

# Express Rights to Academic Freedom in Australian Public University Employment

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## Introduction

Much has been said about Australian universities in the past few years. Two books, *Why Universities Matter*<sup>1</sup> and *The Enterprise University*,<sup>2</sup> give a rather depressing picture, that of a university system where collegiality has been replaced by corporatism,<sup>3</sup> where universities are seen more as businesses providing services to clients run by executives rather than academics,<sup>4</sup> and where the division between those executives or ‘management’ on the one hand and academics or ‘staff’ on the other has never been greater.<sup>5</sup> Every three years 37 of the 39 Australian universities go through individual enterprise bargaining rounds where management and staff, represented by the National Tertiary Education Union (NTEU) and other unions, engage in often bitter and protracted industrial disputes.<sup>6</sup> This process exacerbates the tensions between management and staff.

In this environment, academics have on recent occasions found themselves in difficulty when they have spoken out about matters that trouble them in their university workplace. Fraser, a contributor to *Why Universities Matter*, claims that the book was accepted and then

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1 Coady T (Ed), *Why Universities Matter*, Allen and Unwin, Sydney, 2000.

2 Marginson S and Considine M, *The Enterprise University*, Cambridge University Press, Cambridge, 2000.

3 Marginson S and Considine M, Note 2, p 52; Coady T, “Universities and the Ideals of Inquiry” in Coady, Note 1, p 15.

4 Marginson S and Considine M, Note 2, pp 49, 62, 64 and Ch 4; Millar S, “Academic Autonomy” in Coady, Note 1, pp 111-113.

5 Marginson S and Considine M, Note 2, pp 68–70.

6 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/rights/ebagree/ebupdates/activesites.pdf>>.

rejected by Melbourne University Press because it promoted a traditional view of universities “without clear or sufficient representations from the proponents of countervailing views.”<sup>7</sup> A book rejection is not necessarily the basis for a claim about academic freedom.<sup>8</sup> However, in this instance the book had ultimately been rejected by a committee chaired by the director of the new and very controversial Melbourne University Private. The book is critical of such ventures.<sup>9</sup> Nearby, at the Victoria University of Technology, Professor Patience had his email privileges temporarily withdrawn when he used the University email to criticise expenditure by the Victoria University of Technology on a corporate box at a new football stadium.<sup>10</sup> The privileges were later restored. Another academic at the University of New South Wales discovered that a government minister had contacted the University’s Vice Chancellor after she had written a letter to the editor critical of government policy.<sup>11</sup> An academic has voiced public concerns about private funding to a research team in his department that may have contained conditions preventing competing research from other academics in the department.<sup>12</sup> Emeritus Professor Legge had his privileges threatened at Monash University after complaining about a university restructure proposal.<sup>13</sup> These events represented worrying academic freedom skirmishes, but were mostly resolved and are not further discussed in this article. However, the most serious event in recent times was still to come. Ted Steele was summarily dismissed from the University of Wollongong after he publicly criticised marking standards in that university, and then refused to withdraw his remarks.<sup>14</sup>

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7 Fraser M, “The Body in Question” in Coady, Note 1, pp 235-249.

8 A point readily conceded by the editor, Professor Coady, in a radio interview he gave on the matter. He commented that “people on the board were over sensitive about the critical potential of this book for projects they are identified with”: Australian Broadcasting Commission, Radio National, Background Briefing, 6 December, 1998. The full text of this interview is available at <<http://www.abc.net.au/rn/talks/bbing/stories/s17692.htm>>.

9 Coady, Note 1, pp 85–86, 95-96.

10 “University Blue over \$100000 Sports Box” *The Australian*, 5 May 1999, p 44; Manne R, “The Death of the University” *The Age*, 21 June 1999, p 15.

11 Coady, Note 1, p 246.

12 Raised by Dr Polya, Latrobe University in the ABC radio interview, Note 8, also addressed in Allport C, “Australia” (1999) July/August *Academe* 20, p 21.

13 Allport, note 12, p 22; Manne, Note 10.

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

The 2001 Australian Senate Inquiry into Higher Education in Australia, *Universities in Crisis*, painted a sad picture of academic freedom in this country. It found a system with a ‘corporate’ rather than a ‘collegial’ focus<sup>15</sup> generating a “deterioration of the intellectual climate [and] a victimisation of critics or dissenters and a reduction in academic freedom and transparency.”<sup>16</sup> The Senate Inquiry criticised university management for over concern with image rather than with reputation,<sup>17</sup> and “a declining respect for the ideal of academic freedom.”<sup>18</sup> More worrying was the conclusion that “dissident academics feel more threatened now from within the halls of academe than from without.”<sup>19</sup> This article does not test the conclusions reached by the Senate Inquiry, but they are timely to this investigation of express rights to academic freedom in Australia. If matters are as bleak as the Senate Inquiry suggested, academics will seek increasing recourse to the law and to the industrial relations system to assert and protect alleged rights to speak and write freely within and outside university walls.

## Objectives

The objectives of this article are to examine past and present terms in contracts of employment in Australian universities to determine whether an express reference to academic freedom is present in those contracts, and to investigate the historical origins of tenure, a key element in academic freedom protection. Another matter discussed is the existence of codes of conduct in a number of universities containing express references to academic freedom. A further objective is to determine whether those codes of conduct have contractual effect and, if not, whether a university could be estopped from denying the existence of academic freedom clauses in a code of conduct.

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<sup>15</sup> Senate Employment, Workplace Relations, Small Business and Education References Committee, *Universities in Crisis*, Canberra, 27 September 2001, para 9.33.

<sup>16</sup> Senate Employment, Note 15, para 3.223.

<sup>17</sup> Senate Employment, Note 15, para 5.50.

<sup>18</sup> Senate Employment, Note 15, para 9.33.

<sup>19</sup> Senate Employment, Note 15, para 9.35.

An example of the general type of academic freedom clause under investigation is:

3.2 Academic freedom

3.2.1 The obligation is not intended to detract from the concept and practice of academic freedom, which is regarded by the University as fundamental to the proper conduct of teaching, research and scholarship. Academic and research staff should be guided by a commitment to freedom of inquiry. This commitment is expressed in their teaching and research and in their role in advancing the intellectual heritage of their society. Academic and research staff should exercise their traditional rights to examine social values and to criticise and challenge the belief structures of society in the spirit of a responsible and honest search for knowledge and its dissemination. For example, academic freedom entitles an academic or research staff member to challenge and criticise ideas and methods but not to defame others.<sup>20</sup>

This particular clause uses the words “academic freedom”. However, the discussion is not limited to this particular phraseology, because the type of speech rights described in the clause could be couched in other language, such as intellectual freedom.

In addition, the article analyses university enterprise agreements from the 2001 round to ascertain whether they confer express academic freedom rights. These agreements do not depend on contract law for their enforceability. Nevertheless, it is appropriate to examine them alongside express contractual rights.

As there is no body of academic freedom case law in Australia, law in the United States is examined for guidance on how to deal with contractual issues surrounding academic freedom.

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<sup>20</sup> University of Queensland, *Code of Conduct Policy*, Number 1.50.1, approved 31 July, 1997, available at <<http://www.uq.edu.au/hupp/contents/view.asp?s1=1&s2=50&s3=1>>.

## Express terms: historical context

*Orr v University of Tasmania*<sup>21</sup> made it clear that the typical Australian contract in relation to academics is a contract of employment, not a contract for services.

Nevertheless, the establishment of an employer/employee relationship does not mean that academics only have one status, that of employee. A matter usually forgotten, and not raised in the judgments in *Orr*, is that Australian universities are incorporated under statutes, many of which make academics *members* of the university. This additional status must be kept in mind in considering academic freedom rights, particularly rights relating to dismissal. Old arguments that university staff have another status, that of *officer*,<sup>22</sup> have not survived *Orr* or the modern industrial law regulatory model controlling universities and their employees.

An understanding of modern academic contracts of employment in Australia is best gained by an examination of their historical context. These contracts have not changed a great deal over time, they often incorporate other documents by reference and are not always complete on their face, leaving much unsaid. In this way they bear much in common with their American counterparts. One matter that has changed in the 1990s is that some universities have introduced codes of conduct. Such codes often contain express references to academic freedom. However, the codes are not necessarily contractual.

## University of Sydney

The first university in Australia was the University of Sydney. The Act incorporating the University of Sydney was 14 Vic. no 31 of 1850. It vested appointment and dismissal power in the Senate of the University:

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<sup>21</sup> *Orr v University of Tasmania* (1957) 100 CLR 526.

<sup>22</sup> On the law relating to public service officers see *Miles v Wakefield Metropolitan District Council* [1987] 2 WLR 795 and McCarry G, *The Demise of Tenure in Public Sector Employment* in McCallum R, McCarry G and Rondfeldt P (Eds), *Employment Security*, Australian Centre for Industrial Relations Research and Teaching, University of Sydney, Federation Press, 1994.

And be it enacted that the said Senate shall have full power to appoint and dismiss all professors, tutors, officers and servants belonging to the said University ...

The 1850 Act distinguished “Professors or Teachers of literature, science and art” from “such necessary officers and servants as shall from time to time be appointed by the University.”

In 1851 the Senate of the University of Sydney appointed a committee based in the United Kingdom to select the university’s three initial professors. The committee printed *Papers Relating to the University of Sydney*.<sup>23</sup> These documents, containing information on the conditions of appointment, were sent to potential applicants. The documents included a Report<sup>24</sup> addressing the terms of appointment of professors, lecturers, and the registrar. Section 10 of the Report covered tenure:

That their tenure of office shall be during good behaviour, but in the case of any Professor or Lecturer being incapacitated, from age or any other circumstance, from performing the duties of his office, the Senate shall appoint a substitute, *pro tempore*, who shall receive half the fixed salary, and the whole of the portion of the fees accruing to the Professor or Lecturer so incapacitated.

The University Provost and Vice Provost were aware that the lack of job security might make the recruitment task a very difficult one. Such job security must have been of critical importance to a British academic contemplating a career move to far off New South Wales. In their letter to the selection committee they sought to put the minds of applicants at rest:

By the 8th Section of the Act, you will observe that the Senate is empowered summarily to dismiss the Professors, but in the

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<sup>23</sup> Herschel JF, Airy GB, Professor Maldon, Denison H, *Papers Relating to the University of Sydney and to the University College*, Sydney, New South Wales, London, 1851.

<sup>24</sup> “Report of the Committee appointed to suggest measures for the Establishment of a College in Connexion with the University”, (10 April 1851) contained in Herschel and others, note 23.

Report herewith sent, and agreed to by the Senate, it is recommended that their tenure shall be during good behaviour or other circumstances. We are fully alive to the importance which this question will have in the minds of Candidates; and although we admit that it is desirable to give the greatest possible security to the Professors, we should consider it inconsistent with the high duties attached to the Senate, as the governing body, to divest itself of a power of dismissal, which it may be presumed, would only be exercised in cases of extreme necessity.<sup>25</sup>

They added:

We wish further to say, that, without divesting itself of the power of supervision and control with which the Act has invested the Senate, the counsel of the professors, on whose judgement, energy, and experience must mainly depend the successful issue of this enterprise, will always receive the attention due to them.

This second statement appeared to be directed to the status of the professors in the university and contained, subject to the proviso, an invitation to speak their minds on matters upon which depended “the successful issue of this enterprise”. Taking the two quotations together we have in this letter, which sets out the terms of the first appointment of professors in an Australian university, a provision for dismissal which will only be exercised “in cases of extreme necessity”, and at least a moral if not a legal obligation to speak out on matters going to the success of the enterprise.

The letter set the scene for much of what followed in Australian higher education. These first appointments were made by a state funded secular university:

- Anxious to maximise benefits in a competitive environment.
- With a promise that dismissal powers would not be used except in extreme necessity.

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<sup>25</sup> Extracts from a letter from the Provost and Vice Provost of the University of Sydney, and E Deas Thomson, Esq Colonial Secretary contained in contained in Herschel and others, note 23.

Then, as now, no express rights of free speech or restrictions on rights of speech were contained in the *individual* employment contract, though as will shortly be seen such rights and restrictions are commonly contained in university policy, which may or may not have contractual effect.

The Report proved very influential in defining tenure over the ensuing years. Some 34 years later the Tenure of Office Committee of the University of Sydney still used very similar wording in regard to professors, but drew a clear distinction between the tenure of office of professors and lecturers:

2. The tenure of office of professors shall be during good behaviour, but if any Professor shall be by reason of age or other infirmity become incapacitated from performing the duties of his office, the Senate shall either appoint a substitute, *pro tempore*, who shall be paid from the emoluments of the professor so incapacitated, or shall dispense with his services under the provisions of the following regulation.<sup>26</sup>

Lecturers and demonstrators had no tenure as such:

7. The engagements with the lecturers and demonstrators shall be terminable at six months notice.<sup>27</sup>

Even in 1909 professors at the University of Sydney could still expect similar terms to clause 2 above:

The tenure of office is during good behaviour, subject to the following limitations:

- (a) If the Professor shall become, in the opinion of the Senate, incapacitated for performing the duties of his office, the Senate shall be at liberty to appoint a substitute *pro tempore* ... or to dispense with his services ...
- (b) The Senate shall have an absolute right to determine the Professor's occupation of office, without cause shown, after

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<sup>26</sup> Minutes of the Standing Committee G1/11/1, Tenure of Office Committee, 11 September 1885, Archives of the University of Sydney.

<sup>27</sup> Minutes of the Standing Committee G1/11/1, Note 26.



he shall have attained the age of sixty years; and to place him upon the pension list.

- (c) The Senate shall have power to remove the Professor from his office for misconduct. Such removal will involve forfeiture or reduction of pension, at the discretion of the Senate.<sup>28</sup>

Other restrictions were also appearing. For example, clause 11 prevented private practice, or any profession or business without the consent of the Senate, and the same clause also prevented entry into State or Federal Parliament.

In summary, by 1909 the tenure of professorial office at the University of Sydney was during good behaviour until 60 years of age. Removal required proof of misconduct. Removal after 60 years of age did not require cause.

## University of Melbourne

The University of Melbourne was established shortly after the University of Sydney. By 1902 the University of Melbourne faced a Royal Commission caused by the fraudulent behaviour of its accountant which had cost the University over £23,000. The commission conducted a wide-ranging inquiry into the university, including its conditions of employment.

The commission noted that the meaning of tenure had changed at the University of Melbourne. The original definition was the holding of office *quam diu bene gesserit*. This was “purely a life tenure”. The commission highlighted the problems of this form of tenure: there was no way to deal with “age or infirmity [and] no means existed of getting rid of a professor on general grounds of inefficiency or

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<sup>28</sup> Conditions of Appointment to the Chair of Law in the University of Sydney July 1909. University of Queensland Archives, Papers of Sir William MacGregor, 1909-1911 [29], *Letters and papers from the University of Sydney regarding pay and conditions for Professors*, 18 Dec 1909. Accompanying documentation indicated that these were the conditions of Appointment “at present in force” at the University of Sydney.

unsuitability.”<sup>29</sup> The commission discussed the case of a professor at the University of Melbourne who, because of age and ill health, was not able to conduct his work. Accordingly, a voluntary arrangement was made whereby a portion of the professor’s salary was used to employ an assistant, but there was no mechanism to give this person the professorial position during the life of the professor. Not surprisingly, the assistant left for England. Considerations such as those caused the University Council to alter the statute in relation to the appointment of new professors. They still held their positions *quam diu* but various clauses were inserted allowing removal. Examples of such clauses are:

Cl 7: Each professor shall hold his office for life, or until his resignation, or removal, or dismissal by the Council, as hereinafter provided, on the ground that he has become permanently incapacitated by age or infirmity, or has become inefficient from causes other than age or infirmity, or has misconducted himself.<sup>30</sup>

Cl 8: The decision as to whether a professor is permanently incapacitated by age or infirmity is to be determined by an absolute majority of Council.

Cl 9A: Removal without cause shown may be made at 60 years of age.

Clause 9 allowed an inquiry into the conduct or efficiency of a professor. This gave the University Council the power to appoint the Professorial Board or any officer of the university to investigate and report to it and to call witnesses. The professor also was granted rights to attend and produce his own evidence and witnesses. The council then had the task of determining whether misconduct or inefficiency had been proven. If so, it could by absolute majority censure, suspend, or dismiss the professor.<sup>31</sup>

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<sup>29</sup> Royal Commission on the University of Melbourne: Final Report, Government Printer, 1904, pp 17-18.

<sup>30</sup> Royal Commission on the University of Melbourne: Final Report, note 29, pp 129, Appendix A Statute No. V, The Professors.

<sup>31</sup> Royal Commission on the University of Melbourne: Final Report, note 29, pp 129, Appendix A Statute No. V, The Professors.

The commission sought the views of leading British educators of the time on the concept of tenure as defined in these provisions. The replies of these professors were generally very supportive of the University of Melbourne's conditional life tenure. As will shortly be described the overseas professors canvassed a range of matters:

- The university would have to match the life tenure terms normally offered in British and American Universities, given the distance from 'home'.
- The risk of unemployment in middle age (especially given that superannuation schemes were not yet common).
- The likelihood that professors would find it difficult to obtain employment on return to Britain after being isolated from their British colleagues.
- The dangers to freedom and initiative of the teacher.

Professor Butcher of the University of Edinburgh best made this last point:

One grave evil of the short tenure system is that the freedom and initiative of the teacher are apt to be impaired. This is, perhaps, chiefly to be feared where the governing body is of a popular and representative kind.<sup>32</sup>

Professor Ashley of the University of Birmingham alluded to the dangers of short-term appointments where the body determining these contracts was not an academic one:

Moreover in England, in those cases in which appointment is for a term of years the power is usually in the hands of an entirely academic body, who may be expected to be influenced by purely academic considerations, as well as by a reasonable degree of fellow feeling.<sup>33</sup>

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<sup>32</sup> Royal Commission on the University of Melbourne: Final Report, note 29, pp 20, 21.

<sup>33</sup> Royal Commission on the University of Melbourne: Final Report, note 29, p 21.

Dr Dale, Vice Chancellor of the University of Liverpool, spoke in similar terms in emphasising that “life tenure in most cases is expedient”, and the need to secure the professor “against the caprice or partisanship of a lay authority.” He continued:

If it were possible to expel a man from office who may find himself opposed to popular feeling, agitation would be organized and directed to that end. As it is agitation is impotent and we escape from that danger. What amount of weight must be given to these considerations in Victoria you will be able to judge for yourself; among us, I feel they cannot be ignored.<sup>34</sup>

And the lawyer Professor Frederick Pollock similarly noted the dangers to freedom of speech:

But it all depends on the kind of governing body you have. If there is any danger of interference on political or other extraneous grounds (as to which I know nothing), then I should say keep the professors as independent as Judges are, and accept the risk of minor inconveniences.<sup>35</sup>

The Royal Commission also took oral evidence from a number of local witnesses, many of whom had been on one or the other side of a major dispute which had arisen at the University of Melbourne in the 1890s over the non-reappointment of the music professor, Professor Marshall-Hall. He had upset the Melbourne establishment and many of the senior academics with his writings, including his poetry.<sup>36</sup> Predictably, a number of these witnesses’ views on tenure seem to follow their position in that saga. Accordingly, Thomas Bride, an important supporter of Marshall-Hall and long time member of the University Council, said in response to a question as to whether he believed life tenure was essential for professors:

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<sup>34</sup> Royal Commission on the University of Melbourne: Final Report, note 29, p 24.

<sup>35</sup> Royal Commission on the University of Melbourne: Final Report, note 29, p 130.

<sup>36</sup> Rich JW, *His Thumb unto his Nose: The Removal of GWL Marshall Hall from the Ormond Chair of Music*, Doctoral dissertation, University of Melbourne School of History, 1986 and Jackson J, *Legal Rights to Academic Freedom in Australian Universities*, Unpublished PhD thesis, University of Sydney, 2002, pp 84–94.

Yes I do. There are two reasons ... to induce a good man to come from the old country he must be offered security of tenure ... In the second place, they may be more or less in conflict here with the Council in certain matters, and it is desirable that they should be utterly independent to maintain their position on the Professorial Board, without having to feel that at the end of their five years' tenure they may find themselves out in the cold. I may refer to Professor Jenks, who delivered a certain address about Sunday opening, and who was promptly hauled over the coals at the Council meeting by a member of Council. If he had not had a life tenure it might have meant a serious thing for him at a later stage.

In reply to the question, "Are the Council, as a body, likely to discipline a professor for a thing of that sort?" Bride stated:

I should not think, as a body they would, but the mere fact that an attack was made upon him for his speech, shows that he might have to be very humble in five years time.<sup>37</sup>

Others who were opposed to Marshall-Hall, such as H B Higgins, a member of the council at all relevant times, spoke very negatively of the professorial tenure provisions discussed above. In Higgins' view they were "unworkable and really stupid. It is as if the Council were a judicial rather than an administrative body. We have to carry on the business and should have perfect freedom in doing so." Later, he claimed the changes made to the original *quam diu* tenure were "a sham".<sup>38</sup>

Another significant person against Marshall-Hall was Dr Leeper, the Warden of Trinity College at the University of Melbourne and a member of the University Council. He thought that term appointments were "very common in other universities" and would not prevent the University of Melbourne obtaining good professors. Like Higgins, he

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<sup>37</sup> Royal Commission on the University of Melbourne: Progress Report, The Financial Position of the University, Government Printer, Melbourne, 1904, p 294.

<sup>38</sup> Royal Commission on the University of Melbourne: Progress Report, note 37, p 210.

also was not satisfied with the modified professorial tenure provisions.<sup>39</sup>

Despite this, the Royal Commission came down strongly on the side of life tenure as modified by the university's existing statutes:

It will be seen that professorial tenure and status are not mere incidents in the administration of a University, but are inseparably connected with the whole relation of the professors to the governing body, and to the institution itself ...<sup>40</sup>

The Royal Commission, in canvassing arguments against short-term appointments, said:

[I]t would be impolitic in the highest degree that the question of re-appointment be at the mercy of an executive body like the University Council. It might lead to re-appointments not being made in the true interests of the University; for in a small community, where the Council is composed very largely of one class, a professor's theological political attitude or other personal characteristics unconnected with attainments and ability might sway the governing body. The Commission is not satisfied that considerations of this character have always been absent from the Governing bodies of Australian universities ...<sup>41</sup>

In examining the University of Melbourne's tenure provisions two of the overseas professors compared the provisions to prevailing notions of tenure in the United Kingdom. Dr Dale described British tenure at the beginning of the 20th century:

With few exceptions, the tenure of professorial chairs in the United Kingdom and in Scotland is a life tenure during good behaviour. A professor may be removed for:

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<sup>39</sup> Royal Commission on the University of Melbourne: Progress Report, note 37, p 202.

<sup>40</sup> Royal Commission on the University of Melbourne: Final Report, note 29, p 26.

<sup>41</sup> Royal Commission on the University of Melbourne: Final Report, note 29, p 19.

- (i) misbehaviour in office,
- (ii) being a lunatic,
- (iii) conviction of any felony,
- (iv) conviction of any misdemeanour which shall be judged by the authority of the University with the power of removal to be of an immoral, scandalous, or disgraceful nature,
- (v) actual incapacity for the execution of the duties of the office, or
- (vi) any misbehaviour of an immoral, scandalous, or disgraceful nature, rendering the holder of the office unfit, in the opinion of the authorities of the University with the power of removal, to continue in his place.<sup>42</sup>

Professor Butcher from the University of Edinburgh said:

I hold rather strongly to the view that, apart from certain exceptional cases to which I shall presently refer, the tenure of professorial chairs ought to be for life, *ad vitam aut culpam*, as the formula generally runs in this country. The *culpa* would include not only disgraceful or immoral conduct generally, but any grave neglect of duty; hardly, perhaps, mere intellectual incapacity, however fragrant, although I can recall one instance in which a man - by no means a lunatic - was forced to retire on that ground, and the dismissal was sustained on appeal.<sup>43</sup>

### **Other early Australian universities**

Contracts at the two oldest universities certainly influenced employment contracts at other Australian universities. There are many examples in the archives of the Universities of Queensland and Western Australia of university registrars collecting standard form contracts from the older universities. For example, a copy of the 1909 conditions of appointment for the position of Chair of Law at the

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<sup>42</sup> Royal Commission on the University of Melbourne: Final Report, note 29, p 24.

<sup>43</sup> Royal Commission on the University of Melbourne: Final Report, note 29, p 20.

University of Sydney was sent to the University of Queensland that year. The statement of duties was “to exercise a general supervision over the teaching in the department of law, and to give instruction and conduct examinations.” The professor held the office during good behaviour but could be removed for misconduct (undefined). The contract made no mention of any notion of academic freedom, nor did it describe any obligation to conduct research. The major restriction in the contract was on entry into Federal or State Parliament.<sup>44</sup>

Conditions of appointment at the University of Western Australia in 1912 and 1920 used similar language to the University of Sydney example, but were more restrictive in that they prohibited taking part in political affairs otherwise than by way of the franchise.<sup>45</sup> An English literature professorship at the University of Adelaide in 1921 again contained scarce detail though this contract prevented the professor from sitting in parliament or becoming a member of any political association. The term was for five years and the person could be removed “where the continuance in his office or in the performance of the duties thereof shall in the opinion of the Council be injurious to the progress of the students or to the interests of the University.”<sup>46</sup> Removal was subject to confirmation by the visitor. The terms made no mention of the conduct of research.

Clauses described in the position of Director of Tutorial Classes at the University of Melbourne in 1922 similarly prohibited membership of parliament or political associations.<sup>47</sup> This clause was also used at that university in 1934 in relation to the Chair of Education.<sup>48</sup> Though 12 years apart, both contracts incorporated the same provisions from

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<sup>44</sup> Conditions of Appointment to the Chair of Law in the University of Sydney, July 1909, Archives of the University of Queensland, UQA S332: *Letters and papers from the University of Sydney regarding pay and conditions for Professors*.

<sup>45</sup> Conditions of appointment to certain chairs at the University of Western Australia, 1 July 1912, UWAA File 0035, and Conditions of appointment to certain lectureships at the University of Western Australia, 2 July 1920, UWAA file 0048. The Chair was for 7 years and the lectureship was only for 3 years. There were no other substantial differences between the two sets of appointment terms.

<sup>46</sup> Conditions of appointment for the Jury Professorship of English Language and Literature, University of Adelaide, June 1921, Archives of the University of Western Australia.

<sup>47</sup> Conditions of appointment, Director of Tutorial Classes, University of Melbourne, May 1922, UWAA File 0067.

<sup>48</sup> Conditions of appointment, Chair of Education, University of Melbourne, 1933, UWA Archives File 3325.



Statute V “The Professors”, including clause 10 allowing an inquiry by the University Council into the conduct or efficiency of any professor, the taking of evidence, the giving to the professor of a right to be heard, and then allowing the council to dismiss for misconduct.

## **Express Terms: towards the modern contract of employment**

The express prohibition on participation in political affairs used in a number of universities gradually disappeared,<sup>49</sup> but not before it became a celebrated case in 1951 at the University of Adelaide. Professor Cragg of Durham University was reported as having accepted the Chair of Zoology at Adelaide University,<sup>50</sup> but then withdrawing because of the clause at that university prohibiting such participation. Press coverage at the time drew parallels between Professor Cragg’s withdrawal and an event at the University of Melbourne where three professors had spoken out against the Communist Party Dissolution Bill by urging a ‘No’ vote in the upcoming referendum. The Chancellor of the University of Melbourne, Sir Charles Lowe, attempted to make it a condition precedent to the holding of public meetings in university buildings that the University Council grant permission, and that both sides of a controversy be argued. At the time, this statement received criticism

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49 The clause was removed at the University of Queensland in 1944. Discussion at Senate indicated that the source of the prohibition had been a 1910 Public Service Regulation. Minutes of Senate of the University of Queensland 3 November 1944, University of Queensland Archives S130 Subject file *Old Series Conditions of appointment policy matters*. A letter to the Registrar at the University of Queensland written in 1958 by Professor Henderson from the University of Melbourne indicated that he understood that only Melbourne and Adelaide Universities still had such clauses, but clearly the clause had been enforced at the University of Melbourne where objection had been taken to his membership of the Country Party. He was quite happy for such a clause prohibiting membership of the Communist party but not a “respectable party” such as his! Letter to CJ Connell, Registrar dated 14 May, 1958, University of Queensland Archives S130 Subject file *Old Series Conditions of appointment policy matters*.

50 *The News*, 12 November, 1951, Press Clippings, Archives of the University of Adelaide, and see also Editor, “Notes” (1951-2) 6 *Universities Quarterly* 115, p 116.

both in the Victorian Parliament and within the university.<sup>51</sup> Mr Cain, the member for Northcote, saw such proposals as stifling freedom of speech at the university.<sup>52</sup> Another member, Mr Whately, the member for Camberwell, spoke in favour of the chancellor's suggestion.<sup>53</sup> Importantly, there was no censure of the academics concerned even though the prohibition on participation in political affairs may well have covered the matter.

Occasionally, clauses in contracts of employment in the 1950s and 1960s would have allowed an argument that academic freedom rights must flow logically from an express obligation to engage in research. For example, in 1960 the University of Tasmania had this clause in its list of duties of an academic:

To advance the knowledge of his subject and related subjects by his own original work and by encouraging and directing students.<sup>54</sup>

The University of New England had an almost identical clause.<sup>55</sup> The Canberra University College similarly provided among its list of duties:

To devote a reasonable portion of his time to research or other original work in his subject.<sup>56</sup>

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<sup>51</sup> Wright RD, *Extracurricular Relationships between Members of Staff and Students in the University Memorandum to Professorial Board*, University of Melbourne Professorial Board minutes, 18 March, 1952.

<sup>52</sup> *Victorian Parliamentary Debates 1951–1952 Vol 238*, p 569.

<sup>53</sup> *Victorian Parliamentary Debates*, note 52 pp 571–2 per Mr Whately, Member for Camberwell.

<sup>54</sup> *The University of Tasmania Academic Staff General Conditions of Employment November 1960* University of Queensland Archives S130 Subject file *Old Series Conditions of appointment policy matters*.

<sup>55</sup> *The University of New England Conditions of Appointment for Professors*, undated, University of Queensland Archives S130 Subject file *Old Series Conditions of appointment policy matters*.

<sup>56</sup> *The Canberra University College Conditions of Appointment, 1959*, University of Queensland Archives S130 Subject file *Old Series Conditions of appointment policy matters*.

An earlier version of the Canberra University College conditions had required an academic:

To do all in his power to promote and advance knowledge in his subject [and a professor] to organize and stimulate research work among the staff and students.<sup>57</sup>

These clauses specifically mention research obligations at lecturer and professor level, and while the duty to engage in research may have been capable of implication as a traditional duty in the earlier contracts examined above, its express mention here strengthens an argument that universities as employers now had a commensurate obligation to put in place conditions necessary for the achievement of research duties. If universities do not place express restrictions on the nature of research required,<sup>58</sup> their employees can claim academic freedom as a necessary incident to the engaging in research in their appointed discipline. The gradual inclusion in the first half of the 20<sup>th</sup> century of an express obligation to engage in research is quite important to the emergence of academic freedom as a legal right.

## **Express Terms in Enterprise Agreements**

The next important step in the defining of express obligations and rights was the development of industrial power in the 1970s and 1980s culminating in the registration of a federal academic union and the handing down of an award covering all universities, the *Australian Universities Academic Staff (Conditions of Employment) Award 1988*. This award defined academic duties, including obligations to teach and research. Even though the elusive clause covering academic freedom was missing from this award, its critical importance to academic freedom was that the award introduced a standardised dismissal procedure in universities and defined ‘misconduct’. This brought on the modern industrial era. The words ‘tenure’ and “academic

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<sup>57</sup> The Canberra University College Conditions of Appointment, note 56.

<sup>58</sup> The nature of the appointment will normally carry with it some implied restrictions on what may be researched, for example a lawyer could hardly claim the academic freedom to engage in laboratory experiments on diseases of the heart, though it would be very difficult to prevent or indeed compel that legal academic from engaging in research on the professional liability of thoracic surgeons.

freedom” would not usually appear as express terms in an individual contract of employment, nevertheless these concepts would be protected through formalised dismissal processes, a powerful union and, eventually, enterprise agreements. Academics would be offered “continuing appointments” subject to probationary periods.<sup>59</sup>

This industry based award system itself came under challenge with the advent of collective agreements made at the single business or ‘enterprise’ level, and more recently via a Federal Government intent on strengthening these certified enterprise agreements,<sup>60</sup> and weakening the award system. This was done by limiting the matters that could lawfully be contained in an award: *Workplace Relations Act 1996* (Cth) s 89A. By moving down to the next level, the same government introduced the concept of an individual employer/employee agreement, the Australian Workplace Agreement (AWA) contained in Part VID of the *Workplace Relations Act 1996* (Cth). To date these AWAs have not been used generally to cover academic staff in Australian universities and, not surprisingly, have encountered fierce opposition from the union movement. Nevertheless, the government has persisted in its resolve to force their use at universities. Their introduction represents a major concern for academics, it being unlikely every individual will be minded to include an academic freedom clause in their AWA.

Enterprise agreements acquire their legal status from Part VIB of the *Workplace Relations Act 1996* (Cth) and are enforceable under that legislation. It is important to note that an enterprise agreement does not automatically gain *contractual* status via this process.<sup>61</sup> However, the agreement could gain such status if it was expressly incorporated into

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<sup>59</sup> The author has described the modern approach in detail elsewhere: See Jackson J. “Orr to Steele: Crafting Dismissal Processes in Australian Universities” (2003) 7 *SCULR* 220.

<sup>60</sup> Also referred to as “collective agreements”, “enterprise bargaining agreements” (EBAs), or simply “enterprise agreements”. Under the *Workplace Relations Act 1996* (Cth) they are known as “certified agreements” because they need to be certified under s 170LT of the Australian Industrial Relations Commission prior to commencement. For a full discussion on these agreements and their operation under the *Workplace Relations Act 1996* (Cth) see Pittard M, “Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements” (1997) 10 *AJLL* 62, pp 79–88. On Australian Workplace Agreements see McCallum RC, “Australian Workplace Agreements: An Analysis” (1997) 10 *AJLL* 50.

<sup>61</sup> *Byrne and Frew v Australian Airlines Limited* (1995) 185 CLR 410.

the contract of employment. Prior to gaining certification under s 170LT of the *Workplace Relations Act 1996* (Cth), the employer and a valid majority of employees must agree to the terms: ss 170LI, 170 LK. Once certified, all employees will be bound whether or not they supported the terms of the agreement.

All Australian public universities now have enterprise agreements. The following Table examines enterprise agreements from the 2001 round in Australian universities to ascertain whether and to what extent they made specific reference to academic freedom. The 2003 round is not yet complete. Where a clause has not been used conferring express academic freedom rights in an enterprise agreement, academics will be forced to argue expressly or impliedly for such a right in their contracts of employment, or defend misconduct or serious misconduct actions on the basis that their conduct was an exercise of academic freedom.

**Table 1**  
**References to academic freedom in enterprise**  
**Agreements in Australian universities**

University	Broad academic freedom clause	Code of conduct linked to EB	Critical & open inquiry	Public debates, express opinion	Right linked to Decision making & representation	Rights linked to responsibilities	Rights linked to role of university.	Rights linked to collegiality	Academic freedom linked to teaching	Academic freedom linked to research	Express right to state opinion re university	Freedom from institutional censorship	Right cannot be used to harm or vilify
Adelaide	•		•	•	•	•	•	•	•	•	•		
ACU	Nil												
ANU	•												
CQU	•	•	•	•	•	•	•						•
CSU	Nil												
Curtin	•												
Deakin	Nil												
ECU	Nil												
Flinders	•			•		•			•	•			
Griffith	•	•	•	•	•	•	•		•	•			
JCU	•	•		•			•			•			
La Trobe	•												
M'quarie	•	•		•		•	•		•	•	•	•	
Monash	Nil												
Murdoch	•												
N'castle	•												
NTU	Nil												
QUT	•	•	•	•	•	•	•						•
RMIT	•												
SCU	Nil	•											
Sw'burne	Nil												
Ballarat	•		•										
Canberra	Nil	•											
UNE	•	•	•	•									
Melb'rne	Nil												
UNSW	Nil												
UQld	•	•		•	•	•	•	•	•	•	•	•	
UniSA	Nil												
USC	Nil												
USQld	Nil												
UWS	•					•							
Sydney	Nil	•											
Tasm'nia	Nil												
UTS	•	•	•	•	•		•	•	•				•
UWA	Nil												
Victoria	Nil	•											
UoW	•	•	•	•	•				•	•			•

### NOTES TO TABLE 1

**Column 1.** *Broad academic freedom clause* may represent no more than a reference to academic freedom in the mission or values of the university.

*Nil:* No reference to academic freedom (or a similar term such as intellectual freedom) in the agreement.

**Column 3** *Critical and open inquiry:* Generally means that these words or very similar words are used.

**Column 13** *Right cannot be used to harm or vilify:* This column reflects academic freedom clauses that contain a clause such as this extract from clause 56 of the University of Central Queensland Enterprise Agreement:

Academic employees have the right to express unpopular or controversial views, but this does not mean that they have a right to harass, bully, vilify or intimidate.

Such clauses are contained within the broader statement on academic freedom, and on occasion might be capable of being interpreted to include the university itself as a party that cannot be vilified by the exercise of the right.

Some universities have adopted quite strong, wide, and enforceable clauses such as Clause 60 in the *University of Adelaide Enterprise Certified Agreement 2000-2003*, which provides:

- 60.1 The parties firmly believe that academic staff should not be hindered or impeded in their right to contribution to social change through freely expressing their opinion of state policies and of policies affecting higher education. They should not suffer any penalties because of the exercise of such rights.
- 60.2 The parties agree that the principle of academic freedom should be scrupulously observed at the University of Adelaide. This principle includes the right of academic and general staff, without fear of discrimination or constriction by prescribed doctrine, to express freely their opinion about the institution or system in which they work. This includes freedom from institutional censorship and freedom to participate in professional or representative academic bodies.

60.3 Academic freedom does not require neutrality on the part of the individual. Rather, academic freedom makes commitment possible. Academic freedom carries with it the duty to use that freedom in a manner consistent with the scholarly obligation to base research and teaching on an honest search for knowledge. The parties agree that academic staff:

- should be free to participate in the development of the curriculum and standards and methods of teaching;
- in exercising their freedom to carry out research, have a responsibility to conduct it in accordance with the principles of intellectual rigor, scientific enquiry and research ethics without any interference or suppression;
- have a right to undertake professional activities that enhance their professional skills or allow for the application of knowledge to the community;
- can best do justice to these principles if the environment in which they operate is democratic and collegial.

60.4 These rights are linked to the responsibilities of staff and students to support the role of universities as places of independent learning and thought, where ideas may be put forward and opinion expressed freely; and as institutions which must be accountable for their expenditure of public money.

Clause 60 is an example of a clause meeting most elements in Table 1, making it one of the most extensive academic freedom clauses appearing in an Australian university enterprise agreement. The clause links academic freedom to professionalism and responsibility, key elements in any definition.

Table 1 reveals that approximately half of the 39 Australian universities in the 2001 round made some reference to academic freedom in their agreements, while about one third contained detailed clauses on academic freedom of the order approaching or contained in the *University of Adelaide Agreement*. A few universities opted to cross reference codes of conduct containing academic freedom



clauses, instead of incorporating an academic freedom clause in the agreement. The NTEU had requested its branches to seek an intellectual freedom clause in the 2000-2001 round of negotiations. Given that each enterprise agreement had to be separately negotiated at each university this was a reasonable outcome. There are signs that the NTEU may be having additional success in the current round. For example, clause 20 of the new *University of Sydney Enterprise Agreement* provides:

- 20.1 Academic staff members have the right to:
  - 20.1.1 pursue critical and open inquiry;
  - 20.1.2 participate in public debates and express opinions about issues and ideas related to their discipline area and about the institution within which they work or higher education issues more generally;
  - 20.1.3 participate in decision making structures and processes within the University;
  - 20.1.4 participate in professional and representative bodies, including trade unions;
  - 20.1.5 teach, promote learning, assess and develop curricula;
  - 20.1.6 undertake research and produce publications;
  - 20.1.7 engage in community service without fear of harassment, intimidation or unfair treatment; and
  - 20.1.8 express unpopular or controversial views, but this does not mean that they have a right to harass, vilify or intimidate.
- 20.2 At all times academic staff are required to observe that the hallmarks of relationships within the University are based on tolerance, honesty and respect for others.<sup>62</sup>

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<sup>62</sup> University of Sydney, *Academic and Teaching Staff Agreement 2003–2006*: [http://www.usyd.edu.au/personnel/agreements/2003\\_2006/academic\\_teaching\\_staff/AS\\_toc.htm](http://www.usyd.edu.au/personnel/agreements/2003_2006/academic_teaching_staff/AS_toc.htm).

Clause 11 of the *University of Melbourne Enterprise Agreement 2003* also makes express mention of academic freedom in that it commits the parties to “the values of the university”. Those values include “defending the academic freedom of all staff and students to engage in critical inquiry, intellectual discourse and public controversy without fear or favour.”

### **Codes of Conduct: express terms, estoppel, or mere ineffective aspiration?**

As noted previously, some universities have been developing codes of conduct. These codes contain clauses on a wide range of matters such as financial and other conflicts of interests, for example, acceptance of gifts, personal and family relationships between staff, and between staff and students, discrimination and harassment, and public comment.

University codes of conduct often make an express or implied reference to academic freedom. There are 39 universities in Australia and space does not allow a repetition of the wide variety of clauses used where codes exist. Some clauses are direct. For example, in the Southern Cross University *Code of Conduct* academic freedom is expressed as a guarantee:

5.2.3.1 The University shall:

- (a) Guarantee academic freedom of both inquiry and expression provided such inquiry and expression does not contravene applicable State or Commonwealth legislation (such as defamation and privacy laws) and provided that if disputes arise, the University’s dispute resolution practices are observed.
- (b) Encourage students and staff to express themselves using critical judgement and scholarship, subject to confidentiality obligations placed upon them by any privacy and research obligations.
- (c) Encourage officers and employees to express themselves using critical judgement and scholarship, subject to confidentiality obligations placed upon them by the University either through

defamation or privacy laws, University policy or under the terms of their contracts of employment.

A subsequent clause addresses rights to make public comment:

#### 5.2.11 Public Comment

5.2.11.1 Public comment is any comment which might be expected to be circulated or published outside the University.

5.2.11.2 Officers and employees may make public comment on any issue in their capacity as individual members of the community. However, when making public comment (including via electronic means), members of the University's Council and University officers and employees should take reasonable steps to ensure that the opinions expressed are not represented as an official view of the University. For example, public comments in connection with trade union activities could be prefaced with a comment that they are made in a private or union capacity and do not represent the official view of the University.

5.2.11.3 Where the matter of any public comment relates directly to the academic or other specialised subject area of an officer's or employee's appointment, the employee may use the University's name and address and give the title of his or her University appointment in order to establish his or her credentials.<sup>63</sup>

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<sup>63</sup> Southern Cross University, *Code of Conduct*:  
<[http://www.scu.edu.au/admin/hr/policy/sec\\_1/1\\_4.html#acad](http://www.scu.edu.au/admin/hr/policy/sec_1/1_4.html#acad)>.

The University of Queensland *Code of Conduct* makes strong reference to tradition:

2.7 Traditionally, universities are places where academic and research staff have been encouraged to observe and to comment upon or criticise society and its activities. Universities also encourage the development of new concepts through research and open discussion. The exploration of unconventional views is not merely tolerated but encouraged. The Code of Conduct is not intended to derogate from this traditional and independent right to comment on matters of public concern or to pursue research on matters of public controversy. Administrative and support staff, in facilitating academic and research endeavours, should also seek to protect the appropriate exercise of academic freedom within the scope of their duties.

### 3.2 Academic freedom

3.2.1 The obligation is not intended to detract from the concept and practice of academic freedom, which is regarded by the University as fundamental to the proper conduct of teaching, research and scholarship. Academic and research staff should be guided by a commitment to freedom of inquiry. This commitment is expressed in their teaching and research and in their role in advancing the intellectual heritage of their society. Academic and research staff should exercise their traditional rights to examine social values and to criticise and challenge the belief structures of society in the spirit of a responsible and honest search for knowledge and its dissemination. For example, academic freedom entitles an academic or research staff member to challenge and criticise ideas and methods but not to defame others.<sup>64</sup>

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<sup>64</sup> University of Queensland, *Code of Conduct* Policy Number 1.50.1, approved 31 July, 1997:  
<<http://www.uq.edu.au/hupp/contents/view.asp?s1=1&s2=50&s3=1>>.

The University of Sydney *Code of Conduct* is not as strong, only making reference to public comment:

C18: The University supports the right of staff members to speak publicly on any issue. However in cases where the issues discussed relate to policy and other decisions of University management, unless they are officially representing the University, it is important that individuals make it clear that they are expressing a private point of view and that the views are not necessarily those of the University.<sup>65</sup>

The Griffith University *Code of Conduct* takes a different approach: it uses examples to illustrate various broad conduct propositions. However, the Preamble states:

This Code does not detract from the academic freedom of staff of the University. As a staff member you are encouraged to pursue critical and open inquiry and engage in constructive criticism on matters of public concern within your area of expertise.<sup>66</sup>

From an academic's view this clause offers very limited protection, purporting to restrict academic freedom rights to an "area of expertise". The clause begs obvious questions, such as how is an "area of expertise" defined, and is there any right to criticise the university within that definition. There is of course a further risk to academics in the very existence of such a clause. If it is generally accepted as a policy of the university, or if it has contractual status, it may define academic freedom at that university to the exclusion of any broader definition arising through an implied term.

A code of conduct at a university might have legal force or it may simply represent a 'policy' of the university having no particular legal force. One possibility is that the code has been specifically referred to in a letter of appointment, along with other matters such as sabbatical

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<sup>65</sup> University of Sydney, *Code of Conduct*, approved 26 October, 2000:  
<<http://www.usyd.edu.au/su/audit/policy/fincode.html#personal>>.

<sup>66</sup> Griffith University, *Code of Conduct*:  
<<http://www62.gu.edu.au/policylibrary.nsf/0/dfa2347a8bf28c184a256be6006321b7?opendocument>>.

entitlements, rules relating to tenure and promotion, and references to enterprise bargaining agreements, so as to indicate an intention that the various documents have contractual force.<sup>67</sup> Alternatively, the letter of appointment may have indicated the existence of the code of conduct but disclaimed any legal force in the document, or the code itself may have indicated it was *not* a contractual document. In theory, either alternative creates no legal difficulty. The document is either contractual or it is not, though in practice the determination of contractual status may be quite difficult.<sup>68</sup> Finally, the contract may have made no mention at all of the code, or have been entered into prior to the code's development and implementation. This matter is discussed in detail below.

Where a code is not contractual an argument might be made that a code creating or evidencing positive rights such as academic freedom would create an estoppel. The university would thereby be estopped from denying the existence of those same rights if an academic spoke out in a way protected or authorised by the code and suffered detriment because of doing so. In *Waltons Stores (Interstate) Ltd v Maher*,<sup>69</sup> the High Court of Australia held that in appropriate circumstances a party who had relied on a promise may be entitled to relief, notwithstanding that the promise was not supported by consideration, even where there was no pre-existing contract between the parties.

Detrimental reliance by an academic on the code would make it unconscionable for the university to ignore the statements in the code.<sup>70</sup>

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<sup>67</sup> Documentation such as an employee handbook containing conditions of employment referred to in a letter of appointment will either form part of the contract of employment or evidence it: *Chittick v Ackland* (1984) 53 ALR 143 at 154. See also *Mair v Bartholomew* (1991) 104 ALR 537 which applied *Chittick*. It is also possible that documentation in a "rule book" is not contractual but represents written lawful standing instructions to employees within the scope of the employment contract as to how work is to be performed: *Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen* [1972] 2 QB 455 at 490 and 507.

<sup>68</sup> See *Riverwood International Australia Pty Ltd v McCormick* [2000] FCA 889 (4 July 2000).

<sup>69</sup> *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

<sup>70</sup> But reliance may not always be easily shown: in the American decision in *Tuomala v Regent University* (1996) 477 SE.2d 501 a promissory estoppel argument failed because the professor complainants could not show reliance on statements made.

A related point is that as an administrative law matter the university must follow its own policy or statutes.<sup>71</sup> Two American cases demonstrate this point. In *Subryan v Regents of University of Colorado*,<sup>72</sup> the State Board of Regents had promulgated rules in the School of Medicine. The rules provided: “The first appointment of senior instructor and clinical instructor shall be for three years and each subsequent appointment for a similar period.”<sup>73</sup> The Colorado Court of Appeals held that these rules were like statutes. Accordingly, due process meant that the rules had to be strictly complied with, even though the university had encountered funding problems.

In *Brady v Board of Trustees of Nebraska State Colleges*,<sup>74</sup> Brady was dismissed in contravention of the by-laws with respect to termination and conditions of employment. These by-laws were expressly incorporated into his contract, because his contract had incorporated the faculty handbook. Annual reappointment forms signed by Brady further ensured their applicability. Prior to his dismissal he was given neither notice nor a hearing as required by the by-laws. The Supreme Court of Nebraska held that the termination was ineffective.

The cases are simple, yet they contain a fundamental proposition. Universities will generally be bound by their own procedures and rules when these have been raised to a high status within the organisation by its governing body. Such by-laws work both against and for the institution.

A further proposition is that the existence of a code or policy would strengthen an argument that a dismissal completely ignoring the policy on academic freedom contained in that university’s own documentation could be “harsh, unjust or unreasonable” under s 170CE of the *Workplace Relations Act 1996* (Cth).

Additional legal uses could be made of a code of conduct containing an academic freedom clause. It could be argued that the code, even if not made expressly contractual in the terms of appointment, could assist in evidencing (and more importantly defining) academic

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71 Though access to administrative law remedies may be somewhat illusive: *Griffith University v Tang* [2005] HCA 7.

72 *Subryan v Regents of University of Colorado* (1984) 698 P.2d 1383.

73 *Subryan v Regents of University of Colorado*, Note 72 at 1384.

74 *Brady v Board of Trustees of Nebraska State Colleges* (1976) 242 NW.2d 616.

freedom as an implied term at that university. Furthermore, the code may have gained legal status by being referred to, and made part of, an enterprise agreement at that university.<sup>75</sup>

## **Codes of Conduct: unilateral change by the university**

A difficult contract law point is whether a code or other ‘policy’ document that on its face appears contractual, but is not specifically referred to in an academic’s contract of employment, has any binding effect. Would an academic be bound by changes to that document made after commencing employment at the university?

Conventional wisdom is that a contract, once entered into, governs the rights between the parties and cannot be subject to unilateral change unless there is further agreement to change. If one party attempts to change the terms without any prior agreement to do so, will the other party be bound if he/she continues to treat the contract as still operative? Will non-objection act as a waiver, so that the other party can enforce the new term? Under Australian law the question of whether the change terminates the existing contract and replaces it with a new one, or varies the existing contract which remains on foot,<sup>76</sup> is a question of fact: *Quinn v Jack (Chia) Australia Ltd*.<sup>77</sup> Naturally, the terms of the original agreement will impact on this. If it expressly or impliedly contemplates a process of contract variation then the original contract remains on foot. In *Quinn*, Ashley J concluded that the changes to the employee’s position were not contemplated by the original contract and thus there was a new contract.<sup>78</sup>

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<sup>75</sup> Note the previous discussion and Table 1.

<sup>76</sup> A very common example of this is the contract contained in the articles of association or constitution of a company which itself provides a mechanism for alteration. Common law and statute allows for variation by special resolution of the members which has binding effect on all members unless the variation increases the amount the member has to pay: *Hickman v Kent and Romney Marsh Sheep Breeders Association* [1915] 1 Ch 881; s 140 of the *Corporations Act 2001*(Cth).

<sup>77</sup> *Quinn v Jack (Chia) Australia Ltd* [1992] 1 VR 567.

<sup>78</sup> *Quinn v Jack (Chia) Australia Ltd*, Note 77 at 577-578.



In *Riverwood International Australia Pty Ltd v McCormick*,<sup>79</sup> the court had to construe the legal effect of a clause in an letter of offer stating: “You agree to abide by all Company Policies and Practices currently in place, any alterations made to them, and any new ones introduced.” In the appeal, North and Mansfield JJ, in separate judgments, found that these words had the effect of introducing the company’s policy manual into the contract. Justice Lindgren construed the letter as not incorporating the manual by reference into the contract.<sup>80</sup> A matter of particular interest to the judges was whether this would allow the employer in the future to unilaterally change that policy.

Justice North concluded that an agreement leaving content to one party’s discretion is not a contract. Accordingly, any alterations to company policy required separate agreement.

Justice Mansfield took a different approach:

Nor do I consider that the fact that it was contemplated by the policy clause in the letter that the appellant might change its policies from time to time, or introduce new policies, signifies that it did not intend to be contractually bound to the respondent to comply with its policies from time to time. Its power to change its policies, or to introduce new policies, from time to time would be constrained by an implied term that it would act with due regard for the purposes of the contract of employment: eg *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 1 at 63, 137-138, so it could not act capriciously, and arguably could not act unfairly towards the respondent: cp. *Ansett Transport Industries v Commonwealth* (1977) 139 CLR 54 at 61. It might also be a power which, by implication, must be exercised reasonably having regard to the nature of the contract and the entitlements which exist under it: *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 28 NSWLR 234 at 279-280 per Handley JA.<sup>81</sup>

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79 *Riverwood International Australia Pty Ltd v McCormick*, Note 68.

80 *Riverwood International Australia Pty Ltd v McCormick*, Note 68 at [51].

81 *Riverwood International Australia Pty Ltd v McCormick*, Note 68 at [151]-[152]. The majority judgment in *Riverwood* has been applied in *Hermann v Qantas Airways Limited* (U No. 33490 of 2000), 3 April 2001: <<http://www.airc.gov.au/alldocuments/PR903096.htm>>.

It is submitted that the latter judgment represents the better approach. Theoretically, there seems no reason why parties to a contract cannot agree that one party may change the terms of the contract, provided there exist strong constraints on that power. The implied terms listed in Mansfield J's judgment act as the constraint. Where one party is an employer the court would be expected to be especially vigilant in ensuring these implied terms are met.

Unlike many other places of employment, academics are often (and traditionally) involved in a representational democratic process whereby change directly affecting their employment terms comes about. For example, tenure and promotion rules are, on occasion, changed after consultation and debate at academic board level, and then at the governing body level where again academics will have some representation. Does this mean that an academic, upon joining a university, accepts that in some employment matters he/she impliedly agrees that matters having gone through this traditional consultation process will bind the academic unless he/she specifically voices her/his disapproval?

The contractual difficulties in such a situation have not been discussed in detail in Australian university cases.<sup>82</sup> In *Australian National University v Lewins*<sup>83</sup> the issue arose indirectly when an academic sought an order under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) compelling the university to give him reasons for a decision not to promote him to reader. Initially he was successful but subsequently he lost on appeal. The Full Federal Court held that the decision to not promote him was made under the wide powers of council to employ and manage staff by, among other matters, creating a promotion policy, and was not an exercise of a statutory power. The promotions policy did not have any effect as law under the university by-laws, not having been promulgated as such. Hence, the decision was not one caught under the Act. In reaching this decision the judges made various observations about the status of the promotion policy.

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82 The introduction of enterprise agreements across all Australian universities which bind all employees under the authority of the *Workplace Relations Act 1996* (Cth) means the issue may be less likely to arise, because such agreements offer the university the opportunity to give binding legal effect to university policy/documentation introduced after the commencement of the employment.

83 *Australian National University v Lewins* (unreported, Fed C of A, Full Court, No. ACT G 74 of 1995, FED No. 594/96): <<http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal%5fct/unrep8495.html>>.

Justice Davies noted that the policy was “imposed by the unilateral act of the University”, and even though it had probably been discussed with the union, it was not contractual in effect.<sup>84</sup> Justice Lehane found similarly, and further noted that a power to employ staff does not give a university power to vary employment contracts unilaterally. He noted that employment contracts could be written in such a way as to give universities power “to make determinations which will be binding on the employees concerned.”<sup>85</sup>

Subsequently, Lehane J made it clear that a successful application for promotion operates as a novation of the contract, and a properly drafted employment contract can provide a mechanism for unilateral change of the contract. This possibility reinforces Mansfield J’s comments cited above concerning the particular duties on the employer in such a situation.<sup>86</sup>

The matter has arisen in American universities in the context of the legal enforceability of faculty handbooks and, in particular, provisions relating to mandatory retirement.<sup>87</sup> In *Rehor v Case Western Reserve University*,<sup>88</sup> Rehor, a tenured university professor at Case Western Reserve University, was forced to retire earlier than he believed he had to. In 1967, following an amalgamation with Case Institute of Technology, Western Reserve University became Case Western Reserve University. The Board of Trustees subsequently amended the retirement age to 65 years. In June 1970, Rehor, whose previous retirement age was 70, was advised in writing that he would be retiring at the age of 68. In giving judgment for the university, the court noted that Rehor had signed a number of “annual reappointment forms” from 1969 through to 1972 that provided for an increase in salary. These forms were signed after the promulgation of the new retirement age. The university successfully argued that these forms did not set out in full the terms and conditions of employment. The court accepted that “a university’s policies, rules, and regulations relating to faculty members become a part of the employment contract as a matter of

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84 *Australian National University v Lewins*, Note 83 at [20].

85 *Australian National University v Lewins*, Note 83 at [26].

86 *Australian National University v Lewins*, Note 83 at [30].

87 These cases are discussed in more detail in Jackson J, “Express and Implied Contractual Rights to Academic Freedom in the United States” (1999) 22 *Hamline Law Review* 467 pp 467–499.

88 *Rehor v Case Western Reserve University* (1975) 331 NE.2d 416.

law.”<sup>89</sup> Accordingly, the court held that the amended retirement policy became part of the “annual employment agreements” after 1 July 1967. The university also successfully argued that it could change the retirement age provided the change was reasonable and uniformly applicable, and that the university’s by-law allowing the Board of Trustees to adopt rules governing the appointment and tenure of faculty extended to changing the retirement age. The decision in *Rehor* has been seriously criticised because it characterises tenure as a series of one-year contracts, which seems to misunderstand the nature of tenure. Such characterisation allowed the court to break what was effectively one contract into a series of annual contracts.<sup>90</sup>

The issue of unilateral alteration was also raised in *Rose v Elmhurst College*.<sup>91</sup> Here the court noted that in a college there could be an unwritten “common law”<sup>92</sup> comprised of “the conduct, customs and usage of the academic community in general [which would] permit unilateral modification by the college trustees of a college’s tenure commitment to its faculty members.”<sup>93</sup>

*Drans v Providence College*<sup>94</sup> was another case dealing with a purported unilateral change of retirement age. The court reviewed the meaning of tenure, making reference to the academic community’s custom and usage of the term to discern its common understanding.<sup>95</sup> It was held that the college’s retirement policy was restricted by an implied obligation to examine the common practice among the academic community, and to make reasonable transition provisions where that was dictated by common practice.<sup>96</sup>

The approach in *Drans* and *Rose* recognises and allows evidence to be given of the living and often democratic collegiality of a university, and

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<sup>89</sup> *Rehor v Case Western Reserve University*, note 88 at 420.

<sup>90</sup> Professor Finkin is, with good reason, very critical of this case. See Finkin MW, “Regulation by Agreement: The Case of Private Higher Education” (1980) 65 *Iowa Law Review* 1119 at 1142. See also the criticism in *Drans v Providence College* (1978) 383 A.2d 1033 at 1040.

<sup>91</sup> *Rose v Elmhurst College* (1978) 79 NE.2d 791.

<sup>92</sup> As to the meaning of this concept see *Perry v Sindermann* (1972) 408 US 593.

<sup>93</sup> *Rose v Elmhurst College*, note 91 at 794, fn 2.

<sup>94</sup> *Drans v Providence College* (1978) 383 A.2d 1033.

<sup>95</sup> *Drans v Providence College*, note 94 at 1038.

<sup>96</sup> *Drans v Providence College*, note 94 at 1042.

the fact that policies, rules and procedures will change over time: usually, but not always, at the behest of the majority of a faculty. In theory, such change can be incorporated into each contract of employment because the individual member of faculty impliedly agrees to it by remaining at the university and accepting its traditions and customs, by not making individual protest or objection to the inclusion of the clause in her or his contract, and by not rejecting any benefits the change may bring. The doctrine necessarily means that evidence should be admissible concerning the entire “common law” of that university, including evidence relating to other matters such as academic freedom. This approach will work unless express contradictory terms negate the “common law”.<sup>97</sup>

The readiness of American courts to apply such custom and usage principles is interesting. It is submitted that the notion of “conduct, customs and usage of the academic community” referred to in *Rose*, or the “common law” referred to in *Drans*, could be used to give context to the construction of academic contracts in Australia.

If Mansfield J was correct in *Riverwood*, another way to address the difficulties of unilateral change by the employer is to argue that if a university of its own volition seeks to change an academic’s contract of employment following actual or implied agreement to do so, for example by introducing or varying a code of conduct, any variation will be subject to an implied term. This term would be that the university must act with due regard to the purposes of the contract of employment, and reasonably having regard to the nature of the contract and the entitlements which exist under it, and not capriciously.<sup>98</sup>

## Conclusions

Historically and at present Australian academic contracts have consisted of written contracts unlikely to be descriptive of the whole bargain. The contract will incorporate other internal and external documents by reference, which could include a relevant award, enterprise bargaining agreement, code of conduct, or other policies of the university as they exist from time to time. These, or parts of them, may have contractual or other legal status. Furthermore, if a university

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<sup>97</sup> *Lewis v Salem Academy and College* (1974) 208 SE.2d 404.

<sup>98</sup> *Riverwood International Australia Pty Ltd v McCormick*, note 68, [151]-[152].

has made statements promising academic freedom that are intended to be acted upon, and have been acted upon to the detriment of the academic, a university may be estopped from denying its staff a right of academic freedom.

An academic freedom clause could be negotiated for and included in a specific contract, though this is an unlikely outcome given modern academic contracts are generally standard form documents created in large and reasonably sophisticated university human resource offices. A poorly drafted specific clause might disturb rights and obligations contained in a code of conduct or enterprise agreement at that university. Most Australian academics would not turn their minds to an academic freedom clause: issues such as the duration of the contract, salary and other benefits are more likely to dominate the discussion. Accordingly, the contents of a code of conduct, enterprise agreement, or AWA, become very important.

Codes, other policies, or even enterprise agreements, can be incorporated by reference into an academic employment contract by a well-drafted clause. If there is no reference to an enterprise agreement in the contract, the enterprise agreement nevertheless remains enforceable under the *Workplace Relations Act 1996* (Cth) because its status turns on being a certified agreement under that legislation and not on being part of a contract of employment. It is this feature which makes such agreements attractive to employers, even employees who do not agree to the terms of the enterprise agreement will be bound by its terms once the requirements under the Act have been met.

If there is no reference to a code of conduct or other policy in the employment contract or enterprise agreement, the code or policy will be difficult to enforce at law because the employer does not have the power to change a contract unilaterally. Similarly, if there is a reference to codes or policies existing at the time of employment, but the contract was not properly drafted to make allowance for subsequent code or policy changes, there are complicated factual matters that need addressing. If the academic has accepted some benefits specifically arising under varied policy he/she will have difficulty in denying the application of other parts of the policy,<sup>99</sup> though the employer will not be able to pick and choose which parts of its policy will bind it. In the event that the academic has bound herself/himself in the original

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<sup>99</sup> Creighton B and Stewart A, *Labour Law: An Introduction*, 3rd Edition, Federation Press, 2000, p 224.

contract of employment to accept policy change, the university has to act with due regard for the purposes of the contract of employment, and not capriciously.

A number of universities have codes of conduct containing academic freedom clauses. Furthermore, some enterprise agreements make specific reference to codes or contain an express statement on academic freedom. Approximately half of Australian universities make some reference to academic freedom in their enterprise agreements, while about one third contain detailed clauses on academic freedom.

Given that the use of codes of conduct to protect academic freedom is at best problematic at law, and the likelihood of universities adding academic freedom clauses to employment contracts is low, it is submitted that universities and the unions should increase their efforts to include clauses protecting academic freedom in all enterprise agreements.

