

IMPLIED CONTRACTUAL RIGHTS TO ACADEMIC FREEDOM IN AUSTRALIAN UNIVERSITIES

JIM JACKSON*

Academic freedom is one of those often vague and unexplored concepts thrown around in the common rooms and academic fora of Australian universities. It means many different things to different people. But does it have any legal meaning? A previous article in the 2005 Southern Cross University Law Review by this author tested whether it existed as an express term in contracts of employment. This article follows on from that and examines whether academic freedom has any legal meaning at common law as an implied contractual term in Australia.

I INTRODUCTION

In Australia academic freedom does not exist as a constitutional right as it does in South Africa.¹ It does not exist as a legislative right as in Ireland, the United Kingdom or New Zealand.² It cannot be derived from a bill of rights guaranteeing freedom of expression as in the United States because Australia does not have such an instrument. Whilst there are limited rights of freedom of speech under Australian law there is no common law principle guaranteeing freedom of speech in employment contracts.³ Accordingly, the major source of academic freedom protection in Australia will be under contract law as either an express or implied term, or via the

* Jim Jackson, Professor of Law, Southern Cross University, Lismore, Australia.

1 See s 16 of the *Constitution of the Republic of South Africa* 1996.

2 See s 14 *Universities Act 1997* (Ireland); s 202 *Education Reform Act 1988* (UK); ss 160, 161 *Education Act 1989* (NZ).

3 See the cases and references in J Jackson, 'When Can Speech Lead to Dismissal in a University' (2005) 10 *Australia and New Zealand Journal of Law and Education* 23.

inclusion of an academic freedom term in a collective bargaining instrument.⁴

The objective of this article is to discover whether a term incorporating principles of academic freedom could be implied into employment contracts of Australian university academics.

A further objective is to construct such a clause, thereby defining academic freedom as a common law concept. This is not a study of history for history's sake or for general interest, rather the study is necessary for a clearer understanding of how academic freedom has evolved into an expression with legal meaning.

The search for the illusive notion of academic freedom as a legal concept under contract law starts in the United States and Canada, then turns to Australian contract law on implied terms, legislative material on the nature and meaning of a university and past Australian academic freedom disputes. Much of the analysis is unashamedly historical. Accordingly, the paper investigates how academic freedom has developed under American and then Canadian law.

The analysis which follows includes the very well known United States Supreme court decision in *Sweezy v New Hampshire*⁵ and the common law that has developed around *Greene v Howard University*.⁶ The Canadian arbitration in *University of Manitoba Faculty Association v University of Manitoba*⁷ demonstrates the usefulness of statements from bodies such as the Canadian Association of University Teachers (CAUT) and the American

⁴ For further detail regarding express rights to academic freedom see, by the same author, J Jackson, 'Express Rights to Academic Freedom in Australian University Employment' (2005) 9 *Southern Cross University Law Review* 107. This study found that some universities include express rights to academic freedom in collective agreements and/or codes of conduct but this is not universal practice. Accordingly this legal analysis of academic freedom, based on its historical and traditional rationale, is overdue.

⁵ *Sweezy v New Hampshire*, 354 US 234 (1956).

⁶ *Greene v Howard University*, 412 F 2d 1128 (1969).

⁷ *University of Manitoba Faculty Association v University of Manitoba*, Case No AI-54, 11 February 1991, Arbitration Board, Chair Perry W Schulman QC.

Association of University Professors (AAUP) in defining academic freedom as a legal concept. There is some,⁸ but very limited, judicial commentary in Australia to assist the quest for definition, accordingly the analysis seeks definitional assistance from determinations in Australian Royal Commissions and Inquiries. The next section of the paper discusses the typical Australian academic employment contract and the law on implied terms, finding three potential terms, those implied by law, those necessary to give business efficacy to a contract, and those presumed to apply because of a tradition or custom. Finally, the paper investigates a series of academic freedom disputes in Australia over a 150 year period to test what they say about academic freedom as it has been applied in Australian universities, and to determine whether it has yet reached an implied contractual status.

The conclusion drawn is that a limited form of academic freedom does exist as an implied term in Australia and is necessary for academics to meet their contractual obligations to discover and disseminate knowledge.

II WHAT IS ACADEMIC FREEDOM AND WILL IT BE IMPLIED BY THE COURTS?

The Canadian and United States jurisdictions will now be considered to test whether that law may provide Australian courts with guidance on how to define or deal with implied academic freedom issues and with definitional issues surrounding academic freedom.

The issue has most often arisen in the American courts, but there are also relevant determinations out of Canada.

A United States

The approach to academic freedom issues in the United States is of interest to Australia because that country has developed a significant and sophisticated body of case law on academic freedom, and that law and its associated policy is quite influential. Given the

⁸ *Burns v Australian National University* (1982) 40 ALR 707, 717-18.

willingness of tribunals in other Commonwealth countries such as New Zealand⁹ and Canada to pay cognisance to the statements of the AAUP there is no reason why United States pronouncements on academic freedom¹⁰ will not be equally influential in Australia. Furthermore, the very authoritative United States Supreme Court decision in *Sweezy v New Hampshire*¹¹ was itself influenced by academic statements from another British Commonwealth country, South Africa. This shows the universality of the knowledge discovery propositions advanced in the case. Justice Frankfurter spoke strongly of academic freedom, and his analysis provides a broad definition of it:

In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest. A university is characterized by the spirit of free inquiry, its ideal being the ideal

⁹ *Rigg v University of Waikato* [1984] 1 NZLR 149.

¹⁰ In 1940 the American Association of University Professors (AAUP) in conjunction with the Association of American Colleges (AAC) released the *1940 Statement of Principles on Academic Freedom and Tenure* (1940 AAUP Statement). It provides the following regarding academic freedom, see AAUP, *1940 Statement of Principles on Academic Freedom and Tenure* in 'Symposium on Academic Freedom' (1990) 53 *Law and Contemporary Problems* 407:

Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

¹¹ *Sweezy v New Hampshire*, above n 5.

of Socrates - 'to follow the argument where it leads'. This implies the right to examine, question, modify or reject traditional ideas and beliefs. Dogma and hypothesis are incompatible, and the concept of an immutable doctrine is repugnant to the spirit of a university. The concern of its scholars is not merely to add and revise facts in relation to an accepted framework, but to be ever examining and modifying the framework itself...

Freedom to reason and freedom for disputation on the basis of observation and experiment are the necessary conditions for the advancement of scientific knowledge. A sense of freedom is also necessary for creative work in the arts which equally with scientific research, is the concern of the university...

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment, and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university - to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.¹²

As will be shown later, the rationale provided by Justice Frankfurter for academic freedom is one based around business efficacy, academic freedom is necessary for the effective operation of the university's free inquiry function, and therefore must be accorded to its members in the proper discharge of their duties as members and employees of the university.

Of further note in this famous quote is that Frankfurter J, without hesitation, unifies the university and the scholar's role in this process.

Van Alstyne, a leading academic and American commentator, puts all this very simply: 'Universities are licensed truth hunters defined and bound by academic freedom.'¹³

¹² *Statement of a Conference of Senior Scholars from the University of Cape Town and the University of Witwatersrand, The Open Universities in South Africa*, 10-12, quoted with approval by Justice Frankfurter in *Sweezy v New Hampshire*, above n 5.

¹³ W W Van Alstyne, 'Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review' in 'Symposium on Academic Freedom' (1990) 53 *Law and Contemporary Problems* 79, 87.

Much of the discussion in the United States on academic freedom concerns the use of the First Amendment as a source of academic freedom.¹⁴ This is only of limited interest in Australia. However the Americans have also built up a body of contract law more relevant to us. The leading decision regarding faculty employment in higher education¹⁵ is that of the United States Court of Appeals in *Greene v Howard University*.¹⁶ The Court held that faculty handbooks could have contractual status.¹⁷ It noted that the manual summarised the usual and customary practices, which had built up in the University-faculty relationship. The Court was readily prepared to:

- discuss custom and tradition and recognise its existence in a community of scholars;
- enforce the University's own rules against the University despite a disclaimer as to the legal status of the relevant part of the rules; and
- take judicial notice of the fact that the faculty handbook under review purported to accept the tenure policy of the AAUP.¹⁸

For present purposes the first of these propositions is most important.

Greene v Howard has been applied in *Board of Regents of Kentucky State University v Gale*.¹⁹ This case turned on the meaning of the

¹⁴ See, for example, the many papers contained in 'Symposium on Academic Freedom' (1990) 53 *Law and Contemporary Problems* 1; M W Finkin, 'Intramural Speech, Academic Freedom and the First Amendment' (1988) 66 *Texas Law Review* 1323.

¹⁵ M W Finkin, "'A Higher Order of Liberty in the Workplace': Academic Freedom and Tenure in the Vortex of Employment Practices and Law' (1990) 53(3) *Law and Contemporary Problems* 357, 361.

¹⁶ *Greene v Howard University*, above n 6.

¹⁷ On the legal status of faculty handbooks see Jackson, 'Express Rights to Academic Freedom in Australian University Employment', above n 4.

¹⁸ M W Finkin, 'Regulation by Agreement: The Case of Private Higher Education' (1980) 65 *Iowa Law Review* 1119, 1133, footnote 7.

¹⁹ *Board of Regents of Kentucky State University v Gale*, 898 SW 2d 517, 521 (1995).

expression ‘endowed chair’ and, specifically, whether the position carried tenure. The Kentucky Court of Appeals found that unless the advertisement for the position otherwise indicated, it was customary and understood within the academic community that the chair was to be occupied by a distinguished colleague for his lifetime. Later the Court again took notice of custom in defining tenure: “‘Tenure’, as utilised by the parties and understood in the teaching profession, embraces the concept of permanent security in the academic position one holds.’²⁰

Where custom and practice are clear and there is no express term to the contrary, many United States courts have read in statements such as those promulgated by AAUP as forming part of an academic’s contract of employment or have incorporated provisions from faculty handbooks. This does not mean that all handbooks incorporating various policies or AAUP statements will necessarily be incorporated into individual contracts of employment. The policies themselves may be regarded as merely unenforceable,²¹ or other documentation may have been expressly excluded by the terms of the contract.²²

Of more interest for Australian courts, particularly given that our law on implied terms requires a proposed term to be *capable of clear expression*, is where an American court finds that the terms ‘due process’ and ‘academic freedom’ are not reasonably definite terms that can be interpreted and applied to determine whether there has been a breach of contract. An example of this occurred in *Eldeeb v University of Minnesota*,²³ where Davis J of the United States District Court found that sections 1.1 and 1.2 of the University of Minnesota Tenure Code which contained those terms were no more

20 Ibid.

21 See, for example, *Goodkind v University of Minnesota*, 417 NW 2d 636 (1988), where the Supreme Court of Minnesota held that provisions which related to the hiring of departmental chairpersons were merely general statements of policy, insufficiently related to the terms and conditions of the professor’s current employment as professor.

22 See *Black v Western Carolina University*, 426 SE 2d 733 (1993).

23 *Eldeeb v University of Minnesota*, 864 F Supp 905, 911 (1994).

than statements of policy, not containing a definition of academic freedom.²⁴ The clauses provided:

1.1 Principles.

Every member of faculty is entitled to due process and academic freedom as established by academic tradition and the constitutions and laws of the United States and the State of Minnesota and as amplified by resolutions of the Board of Regents.

1.2 Protection of Faculty

Denial of faculty appointment or reappointment or removal or suspension from office or censure or other penalty must not be based upon belief, expression or conduct protected by law or principles of academic freedom.

It is respectfully submitted that the judge failed to properly interpret this provision in light of the tradition the clause itself refers to and in accordance with definitions of academic freedom as contained in *Sweezy v New Hampshire*.²⁵ As noted, academic tradition has been given effect to in numerous cases starting with the line of authority in *Greene v Howard University*. Finally, his failure to give contractual status to the term ‘due process’, given the extensive United States law on this term is, at best, surprising.

Despite this, Australian lawyers should be encouraged to examine the customs and traditions of the university under examination, and universities generally, to determine what additional evidence may be implied so as to determine or define the ‘common law’ of that institution as the Americans have called it, or implied contractual terms as argued in this article.

Accordingly, counsel in cases where terms such as ‘tenure’ and ‘academic freedom’ are not expressly defined, as in *Eldeeb v*

²⁴ Ibid. The judge stated: ‘The policy must provide for reasonably definite terms to allow a fact finder to interpret and apply in determining whether or not there has been a breach.’ His support was the decision in *Kulkay v Allied Central Stores, Inc*, 398 NW 2d 573, 576 (1986).

²⁵ *Sweezy v New Hampshire*, above n 5; see also, *Keyishian v Board of Regents*, 385 US 589 (1967).

University of Minnesota, should introduce evidence of the sort described later in this paper as to the customary meaning of those terms at that institution and nationally, and not allow university administrators to show that the lack of definition proves that they represent policy of a non contractual nature. In the United States, definitions in the AAUP documentation, whether expressly included in contracts or otherwise, is valuable evidence of that tradition.²⁶ Legal counsel in Australia need to seize on American law to assist in convincing a court that the term ‘academic freedom’ can be defined with reasonable certainty.

In summary, American academics may be able to point to the following matters regarding academic freedom in their employment contracts:²⁷

- an express written clause guaranteeing academic freedom;
- a clause from another source incorporated by reference, such as the AAUP statement on academic freedom; and/or
- a custom or tradition that academic freedom exists at his or her university, or at universities generally.

The written or unwritten statement must have achieved contractual status and not be relegated as mere policy or be so uncertain of meaning as to be unenforceable.

²⁶ Such evidence may favour the university. See *Tuomala v Regent University*, 477 SE 2d 501 (1996). Evidence of a ‘common law’ of the university was not allowed to contradict express provisions to the contrary in *Lewis v Salem Academy and College*, 208 SE 2d 404 (1974). The Court of Appeals of North Carolina rejected a professor’s claim that Salem Academy, as usual and customary practice, continued employment of its faculty to age 70, and such practice then became an implied part of the contract of employment.

²⁷ For more detail on the United States law see Finkin, “‘A Higher Order of Liberty in the Workplace’: Academic Freedom and Tenure in the Vortex of Employment Practices and Law”, above n 15; Finkin, ‘Intramural Speech, Academic Freedom and the First Amendment’ above n 14; Finkin, ‘Regulation by Agreement: The Case of Private Higher Education’, above n 18; J Jackson ‘Express and Implied Contractual Rights to Academic Freedom in the United States’ (1999) 22 *Hamline Law Review* 467.

B Canada

In 1975, Fridman doubted whether there were ‘any terms which are implied by custom into a contract of employment of a professor unless they stem from the concept earlier mentioned academic freedom.’²⁸ He thought it could be argued that ‘nothing is to be done by the University that would interfere with such freedom.’ For him the existence of tenure satisfied this requirement without the need to search for an implied term.²⁹ He supported this by pointing to the decision in *Craig v Governors of University of Toronto*,³⁰ where Orde J had not allowed the introduction of evidence proving a custom of appointments for a life tenure on procedural grounds (insufficient notice to the other side) and also because Orde J believed that even if admitted any such evidence would be contradicted by an express stipulation to the contrary in the University Act that appointments would be during the pleasure of the Board.³¹ *Craig v Governors of University of Toronto* is not a good authority for arguing against the implication of an academic freedom term. Obviously an express term or provision in legislation will prevail over an implied term, and in a properly prepared case lack of notice of evidence of a custom or tradition would not occur.

More interesting is *University of Manitoba Faculty Association v University of Manitoba*.³² In this arbitration the faculty association alleged that academic freedom had been damaged. During a presentation by Xerox at the University’s faculty club, an academic, Dr Vedanand, challenged the accuracy of statements made by a Xerox representative. This eventually led to a complaint being made by Dr Gray, the Associate Dean of the Faculty of Management in which Dr Vedanand worked, to the effect that Dr Vedanand had embarrassed the faculty and was rude to the visitors from Xerox.

²⁸ G H L Fridman, ‘The Nature of a Professorial Contract’ in P Thomas (ed), *Universities and the Law* (1975) 11.

²⁹ *Ibid.*

³⁰ *Craig v Governors of University of Toronto* (1923) 53 OLR 312.

³¹ *Ibid* 320.

³² *University of Manitoba Faculty Association v University of Manitoba*, above n 7.

Eventually the Dean wrote to Dr Vedanand indicating that he was disturbed by reports of Vedanand's comments at the meeting. No disciplinary action was indicated in the memorandum.

In bringing the action, the Faculty Association was clearly concerned at the chilling effect of the Dean's letter. The arbitrator, Schulman QC, found that Dr Vedanand's conduct 'was unreasonable in relation to time, place, subject matter and tone' and that 'he exceeded the acceptable limits of academic freedom.'³³ Accordingly, the Association failed to prove a breach of his academic freedom.³⁴

For present purposes the arbitration is important because the arbitrator, after a very detailed examination of Canadian, New Zealand and United States litigation and statements on academic freedom, readily accepted academic freedom in the context of the legal dispute before him: 'The principle of academic freedom is of fundamental importance not only to the university and professors, but to the whole community.'³⁵

His determination concentrated not on the question of whether academic freedom existed as a legal right, implicitly he accepted this, but rather on the limits to academic freedom. To determine these he examined in detail United States case law on academic freedom, various AAUP statements and the Policy Statement of Academic Freedom from the CAUT.³⁶ The arbitrator thought this

33 Ibid 63.

34 Ibid 64.

35 Ibid 61.

36 This provides, see Canadian Association of University Teachers (CAUT), *Policy Statement on Academic Freedom* CAUT Information Service Reference: 3-1 (approved by the CAUT Council, May 1977):

The common good of society depends upon the search for knowledge and its free exposition. Academic freedom in universities is essential to both these purposes in the teaching function of the university as well as in its scholarship and research. Academic staff shall not be hindered or impeded in any way by the university or the faculty association from exercising their legal rights as citizens, nor shall they suffer any penalties because of the exercise of such legal rights. The parties agree that they will not infringe or abridge the academic freedom of any member of the academic community.

statement deficient because it failed to ‘delineate the limitations of academic freedom.’ He then referred to statements including that part of the 1940 AAUP Statement which provides that academics ‘at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others’, and to the 1915 AAUP *General Declaration of Principles* which required of academic utterances that ‘they must be the fruits of competent and patient and sincere inquiry, that they should be set forth with dignity, courtesy, and temperateness of language.’³⁷

He also described Canadian collective agreements that provided that the freedom had to be used in a ‘responsible manner’. His conclusions on both the USA and Canadian positions are similar to those which will be drawn below in the review of Australian disputes: Academic freedom exists not as an absolute right but one with limits as to its responsible and professional use.

C Australia

1 Academic freedom in Australian courts

Academic freedom has rarely been discussed in Australian courts, one exception being the comments of Ellicot J in *Burns v Australian National University*:³⁸

It is vital to the fulfilment of the University’s functions as an independent educational institution committed to the search for truth that the tenure of its professorial staff be free from arbitrary attack. I can think of no principle more basic to the existence of a

Academic members of the community are entitled, regardless of prescribed doctrine, to freedom in carrying out research and in publishing the results thereof, freedom of teaching and of discussion, freedom to criticise the university and the faculty association, and freedom from institutional censorship. 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.

³⁷ Quoted in *University of Manitoba Faculty Association v University of Manitoba*, above n 7, 57.

³⁸ *Burns v Australian National University*, above n 8, 717-18.

university in a free society. The notion that in the involuntary termination of a professor's appointment it is merely acting under the terms of appointment and not under its basic statute as well, in my view, debases *the very principle upon which the university is founded – academic freedom*. This is why, in my opinion, the decision for involuntary termination of a professor's appointment is of a fundamental character and when it is made by a university set up by statute, it is inescapably one which is made in exercise of the powers conferred by statute even if the occasion for its exercise arises as a result of a contractual arrangement.³⁹

In *R v McMahon; Ex parte Darvall*, Mason J of the High Court endorsed a report commenting on the research function of universities and free inquirers pursuing ideas in pursuit of enlightenment for its own sake.⁴⁰ But with these exceptions, our courts have not had an opportunity to develop academic freedom at common law. The next section examines the concept in Parliament, commissions and inquiries.

2 Academic freedom in Australian Royal Commissions and Inquiries

Speaking in Parliament during the second reading of the Bill establishing the first university in Australia, W C Wentworth, politician and the founder of the University of Sydney, was adamant that religious tests would not form part of his public, fiercely non-sectarian and state funded university.⁴¹ This became and remains the dominant model for Australian universities and at least partly explains why the church has figured only on one or two occasions in academic freedom disputes in this country.

³⁹ Quoted in Commonwealth of Australia, Senate Standing Committee on Education and the Arts, *Tenure of Academics* (1981) 4 (emphasis added).

⁴⁰ *R v McMahon; Ex parte Darvall* (1982) 151 CLR 57, 67.

⁴¹ New South Wales, *Second Reading of the Sydney University Bill*, Legislative Council, 4 October 1849 (Speech of William Charles Wentworth).

In the early 1900s, an administrative official at the University of Melbourne defrauded that university of significant funds. This resulted in a Royal Commission into the University.⁴² A number of very senior British academics gave evidence. This provides an important historical account of university contracts in the early 1900s in the United Kingdom and in Australia. Speech is not singled out by any of the overseas experts as a ground for dismissal, though a number of academics highlight term contracts (as opposed to life tenure) as containing distinct impediments to free speech at a university. Non ‘careful’ speech was a threat to reappointment but was not contemplated by the British as a basis for dismissal. The importance of a tradition of free speech at a university was simply assumed 100 years ago, not debated, by the British academics. The Royal Commission was strongly urged to act so as to protect it, both in the way university governing bodies were constituted and in providing for life tenure, though one with certain conditions.⁴³

Occasionally academic freedom has been discussed and strongly endorsed in government reports, including the 1957 Murray Report,⁴⁴ the 1961 Report into Higher Education in New South Wales (which noted that universities were the only organisations in society designed to inquire into knowledge, follow these inquiries and declare truth as they saw it),⁴⁵ the 1981 Senate Standing

⁴² Victoria, Royal Commission on the University of Melbourne, *Final Report* (1904).

⁴³ *Ibid* 20-4.

⁴⁴ Commonwealth of Australia, *Report of the Committee on Australian Universities* (1957) (The Murray Report) 9:

Finally in addition to the two aims of education and research, Universities have a third function. They are, or they should be, the guardians of intellectual standards, and intellectual integrity in the community... The public, and even statesmen, are human enough to be restive or angry from time to time, when perhaps at inconvenient moments the scientist or scholar uses the licence which the academic freedom of universities allows him, and brings us all back to a consideration of the true evidence and what it may be taken to prove; and certainly the academic scholar has a clear duty to maintain a strong self-discipline to keep himself from attempting to speak with any authority outside his own sphere of knowledge.

⁴⁵ New South Wales, *First Report of the Committee appointed by the Minister for Education to Enquire into Various Aspects of Higher Education in New South Wales* (August, 1961) 22.

Committee on Education and Arts inquiry into *Tenure of Academics*,⁴⁶ and the Linke inquiry into *Academic Freedom, Institutional Autonomy and Related Responsibilities*. In the Linke inquiry, a business efficacy rationale is provided for academic freedom:

Academic freedom is basic to the effective operation of higher education institutions in democratic countries. Freedom to inquire, to speak and to publish is the essential ingredient of academic life that secures the advancement and transmission of knowledge and understanding.⁴⁷

The Linke Report defines academic freedom as the:

right of individual academic staff to exercise their professional judgment in matters of teaching, research and other relevant activities without unnecessary constraint and without fear of retribution or loss of privilege in their employment.⁴⁸

Earlier, separate Royal Commissions into Melbourne, Adelaide, and Western Australia Universities endorsed traditional definitions of a university concentrating on the truth discovery function and the free interchange of ideas.⁴⁹ A 2001 Senate inquiry, strongly supporting

46 Commonwealth of Australia, Senate Standing Committee on Education and the Arts, *Tenure of Academics*, above n 39.

47 R D Linke, *Report on Academic Freedom, Institutional Autonomy and Related Responsibilities* (November, 1990) (Linke Report) 13.

48 Ibid 3-4.

49 Western Australia, Royal Commission on the Administration of the University of Western Australia, *Report of the Royal Commissioner* (1942); South Australia, Royal Commission on the Adelaide University and Higher Education, *First Progress Report together with Minutes of Proceedings, Evidence, and Appendices* (1911); Victoria, Royal Commission on the University of Melbourne, *Progress Report, The Financial Position of the University* (1904); Victoria, Royal Commission on the University of Melbourne, *Final Report*, above n 42.

the concept, raised serious concerns about academic freedom in Australia.⁵⁰

In the early 1990s, a dispute broke out at the University of Western Australia as to whether Dr David Rindos should be granted tenure at that university. Eventually the matter ended up before the Standing Committee on Public Administration of the Legislative Council of Western Australia. This body reached some very important conclusions about the applicability of and the need for procedural fairness in tenure hearings, though it had little to say on traditional rights of academic freedom apart from one very important passage regarding the customs on the closely related concept of tenure:

The Committee accepts, after substantial investigation and research, that there are no recognised national or international standards for assessing tenure. These are more accurately described as ‘mores’, or recognised customs, which most academic institutions invoke (although it is acknowledged by the Committee that there is a diverse variation in specific details between different institutions). Some of the ‘conventions’ or ‘mores’ which have been ascertained by the Committee’s inquiry include a probationary period, the expectation that a certain level of performance is necessary and that peer assessment may be part of the final determination of tenure. The evidence before the Committee has revealed that tertiary institutions essentially can determine their own procedures for review and performance, and the University of Western Australia is no different in this regard.⁵¹

The Committee’s recognition of tenure customs within a university context is significant. That and the various matters noted above add to the possibility of leading evidence of other mores within a

⁵⁰ Commonwealth Parliament, Senate Employment, Workplace Relations, Small Business and Education References Committee, *Universities in Crisis* (27 September 2001).

⁵¹ Standing Committee on Public Administration, Legislative Council of Western Australia, *Fourth Report on its Inquiry into the Events Surrounding the Denial of Tenure to the Late Dr David Rindos by the University of Western Australia* (December, 1997) 59.

university in the context of implied terms in employment contracts.⁵² I now turn to an examination of the relevant law.

3 *The Australian Academic Contract of Employment*

Australian academic contracts usually consist of brief written contracts which typically do not include the entire contract.⁵³ Furthermore, the contract may incorporate other internal and external documents including an enterprise bargaining agreement, code of conduct or other policies of the university. These, or parts of them, may have contractual or other legal status, for example, Australian law workplace agreements (including Australian Workplace Agreements (AWAs), Employee Collective Agreements and Union Collective Agreements) gain their enforceability under Part 8 of the *Workplace Relations Act 1996* (Cth) and not as a matter of contract law.

It should be noted that most, though not necessarily all academics are employed to engage in research. Some academics may be engaged to perform research of a particular kind under particular conditions. The discussion in this paper applies to those academics in Australia who are not subject to any valid clause restricting their academic freedom or capacity to engage in research. Accordingly, the paper concerns the vast majority of academics employed on normal teaching/research contracts.

Contracts of employment could contain an express academic freedom clause but this is very unlikely given the inequality of bargaining power between the university, and the reluctance of their human resource offices to interfere with that university's standard form contract. In most cases, the academic will be bound by an enterprise agreement and university human resources offices are unlikely to insert anything in the contract that may run counter to that. Approximately half of the enterprise agreements in the 2001

52 In the United States mores and custom have been used to recognise tenure: see, for example, *Board of Regents of Kentucky State University v Gale*, above n 19; on a related point see *Greene v Howard University*, above n 6.

53 For detail refer to Jackson, 'Express Rights to Academic Freedom in Australian University Employment', above n 4.

round included some reference to academic freedom, only about one third contained a detailed clause.⁵⁴

As an alternative to collective bargaining the present federal government is *obligating* the offering of AWAs.⁵⁵ Where these individualised contracts are used, clauses in that university's enterprise agreement are not applicable unless specifically included. It remains very unlikely that an individual academic would successfully negotiate for an academic freedom clause even if they turned their minds to it, tenure and salary components will dominate the agreement. Furthermore, the absence of union representation in the contract negotiations will mean that an academic freedom clause of the type occasionally negotiated for by unions in enterprise agreements will be rare.

It is clear, therefore, that many Australian academics will *not* be able to point to a detailed employment clause protecting academic freedom. Accordingly, it is very important to ascertain whether academic freedom might gain some status in Australian university employment via an implied contractual term.

4 *The Australian law on implied contractual terms in employment contracts*

In 1996 the High Court in *Breen v Williams*⁵⁶ considered the law on implied terms in a case where it was alleged that an implied term existed that a doctor would act in the 'best interests' of a patient, a term which was then argued would include giving the patient access to records kept by the doctor on the patient. The High Court rejected the argument. Gaudron and McHugh JJ provided a summary of the law on implied terms:

⁵⁴ Ibid 130.

⁵⁵ Clause 1 of the Commonwealth Government's *Higher Education Workplace Relations Requirements* (HEWRRs) provides that: 'The HEP's certified agreements, made (or varied) and certified after 29 April 2005, are to include a clause that expressly allows for AWAs to operate to the exclusion of the certified agreement or prevail over the certified agreement to the extent of any inconsistency.'

⁵⁶ *Breen v Williams* (1996) 138 ALR 259.

Leaving aside terms that are presumed to apply because of the custom of a trade or business, the courts will only imply a term in fact when it is necessary to give efficacy to the contract. A term implied in fact purports to give effect to the presumed intention of the parties to the contract in respect of a matter that they have not mentioned but on which presumably they would have agreed should be part of the contract... Other terms are implied by the common law because, although originally based on the intentions of parties to specific contracts of particular descriptions, they 'became so much a part of the common understanding as to be imported into all transactions of the particular description'. Many of these terms are implied to prevent 'the enjoyment of the rights conferred by the contract (being) rendered nugatory, worthless, or, perhaps,... seriously undermined', the notion of necessity being central to the rationale for such an implication.⁵⁷

It can be seen from this judgment that these judges identify three categories. These are terms:

- implied by the common law (*implied by law*);
- necessary to give efficacy to a contract (*business efficacy*); or
- presumed to apply because of a custom of a trade or business (*custom and usage*).

A business efficacy implied term will be implied where it is clear the parties have not spelt out the full terms of their contract and the implication of the particular term is necessary for the reasonable or effective operation of a contract of that nature in the circumstances of a case.

An implied term may be established by mercantile usage, professional practice or a past course of dealings (*custom and usage*) provided it is so well known and acquiesced in that persons making a contract in that situation reasonably can be presumed to have imported it into their contract.

⁵⁷ Ibid 281 (footnotes deleted).

Precisely when a term will be implied by law is less clear, however a term may be implied if enjoyment of the rights under the contract would be rendered worthless without the implication. The High Court has noted that the distinction is that in this category the term does not represent ‘what is taken to have been the intentions of the parties’ but rather is implied ‘by law and as a matter of policy’.⁵⁸ Furthermore, terms which are implied by law apply to all contracts of a particular class or which answer a particular description, whereas a term applied on the business efficacy basis would apply to that contract alone.⁵⁹

As will be discussed, implied terms are difficult to prove in Australia. An implied term will not be included in a contract:

- if the contract provides expressly to the contrary;
- if the purported term is not capable of clear definition;
- merely to make a contract ‘reasonable’;⁶⁰ or
- so as to give contractual effect to clauses in an industrial award or an enterprise agreement, unless the award or enterprise agreement is expressly incorporated by the terms of the contract.⁶¹

(a) Implied by Law

Some of the more obvious duties imposed on employees come about via this implied term. Hence Australian courts will imply terms at

⁵⁸ *Byrne and Frew v Australian Airlines Limited* (1995) 185 CLR 410 (*Byrne and Frew*), [64]-[65] (McHugh and Gummow JJ).

⁵⁹ *Ibid* [68] (McHugh and Gummow JJ).

⁶⁰ In *Scally v Southern Health and Social Services Board* [1941] 4 All ER 563, 572 the House of Lords expressly disclaimed they were doing this.

⁶¹ *Byrne and Frew*, above n 58.

law that employees will obey a lawful command,⁶² have duties of care,⁶³ and obligations of good faith.⁶⁴

Certain employees will also be bound by an obligation at law to act 'professionally'. Hence, in the English case *Sim v Rotherham Metropolitan Borough Council (Sim)*,⁶⁵ teachers were found to have an implied obligation that they would 'cover' classes for other teachers who were absent. Having commented that professionals including solicitors and doctors are employed under contracts which do not detail the professional obligations expected of the employee, Scott J was 'firmly of the opinion that school teachers are members of a profession, are entitled to be so regarded, and ought to be so regarded. They are employed in a professional capacity... School teachers have professional obligations towards the pupils in their schools. Their contractual duties must include at the least the duty to discharge these obligations.'⁶⁶ In his view, the professional obligations of teachers was not to be limited to the impartment of knowledge, and included obligations of discipline and care.⁶⁷

Similarly, university academics have been described as professional employees who owe their universities fiduciary obligations not to profit at the expense of the university and to avoid conflicts of interest and duty.⁶⁸

There is also an implied term at law relating to inventions that:

any invention or discovery made in the course of the employment of the employee in doing that which he is engaged and instructed to do during the time of his employment, and during working

62 *Adami v Maison de Luxe Ltd* (1924) 35 CLR 143.

63 *Printing Industry Employees Union of Australia v Jackson & O'Sullivan Pty Ltd* (1957) 1 FLR 175.

64 *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66.

65 *Sim v Rotherham Metropolitan Borough Council* (1986) 3 WLR 851.

66 *Ibid* 870.

67 *Ibid* 873.

68 *Victoria University of Technology v Wilson* [2004] VSC 33 (18 February 2004) (*Victoria University*) [149] (Nettle J).

hours, and using the materials of his employers, is the property of the employer and not of the employee.⁶⁹

This implied term also applies to academics.⁷⁰

In *Victoria University of Technology v Wilson (Victoria University)*, Nettle J also made the point that where an employee is engaged to conduct research, as in the facts before him, the business of the employer will inform the content of the duty. In this case he held that the duty was informed by the activities of the School where the academics worked, in this case the School of Applied Economics.⁷¹

Similarly, the legislation incorporating the university will inform the research obligations of that university's academics. Legislation incorporating universities in Australia will normally make specific reference to the university's teaching and research functions. Under the *Universities Legislation Amendment (Financial and Other Powers) Act 2001* (NSW) the incorporating legislation of all public universities in New South Wales was amended to insert the following clauses in each university statute in that State:

- (1) The object of the University is the promotion, within the limits of the University's resources, of scholarship, research, free inquiry, the interaction of research and teaching, and academic excellence.
- (2) The University has the following principal functions for the promotion of its object:

⁶⁹ Ibid [104] (Nettle J).

⁷⁰ Ibid. Nettle J noted that Australian law was similar to that applied in the United States Supreme Court in *United States v Dubilier Condenser Corporation*, 289 US 178 amended 289 US 706 (1933) (*Dubilier*) and *Kaplan v Johnson*, 409 F Supp 190, 192 (ND Ill, 1976), rev'd in par, sub nom, *Kaplan v Corcoran*, 545 F 2d 1073 (7th Cir, 1976) (*Kaplan*). In *Dubilier* it was held that an invention belongs to the employee unless the employee was hired to invent that invention. *Kaplan* established that an obligation to engage in research by itself does not establish the employee 'was hired to invent a specific invention that may be made in the course of that research'.

⁷¹ *Victoria University*, above n 68, [109].

... (b) the encouragement of the dissemination, advancement, development and application of knowledge informed by free inquiry.⁷²

Other states do not necessarily make an express reference to free inquiry but do include clause such as this one from the University of Queensland:

The university's functions are--

- (a) to disseminate knowledge and promote scholarship; and
- (b) to provide education at university standard; and
- (c) to provide facilities for, and encourage, study and research; and
- (d) to encourage the advancement and development of knowledge, and its application;...⁷³

This statute ensures that the university *itself* must meet the knowledge inquiry function, and it follows logically that it must so provide those conditions to enable its academics to enable the university to meet its statutory objects. This strengthens the

⁷² See, for example, s 6 of the *University of Sydney Act 1989* (NSW).

⁷³ Section 5 of the *University of Queensland Act 1998* (Qld). The Victorian statutes include a clause such as this one from s 4A of the *Melbourne University Act 1958* (Vic):

The objects of the University include-

- (a)
- (b) to undertake scholarship, research and research training of international standing and to apply that scholarship and research to the advancement of knowledge and to the benefit of the well-being of the Victorian, Australian and international communities;
- (c)
- (d) to serve the Victorian, Australian and international communities and the public interest by-
 - (i) enriching cultural and community life;
 - (ii) elevating public awareness of educational, scientific and artistic developments;
 - (iii) promoting critical enquiry, informed intellectual discourse and public debate within the University and in the wider society...

arguments made for an implied academic freedom term. It would be very difficult to see how a university which did not provide academic freedom to its academics could discharge its statutory teaching and research obligations.

In regard to individual academics it is interesting to note the link between an express term to conduct research and certain other implied terms at law. In *Riverwood International Australia Pty Ltd v McCormick (Riverwood)*,⁷⁴ Mansfield J was prepared to imply a term that an employer, given power to alter a contract via the introduction of new policy, had to act with due regard to the purposes of the contract. This is not dissimilar to the theme that emerges in the House of Lords decision in *Scally v Southern Health & Social Services Board (Scally)*.⁷⁵ There the Court was faced with the difficult question of whether the law will imply a term into an employment contract requiring an employer to take reasonable steps to notify an employee of a valuable right, in this case the right to purchase additional years so as to enhance a pension entitlement. Lord Bridge, supported by the other four Law Lords, held that it was necessary to imply such an obligation on the facts. He did this, not as a term implied by business efficacy to the contract as a whole, but as one which the law will imply 'as a necessary incident of a definable category of contractual relationship' to 'render efficacious the very benefit the contractual right to purchase additional years was intended to confer'.⁷⁶

In *Byrne and Frew v Australian Airlines Limited (Byrne and Frew)* the reasoning in *Scally* was accepted, though the High Court refused to apply the doctrine to read into a contract of employment a condition from an award.⁷⁷

⁷⁴ *Riverwood International Australia Pty Ltd v McCormick* [2000] FCA 889 (4 July 2000). This case and the law on codes of conduct in universities is discussed in further detail in Jackson, 'When Can Speech Lead to Dismissal in a University', above n 3, 139-40.

⁷⁵ *Scally v Southern Health and Social Services Board*, above n 60.

⁷⁶ *Ibid* 571.

⁷⁷ *Byrne and Frew*, above n 58, [81] (McHugh and Gummow JJ).

The House of Lords found in *Malik v Bank of Credit and Commerce International SA (Malik)*,⁷⁸ that there was an implied term at law

to the effect that the bank would not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.⁷⁹

It has been held in Australia that such a term of trust and confidence may be implied in a contract of employment,⁸⁰ though speaking of commercial contracts in *South Sydney District Rugby League Football Club Ltd v News Ltd*, Finn J made the point that ‘Australian law has not yet committed itself unqualifiedly to the proposition that every contract imposes on each party a duty of good faith and fair dealing in contract performance and enforcement’.⁸¹

Putting the implied terms in the decisions of *Riverwood*, *Scally*, and *Malik* together and linking these back to research in a university, as discussed in *Victoria University*, we can say with some certainty that a university employer must act with due regard to the purposes of the contract, one term (normally) of which is that an academic will conduct research. Furthermore, the university without reasonable and proper cause, must not conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust that the academic has under their contract. Applying *Sim* and *Victoria University*, this must include a trust and confidence that

⁷⁸ *Malik v Bank of Credit and Commerce International SA* (1997) 3 WLR 95 (*Malik*).

⁷⁹ *Ibid* 98. The House of Lords has further supported *Malik* in *Johnson (AP) v Unisys Ltd* [2001] UKHL 13.

⁸⁰ Kirby J in the High Court decision in *Concut Pty Ltd v Worrell* [2000] HCA 64 (14 December 2000) seems to have been referring to the *Malik* term when he said: ‘The ordinary relationship of employer and employee at common law is one importing implied duties of loyalty, honesty, confidentiality and *mutual trust*’ (emphasis added). See also, *Gambotto v John Fairfax Publications Pty Ltd* [2001] NSWIR Comm 87 (1 May 2001); *Blaikie v SA Superannuation Board* (1995) 64 IR 145; *Irving v Kleinman* [2005] NSWCA 116; *Heptonstall v Gaskin (No 2)* [2005] NSWSC 30; *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144; *Thomson v Orica Australia Pty Ltd* [2002] FCA 939.

⁸¹ *South Sydney District Rugby League Football Club Ltd v News Ltd* [2000] FCA 1541, [393].

research can be conducted professionally and that the university will not destroy the conditions which enable professional research to occur. Furthermore, the university *itself* has statutory obligations to enable research to be conducted by its community and must meet its statutory objects at law when it enters into and performs its contracts, including its contracts of employment.

This research mutuality is reflected in *Sweezy v New Hampshire* and at law in the related notions of a community (or company) of scholars and membership of a university. At law a university is a company. Indeed some of the very earliest forms of company were communities of learning. A feature of a company is that it has members. The enabling statute of a university will normally describe who those members are, but if it does not, common law may well include the staff and former or present students. Membership is an ancient concept, as demonstrated by the 1723 decision in *King v The Chancellor, Masters and Scholars of the University of Cambridge*.⁸²

Membership has also been crucial in the past for determining whether a visitor has jurisdiction. Hence the dismissal of a cleaner at the university could not attract the visitor jurisdiction but the dismissal of a professor would because it would inevitably involve the rules ‘governing admission to and removal from membership’.⁸³ It is this ancient distinction between governance/membership issues and domestic issues (such as normal goods or services contracts and employment of non academic staff or non full time academic staff) that is still maintained in some Australian university statutes even though the visitorial jurisdiction may have been removed.⁸⁴ In many Australian jurisdictions academic staff are stated in the incorporating

⁸² *King v The Chancellor, Masters and Scholars of the University of Cambridge* (1723) 1 Stra 557.

⁸³ *Thomas v Bradford University* [1987] 1 AC 795, 816, 820 (Lord Griffiths).

⁸⁴ The visitorial jurisdiction has been removed in all universities in New South Wales by the *Universities Legislation Amendment Act 1994* (NSW). On the university visitor in Australia, see: P Whalley and G Evans ‘The University Visitor - An Unwanted Legacy of Empire or a Model of University Governance for the Future?’ (1998) 2 *Macarthur Law Review* 109.

statute to be members of the university,⁸⁵ whereas general staff might not be.

So where does membership take us? The point is a very simple one, unless expressly excluded by statute, university academics have an ancient status beyond that of mere employee. Academic freedom is intrinsically tied up in this status: the community of scholars are vested with the knowledge discovery and dissemination function, this applies to the whole, the university, and to individual parts, the members. Thus, when a statute imposes this duty on the university it is an imposition which also applies to the academic community. If the university chooses to deny rights of academic freedom to a member they may well be denying part of their statutory obligation.

(b) *Business efficacy*

In the course of their judgment in *Byrne and Frew*,⁸⁶ Brennan CJ, Dawson and Toohey JJ summarised the Australian law on business efficacy implied terms from *BP Refinery (Westernport) Pty Ltd v Shire of Hastings (BP Refinery)*:

The implication which the appellants seek to make is based upon the presumed or imputed intention of the parties. In that context, the remarks of the majority in the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1994) 180 CLR 266 are frequently called in aid: '(1) (the implication) must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract'. In laying down those criteria, it was recognised that there was a degree of overlap.⁸⁷

⁸⁵ Typical are s 4 of the *Melbourne University Act 1958* (Vic); s 5 of the *University of Tasmania Act 1992* (Tas); s 4 of the *Southern Cross University Act 1993* (NSW); s 4 of the *University of Wollongong Act 1989* (NSW) which include full time academic staff as members. Less typical are the *University of Western Australia Act 1911* (WA) and the *University of Queensland Act 1998* (Qld) which do not.

⁸⁶ *Byrne and Frew*, above n 58.

⁸⁷ *Ibid* 422.

These judges then referred to and supported the qualification to the above test in the judgment of Deane J in *Hospital Products Ltd v United States Surgical Corporation*,⁸⁸ where he noted that the cases in which the criteria in *BP Refinery* have been applied were cases involving a formal contract, complete on its face. Deane J had rejected a rigid approach where there was no formal contract. In those cases the actual terms of the contract must first be inferred before any question of implication arises. Brennan CJ, Dawson and Toohey JJ continued:

That is to say, it is necessary to arrive at some conclusion as to the actual intention of the parties before considering any presumed or imputed intention. And the test to be then applied was in a later case formulated by Deane J in these terms (See *Hawkins v Clayton* (1988) 164 CLR 539 at 573.):

“The most that can be said consistently with the need for some degree of flexibility is that, in a case where it is apparent that the parties have not attempted to spell out the full terms of their contract, a court should imply a term by reference to the imputed intention of the parties if, but only if, it can be seen that the implication of the particular term is necessary for the reasonable or effective operation of a contract of that nature in the circumstances of the case. That general statement of principle is subject to the qualification that a term may be implied in a contract by established mercantile usage or professional practice or by a past course of dealing between the parties.”⁸⁹

The judges concluded that this was the appropriate test to apply to the facts before them. The question in *Byrne and Frew* was whether a clause in an applicable industrial award was also an implied term in a contract of employment between employers and employees governed by that award. The relevant clause was cl 11(a), which provided:

⁸⁸ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 121.

⁸⁹ *Byrne and Frew*, above n 58, 422.

Termination of employment by an employer shall not be harsh, unjust or unreasonable. For the purposes of this clause, termination of employment shall include terminations with or without notice.

The High Court held that the clause was not incorporated. They held that it was not necessary to imply the ‘harsh, unjust or unreasonable’ award clause for the reasonable or effective operation of the contract of employment in all the circumstances. Accordingly, termination could occur on reasonable notice or summarily for serious breach.

McHugh and Gummow JJ delivered the second judgment in *Byrne and Frew*. These judges also agreed that the award provision could not be read into the contract under this test, applying the *BP Refinery* test and qualifying it in the light of Deane’s ‘reasonable or effective operation of the contract’ statements reproduced above.

(c) *Custom and Usage*

In *Byrne and Frew* McHugh and Gummow JJ considered the *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd (Con-Stan Industries)*⁹⁰ custom and usage test. They said:

The question is always whether the general notoriety of the custom makes it reasonable to assume that the parties contracted with reference to the custom so that it is therefore reasonable to import such a term into the contract. Where there is such an established usage, ‘the courts are spelling out what both parties know and would, if asked, unhesitatingly agree to be part of the bargain’ (*Liverpool City Council v Irwin* (1977) AC 239 at 253).

Further, whilst it is not essential that the custom be universally accepted, it must be so well known and acquiesced in that persons making a contract in that situation reasonably can be presumed to have imported it into their contract.⁹¹

⁹⁰ *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226.

⁹¹ *Byrne and Frew*, above n 58, 440.

McHugh and Gummow JJ found that this was not the case on the facts: there was no evidence of custom 'whereby, as between persons in the position of the respondent and the appellants, the provisions of cl 11(a) of the Award were carried into their contracts of employment.' Furthermore, they could find no:

evidence that such a custom was, at any relevant time, so well known and acquiesced in that all parties of the relevant description can reasonably be presumed thereafter to contract on the footing that cl 11(a) became a term, and to modify existing contracts so as to include it.⁹²

Brennan CJ, Dawson and Toohey JJ noted that the existence of a custom or usage that will justify the implication of a term into a contract is a question of fact and also quoted the reasonable assumption test from *Con-Stan Industries*.

Custom and usage implied terms have also been described in other cases dealing with employment contracts.

In *Turner v The Australasian Coal and Shale Employees' Federation and Elcom Collieries Pty Ltd*,⁹³ the Full Federal Court had to decide whether there was a well recognised custom and practice in the building industry which implied a term that an employee had to be a member of a particular union before commencing work. The Court held that for this term to be implied both parties had to be familiar with the term. On the facts it was not shown that both parties were involved in the industry and 'that each would be familiar with and accept the usage.'⁹⁴ The term was not implied into the contract.

⁹² *Byrne and Frew*, above n 58, 441.

⁹³ *Turner v The Australasian Coal and Shale Employees' Federation and Elcom Collieries Pty Ltd* (1984) 6 FCR 177.

⁹⁴ *Ibid* [7].

In *Roberts v Murlar Pty Ltd*,⁹⁵ the Federal Court again had to determine a ‘no ticket, no start’ dispute. Counsel for Roberts, citing the High Court decision in *Con-Stan Industries* submitted that a term was implied into the contract of employment that Roberts would belong to an appropriate union. This time it was accepted that each party was well aware of the practice. Pincus J refused to include the term because he held that the importation of a term by custom would require that Roberts implicitly promised, in the event of deregistration of his union, to join another union, or perhaps a number of other unions, to facilitate his continued employment. There was no evidence of this on the facts.⁹⁶

(d) Business Efficacy and Custom and Usage Implied Terms in Universities

It is not easy to predict when a court will imply a term. Creighton and Stewart make the point that:

So long as a term must be shown to be ‘necessary’ rather than just ‘reasonable’, neither employees nor employers will find it easy to mount a persuasive case for the incorporation of any given term into a contract of employment.⁹⁷

With this in mind can any particular implied terms relating to academic freedom be said to emerge in employment contracts? Elsewhere this author has conducted a far more detailed study of real or purported academic freedom disputes in Australian universities.⁹⁸ Below, a number of these events are first described and then analysed in a legal context to ascertain what they reveal about academic freedom and whether any form of business efficacy or custom and usage term can be discovered.

⁹⁵ *Roberts v Murlar Pty Ltd* [1986] FCA NSW G164 of 1986 Trade Practices 16 IR 199 (Pincus J, 22 August 1986).

⁹⁶ *Ibid* [41].

⁹⁷ B Creighton and A Stewart, *Labour Law: An Introduction* (3rd ed, 2000) 222.

⁹⁸ J Jackson, *Legal Rights to Academic Freedom in Australian Universities* (Unpublished PhD thesis, University of Sydney, 2002) especially chapters 3 and 4.

III A SELECTION OF ACADEMIC FREEDOM EVENTS IN AUSTRALIAN UNIVERSITIES

A *The Events*

1 *Professor Marshall-Hall*

Professor Marshall-Hall was foundation music professor at the University of Melbourne and head of the University Conservatorium. In 1897 Marshall-Hall published poems entitled *Hymn to Sydney*, and *A Book of Canticles*. The following year he followed this with *Hymns, Ancient and Modern*. He also delivered a speech at the Melbourne Liedertafel in which he praised war and attacked popular concerts. Shortly after this, the *Argus* newspaper attacked him and his poetry as indecent and impious. The churches launched further attacks. When primary and secondary school principals (at least 78 of them) complained about how this could corrupt the beliefs of his students,⁹⁹ the University, after much debate, did not renew his five year appointment when his initial contract expired. He was the only non-tenured professor at Melbourne at the time.

In his defence he claimed:

The rest of the charge resolves itself into the question of freedom of thought and public speech, the value of which, in every age, has only been appreciated when directed against current views of religion, politics, and morality, and which, it is unnecessary for me to remind you, is the right of every citizen, and not the exclusive privilege of the trade or profession which arrogates to itself the name of the Press.¹⁰⁰

He also regarded his right to speak as duty:

On such grounds, however, as you may disapprove of my opinions, the mode in which I give them utterance, or the wisdom

⁹⁹ University of Melbourne, *Council Minutes*, 11 June 1900, University of Melbourne Archives.

¹⁰⁰ Letter from Marshall-Hall to Council, 11 August 1898, University of Melbourne, *Council Minutes*, 12 August 1898, University of Melbourne Archives.

of uttering them at all, you must at least credit me with no flippant spirit of mockery, but an earnest desire to do what I conceive is my duty.¹⁰¹

He wrote a second letter to Council in which he continued this theory on the right and duty of a university professor to speak:

The notion that such expression by a Professor not ex cathedra but as a private citizen can be injurious to the University is possible only by forgetting that the greatest service a University can render to the community is to be the model of toleration in opinion and the champion of freedom of thought. There is no toleration, and no freedom where men must echo conventional views of life, religion, or politics, or hold their peace. I am aware however that there are some who think that freedom is inconsistent with the interests of the University; with them must rest the grave responsibility for a determination inimical to its highest functions.¹⁰²

Those opposing him, including Dr Morrison on the University Council, recognised the ‘reasonable liberty’ of teachers to give ‘legitimate expression to their views.’¹⁰³ Nevertheless, Morrison moved a motion of summary dismissal against him because his conduct had gone beyond ‘reasonable toleration.’ Importantly, the motion was lost and the University did not dismiss the outspoken academic, though he was told that he would not be re-appointed. Nevertheless, he worked for a further two years. Some years later he was reappointed.

In this dispute both sides recognised the existence of a right of an academic to speak out; nevertheless, they differed as to its scope. Indeed Council and Senate at the University of Melbourne subsequently argued about, but could not agree on, a suitable form

101 Ibid.

102 Ibid.

103 University of Melbourne, *Council Minutes*, 24 October 1898, University of Melbourne Archives.

of words to be inserted into the professors' statute. Council did not accept the words in the Senate resolution:

Provided that the fact that views expressed by a Professor are opposed to or in favour of any religious political philosophical or scientific doctrine shall not be deemed to justify a finding that a Professor expressing such views is not a fit and proper person to hold his office.¹⁰⁴

Had these words been adopted by Council there would have been an express form of words suitable as a model for other universities. Instead we had to wait over 90 years before universities again attempt to define the right in codes of conduct.¹⁰⁵

Significance for implied terms discussion

Hall's was an obvious academic freedom dispute, and while those words are not used by intramural or extramural participants in the debate and had not yet fallen into popular jargon, Marshall-Hall appears to be the first Australian academic to publicly characterise academic speech as duty.¹⁰⁶

The principle which he strongly asserts is one that can be linked to business efficacy: If the matter had gone to a modern court, Marshall-Hall would have claimed that the implication and enjoyment of a speech right is necessary for the reasonable or effective operation of an academic employment contract.

It will be recalled that for a term to be implied it must be capable of clear expression. This first academic freedom battle, or the discussion it generated in the University of Melbourne does *not* assist us in defining the extent of any potential implied speech term.

¹⁰⁴ University of Melbourne, *Council Minutes*, 6 November 1899, University of Melbourne Archives.

¹⁰⁵ On the legal status of codes of conduct, see Jackson, 'Express Rights to Academic Freedom in Australian University Employment', above n 4.

¹⁰⁶ Though the university could have argued that much of the controversial poetry was not part of his duties as professor of music.

2 Professor Wood

If the Marshall-Hall matter could be legally argued in a business efficacy context, Professor Wood's dispute is better remembered for what it, and in particular what *he*, says about custom or tradition. Business efficacy also appears in this dispute.

Professor Wood was appointed to the Challis Chair in History at the University of Sydney in 1891, having emigrated from Britain. In October and November 1899, he publicly stated his opposition to the Boer War which had broken out that year.¹⁰⁷ Subsequently, he and fellow Professor MacCallum engaged in vigorous correspondence in the Sydney newspaper, *The Telegraph*, concerning the war. MacCallum took a pro-war stance, but Wood was strongly against the war.¹⁰⁸ In late January 1902, Wood took the further step of being involved in the establishment of the Anti-War League, a group strongly opposed to the war. At this time, Wood spoke on a number of occasions to various groups including the Anti-War League, the Political Labour League and a conference of the Australian Worker's Union.¹⁰⁹ Wood's speeches and writings came to the attention of James Inglis, a very prominent Sydney businessman and New South Wales government minister. Inglis wrote on two occasions to the University of Sydney complaining about Professor Wood. Professor Wood wrote a lengthy reply to Senate as a result of an invitation from its meeting of 3 February 1902. He went beyond the matters requested in the Senate resolution. He sought: (i) to know what he had been accused of, a copy of the letter from James Inglis and a written statement as to why the accusations constituted a 'very serious matter'; and (ii) the right to respond in writing to charges brought against him by Inglis or members of the Senate. In great detail he wrote a convincing argument that traditionally he, as

¹⁰⁷ See, for example, his 'Letters to the Editor', *Daily Telegraph* (Sydney), 19 October 1899 and 11 November 1899 (University of Sydney Archives, P/13 Archives of the Family of George Arnold Wood, Commonplace Book 2).

¹⁰⁸ Copies of some of this correspondence is contained in University of Sydney Archives, P/13 Archives of the Family of George Arnold Wood, Commonplace Book 1.

¹⁰⁹ R M Crawford 'A Bit of a Rebel' *The Life and Work of George Arnold Wood* (1975) 186-7.

a university professor, could expect freedom of speech rights unless they were expressly withdrawn:

I received my historical education at two great English Universities, the Victoria University of the North of England, and Oxford University... It was therefore natural that I should take perhaps too much for granted those principles as to freedom of speech which have in modern times been respected in these and, I think, in most if not all other British Universities. When I became a candidate for the Chair of History in Sydney University, I was a member of the University in which Professor Freeman was the Regius Professor of Modern History; and I was connected with two colleges, Balliol and Mansfield, presided over respectively by Professor Jowett and Dr Fairbairn. Under such circumstances it became a habit of mind with me to imagine that a University teacher was free to criticise the policy of the British Government; and it was not likely to occur to me that such criticism would be taken as evidence of lack of patriotism, and 'anti-British sentiment'. Even during the present heated controversies, the principle of liberty of speech has been guarded with the utmost jealousy in both of the two great English Universities with which I am connected.¹¹⁰

Wood also argued strongly for the notion of speech as duty: 'I have therefore thought it my duty, as Professor of History, to make a careful and scientific study of recent and passing events.'¹¹¹ The Prime Minister, Edmond Barton, added his logic and weight to the right of a professor to speak out.¹¹² Students, members of the public,

¹¹⁰ Handwritten undated draft of Letter from G A Wood to the Registrar, 1902 (University of Sydney Archives, P/13 Archives of the Family of George Arnold Wood, Commonplace Book 2).

¹¹¹ *Ibid.*

¹¹² Letter from Edmond Barton, Prime Minister, to the Chancellor of Sydney University, Dr MacLaurin, 2 May 1902 (University of Sydney Archives, MacLaurin papers, P/14 Series 1).

some elements of the press, the Labor Party and other academics joined in the demand for Wood's right to speak.¹¹³

On 3 March 1902, the Senate of the University of Sydney resolved:

That in the opinion of the Senate, the statements contained in Professor Wood's letters and speeches relating to the South African war, especially those alleging that Lord Kitchener hopes to end the war by destroying the Boer women and children, are unworthy of a Professor of History, whose utterances ought to be marked by strict impartiality and freedom from passion, and further that such remarks are highly reprehensible inasmuch as they tend to encourage the enemies of the country and to hinder the establishment of a just and honourable peace, and also to impair the value of his teaching in the University.¹¹⁴

Ironically, the Senators in resolving this way exercised their speech rights in favour of the war. Their statement seems more a public relations statement showing support for the war and for the establishment of a just peace than designed to show its displeasure for Wood's speaking. The Senate resolution suggests that Professor Wood's words are unworthy, the Senators do not say that Wood is unworthy. He is rebuked for what he said. He is neither suspended nor prevented from speaking again and not required to appear before Senate.

The resolution of 3 March was not the end of the Wood matter. At the Senate meeting of 5 May 1902, a new complaint had been made by a J A Dick and the secretary of the British Empire League about an article Professor Wood had published in the *Manchester Guardian*. Any decision on this was postponed at that meeting and also at the meetings on 2 June and 7 July 1902.¹¹⁵ The matter

¹¹³ See, for example: 'Editorial', VIII(2) *Hermes*, 31 May 1902, 4-5; *The Bulletin*, 17 May 1902; Crawford 'A Bit of a Rebel' *The Life and Work of George Arnold Wood*, above n 109, 223, footnotes 38, 42.

¹¹⁴ University of Sydney, *Senate Minutes*, 3 March 1902, University of Sydney Archives, 251.

¹¹⁵ University of Sydney, *Senate Minutes*, 5 May 1902, 2 June 1902 and 7 July 1902, University of Sydney Archives.

appears to have been dropped from Senate discussion thereafter, and in any case the Boer War had come to its conclusion.

The Prime Minister's intervention is an important first step in establishing the continuation of the British tradition in Australia. It should be remembered that Wood is not dismissed for his conduct despite many demands for that outcome. We will see other examples including the John Anderson and Harry Anderson matters where university senates or councils have gone no further than a light reprimand, nothing more than an ineffective sop to public opinion.

Significance for implied terms

If a rationale was ever needed for a right to academic freedom it emerges from the Wood case. He was one of the first in Australia to speak out against concentration camps created by the British in a very popular war. History has proven the history professor to be right re the horrors of those camps, yet his informed speaking of truth could have destroyed his career at the University of Sydney. The fact that many years later that we are no longer saying 'what if he is right?', but rather 'he was right' provides the most fundamental rationale for an implied right of speech in a university, it is a necessary ingredient in the discovery of new knowledge in the university. As quoted above, Wood, like Marshall-Hall, turned to the express terms of his contract, arguing essentially that in a university any denigration of the right of speech should be made expressly. This too is consistent with the right of the university to employ on terms of its own choosing provided these are not *ultra vires* its statutory objectives. The propositions advanced in this paper concerning implied terms cannot apply where a university lawfully prohibits speech of a particular kind.

Because universities are in the business of knowledge discovery and dissemination and their statutes generally provide for this, they must not destroy those employees who may be the first to offer the new insight on a particular problem, or academics who promulgate against *short term* popular viewpoints. This then is 'business efficacy' within a university context. Universities that do not deter such speech are giving force to their statutory research obligations

and academics who speak out in a considered way can be said to be acting professionally.

There is a second reason why the Wood matter is important legally: Wood, as an historian, importantly provides the evidence of a customs and usages link between British traditions of freedom of speech in universities and the University of Sydney:

Living then in the free and liberal atmosphere of Oxford University, it was natural to me to imagine, when I received my appointment to the Chair I at present hold, that the Senate of Sydney University would, like the governing bodies of other British Universities, allow to its teachers all those privileges of British citizenship which were not explicitly excepted by the written conditions of appointment.¹¹⁶

Wood firmly indicates that he believed himself to be participating in a 'well known and acquiesced in custom' to use the language of the implied terms cases. His only doubt was whether the custom was established in Australia (as opposed to the United Kingdom) at the time. Accordingly, the Wood matter has evidentiary significance for a litigant seeking to establish an implied term based on custom.

3 *Professors Irvine and Brennan*

Professors Irvine and Brennan were dismissed from the University of Sydney in 1922 and 1925 respectively, basically for offences against the prevailing public morality. In the former case, the precise nature of Irvine's 'transgression' was not made clear, whereas in the Brennan case it was adultery.

The departure of the left wing economist Professor Irvine does not assist in the establishment of implied rights to academic freedom. At best the case might show that some members of the University of Sydney Senate had realised by 1922 (perhaps *because of* the Wood matter) that it was outside tradition to even attempt to dismiss an

¹¹⁶ Handwritten undated draft of Letter from G A Wood to the Registrar, 1902 (University of Sydney Archives, P/13 Archives of the Family of George Arnold Wood, Commonplace Book 2).

academic for what he had to say or teach. It was far better to discover other conduct and use this as a means of forcing the removal of the academic who had bitterly upset the forces of large business. A prominent business man had written to a member of the Senate (who subsequently met with the Vice Chancellor) indicating that a Diploma in Economics from Sydney University was a 'disqualification for one seeking employment with this company'.¹¹⁷ Another business man stated at the time:

In reading Professor Irvine's thirteen articles on the future of finance, it is difficult to make a selection from the extraordinary mass of false economics he puts forward...

One stands simply appalled when faced with such ignorant rubbish written by a man supposed to be teaching economics at the University...

Truly Professor Irvine is a dangerous man to have as Professor of Economics at the University. Brainy young men will be disgusted with his teaching, while those of poor mentality will be encouraged to indulge in foolish if not dangerous ideals.¹¹⁸

If Irvine was removed even in part because of his teachings and writings, his removal from the University of Sydney is a sad chapter in academic freedom in Australia.

The danger of removing academics for immoral behaviour was that it set a very bad precedent for the University when it came to the much more revered Professor Brennan, who was forced to go because of his adultery, and the University was caught by its own treatment of Irvine.¹¹⁹ The less than subtle means to force Irvine's departure had a second and very unintended victim, Brennan.

¹¹⁷ Letter from General Secretary MLC to Sir Henry Bradden, 24 February 1921 (*Some papers re Chair of Economics 1912 - Professor Irvine*, University of Sydney Archives G3/13).

¹¹⁸ Letter from R D Miller to Mr Garvan, 24 February 1921 (*Some papers re Chair of Economics 1912 - Professor Irvine*, University of Sydney Archives G3/13).

¹¹⁹ University of Sydney, *Senate Minutes*, 15 June 1925, University of Sydney Archives, 448.

4 *Dr Heaton*

Considered in detail elsewhere,¹²⁰ there is a suggestion that the non appointment of Herbert Heaton to a chair at the University of Adelaide in 1925 had a significant amount to do with the non acceptance of his economic views amongst business leaders in South Australia at the time. The evidence is not clear, though Heaton himself provides a statement, which demonstrates the business efficacy of academic freedom within a university. It further shows how well understood that concept was 80 years ago by an academic who felt free to publish his views in *The Adelaide Advertiser*, views which went unchecked by the University. Speaking in 1923, well before the Nazi destruction of the German universities, he demonstrates the necessary link between academic freedom, teaching and research:

And if you ban teaching on controversial subjects outside the university, you must shut down such teaching inside as well, for ideas and books will get about, no matter how you try to prevent it. You must stop the teaching of philosophy, for it discusses questions which border on theology; you must abandon history, for people have theories and interpretations of history; chemistry must be taboo, for it teaches things which are of use in making poison gases for the next war; biological studies must be stopped, for they are groping round trying to upset our old ideas about the origin of life; and sixty years ago geology would have been anathema just as all talk of evolution is to some folk in Kentucky to-day. Even literature is a bit suspect, for Milton had strange views about freedom of speech, Carlyle and Ruskin said unpleasant things about modern industry, and most modern writers are socialists.¹²¹

Accordingly, a university which introduces controls over its academics in matters as described by Heaton imposes controls over

¹²⁰ H Bourke, 'Herbert Heaton and the Foundation of Economics at the University of Adelaide, 1917-1929' in F B Smith and P Crichton (eds), *Ideas for Histories of Universities in Australia* (1990) 58, 64-5; Jackson, *Legal Rights to Academic Freedom in Australian Universities*, above n 98, chapter 3.

¹²¹ Herbert Heaton, 'Reply to Mr McGregor', *The Adelaide Advertiser* (Adelaide), 1 January 1923.

the discharge of its own functions. Restrictions on the research or teaching activities of members of the university community so restricts the community's broader discovery objective. The university must provide its academics with the opportunity to meet their contractual obligations to discharge their knowledge discovery function so as to enable the university to meet its statutory obligation to do likewise.

Is this then an unrestricted license for an academic to say and do whatever he or she likes? The answer, as will next be shown in the discussion of Anderson, is unequivocally *no*.

5 Professor Anderson

Of some significance are the separate 1931 and 1943 matters concerning the philosopher, Professor Anderson, at the University of Sydney. On 9 July 1931, he delivered an address at that University where he said:

But such sayings as 'your King and Country need you' appeal to prejudice and superstition and will be criticised by free thinkers. War memorials too are political idols and the keeping up of religious ceremonies connected with them are merely fetishes for the purpose of blocking discussion. They prevent critical thinking about the character and conditions of the last war and thus about war and social relations in general.¹²²

His speech was widely reported in the press and caused a public and political outcry.¹²³

He was censured for these comments, yet the 1931 Senate resolution contains a clear recognition of academic freedom by university management, though one with limits. In 1931 the Senate commenced its censure of Anderson by 'asserting the right of free speech in universities...' but then noting he had transgressed 'all

¹²² Quoted in A J Baker, *Anderson's Social Philosophy: The Social Thought and Political Life of Professor John Anderson* (1979) 90.

¹²³ *Ibid* 91.

proper limits and required him to abstain from such utterances in the future.’¹²⁴ The significance is that this statement represents the first academic dispute in Australia where a principle of free speech in a university is asserted by a university *itself*, as opposed to claims made by its academic employees. This then is some evidence of a free speech term in universities though, one limited by the Senate’s subjective views on propriety.

There is other evidence for an implied term arising out of the 1931 Anderson matter. The speech of the Hon C E Martin in the New South Wales Legislative Assembly defending the actions of Anderson states a rationale for an implied term arising traditionally, and also as a necessary incidence of university business, that is, business efficacy:

If the University does not stand for freedom of expression of every possible philosophical attitude on every question concerning society, then there is no need for a University, and it is time the University was destroyed; for it would have lost the whole of its traditional backing and everything that Universities have stood for down through the ages, and it would have lost that which is most important to a university, the traditional right of complete free speech.¹²⁵

Despite the censure, another furore was to occur concerning Anderson. In 1931 the member for Clarence, Henry, had virtually goaded Anderson to attack religion: In answering his own question, ‘Why did not this professor go farther and say that religion was fetish...’, the member said: ‘Because he did not dare to attack religion openly.’¹²⁶ Whether he was accepting Henry’s challenge is not known, but Anderson was in trouble in 1943 because of widely reported statements he made on the teaching of religion in schools. These comments did not come in the course of his teaching at the

¹²⁴ University of Sydney, *Senate Minutes*, 20 July 1931, University of Sydney Archives.

¹²⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 4 August 1931, 4967.

¹²⁶ New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 September 1931, 5819.

University but in an address he gave to the New Education Fellowship, on 1 April 1943, in which he was reported in the press as saying:

Religious training in school could result in political exploitation... teachers should resent the introduction of religion into the curriculum... religious doctrines are a direct attack on a child's commonsense... religious instruction prevents the child from becoming a solid and critical thinker... it will undermine his understanding of things in general. The teaching of religion has an important political character because it promotes an extension of credulity, which is a very desirable thing from the point of view of the ruling order...'¹²⁷

This caused an immediate political reaction: on 6 April 1943, the New South Wales Legislative Assembly adopted without opposition the following resolution:

- (1) That in the opinion of this House, certain statements relative to religion and education made by Professor John Anderson, Professor of Philosophy, Sydney University, in the course of an address to the New Education Fellowship on 1st April 1943, and subsequently published in the Press, are unjustified, inasmuch as they present a travesty of the Christian religion and are calculated to undermine the principles which constitute a Christian State.
- (2) That the terms of this resolution be remitted by Mr Speaker to the Senate of the University of Sydney.

Seven days later, a better defence of Anderson was made in the Legislative Council. Nevertheless, that Council resolved (22 ayes to 15 noes) on 13 April 1943:

- (1) that the attention of Senate of the University of Sydney be drawn to the fact that one of the purposes for which the University

¹²⁷ Extracts from the *Daily Telegraph* (Sydney), 2 April 1943, quoted by Sir Henry Manning, MLC in New South Wales, *Parliamentary Debates*, Legislative Council, 13 April 1943, 2317.

has been established and is supplied by Parliament is the advancement of religion and to the other provisions of the University and Colleges Act, 1900 - 1937, particularly section 18 thereof.

(2) that this House requests its representative on the University Senate (Sir Henry Manning) to bring the above matters before the Senate (as the body controlling the appointment of teachers) with a view to obtaining the opinion of that body as to what limits it considers should be observed by the teaching staff of the University on religious or other controversial matters.

Fully informed of the parliamentary debate in both chambers, the Senate considered the resolutions of Parliament on 3 May 1943. It resolved:

As regards the first, it is laid down in the University and University Colleges Act that no religious test shall be applied to the teachers or the students of the University and yet, without it, it is manifestly impossible to ensure that the views put forward by teachers and students will always be generally acceptable. The Senate desires to affirm its conviction that no such test should be imposed. And remembering as it does, the results which have followed the regimentation of universities in other parts of the world, it is also strongly of the opinion that nothing but harm would follow the stifling in a university of the spirit of free inquiry. As regards the imposing of limitations, the Senate has in the past relied, and must continue to rely, on the intellectual integrity, and the good taste and the good sense of its staff to approach all problems in an objective, disinterested, and scientific a spirit as possible, and so to state and argue them so as not to inflame people's minds to no good purpose.¹²⁸

The Senate resolution is both a celebration of academic freedom and the independence of the University, coming as it did 12 years after the 1931 resolution which purported to, but did not, uphold freedom of speech in the University. Importantly, the Senate ignored the fact

¹²⁸ University of Sydney, *Senate Minutes*, 3 May 1943, University of Sydney Archives, 372-4.

that this was the second time his speech was before it for resolution, and that the earlier resolution had required him ‘to abstain from such utterances in the future’. It should be remembered that ‘such utterances’ had included attacks on religion by this man, which was the very subject of his second return to the Senate.

Instead, the Senate resolution makes no mention of the 1931 resolution, and in asserting that ‘nothing but harm would follow the stifling in a university of the spirit of free inquiry’ reveals in this, the third very serious academic freedom matter before the Senate of the University of Sydney, a new maturity, and an awakening that the stifling of expression in its academics can destroy the very heart of the university function, that is ‘free inquiry’. No doubt the Nazi destruction of the great German universities implied in the resolution had caused the Senate to realise just how fundamental freedom of speech among academics is to both the University and to its academics.

The 1943 treatment of Anderson by the University of Sydney Senate completes the trilogy of very public cases that the University had to deal with in the first half of the 20th century. The 1943 matter is important on another front. This time there was no Prime Minister, or supportive Labor Party to defend a professor, indeed both Houses of Parliament were out for blood. Faced with this attack, the Senate reached a new independence and Sydney University a new maturity.

Significance for implied terms

The *BP Refinery* case required that an implied term ‘must be capable of clear expression.’ This resolution of the University Senate, as the governing body of the University of Sydney, is very important because it addresses the question of definition. There is, the Senate tells us, a spirit of free inquiry in a university governed by intellectual integrity, objectivity, disinterest and scientific inquiry. Cleverly approaching the problem in this way, the University accepts academic freedom as essential for the University and a right of its staff, providing limits no longer based on subjectivity, as in 1901 and 1931, but on criteria used to measure academic performance.

On the Senate's definition, it is not an exercise of academic freedom to act without integrity or without professionalism, for example to defame, speak untruth or be non objective or unscientific, or colour results to produce a preferred outcome or engage in hate speech, or to be sensational for sensation's own sake.

Accordingly, we can surmise that attacks by University of Sydney academics on church, state or the University itself are legitimate, provided these professional standards of integrity and science are met. The tests applied on speech are similar to tests applied on all academic conduct, whether that is preparation or delivery of a lecture, the conduct of a scientific experiment or the writing of a journal article in the social sciences. Accordingly, academic freedom is capable of definition.

There is also a link between academic freedom, professionalism and misconduct. Thus a professor who faked his experiments or lied about the policy of the university or the standards of her colleagues could hardly pretend to do so under some cloak of academic freedom. Such a professor is engaging in misconduct of the most serious kind. None of this is adventuresome; it flows from the link between university and its pursuit of knowledge through the work of its academics.

The University of Sydney resolution is not dissimilar to aspects of the 1940 AAUP Statement which, inter alia, required that academics should 'at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others' and to be 'careful not to introduce into their teaching controversial matter which has no relation to their subject'.¹²⁹

The 1943 Anderson matter brought together quite a significant coalition of thought evidencing academic freedom. In addition to those from the Senate, other influential statements were made: A B Piddington QC who pointed to the inhibition that a limitation on speech would place on a University,¹³⁰ the Lecturers Association

¹²⁹ AAUP, *1940 Statement of Principles on Academic Freedom and Tenure* in 'Symposium on Academic Freedom', above n 10.

¹³⁰ A B Piddington, Open letter to Senate, 28 April 1943 (University of Sydney Archives G3/158, Personnel file of John Anderson 1, 2).

spoke of academic freedom as of duty;¹³¹ and the Students Representative Council spoke of the ratio essendi of the University as being its complete freedom of expression.¹³² Linking this to protection of the nation, the Australian Association of Scientific Workers (after alluding to Fascist regimes in Europe) spoke of scientific method, and universities as centres of learning and knowledge.¹³³

All of these are business efficacy arguments going to the very heart of an academic contract and the objectives of the university and linking the truth discovery role to the protection of the democratic ideals of the nation.

6 *Professors Orr and Steele*

The most well known Australian cases on the summary dismissal of academics, Professor Orr at the University of Tasmania and Professor Steele at the University of Wollongong, add little to the discussion of implied rights to academic freedom or to the definition of academic freedom. They are highly relevant on the issue of measures to protect academics against summary dismissal.¹³⁴

Outside of the court the Orr matter was argued for many years as an academic freedom case but within the court it was seen as nothing more than a case of inappropriate sexual relations between a staff

¹³¹ Letter to the Vice-Chancellor from the Lecturers' Association, 22 April 1943 (University of Sydney Archives G3/158, Personnel file of John Anderson).

¹³² Letter to the Vice-Chancellor from the Student's Representative Council, 28 April 1943 (University of Sydney Archives G3/158, Personnel file of John Anderson).

¹³³ Letter from the Australian Association of Scientific Workers NSW Division to the Chancellor, 30 April 1943 (University of Sydney Archives G3/158, Personnel file of John Anderson).

¹³⁴ This issue is covered in detail in J Jackson, 'Orr to Steele: Crafting Dismissal Processes in Australian Universities' (2003) 7 *Southern Cross University Law Review* 220.

member and a student.¹³⁵ There are no statements about academic freedom in the litigation and nothing on the role and function of a university. The case makes it clear that an academic is a mere employee who can be dismissed on notice or for misconduct, in this case defined as sexual relations with a student.

The broader dispute (as opposed to the court cases) certainly had widespread implications for universities. Specifically, it caused universities to look carefully at their procedures for dismissal, the importance of which was, at the time, best characterised by Wootten:

Accordingly every case of the dismissal of a professor raises a question of academic freedom, insofar as the question arises whether the dismissal was 'possible only through some definite form of judicial procedure'.¹³⁶

On 26 February 2001, Associate Professor Ted Steele was dismissed without notice by the University of Wollongong. The Vice Chancellor's dismissal letter refers to statements made by Steele in the press to the effect that Steele 'had been told/instructed to increase the grades of honours students.' According to the Vice Chancellor, Steele did not substantiate the claims. The Vice Chancellor's letter asserts that he refused a request from his head of department 'to correct the public record'. The Vice Chancellor's letter further asserted that Professor Steele responded to his head of department with a letter circulated widely referring to 'deeply flawed process of honour's assessment', 'sham process of honours assessment' and 'shonky marking practices'.¹³⁷

Despite the obvious academic freedom implications of such claims, including the question whether an academic has the right to go public on such concerns, the litigation proceeded solely on the

¹³⁵ *Orr v University of Tasmania* [1956] Tas SR 155; see also, *Orr v University of Tasmania* [1956] (Unreported, Matter Number 278/1956, 19 November 1956) for the full report of the case; and *Orr v University of Tasmania* (1957) 100 CLR 526 for the High Court appeal.

¹³⁶ J H Wootten 'The Orr Dismissal and the Universities' (1957) 1(2) *Quadrant* 25, 26.

¹³⁷ National Tertiary Education Union, *NTEU National Industry Bulletin* [April, 2001] 2.

interpretation of the University's enterprise bargaining agreement. The University lost the case and the subsequent appeal, the Full Federal Court finding:

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.¹³⁸

7 Harry Anderson

The situation Harry Ross Anderson found himself in at the University of Queensland had close parallels to that of his namesake, Professor Anderson, at the University of Sydney. In both cases there was extensive parliamentary pressure placed on the University to remove the 'offending' academic, neither university did. The cases represent victories for both university autonomy and academic freedom.

The controversy surrounding Anderson arose in October 1953 and concerned comments he made in relation to the *Printers and Newspapers Bill* which was at the time going through the Queensland Parliament. Anderson was at the time President of the Queensland Civil Liberties League, and in that capacity prepared a report on the Bill, which was distributed among parliamentarians. This generated an unprecedented attack from the Attorney-General of Queensland who attacked Anderson's teaching methods in addition to criticising his comments on the Printers Bill. He made these comments:

I have one other question to ask Mr Anderson through *The Courier - Mail*. I am informed that Mr Anderson did employ one section of his students in preparing a detailed list of Ministerial powers contained in Queensland statutes. I would like to know what that

¹³⁸ *University of Wollongong v National Tertiary Education Industry Union* [2002] FCAFC 85 (Unreported, Wilcox, Ryan and Conti JJ, 28 March 2002) [35].

has to do with a lecture in law. Whilst this information in detail may be valuable for the purposes of Communist propaganda, I suggest that it serves no purpose in the training of law students.¹³⁹

This becomes the first modern academic freedom dispute involving classroom conduct and was treated very seriously by the Vice Chancellor who obtained a legal opinion from J S Hutcheon QC. This opinion and the response of the governing body, the University Senate are important because they go to the elusive academic freedom definitional question.

Significance for implied terms

Hutcheon QC believed that to establish misconduct on the facts there would be a need of a lack of bona fides. He also invoked a test of disgraceful or dishonorable conduct.¹⁴⁰ He could find no fault in Anderson. His opinion does not mention academic freedom though it impliedly recognises a right to speak. In this way the reasoning is close to that of the University of Sydney Senate in the 1943 Anderson case: an acceptance of a right to speak but a testing of that behaviour in the same way all other employee conduct is tested, against criteria for misconduct for an academic.

In accepting Hutcheon's advice to take no action against Anderson, the Senate discussed academic freedom:

during the discussion the question of academic freedom was raised and an opinion was advanced that the University stand firm in the tradition of the Universities in respect of academic freedom.

Other members expressed the view that members of the University should be seized with a sense of responsibility when making a public statement as the public think a University member who speaks on a particular subject is the authoritative voice of the University on that subject.

¹³⁹ Queensland, *Official Record of the Debates of the Legislative Assembly*, 8 October 1953, vol 206, 629.

¹⁴⁰ J S Hutcheon QC, *Opinion 2*, November 1953, Inns of Court, Brisbane (University of Queensland Archives S135, Permanent Staff Files).

The Vice Chancellor, in his remarks, expressed the view that if the staff, as a staff, desires to take any action in respect of a public statement in regard to academic freedom, it is open to the staff to make its own public statement and he did not think that the Senate would restrain them from making that statement, but he said, they would make that statement on their own authority.¹⁴¹

Two matters emerging from the Senate discussion are important.

The first is a reference to academic freedom as tradition. This provides further evidence of its acceptance as custom by the governing body level of an Australia university.

The second matter required academics to have a sense of responsibility when they make public statements because the public may erroneously assume that the academic speaks for the university. This is a matter compatible with, and indeed critical for, academic freedom and is one of the elements the Americans included in their 1940 AAUP Statement. One reason this is so important is that an academic who purports to speak for a university is directly affecting the academic freedom of his or her colleagues who may hold equally justifiable but counter views.

8 Dr Knopfelmacher, Dr Ward

The next two cases concern non appointments rather than attempts to dismiss or actual dismissal. Russell Ward was not appointed to a position at the University of New South Wales allegedly because he was a communist. Dr Knopfelmacher was allegedly not appointed to a position at the University of Sydney because he was perceived as being too far to the right. The refusal to appoint Russell Ward led to the resignation of the Dean of the Faculty of Humanities and Social Science. He noted:

But I am convinced that there is a real issue of academic freedom involved, and I would be very cowardly not to support principles

¹⁴¹ University of Queensland, *Senate Minutes*, 5 November 1953, University of Queensland Archives.

which I believe in strongly. A University, to me, is like a democracy, only more so, giving opportunities for all points of view, barring no discussion, and encouraging independence. Any move to restrict freedom of views, either among staff or students, and to make University people conform to 'approved' views runs counter to University traditions, and in the long run, can only lead to the suppression of independent thinking.¹⁴²

Clearly Professor Hartwell had no hesitation in linking the old traditions to this relatively new university. For him the concept of academic freedom logically flowed from the notion of a university, however it was a right that staff had to 'fight, here and now' and if that fight was unsuccessful the university would become an 'academic abortion'.¹⁴³ The Chancellor and Vice Chancellor denied the application of political tests. Others were not convinced and echoed earlier comments that such tests deny a university 'its own essential character'.¹⁴⁴

Senior commentators such as Professor Ray made similar comments in relation to Knopfelmacher's non appointment, repeating the (by the 1960s) well voiced definition: 'A true university is a community of scholars dedicated to the pursuit of knowledge and its dissemination' and then immediately linking this to academic freedom.¹⁴⁵

¹⁴² Copy of letter from Professor R M Hartwell, Dean of the Faculty of Humanities and Social Sciences to Mr Wurth, Chancellor, 16 January 1956 (University of New South Wales Archives, Cn 99 A81 Hartwell R Max, *Ward Case*).

¹⁴³ Professor R M Hartwell, 'Professorial Board Speech on the Russell Ward Case' (University of New South Wales Archives, Cn 99 A81 Hartwell R Max, *Ward Case*).

¹⁴⁴ Letter from R F Brissenden and D W A Baker to the Editor, *Sydney Morning Herald*, 21 December 1960 (reproduced in Edit, *Political Tests for University Appointments: the Russell Ward Case* (1961) IV(1) *Vestes* 51, 58).

¹⁴⁵ E St John et al 'Dr Knopfelmacher – Five Views' (1965) 9(4) *Quadrant* 69, respectively 70, 72 and 73, and 71.

Significance for implied terms

In both of these very public disputes there is resort to academic traditions and to definitions of a university. This is further evidence of implied rights on both custom and business efficacy grounds.

Ironically, one of the administrators involved in the Ward controversy, the Vice Chancellor Professor Baxter, was to later inform the Professorial Board at the University of New South Wales that a '[u]niversity traditionally accorded its staff freedom of expression and no specific permission from the Vice-Chancellor was necessary to exercise it...'.¹⁴⁶ Accordingly, a member of staff was free to circulate a document written by scientists voicing concern about nuclear weapons. He qualified this academic freedom right by voicing a concern that there may be a lack of academic propriety in using a university designation and address in circumstances which could identify the entire university with that viewpoint. This is very close to the 'sense of responsibility' described above in the Ross Anderson dispute at the University of Queensland.

It adds to our definition of academic freedom in a legal context: traditional academic freedom does exist in Australian universities, but this speech right is not absolute because to exercise it in that fashion might lessen the academic freedom of one's colleagues, it must be exercised professionally; with propriety and a sense of responsibility. Propriety and responsibility bring truth into the definition: clearly the academic must be speaking truth, or his or her reasonable understanding of that as supported by standards appropriate to that person's academic discipline.

9 Dan O'Neill

Dan O'Neill was a lecturer in the Department of English at the University of Queensland and was heavily involved in the radical movements of the late 1960s and early 1970s. O'Neill's probationary period was due to expire on 31 December 1971, in the

¹⁴⁶ 'Public Expressions of Opinion by Members of Staff', extract from the minutes of the meeting of the Professorial Board, 10 December 1957, University of New South Wales Archives, Cn 980/51.

middle of this very active period. Angry communications, only a few days before the determination of probation,¹⁴⁷ had passed between O'Neill and the Vice Chancellor, Professor Zelman Cowen, later to become Governor-General of Australia. More significantly, O'Neill's radicalism had attracted the attention of the Queensland Parliament including a suggestion, *inter alia*, he had been guilty of treason.¹⁴⁸

On Cowan's recommendation, the Senate voted to confirm the appointment of one of the more outspoken and radical academics in Australian university history. The Senate concentrated on his teaching and research, and ignored those who would have concentrated on 'other matters'. This is a clear recognition of traditional academic freedom and is so recognised in the University history.¹⁴⁹

Significance for implied terms

Dan O'Neill's matter is important because of Vice Chancellor Cowan's interpretation and defence of academic freedom. He used the traditional definition: 'freedom on the part of faculty members to teach according to their lights and to follow their own lines of inquiry and research' but he qualified it by the insertion of certain 'ground rules' which existed because '[w]ithout these to enable the pursuit of activities in an orderly way, we would find ourselves in the midst of chaos and the very purpose of the university defeated.'¹⁵⁰ The newspaper report quoting Cowan did not list his ground rules but other parts of the article imply these were

¹⁴⁷ See, for example, the letters published in the University of Queensland weekly newspaper, *Semper Floreat*, where a letter from Professor Cowan to Dan O'Neill is published along with O'Neill's reply: 'Cowan Correspondence: Cowan lashes out' *Semper Floreat*, 30 April 1971, 2. The Cowan letter is written on 5 April, and the Senate meeting considering O'Neill's probation was held only 10 days later.

¹⁴⁸ Queensland, *Official Record of the Debates of the Legislative Assembly*, 13 November 1968, vol 250, 1429.

¹⁴⁹ M I Thomis, *A Place of Light and Learning, The University of Queensland's First Seventy Five Years* (1985) 327.

¹⁵⁰ *Courier Mail* (Brisbane), 22 June 1970 (University of Queensland Archives, S278 Newspaper Clippings relating to the University of Queensland 1968-71).

concerned with the ‘maintenance of orderly operations’.¹⁵¹ This notion of maintenance of order is again not so far removed from Baxter’s position above: academic freedom cannot be used to destroy the very conditions needed for its maintenance. Academic freedom is not seen as an absolute right, it has its qualifications.

B What does this academic history tell us?

The first 100 years of university history did not start favourably for those seeking to argue an academic freedom tradition in Australia. Wood, initially victimised, then saved, emerges as a good historian, traced the custom and provided the link back to the English and Scottish universities. Marshall-Hall claims academic freedom rights without using those words. Marshall-Hall and probably Irvine are early examples of a denial of academic freedom.

The tide begins to turn with Anderson at the University of Sydney. He loses his 1931 battle with the Senate, but the resolution of the 1943 dispute represents a watershed in defining Australian academic freedom. The term ‘academic freedom’ itself seems to emerge in Australia somewhere between the first and second Anderson disputes. It is significant that the defence of academic freedom by the University of Sydney Senate occurs at a time when Hitler was destroying German universities.

The first 100 years were important in defining academic freedom in Australia, however the last fifty have been more important in defining measures to protect it. The *Orr* case directly brought about dismissal mechanisms in Australian universities designed to ensure procedural fairness and protect academic freedom.

At least two Prime Ministers, Edmond Barton, who intervened in the Wood dispute at the University of Sydney, and Sir Robert Menzies, one of the few public figures to speak on the concept in Australia, showed a good understanding of the importance of academic

151 *Ibid.*

freedom.¹⁵² Other politicians, including the NSW Member for Young, C E Martin, spoke passionately about the right of free speech in universities in 1931 during his parliamentary defence of John Anderson and his dispute with the University of Sydney. This was at a time when the University Senate, and academics including the Vice Chancellor, Sir Mungo MacCallum, and the Dean of the Law Faculty and Chair of Professorial Board, Professor John Peden, demonstrably did not understand academic freedom, and did not defend their colleague, Professor Anderson, who was determined to put forward controversial views and shock conservative Australia.

Politicians such as the Queensland Attorney-General, Power, showed no understanding of the concept in his scathing attack on Harry Anderson, nor did the leader of the Nationalist Country Party in New South Wales, Bruxner, in his attempted destruction of John Anderson.¹⁵³

There have been cases where university administrators have taken personal risks to defend academic freedom. For example in the Dan O'Neill dispute at the University of Queensland, the Vice Chancellor, Zelman Cowan, played a very important role in ensuring the survival of an academic when there was enormous external pressure to deny tenure. Earlier, the same University Senate resisted pressure from the Queensland Attorney-General to dismiss Harry Ross Anderson.

Senate of the University of Sydney finally stood up for academic freedom in the 1943 John Anderson dispute recognising the harm that would follow from a stifling of the spirit of free inquiry. Yet on other occasions, including the Steele dismissal at Wollongong University, the University did not follow processes existing specifically to protect academic freedom, and seemed not to

¹⁵² Sir Robert Menzies, 'The Universities – Some Queries' (The Inaugural Wallace Wurth Memorial Lecture, University of New South Wales, 28 August 1964) 17:

I hasten to add of course that any university, which treated a professor or lecturer as if he was just a man hired to study as directed and to teach in accordance with rules laid down by other people would be an extremely strange university; it would have failed to understand the immense importance of true academic freedom.

¹⁵³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 July 1931, 4266-7.

recognise that the matter before them had very strong academic freedom implications.

IV CONCLUSIONS

What conclusions can be drawn about the law on implied terms from the forgoing analysis?

A Business efficacy

Under common law, a business efficacy term will be implied where this is necessary for the reasonable or effective operation of a contract. Teaching and research represent the major contractual obligations of academics, and it has been argued extensively in this paper, including the authoritative United States Supreme Court decision in *Sweezy v New Hampshire*,¹⁵⁴ just how fundamentally important freedom to reason and freedom for disputation are to the advancement of scientific knowledge in a university. Accordingly, academic freedom is necessary to meet the teaching and research duties and functions at the individual level, enabling the university to discharge its statutory functions at the community level.

Except where excluded or modified by specific and binding university documentation, for example, a code of conduct or enterprise agreement limiting expressive rights, a qualified form of academic freedom as described below is more likely than not to be implied using the business efficacy test into a contract of academic employment in Australian universities. The evidence for this is contained in powerful statements over 150 years of Australian university history describing the nature of an Australian university. It is further supported by statutes and the university law of other countries, especially the United States, which intrinsically link academic freedom to the very nature of a university.

¹⁵⁴ *Sweezy v New Hampshire*, above n 5.

B Custom and usage

There is also a possibility that academic freedom will be implied under the custom and usage test, though it is acknowledged that this form of term has been difficult to prove in other fields of employment. Nevertheless, the great wealth of Australian university tradition building on British heritage, and influenced by the American universities, presents strong evidence of a tradition of employee speech rights not matched in other industries. Professor Wood is correct in asserting that the speech privilege remains in a university unless it is explicitly removed by the written conditions of appointment.

C Implication at law

University statutory obligations suggest that the collective community of a university must not act so as to inhibit the research functions of its academics. Academic freedom is further supported by an implied term that a university has to act with due regard to the purposes of its employee contracts and not so as to damage the relationship of trust and confidence between the academic, who must act professionally in his or her teaching and research, and the university which must act in accordance with its statutory obligations.

D Certainty of definition of implied terms

As noted above, a further condition on the implication of a term is that it will not be implied merely to make a contract 'reasonable'. Academics would argue that academic freedom is essential to the knowledge discovery and dissemination process, and not just something a reasonable university would provide.

More importantly, American law shows that, in arguing for contractual validity, counsel must define a proposed implied academic freedom term with precision or risk a court's interpretation that it is mere indeterminate and unenforceable policy. The definition needs to expose any particular limitations imposed at that particular university and in a way which describes its status vis-a-vis other policy, rules or contractual terms at that institution. Australian

law on implied terms leads to the same conclusion. In arguing for contractual validity counsel needs to be able to define a proposed implied academic freedom term with precision or risk a court's interpretation that it is mere indeterminate and unenforceable policy. It needs to be defined carefully exposing any particular limitations imposed at that particular university, and in a way which describes its status vis-a-vis other policy, rules or contractual terms at that institution.

It is very unlikely that an implied term of the sort described in the CAUT or AAUP statements would be successfully argued before an Australian court. Indeed, the former term ran into difficulty in the University of Manitoba Arbitration for not delineating academic freedom. The Canadian statement is inspired and aspirational, but it lacks precision in definition. It is more likely that a clause of the following type may be implied.

E A possible implied term

Where an Australian university academic has legal obligations to teach and to research there are attendant duties to speak and to write in a responsible and professional manner. That professionalism carries with it further obligations to not restrict the speech or writing of colleagues or the learning of students, to work within the law, disclose limitations in the research, and not represent speech as that of the university or colleagues. If the academic chooses to criticise the university he or she may do so but that speech or writing carries the same attendant professional obligations as any other speech.

Such a term recognises that for an academic, speech is part of the teaching and research duty and it follows that the academic must act responsibly in the discharge of the duty. Business efficacy supported by custom and tradition requires that the employing university in the fulfilment of its statutory research and teaching mission must accord its academics the freedom to speak and act professionally in the way in which they teach and research.

A term will not be implied if the contract of employment provides expressly to the contrary. It is very unlikely that a university would ever expressly outlaw academic freedom *per se* though it may attempt to impose restrictions on speech, for example, by requiring approval before commentary on internal affairs is made. The success of this attempt will turn on the status of the policy; if it is contractual or contained in an enterprise agreement, and not *ultra vires* the university it will be enforceable.

There is no absolute right of unfettered speech at Australian universities. If we accept the above likelihood that academic freedom will be read into contracts of employment as an implied term, it must be recognised that the statements and case studies evidencing that term impose a requirement of professional responsibility in the intramural and extramural speech of academics. In speech, as in all other forms of academic behaviour, academics will be subject to the prevailing misconduct rules at that institution and to any other express terms contrary to the implied term.

Accordingly, an academic freedom term as defined above gives little protection to an academic who engages in defamation or hate speech. Breaches of a university confidence have been discussed in detail elsewhere and present more difficulty, consider for example the academic who discloses that his or her university is falsifying its financial data.¹⁵⁵

The above term will not protect an academic who transgresses the law in speaking out, a common law contractual term cannot protect an academic from a criminal sanction. Nevertheless, the academic may in certain circumstances be able to set up the term in his defence if the university moved to dismiss for that transgression. For example, a legal academic who spoke out against a terrorist law, thereby breaking the same law, may have no defence against the crime, yet should be able to resist dismissal on the basis that it was his or her duty to speak out against a harsh law denying human rights. The academic may gain some sympathy or moral force for some or all of these matters, many academics throughout history

¹⁵⁵ For a detailed discussion on such matters see Jackson, 'When Can Speech Lead to Dismissal in a University', above n 3.

have been severely punished for their speech, Galileo and Socrates are good examples.

There are those academics who, somewhat depressingly, see the modern university engaged in mass education as having undergone some form of fundamental change, more managerial, more focused on product and money and less on traditional values. Some of them would see the historical analysis in this paper as irrelevant to an enterprise university, as just amusing history overtaken by modern and far more important and threatening events. Of course this view patronisingly dismisses our academic forebears as somehow facing easier times, as living in some university golden age where academics were paid to write to think and occasionally teach, where there were no pressures on their university funding or on their academic writing. Such times never did exist in Australian universities. Every age has had its difficulties.

There is a risk that this same group of academics will meekly surrender their freedom under modern managerial pressure. If, however, there has been no valid and express restriction placed upon them or what they research or teach, they do so needlessly, and ironically expose themselves to an additional risk: If they are purely at the beck and call of their managers are they still meeting their contractual obligations to teach and research, to discover and disseminate knowledge? Is their university meeting its statutory obligations to do likewise?