduct investigation clauses in these certified agreements are the 1988 and 1995 Awards. Most agreements have copied the Misconduct Investigation Committee tribunal procedures for dealing with serious misconduct from the 1995 Award with few changes.

However, some universities have modified the procedures to implement a formal investigating officer process prior to moving to the misconduct tribunal. This has been done for example at the Universities of Melbourne, New South Wales and Sydney. Clause 42.3 of the University of Melbourne agreement states:

If the Deputy Vice-Chancellor believes that an allegation of misconduct or serious misconduct is serious and warrants investigation, the Deputy Vice-Chancellor shall appoint 1 or 2 investigation officer(s) to undertake a misconduct investigation

Subsequent clauses arm the investigating officer with power to conduct such further inquiries on the allegations as he/she considers appropriate, determine procedures for conducting the inquiries, and outline those to the staff member, at all times being guided by a desire to determine the truth and to ensure fairness to the staff member.

The investigating officer (IO) has to report to the deputy vice chancellor who can implement a penalty. A right of appeal is given to a Review and Appeals Committee (RAC). If the academic does not accept the report or penalty, this panel will consider whether there is sufficient evidence to support the finding of misconduct or serious misconduct and whether the proposed disciplinary action is in proportion to the level of misconduct or serious misconduct. Clause 49.5 makes it clear that the RAC acts in a similar way to a misconduct investigation committee with similar powers and functions including the power to take evidence. Accordingly the RAC may proceed by way of a rehearing.

A criticism often made by management of the award misconduct processes is that they are cumbersome in practice. The presence at the University of Melbourne of a proper preliminary investigation process with an initial level of determining power granted to the investigating officer addresses those concerns while maintaining full protective rights in the academic to go to a misconduct tribunal. It is submitted that this initial investigation process might more easily and rapidly deal with serious misconduct cases, such as those where the evidence is strong and the matters turn strictly on fact determination. This, for example, could include cases concerning theft or sexual harassment. Those matters where a higher level of academic judgment is required, including issues relating to academic freedom would go inevitably to the traditional tribunal with its attendant community notion of academics sitting in judgment over their colleagues.

The University of Sydney investigating officer procedures are similar to those at the University of Melbourne. The University of Western Australia also uses investigating officer procedures. However

these are different again. At that university the IO serves the needs of the MIC and is appointed only *after* the matter has gone to the MIC “to conduct further inquiries as the Misconduct Investigation Committee considers reasonable and appropriate.” (Clause 4(a))

The 2000 Enterprise Agreement at the University of New South Wales also provided for an investigating officer, but then, unusually, gave the academic the choice of using the investigating officer process instead of a misconduct investigation committee: clause 14.3(g). That university is the first to certify an agreement under the 2003 round. Amendments to the investigating officer and MIC procedures have been made: The choice of investigating officer or MIC has been removed, though an election to use a review committee is given for serious matters: If an allegation of misconduct or serious misconduct is denied by the academic, the deputy vice chancellor will appoint one or more investigating officers to undertake the misconduct investigation.⁵¹ The investigating officer reports to the deputy vice chancellor, who has to consider the report and under cl 14.2.4 make a determination as to whether misconduct or serious misconduct has occurred and what disciplinary action is appropriate. Where it is recommended to the vice chancellor that the academic be demoted, suspended, removed from a position which carried an allowance, or have his/her employment terminated, then the academic can elect to have the matter dealt with by a “Review Committee”: cl 14.3(c). This committee then operates in a similar manner to those in other universities.

A matter that is not resolved under many certified agreements is the extent to which a vice chancellor is bound to follow the findings of fact of a MIC.

A second issue is whether the university may ignore the above procedures and purports to exercise a power to dismiss it believes is contained in a statute. This issue arose in an academic freedom context in *NTEIU v University of Wollongong*.⁵²

On 26 February, 2001 Associate Professor Ted Steele was dismissed without notice by the Vice Chancellor of the University of Wollongong Professor Sutton. On that day the Vice Chancellor wrote to Dr Steele advising him:

- a) that you have engaged in serious misconduct by wilful or deliberate behaviour that is inconsistent with the continuation of your employment and
- b) that your conduct has caused serious risk to the reputation of the University of Wollongong, your employer.

Accordingly, pursuant to clause 59 of the Enterprise Bargaining Agreement and Section 170CM(1)[c] of the *Workplace Relations Act 1996*, I advise you that your employment with the University of Wollongong is terminated, effective immediately.⁵³

What conduct had given rise to this action? The Vice Chancellor’s dismissal letter refers to statements made by Steele in the press on 9 January 2001 to the effect that Steele “had been told/instructed to increase the grades of honours students.” The letter indicates that according to the Vice Chancellor, Steele did not substantiate the claims, and later denied those claims. Upon being instructed to withdraw the claims the letter asserts that he refused a request from his head of department “to correct the public record accordingly and to take appropriate steps to repair the obvious damage your remarks had caused to the reputation of the University of Wollongong.” Instead the Vice Chancellor’s letter asserts that Professor Steele responded to his head of department with a letter circulated widely referring to “deeply flawed

⁵¹ UNSW (Academic Staff) Enterprise Agreement 2003 Clause 14.2.3(b)

⁵² *NTEIU v University of Wollongong* [2001] FCA 1069 (8 August, 2001)

⁵³ The dismissal letter is reproduced in 2001 (April) NTEU National Industry Bulletin at page 2, also available at <http://www.nteu.org.au/rights/tedsteele.pdf>

process of honour's assessment", "sham process of honours assessment" and "shonky marking practices".⁵⁴

Professor Sutton chose not to use the misconduct investigation procedures in the *University of Wollongong (Academic Staff) Enterprise Agreement 2000-2003*. This action immediately raised the spectre of *Orr*. Again an academic had been summarily dismissed in Australia by a university. On this occasion there existed formal procedures which themselves could be traced back to *Orr*, yet the University did not to follow them. In *Orr* there was an argument on the facts as to whether he had been dismissed for an inappropriate sexual relationship with a student or because of what he had said about the university. In *Steele* there could be no such confusion, essentially *Steele* made allegations about the marking practices of the University and refused a direction to correct the record.

On 14 May, 2001 *Steele*, represented by the NTEU, sought an interpretation of the Enterprise Agreement in the Federal Court. The specific legal question raised was whether the Vice-Chancellor, having unilaterally decided that an academic has engaged in serious misconduct was entitled to ignore the misconduct investigation procedures in the Agreement.

In the event Branson J rejected the University's interpretation of the Enterprise Agreement: This question could not have arisen under the misconduct procedures in the Award, because the Award provisions had been held to constitute a code thereby preventing any party from ignoring the procedures.⁵⁵ This point had not been tested under the new enterprise bargaining regime that universities were now in. Accordingly the *Steele* case was a critical test for enterprise bargaining, particularly as it related to dismissal of Australian academics.

If a vice chancellor was to be allowed to circumvent the misconduct investigation procedures in an enterprise bargain, academic freedom in Australia was under direct threat because these procedures developed over the forty years post *Orr* represented the main safeguard against arbitrary dismissal. In an explanatory statement regarding the judgment Branson J made this comment:

Nor was the Court required to address any issue touching on academic freedom or freedom of speech generally. The only issue on which the Court has ruled is an issue concerning the proper interpretation of the Agreement.⁵⁶

Accordingly Branson J characterised her judgment as simply one of construction of an enterprise agreement. Apart from this she makes no reference to academic freedom, and surprisingly no reference to the academic freedom background and history of the misconduct investigation procedures before her, which would certainly have added considerable weight to her interpretation of the agreement. After all but for academic freedom why should universities have special and quite complicated dismissal procedures?⁵⁷

⁵⁴ 2001 (April) NTEU National Industry Bulletin at page 2, also available at <http://www.nteu.org.au/rights/tedsteele.pdf>

⁵⁵ *Chambers v James Cook University* (1995) 61 IR 121 at 137; *Rice v University of Queensland* *Rice v University of Queensland* (980009), <http://www.austlii.edu.au/au/cases/cth/irc/980009.html>, QI 1042 of 1995, 13 March 1998

⁵⁶ Note 52 Explanatory Statement, para 6

⁵⁷ *Steele's* case has parallels to the 1885 Canadian case *Re Wilson* (1885) 18 NSR 180 with a similar outcome. In that case Professor Wilson published a letter in a newspaper said by the university to be injurious to the college and manifesting a contempt of authority subversive of discipline and likely to destroy the harmony and mutual confidence between the professor and the governing body of Kings College Windsor. By majority the Court held that "Professor Wilson had no notice that the Governors would deliberate on the offence charged and consider the propriety of removing him from his office on account of it": per Thompson J at 193. Accordingly the dismissal failed on procedural grounds, "no man shall be condemned unheard": per Thompson J at 193.

The University of Wollongong appealed the decision of Branson J. The Full Court of the Federal Court rejected this appeal, fully supporting the reasons advanced by Branson J in her judgment.⁵⁸ In delivering the judgment the actions of the University of Wollongong in dismissing Steele were criticised by the Court:

It is unlikely any trade union, today, would accept a proposed enterprise agreement that permitted the employer to dismiss an employee for misconduct without prior warning and an opportunity to make a defence. Common fairness requires the provision of these rights. It is disappointing to find a university, of all employers, claiming not to be under an obligation of common fairness.⁵⁹

This comment indicates just how far academic rights have developed since the Orr case. Processes protecting academics in earlier times were more likely to be found in rules relating to natural justice rather than in documented processes in the universities. Proper process was given a boost by *Orr* and reached a state of systemic unity offering high levels of protection in the Bryant Award. With the advent of enterprise bargaining the uniformity has started to disappear, though most dismissal processes remain similar. The investigating officer provisions introduced in a small number of universities including the Universities of NSW, Sydney and Melbourne represent a variation on the procedures originally introduced in the Bryant award.

The *Orr* dispute also strengthened the role of staff associations in universities. These associations eventually grew into a powerful industrial union. At the time of the *Orr case* there was no federal union, and while the efforts of staff associations were able to put significant political and moral pressure on the University of Tasmania they were not able to represent Orr in the litigation who had to bear his own costs and those of the University⁶⁰ when he lost. The *Steele* case reflects significant growth in the industrial and legal power of unions. Steele has been represented by a financially secure union which was prepared to run the case to its conclusion.

Proper procedures on dismissal are quite vital to the protection of academic freedom because they provide a form of trial by peers in the academy. In most cases one would expect these peers to have some understanding of academic freedom or at least a tolerance of it. The decision of Wollongong University to dismiss Steele does not reflect well on their executive's understanding of 250 years of university and judicial history bestowing at least rudimentary natural justice rights on academics. It certainly missed the lesson from *Orr* and further demonstrates a distrust of the procedures contained in the University's enterprise agreement, which included a misconduct investigation committee, a process that has at least some of its origins in *Orr*. The executive's decision put the University on the defensive giving Steele an action based on a failure of process rather than having to face a misconduct investigation on the truthfulness of what he had said.

⁵⁸*University of Wollongong v National Tertiary Education Industry Union* [2002] FCAFC 85 (28 March 2002) Wilcox J, one of the appeal judges was quoted in the press at the time of the case, as saying in response to University counsel's argument: "Look, even murderers are entitled to be heard in their defence. The suggestion that an academic, whatever his or her offence, is not allowed to make a defence – for a university to put that proposition, I repeat, I just find it a shocking proposition." Sydney Morning Herald, 28 February, 2002, at 3.

⁵⁹ *University of Wollongong v National Tertiary Education Industry Union* [2002] FCAFC 85 (28 March 2002) at para 35

⁶⁰ The University forgave the debt relating to costs awarded in the University's favour in the 1966 settlement.

Conclusions

On my recent sabbatical leave in Europe I met a number of academics from many universities. I sensed a certain admiration for Australian universities which were generally perceived as innovative, modern and flexible in structure, and very successful at attracting full fee paying overseas students. The Australian university system was seen as one which was worthy of careful review and adoption.

This paper has attempted to illustrate that such perceptions do not always accord with reality and to demonstrate that there are many aspects of the Australian system that are unsatisfactory. It is always tempting to look over the fence and assume that something is better than it may seem. Accordingly it is submitted that you carefully examine what is great about your own system and preserve it at all costs. At the same time an examination of the Australian system should warn of four dangerous pitfalls.

(1) *The executive / academic divide and enterprise bargaining*

Do not destroy collegiality by creating elitist academic management groups called 'executives' to 'run' your "corporatised" universities. Such structures increase the power of unions on campuses because they remove trust and give force to a management /workers split which previously did exist on Australian campuses. This divide is exploited by groups in both management and unions to increase their respective power on the campus, which is most obvious when a university and the union are negotiating an enterprise bargaining agreement. At its worst the university then better resembles a fiercely unionised building site rather than a collegial environment. The whole concept of enterprise bargaining in its application to universities needs to be re-evaluated, because it puts at peril centuries of tradition based around collegiality and respect. In my opinion Australian universities were better and certainly happier institutions when base level salaries were set by an independent salaries tribunal rather than through a bitter system of strikes and pickets.

(2) *Do not try to make entrepreneurs out of academics who are not*

Many academics become academics because they reject the world of business. In Australia there is significant pressure on universities to generate a significant proportion of their funds from private non-government sources. Some universities have been particularly successful at this, especially in the field of business and management education. The individual academic will inevitably feel the same pressure. To the extent that this occurs and entrepreneurial values replace traditional knowledge discovery and dissemination values the system will suffer. There is also the risk that those same profit driven values will put at risk academic standards, essentially the allegation made by Professor Steele, though this aspect of the case was never argued or proven in court.

(3) *Do not lose sight of your university values*

This then leads me to the next risk. Any university system must understand its values, what makes it unique. You must understand your traditions, your definition of what a university is, and recognise who your members are. The danger is that an organisation which calls itself a university but simply exists at the call of government or large business will over time lose its independence as it begins to look like any other corporate organisation. When that happens the university loses its distinctiveness and its economic value...indeed the more corporate it becomes the less may be its value in the eyes of the corporate sector. The quest to be more entrepreneurial may itself destroy the economic value of the university, to say nothing of its social value.

(4) *Have in place and follow proper processes to deal with misconduct*

Much of this paper has concentrated on dismissal processes in universities. As our Australian system has become more dollar driven and more corporatised vice chancellors have become much more sensitive to image. This places more pressure on academics to conform.

It also means that transgressions will be followed up more rigorously than in the past. This latter comment does not necessarily reflect poorly on universities indeed in matters such as sexual harassment were probably not dealt with poorly by universities in previous generations. Every modern Australian university has to deal with such allegations and it is imperative that proper processes exist for sifting fact and fiction. Accordingly in this paper I have placed a great deal of emphasis on the modern Australian procedures relating to dismissal.

Appendix 1

Australian Commonwealth Government

Criteria for Second Round University Funding - Workplace Reform Programme

Source Nelson B *Our Universities Backing Australia's Future Commonwealth of Australia 2003*

http://www.dest.gov.au/highered/programmes/workplace_reform/guidelines_roundtwo_wrp.htm#5

Institutions are required to meet 9 of the following 14 criteria:

(1) Enterprise agreements which include measures which promote institution-specific terms and conditions, cost savings and freedom of association.

An applicant institution must demonstrate that it has:

- (a) agreements which give all employees, collectively and individually, equal opportunity to participate in future bargaining processes;
- (b) agreements which promote an institution-specific focus through approaches including:
 - (i) ceasing reliance on sector-wide industrial instruments (i.e. developing agreements which are comprehensive and closed); and
 - (ii) ensuring that any award provision (allowable or non-allowable) included in an agreement is tailored to the needs of the institution;
- (c) agreements which provide for Australian Workplace Agreements (AWAs) to be made with staff;

Note: Institutions with one or more certified agreements beyond its nominal expiry date(s) must have a policy, and state in the application that they have a policy, that the use of AWAs will be considered in relation to all staff classifications covered by each certified agreement beyond its nominal expiry date.

- (d) agreements which enable AWAs to operate in conjunction with certified agreements;

Note: Institutions with one or more certified agreements beyond its nominal expiry date(s) must have a policy, and state in the application that they have a policy, that the use of AWAs will be considered in relation to all staff classifications covered by each certified agreement beyond its nominal expiry date.

- (e)
 - (i) agreements which utilise flexible/facilitative terms which allow employment conditions to be tailored to needs at the local level; and
 - (ii) made progress in implementing those employment conditions;
- (f)
 - (i) agreements which include initiatives which promote cost savings, discretionary revenue generation and productivity gains, particularly gains in quality and administrative efficiency; and
 - (ii) made progress in implementing those initiatives;
- (g)
 - (i) agreements which include effective performance management arrangements; and
 - (ii) made progress in implementing those arrangements;
- (h)
 - (i) agreements which reinforce the achievement of the institution's strategic objectives; and
 - (ii) made progress in achieving those objectives;
- (i) agreements which simplify procedures for redeployment and retrenchment; and
- (j) agreements which guarantee freedom of association, and refrain from any indication of disposition towards, or against (or other encouragement or discouragement of) union membership;

(2) Initiatives.

An applicant institution must demonstrate that it has:

- (a)
 - (i) initiatives which provide, where payment for union fees is effected through payroll deduction, an opportunity for staff to elect whether or not to continue to make such payments through payroll deduction; and
 - (ii) made progress in implementing initiatives which provide that opportunity for staff;
- (b)
 - (i) initiatives which reflect the active pursuit, either directly or through representative bodies, of award simplification consistent with the objectives of the Workplace Relations Act; and
 - (ii) made progress in implementing initiatives which reflect that active pursuit;
- (c)
 - (i) initiatives which, where appropriate, encourage youth employment, including junior rates of pay; and
 - (ii) made progress in implementing, where appropriate, those initiatives;

(3) A commitment to, and progress in implementing initiatives to improve management and administration.

An applicant institution must demonstrate that it has:

- (a) a commitment to initiatives to improve management and administration; and
- (b) made progress in implementing those initiatives.

Initiatives to improve management and administration could include:

- * sharing educational courseware, technology, library and administrative services, cutting costs and improving quality;
- * rationalisation of governance structures and committees by reducing the number and size of committees and councils;
- * better use of academic staff and physical resources, including the capacity for a trimester year, and to change workload and working hours over weeks and over the year. Academic work agreements could also cover a full year;
- * appropriate training for staff, for example, by ensuring that heads of schools/departments have appropriate management training as well as academic expertise;
- * streamlining of recruitment and selection processes, including reducing interview panels and promotion to a position rather than promotion on merit irrespective of the organisational need; and
- * discretionary revenue generation through fee-paying courses and other activities.

Appendix 2

Dismissal Processes in Certified Agreements: The 2001/2001 round

Source Jim Jackson, *Legal Rights to Academic Freedom In Australian Universities* Unpublished PhD thesis, University of Sydney, 2002

UNI	Nature of process					University rights to		Academic's rights to				
	Investigation by	MIC or MRC	In camera	Representation by	Rules of evidence apply?	Ban from campus	Suspend pending outcome	Get written alleg'ns	Answer & be present	Examine witness	Natural justice	Copy of Cmmttee report
Adelaide	MIC	MIC	Yes	Nolaw	No	Yes	W/oP	Yes	Yes	Yes	Yes	Yes
ACU	MIC	MIC	Yes	Nolaw	N/S	Yes	Yes	Yes	Yes	Yes	Yes	Yes
ANU	IO	MRC	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	N/S
CQU	RP	RP	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	Yes
CSU	CR	CR	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	Yes
Curtin	RC	RC	Yes	Law	N/S	N/S	N/S	Yes	Yes	Yes	Yes	N/S
Deakin	DRC	DRC	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	Yes
ECU	MC	MC	N/S	Yes	N/S	Yes	W/oP	Yes	Yes	N/S	N/S	Yes
Flinders	MIC	MIC	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	Yes
Griffith	MP	MP	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	N/S
JCU	MIC	MIC	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	Yes
La Trobe	MIC	MIC	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	Yes
Mcquarie	MIC	MIC	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	Yes
Monash	SMIC	SMIC	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	Yes
Murdoch	MIC	MIC	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	Yes
Newcastle	MIC	MIC	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	Yes
NTU	MIC	MIC	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	Yes
QUT	MIC	MIC	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	Yes
RMIT	MIC	MIC	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	Yes
SCU	MIC	MIC	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	Yes
Swinburne	MIC	MIC	N/S	Nolaw	N/S	N/S	W/oP	Yes	N/S	N/S	Yes	Yes
Ballarat	MIC	MIC	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	Yes
Canberra	MIC	MIC	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	Yes
UNE	MIC	MIC	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	Yes
Melburne	IO	RAC	Yes	Nolaw	No	Yes	F'pay	Yes	Yes	Yes	Yes	Yes
UNSW	I/MIC	I/MIC	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	Yes
UQ	CR	CR	Yes	Nolaw	No	Yes	W/oP	Yes	Yes	Yes	Yes	N/S
UniSA	I/MIC	I/MIC	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	Yes
USC	MIC	MIC	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	Yes
USQ	MIC	MIC	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	Yes
UWS	I/MIC	I/MIC	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	Yes
Sydney	IO	MRC	N/S	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	N/S
USC	RC	RC	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	Yes
Tasmania	MIC	MIC	Yes	Nolaw	N/S	Yes	W/op	Yes	Yes	Yes	Yes	Yes
UTS	MIC	MIC	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	Yes
UWA	Io	MIC	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	Yes
Victoria	MIC	MIC	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	Yes
UoW	MIC	MIC	Yes	Nolaw	N/S	Yes	W/oP	Yes	Yes	Yes	Yes	Yes

Abbreviations used in this Table

Natural justice includes express reference to *fairness*

Nolaw: representation is allowed but not by a practising lawyer

Law Representation is allowed by a lawyer or non lawyer

N/S: not stated

W/oP: The university may suspend the academic with or without pay

Io: Investigating Officer

I/MIC the employee has a choice between a MIC or an Investigating Officer

MIC: Misconduct Investigation Committee

RP: Review Panel

MRC: Misconduct Review Committee

CR: Committee of Review

RC: Review Committee

DRC: Disciplinary Review Committee

MP: Misconduct Panel

SMIC: Serious Misconduct Investigation Committee

RAC: Review and Appeals Committee

Appendix 1 includes all Australian universities with the exception of Bond and Notre Dame

Universities which did not have enterprise agreements in that round. The agreements are from the 2001 – 2002 enterprise bargaining round.

Specific clauses summarised in the above Table are now examined.

In camera

Most universities expressly provide that the process for investigating misconduct will be conducted in camera. Only three universities do not expressly state this, Edith Cowan, Swinburne, and Sydney.

Representation by advocate

Typical clauses give the staff member and/or the Vice-Chancellor, if they so wish, an opportunity to be assisted or represented by an agent of their choice. The agent may be a staff member of the University, a private advocate or an officer or official of the union but must not be a currently practising solicitor or barrister. Only two universities do not expressly exclude lawyers, Curtin and Edith Cowan. This exclusion of lawyers would be of more concern for academics given the potential imbalance of power between the university and the individual academic but for the existence of the NTEU and its officers trained to assist academics in misconduct hearings. The typical clause banning lawyers comes from clause 13.4 of the Bryant Award.

Do rules of evidence apply

Only a few certified agreements mention the rules of evidence, stating that they do not apply. Such clauses are redundant, the *Evidence Acts* and rules of evidence would not apply to these non judicial proceedings. Nevertheless procedural fairness would require that decisions be based on “probative and relevant material evidence”.⁶¹

Ban from campus and suspend pending outcome

Most universities have an express right to ban an academic from campus (there are only two exceptions, Curtin and Swinburne). The typical clause gives this discretion to the Vice Chancellor. The clause is borrowed from clause 12 of the Bryant Award. Most enterprise agreements have expressly given the university the right to suspend the academic with or without pay, the exceptions are the University of Melbourne which requires suspension to be on full pay, and Curtin University which does not address the matter. The misconduct investigation committee is generally required to address the situation of no pay at its first meeting.

In *Habili Saira v Northern Territory University*⁶² Kearney J interpreted the 1988 Award as not containing a natural justice requirement that there be a hearing prior to the vice chancellor’s decision to suspend. If suspension involved a loss of salary the outcome may be different⁶³ but the outcome would turn on the wording of the enterprise agreement.

⁶¹ per Deane J in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 368

⁶² *Habili Saira v Northern Territory University* (1992) 109 FLR 46

⁶³ see *Dixon v Commonwealth* (1981) 55 FLR 34

Get written allegations

An important procedural fairness right is the right to know what one is being accused of. All university agreements examined confer a right to written allegations. The source of the typical university clause is clause 12(b) of the Bryant Award.

Answer and be present, examine witnesses

The right to be present and hear allegations and answer these is equally important to academic freedom and natural justice. All universities except Swinburne University confer the right in disciplinary hearings. Swinburne expressly confers a right of natural justice in such proceedings, which would include this right.

Generally the agreements also confer a right on the academic to examine witnesses. In two universities this is not expressly stated. One of these is Swinburne, though the express provision covering natural justice would cover this matter as above. Of more concern is Edith Cowan University which makes no reference to natural justice or procedural fairness, and does not expressly confer a right of examination, though it does give a right to “present and challenge evidence”.

The standard university clauses on these matters are generally borrowed from clause 13 of the Bryant Award.

Natural justice

Not all universities make an express reference to natural justice, most in fact adopt the previous Bryant formula in clause 13(v) “conduct proceedings as expeditiously as possible consistent with the need for fairness.” Only Edith Cowan University does not make a reference to either fairness or natural justice, though the unrelated redundancy provision in cl. 21.14(e) does use this expression.

What procedural fairness requires is governed by the circumstances of the case⁶⁴ but it will require the absence of any disqualifying bias, the providing of an appropriate opportunity to be heard, and a tribunal which does not act arbitrarily, irrationally or unreasonably, or act on immaterial or irrelevant considerations.⁶⁵

Furthermore, an academic not afforded proper procedural fairness by a university misconduct investigation tribunal could commence proceedings under s 170CE of the *Workplace Relations Act 1996 (Cth)* on the ground that the termination was “harsh, unjust or unreasonable”. In determining this, s.170CG(3) requires the Commission to have regard to whether an employee was notified of the reason relating to his or her dismissal and whether the employee was given an opportunity to respond to any reason related to the capacity of conduct of the employee. If on the other hand the university simply chooses to summarily dismiss, and not use its procedures the action would be for breach of the enterprise agreement.⁶⁶ The unfair dismissal provisions of the *Workplace Relations Act 1996 (Cth)* apply, *inter alia*, to “constitutional corporations”. Recently a full Federal Court has held that the University of Western Australia is a constitutional corporation.⁶⁷

Copy of committee report

A most obvious right, a right to receive a copy of the misconduct investigation committee report, is unstated in a number of agreements: ANU, Curtin, Griffith, and the University of Sydney. The standard Bryant formulation or similar wording is used in most cases:

- (ix) make its report available to the CEO and the staff member as soon as reasonably possible.

⁶⁴ *Kioa v West* (1985) 159 CLR 550

⁶⁵ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 367, 368

⁶⁶ see *NTEIU v University of Wollongong* [2001] FCA 1069 (8 August, 2001). The action in this case was for an interpretation of the enterprise agreement under s 413A of the *Workplace Relations Act 1996 (Cth)*, though the union also sought penalties for its breach

⁶⁷ *Quickenden v Commissioner O'Connor of the Australian Industrial Relations Commission* [2001] FCA 303 (23 March 2001)

It is more likely oversight rather than any intentional conduct on the part of universities to not include this right. In any case a refusal to grant only one party to the proceeding access to the written report would seem very unfair and challengeable under the natural justice / fairness clauses in these agreements. The report would normally be discoverable under freedom of information legislation or as part of subsequent judicial proceedings.

Finally, it should be noted that while the MIC processes are subject to natural justice rules, an academic could lose the right to a misconduct investigation committee by admitting in full that the conduct has occurred. This occurred in *Habili Saira v Northern Territory University*⁶⁸ where Kearney J held that the academic's admission that he had not taught classes constitutes an admission in full.

Appendix 3 Sources of revenue for Australian Higher Education sector, 2002

Source: Nelson, Dr Brendan *Higher Education Report for the 2004 to 2006 Triennium*, Department of Education, Science and Training, January 2004 at 42

Sources of revenue for Australian Higher Education Sector, 2002

Commonwealth Government Funding	42%
State Government	2%
HECS	16%
Fees and Charges	21%
Investment Income	2%
Consultancy and Contract Research	4%
Other Income	12%
P/G Education Loan Scheme	1%

Revenue from full fee paying overseas

Revenue from overseas students has doubled from A\$701 million in 1998 to A\$1423 million in 2002. It represents 13% of revenue in the Australian Higher education sector.

⁶⁸ *Habili Saira v Northern Territory University* (1992) 109 FLR 46

Appendix 4 Australian Higher Education Staff Numbers

Source of this Table

Publications Australian Government Department of Education Science and Training- Higher Education Statistics Collections <http://www.dest.gov.au/highered/statpubs.htm#staffpubs>

FTE for Full-time, Fractional Full-time and Estimated Casual Staff by Work Contract, 1994 to 2003								
	Full-time		Fractional Full-time		Estimated Casual		TOTAL FTE	
Year	FTE	% Change on prior year	FTE	% Change on prior year	FTE	% Change on prior year	FTE	% Change on prior year
1994	63,435		6,823		8,895		79,154	
1995	64,349	1.4%	7,157	4.9%	9,249	4.0%	80,754	2.0%
1996	65,254	1.4%	7,449	4.1%	10,185	10.1%	82,888	2.6%
1997	62,771	-4.0%	7,910	6.2%	10,723	5.3%	81,404	-1.8%
1998	61,284	-2.4%	8,290	4.8%	10,711	-0.1%	80,285	-1.4%
1999	61,192	-0.2%	8,059	-2.8%	11,580	8.1%	80,832	0.7%
2000	61,568	0.6%	7,973	-1.1%	12,760	10.2%	82,301	1.8%
2001	61,713	0.2%	8,911	11.8%	13,162	3.2%	83,786	1.8%
2002	63,462	2.8%	9,478	6.4%	13,401	1.8%	86,341	3.1%
2003	66,301	4.3%	9,254	-2.4%	13,815	3.0%	89,370	3.4%
% of Total FTE in 2003	74.2%		10.4%		15.5%		100.0%	

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