

# WHEN CAN SPEECH LEAD TO DISMISSAL IN A UNIVERSITY

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## ABSTRACT

This article considers when academic speech can lead to employee dismissal in a university. Under common law employees owe duties of good faith to their employers and these duties also apply to conduct involving speech. Speech has arisen as a dismissal issue in the workplace in Australia, for example in *Lane v Fasciale*<sup>1</sup>, where Lane, a principal of a high school was directed by his employer to refrain from speaking out publicly against the employer's decision to close the school. The employer prevailed. But does this law apply to university employees or does the concept of academic freedom change matters?

In Australian universities the law is in its infancy in the area of academic freedom. Accordingly the paper will examine speech issues which have arisen in other countries to ascertain what those legal systems may have to offer.

One conclusion drawn is that academic freedom imposes duties and obligations on the academic *and* the university: an indignant cry of academic freedom could never justify the dissemination of that which is knowingly false, poorly researched, or the product of negligently prepared or falsified data. The most telling obligation placed on an academic is to seek out and disseminate knowledge in an academy which, by definition, itself *must* hold that value and that function. The university has an obligation to provide the conditions for the pursuit of knowledge by its academics, and also to ensure that such pursuit is not at the expense of the academic freedom rights of others in the academy.

The paper concludes that an academic's speech can bring about that academic's lawful dismissal, and there is no absolute right of academic speech Australian universities.

## INTRODUCTION

Events at Wollongong and Macquarie universities have raised once again<sup>2</sup> the rights of academics to speak out on matters of their choosing. At Wollongong University Ted Steele was summarily dismissed after he publicly criticised marking standards in that University and then refused to withdraw his remarks.<sup>3</sup> At Macquarie University Andrew Fraser publicly voiced his controversial opinions about race and intelligence. Vice Chancellor Yerbury thought that Fraser had 'abused his academic position by associating Macquarie with his statement of private views'<sup>4</sup> nevertheless she did not dismiss him for expressing them. Accordingly it is timely to consider both the legal rights of academics to speak out and the rights of their universities to attempt to control that speech.

## SPEECH AS MISCONDUCT AT COMMON LAW

Before moving to the specifics regarding academic speech it will be of advantage to review the common law on speech within the workplace. In the High Court decision *Concut Pty Ltd*

*v Worrel*<sup>5</sup> Kirby J described the circumstances allowing an employer to summarily dismiss an employee, and in doing so applied the well known test from an earlier High Court decision in *Blyth Chemicals Ltd v Bushnell*<sup>6</sup> (1933) 49 CLR 66. He said:

The ordinary relationship of employer and employee at common law is one importing implied duties of loyalty, honesty, confidentiality and mutual trust. At common law:

‘[c]onduct which in respect of important matters is incompatible with the fulfilment of an employee’s duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal... [T]he conduct of the employee must itself involve the incompatibility, conflict, or impediment, or be destructive of confidence. An actual repugnance between his acts and his relationship must be found. It is not enough that ground for uneasiness as to its future conduct arises.’ [*Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66 at 81–82]

McGarry notes that the *Blyth Chemicals* test is ‘still too general to enable any very precise formulation of the limits on an employee’s right to comment on or discuss his employer’s business.’<sup>7</sup> Accordingly it is necessary to review subsequent litigation to provide that precision. The starting position is that words which breach the implied (or express) duties described in *Concut* and *Blyth Chemicals* will allow dismissal of the employee unless an appropriate defence can be made out.

An employee has duties of confidentiality and good faith and obligations to obey the lawful and reasonable directions<sup>8</sup> of the employer. In relation to speech the duty of good faith may be broken if an employee:

- (i) speaks against the interests of the employer so as to breach the duty of fidelity;
- (ii) breaches a duty of confidentiality by speaking; and /or
- (iii) having been lawfully and reasonably directed not to speak on a matter within the scope of the employment, speaks.

These categories are now described in more detail.

(i) *Speaking against the interests of the employer so as to breach the duty of fidelity*

An example of (i) is the 1946 decision *Federated Ship Painters & Dockers Union of Australia v Cockatoo Docks & Engineering Co Pty Ltd*.<sup>9</sup> Here an employee was summarily dismissed for writing an article published in an Australian Labor Party newspaper which the employer had argued was a misrepresentation of the facts, making the employer out to be running its dock on gaol like lines with management ‘deserving the contempt of decent and fair minded citizens’.<sup>10</sup> The employer then argued that the employee could not be regarded as loyal and that the relationship had been alienated. In defence the union claimed the article had been written after 5.00PM, was not slanderous, and was fair and just criticism of conditions on the dock. The Board of Reference, Mr. JC Welbourn found that the article, though not ‘offensive in its terms, is one which produces a situation which is incompatible to the continuance of the relationship of master and servant’<sup>11</sup> and held that it was a reasonable exercise of the right to dismiss.

In *Nokia Telecommunications Pty Limited v Davis*<sup>12</sup> Wilcox CJ indicated a possible public duty defence:

It would be wrong for an employee to make public allegations damaging to the employer's business and reputation; at least, not unless the employee was satisfied they were accurate and there was an overriding public duty to do so.<sup>13</sup>

In that case the conduct of an employee was in fact not public, he had internally notified senior overseas management about matters the employee honestly believed were not being handled properly in the company. This was held not to be grounds for his dismissal, and he was reinstated.

Citing Canadian authority<sup>14</sup> McGarry raises the possibility that a 'professional man' may have a right to express opinions in the area of 'his professional competence.' However he concludes that 'obligations imposed by a code of professional ethics, without more, will not justify an employee's adverse comment on his employer in Australia'.<sup>15</sup> Nevertheless there is at least a possibility that such a code could be read into a contract of employment.

Another Canadian case concerning an employee's right of speech in the workplace is *Robertson v North Island College*.<sup>16</sup> It was made clear in this case that an employee had a right to express a personal view contrary to that held by his supervisor when appearing before a commission inquiring into school education or writing letters to the Deputy Minister of Education. He also had a right to his 'express opinions differing from those held by those senior to him'.<sup>17</sup> When he consistently opposed and confronted his supervisor the supervisor was entitled to transfer him to another section.<sup>18</sup>

#### (ii) *The breach of a duty of confidentiality by speaking out*

The *Blyth Chemicals* test spoke of conduct 'destructive of the necessary confidence' between employee and employer. Non permitted disclosure of the employer's confidential information is an obvious breach.<sup>19</sup> The difficulties in this category arise when the employee argues that he/she had a public duty to speak out. This goes to the conflict between the public interest in having a matter disclosed versus the employer's interest in having the employee maintain confidence over that same material.

In *Gartside v Outram*<sup>20</sup> it was held that there is 'no confidence as to the disclosure of iniquity'.<sup>21</sup> Cases such as *Steel Corporation v Granada TV Ltd*<sup>22</sup> and *Lion Laboratories Ltd v Evans*<sup>23</sup> have taken a broad view of what is meant by the 'public interest', though it should be noted that these are British decisions. In the New South Wales decision *Associated Dominion Assurance Society Pty Ltd v Andrew*<sup>24</sup> an issue arose as to the appropriate directions a judge should have given to a jury in a case involving the dismissal of certain employees, including Andrew, the company's accountant. Andrew had given certain material to government officials and had spoken to a politician about possible discrepancies in the employer's accounts. Jordan CJ with whom Owen and Herron JJ concurred, after citing the above passage from *Blyth Chemicals Ltd v Bushnell*, and noting that in his opinion the passage refers to 'an employer carrying on a legitimate business and in no respect committing a serious breach of the law',<sup>25</sup> continued:

For instance, if an employee discovered that his employer had made him an innocent tool in committing what was, on his employer's part, a deliberate breach of the law, the employee's duty as a citizen and his interest in exculpating himself from a possible charge of being an accomplice, might well over-ride any duty he would otherwise owe to his employer not to disclose to outsiders details of his employer's business.<sup>26</sup>

In the Australian High Court decision *A v Hayden*<sup>27</sup> Gibbs CJ qualified the statement of Sheppard J in *Allied Mills Industries Pty Ltd v Trade Practices Commission*<sup>28</sup> that ‘the public interest in the disclosure ... of iniquity will always outweigh the public interest in the preservation of private and confidential information’ limiting the comment to ‘serious crime’.<sup>29</sup> Dawson and Wilson JJ also noted:

It follows that while there may be cases where the triviality of the alleged breaches of the criminal law will not lead a court to withhold relief by way of injunction to restrain a threatened breach of a duty of confidentiality such a submission cannot succeed in this case.<sup>30</sup>

In *Hayden* the High Court allowed the Commonwealth to disclose to the Victorian police the identity of officers of the Australian Secret Intelligence Service who may have committed crimes during a training exercise in a hotel. The ASIS officers had claimed that such disclosure would be a breach of express terms in their employment contracts, however it was held that the employer’s obligation of confidentiality under the officers’ respective contracts of employment could not be enforced by the officers due to the public interest in investigating the serious nature of possible crimes that may have been committed.<sup>31</sup>

The public interest test has been read in *Hayden* to at least include serious crime, but seems silent on whether disclosure of serious but non criminal matters will be in the public interest so as to set up a defence for breach of the confidence.<sup>32</sup>

### (iii) *Lawful and reasonable direction not to speak*

An example of the third category arose in *Lane v Fasciale*<sup>33</sup> where Lane, a principal of a high school was directed by his employer to refrain from speaking out publicly against the employer’s decision to close the school. Beach J found that he had continued to do so against this command which he found to be lawful and reasonable. In reaching this conclusion, Beach J dismissed Lane’s argument that there was no express or implied term in his contract of employment to the effect he was forbidden to make public comment on any matter relating to the College or the welfare of its students, and therefore any direction given him which derived from a perceived need to protect the decision from scrutiny had nothing to do with the subject of his employment.

Beach J also rejected a second argument that a teacher, and a principal, in the discharge of his/her obligation of care for students is free to comment upon activities which the teacher considers are detrimental to the interests of students and to make comments which are bona fide believed upon good grounds are likely to advance the interests of students. He continued:

Freedom of expression is jealously guarded by the common law and will not be interfered with lightly. In that regard see *Nationwide News Pty Ltd v Wills* (1992) 66 ALJR per Mason, CJ at p662. But that does not mean that situations cannot arise in which an employer justifiably directs his employee to refrain from making public comments concerning decisions the employer has made relating to his business whether that business be the running of a factory or the conduct of a school.

It must be remembered that in some respects Mr Lane was not in the position of an ordinary employee. He was the head of the College. As counsel for the defendants pointed out in his final submissions he had the ability and the right to hire and fire the staff of the College; he was the College’s chief executive and as a consequence owed higher duties of fidelity than an employee further down the school and closer to the rank and file.<sup>34</sup>

In reaching his decision Beach J applied a two part test, the conduct (in this case the impugned speech of Lane) must be (a) within the scope of the employment contract and (b) be lawful and reasonable. This came from the High Court decision in *R v Darling Island Stevedoring and Lighthouse Co Ltd; ex parte Halliday & Sullivan*<sup>35</sup> where Dixon J said:

If a command relates to the subject matter of the employment and involves no illegality, the obligation of the servant to obey it depends at common law upon its being reasonable. In other words, the lawful commands of an employer which an employee must obey are those which fall within the scope of the contract of service and are reasonable ... But what is reasonable is not to be determined so to speak, in vacuo. The nature of the employment, the established usages affecting it, the common practices which exist and the general provisions of the instrument, in this case an award, governing the relationship, supply considerations by which determination of what is reasonable must be controlled.<sup>36</sup>

Echoing *Davis v Nokia Communications* Beach J made it clear that Lane ‘was completely free to express his dissent to anyone within the hierarchy of the Church.’<sup>37</sup> Beach J found that what he was ‘instructed not to do was to express his views publicly because it was perceived by Fr Fasciale that if he continued to do so that could have a disrupting effect upon the College ...’.<sup>38</sup> In this sense it was held that the order was lawful and reasonable, and the speech not within the scope of the employment contract.

## SPEECH AS MISCONDUCT IN UNIVERSITIES

Elsewhere<sup>39</sup> I have described circumstances in which Australian academics found themselves at odds with various forms of authority in relation to their speech. None of these disputes generated a statement from an Australian court defining or describing the circumstances when an academic could freely exercise a speech right. Australian law is in its infancy in this area. Accordingly Australians need to examine and, where appropriate, apply law from other countries. The only country where academic freedom law carries a large body of case law is the United States. Some of this law comes from First Amendment cases which does not necessarily render it irrelevant in Australia. This is because that law can help define the meaning of academic freedom. A very significant other source of academic freedom law in the United States is contract law.

The following section examines United States law for assistance in interpreting future Australian academic freedom cases. This is followed by discussion of a New Zealand dismissal case. Principles emerging from these examinations are then applied in the context of speech as misconduct at common law.

### *Speech as Misconduct in American Universities*

The most powerful statement regarding academic freedom in the United States comes from *Sweezy v New Hampshire*<sup>40</sup> where Justice Frankfurter spoke of academic freedom:

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 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.<sup>41</sup>

This case describes quite powerful constitutional rights to academic freedom in the United States.

In *Pickering v Board of Education*<sup>42</sup> a teacher Pickering was dismissed for having written a letter to the editor of a newspaper which was critical of financial plans of the School Board. Pickering successfully claimed that his speech was protected under the First Amendment. The School Board's arguments that his speech was disruptive and would cause dissent among the teachers were unsuccessful. The Court balanced Pickering's free speech rights against the interest of the state in running an efficient school system.<sup>43</sup>

Developments in the past two decades have limited the circumstances when the First Amendment right can be used which is directly critical of the employer but which is not seen as having some public utility.

In *Connick v Myers*<sup>44</sup> Ms Myers was dismissed for insubordination for sending a questionnaire to her fellow assistant district attorneys covering issues such as staff morale, the transfer procedures, leadership, and pressure to support election candidates. The Supreme Court found in favour of the employer, the Court holding that the 'limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships.'<sup>45</sup>

Finkin is critical of this case because it gives greater value to the employer's opinion if there is a perceived threat to authority.<sup>46</sup>

Employee speech critical of an employer will not be protected unless it relates to a public interest broader than mere concern with matters such as the efficiency or morale of a particular public office.<sup>47</sup>

The Supreme Court decision *Waters v Churchill*<sup>48</sup> represents additional limits on the power of employee speech. Churchill was dismissed on the most generous view of what she had said (the facts were disputed) about the value of cross training in a hospital. The majority held that a government employer could dismiss based on its reasonable belief as to the disruptiveness of what had been said regardless of what had in fact been said.

In *Jeffries v Harleston*,<sup>49</sup> *Waters v Churchill* was applied in a university context to allow dismissal for 'disruptive speech'.<sup>50</sup> Jeffries was the Chairman of the Black Studies Department at the City College of New York. His term as Chairman was reduced from three years to one year following a speech he gave off campus which was said to be racially biased. Jeffries sued the Trustees arguing the removal breached the First Amendment. The Court held that the Trustees should be successful because of their reasonable belief as to the disruptiveness of what had been said by Jeffries.

The case has important implications for American academics. The application of *Waters v Churchill* in *Jeffries v Harleston* allows reasonable belief of disruption to be substituted for actual disruption in an academic context. The Court was aware of the importance of academic freedom, yet they saw no academic freedom issue because Jeffries was merely being removed from his position as departmental chair, a 'ministerial' position which did not 'silence him, or otherwise limit his access to the 'marketplace of ideas' in the classroom.'<sup>51</sup> This has been criticised as inaccurate<sup>52</sup> as possibly causing a redefinition of academic tasks as managerial<sup>53</sup> and for not understanding the 'unique nature of a university'.<sup>54</sup> Hiers<sup>55</sup> suggests the cases could impose 'severe restrictions on traditional and legitimate professional speech by faculty....'.<sup>56</sup>

United States cases separate a university professor's performance as a teacher from speech issues.<sup>57</sup> They cannot object on academic freedom grounds to 'course content, homework load and grading policy' though they could comment on such policies.<sup>58</sup> On the other hand if teaching performance was not the real reason behind a dismissal or tenure denial, but protected academic speech was, the academic could be reinstated.<sup>59</sup>

The decision in *Adamian v Jacobsen*<sup>60</sup> suggests another distinction in regard to speech, manner versus content. It was alleged in that case that the academic's language could have led to violence, in which case this would amount to misconduct. Furthermore a professor's speech could impose on the religious or speech rights of others, for example, by requiring them to pray before a class.<sup>61</sup> Kaplin and Lee list a number of decisions where the First Amendment has been raised in classroom situations:<sup>62</sup> It does not protect 'teaching style'<sup>63</sup> nor does it give a teacher the right to vary established curricular contents;<sup>64</sup> nor to refuse the university's requests to lower standards;<sup>65</sup> but in *Parate v Isibor*<sup>66</sup> the First Amendment was applicable where a grade change had been ordered. Academic freedom does not permit the use of vulgar language in a college classroom that has no educational function.<sup>67</sup>

In a 1988 paper Finkin lists case examples of First Amendment *unprotected* speech. These include speech relating to the airing of personal grievances relating to departmental administration and curriculum, criticising a colleague's tenure denial, opposing a faculty appointment, and containing complaints regarding 'salary, promotion, assignment, and collegial relations'.<sup>68</sup> He rejects any attempt to constrain academic freedom by discipline boundaries because this could have a chilling effect<sup>69</sup> creating perhaps a peaceful but sterile place.<sup>70</sup> Despite criticism by Yudof<sup>71</sup> Finkin does not advocate unrestricted academic speech: the major control Finkin describes is 'a professional standard of care' and 'canons of responsible scholarship' addressed above.<sup>72</sup> This is a major theme in *Rigg v University of Waikato*<sup>73</sup> now discussed.

### *Speech as Misconduct in a New Zealand University*

The New Zealand matter of *Rigg v University of Waikato*<sup>74</sup> raises the issue of academic speech and misconduct. It also resulted in the dismissal of an academic. *Rigg v University of Waikato* is a report of the Visitor, Sir David Beattie (Governor General of New Zealand and previously a judge of the New Zealand High Court) on his visitation to the University of Waikato. The Visitor delegated to two Commissaries (a retired judge and a senior academic) the task of considering the petition and writing the Report. Rigg, a senior lecturer in German, and a student, Buchanan, wrote an article in the student newspaper at the University of Waikato claiming that an isotope laboratory at that University had probably contributed to the deaths of at least four students from cancer, and that the University had covered this up. The Vice Chancellor requested the New Zealand Department of Health to inquire independently into the allegations. The Department found there was no evidence to sustain the claims. The University then set up a Committee to examine the

conduct of Rigg and Buchanan in writing the article. Both authors attended this Committee's deliberations and were represented by legal counsel. Prior to that Committee handing down its recommendations, Rigg and Buchanan apologised in writing admitting there was no evidence linking the deaths to the laboratory or any cover up.

The Committee recommended the dismissal of Rigg and the fining of Buchanan. The Academic Board, after considering this, also recommended Rigg's dismissal to Council. Council in turn decided that Rigg should have his contract terminated because his conduct had been grossly irresponsible, his claims having been made on very flimsy and unchecked evidence. Rigg petitioned the Visitor seeking reinstatement, arguing that his position had been terminated in breach of the right to freedom of expression within a university. He also claimed the University had breached principles of natural justice in the dismissal process. The Commissaries did not accept Rigg's academic freedom claims. Importantly, they were readily prepared to support a view that universities

[O]ught not to use their legal powers to discipline a member of academic staff for conduct which truly falls within the scope of the concept of academic freedom of thought and expression.<sup>75</sup>

They continued:

The only justification which we can see for a special right to freedom of expression in a university environment is the need for academics, whether teachers or students, to feel free to pursue the search for knowledge and learning and truth without fear of institutional disciplinary action being used to divert them from those purposes in order to force conformity with views held by the university authority.<sup>76</sup>

The Commissaries went on to argue that freedoms, including academic freedom, do not exist without corresponding responsibilities. Academic freedom was not an 'uninhibited licence'.<sup>77</sup> Nor did they accept that Rigg's comments were extramural utterances within that part of the AAUP 1940 Statement which allows freedom from institutional censorship when an academic speaks or writes as a citizen. It is important to note the preparedness of these New Zealand Commissaries to rely on statements defining academic freedom including those from the AAUP and the Association of University Teachers in the United Kingdom (AUT). The passage from AUT said:

The purposes of higher education cannot be fulfilled unless all those concerned in it are free, independent and critical in their work and pursue it with integrity, scholarship and a sense of responsibility.<sup>78</sup>

The Commissaries also favourably cited the Australian decision in *Burns v the Australian National University*.<sup>79</sup>

This readiness to use overseas sources suggests that universities following the Newman tradition across the western world bear an enormous amount in common. The resolution of these disputes and the remarkably similar statement of academic freedom principles within them demonstrate the portability of academic freedom principles.



## *Speech as Misconduct in Australian Universities*

### (i) *Serious misconduct under the Bryant Award and enterprise agreements*

The typical definition of *serious misconduct* in enterprise agreements in Australian universities is derived directly from the *Universities & Post Compulsory Academic Conditions Award 1995* (the Bryant Award):

‘Serious Misconduct’ shall mean:

- (i) Serious misbehaviour of a kind which constitutes a serious impediment to the carrying out of an academic’s duties or to an academic’s colleagues carrying out their duties.
- (ii) Serious dereliction of the duties required of the academic office.
- (iii) Conviction by a court of an offence which constitutes a serious impediment of the kind referred to in paragraph (i).

Under that Award, and as adopted in typical enterprise agreements, *misconduct* is defined as ‘conduct which is not serious misconduct but which is nonetheless conduct which is unsatisfactory.’

Fairly typical (with the exception of the reference to repeated misconduct) of modern enterprise agreements<sup>80</sup> is the following clause from the University of Sydney:

‘Serious Misconduct’ means misconduct that constitutes:

- a. serious misbehaviour of a kind which constitutes a serious impediment to the carrying out of an academic’s duties or to an academic’s colleagues carrying out their duties; or
- b. a serious dereliction of duties; or
- c. conviction by a court of an offence that constitutes a serious impediment of the kind referred to in sub-clause a;

and may include:

- d. theft;
- e. fraud;
- f. assault;
- g. serious harassment (including sexual harassment); and
- h. repeated or persistent instances of Misconduct which have been the subject of previous Determinations in accordance with this clause.<sup>81</sup>

Importantly the difference between *misconduct* and *serious misconduct* is that the latter could result in dismissal. There was very little judicial interpretation of the meaning of *serious misconduct* under the Bryant Award, however there are two cases where some attempt at definition has been made.

In *Miller v University of New South Wales*<sup>82</sup> the deputy president had to determine whether an academic who had disobeyed an order on a number of occasions to act as first year laboratory director (FYLD) had engaged in serious misconduct. Senior Deputy President Harrison said:

If contrary to my construction of the terms of the EBA it should be read as incorporating the Award definition of serious misconduct then in my opinion the actions of Dr Miller would fall within the definition of serious misconduct. I am inclined to the view that in refusing to perform the duties of FYLD those duties being of such a nature as could be

required of an Associate Professor this amounts to a serious impediment to the carrying out of those duties. I accept that the reference to ‘*serious misbehaviour*’ is not how one would normally categorise the refusal of duties. If ‘*misbehaviour*’ is ‘*bad behavior*’ or ‘*behaving badly*’ as some dictionary definitions suggest then one could be of the opinion that Dr Miller’s actions were those of a person behaving badly. This interpretation is however somewhat strained. If however, consistent with the dictionary definitions it also means ‘*improper conduct*’, or ‘*to conduct oneself improperly*’ or ‘*to behave wrongly*’ that more closely equates with how Dr Miller’s actions could be described. I am not persuaded that the actions of Dr Miller easily fit within the definition of ‘*serious dereliction of duties of the academic office*’.

In *Habili Saira v Northern Territory University*,<sup>83</sup> Saira was found to be validly dismissed for serious misconduct under the serious dereliction of duty limb for failing to deliver four classes after being formally directed to do so. The relevant Award was the *Australian Universities Academic Staff (Conditions of Employment) Award 1988*. Kearney J of the Supreme Court of the Northern Territory found that the definition of serious misconduct contain an intent element, but ‘it is sufficient if the staff member intentionally engaged in conduct which, in all the circumstances in which he engaged in that conduct, it is fairly assessed as a serious dereliction of the duties of his office.’<sup>84</sup> Holding that the academic intentionally failed to teach, the judge also noted that the academic had failed to avail himself of a complaint procedure after being advised to do so by his supervisor.

Later in *Rice v University of Queensland*,<sup>85</sup> Madgwick J also examined the ‘serious dereliction of duty’ limb of the definition and linked this to the common law.

The phrase obviously takes colour from its context. It would be anomalous if less blameworthy and consequential conduct than in the case of ‘serious misbehaviour’ would suffice. The Shorter Oxford Dictionary gives ‘reprehensible abandonment or neglect’ as a meaning for ‘dereliction’. The notion of seriously reprehensible abandonment or neglect of duty is about as close as one can come to a paraphrase of ‘serious dereliction of duty’. The phrase is used to denote a very high degree of culpability apt, in the context (which includes the extended definition of ‘serious misconduct’), to attract dismissal as a possible proportionate response: *Hager v Pulitzer Publishing Company* 158 SW 2d 54 at 62. It would at least need to satisfy the common law test of wilful misconduct (although the Award supersedes this), namely that it amount to repudiation of the fundamental terms of the contract of employment: *Scharmann v Apia Club Pty Ltd* (1983) 6 IR 157.<sup>86</sup>

There is no doubt that the judges have and will need to resort to the common law examples of serious misconduct to give effect to the definition. Common law describing employee conduct which is destructive of the mutual trust between employer and employee will assist in the interpretation of the term ‘serious misconduct’.

#### (ii) *Application of the American and New Zealand Cases and a UNESCO standard*

The questions that now arise are whether and when a purported exercise of academic freedom in Australia could represent a repudiation of the terms of the contract, thereby amounting to serious misconduct, or be such as to constitute serious misbehaviour which constitutes a serious impediment to the carrying out of duties of the academic or a colleague.

From the outset it must be noted that some defences that might be available to academics in other countries do not exist here. Australian academics do not benefit from any constitutional defence which could override terms in their contracts of employment because there is no general

guarantee or right of freedom of speech in the Australian or state constitutions. Nor will academics benefit from any legislative or constitutional guarantee of academic freedom, unlike countries such as South Africa, the United Kingdom, New Zealand, and Ireland.<sup>87</sup> Attempts to introduce such legislation in Australia were thwarted by the Australian Vice Chancellors Committee.<sup>88</sup>

The first point that comes from the American case law is that even there, no absolute right of free speech exists in the workplace. The First Amendment provides some level of protected speech, but as seen above, often this will not assist the employee who criticises his/her public employer. While there are quite significant controls on academic speech, it is not an uninhibited licence, the speaker will have to obey valid laws.

Second and more importantly, academic speech will have to conform with overriding standards of professionalism or as described above by Finkin ‘a professional standard of care’ and ‘the canons of responsible scholarship’ or as *Rigg v University of Waikato* puts it ‘integrity, scholarship and a sense of responsibility’. UNESCO has similarly resolved:

Higher-education teaching personnel should recognize that the exercise of rights carries with it special duties and responsibilities, including the obligation to respect the academic freedom of other members of the academic community and to ensure the fair discussion of contrary views. Academic freedom carries with it the duty to use that freedom in a manner consistent with the scholarly obligation to base research on an honest search for truth. Teaching, research and scholarship should be conducted in full accordance with ethical and professional standards and should, where appropriate, respond to contemporary problems facing society as well as preserve the historical and cultural heritage of the world.<sup>89</sup>

UNESCO also links dismissal to a lack of professionalism:

Dismissal as a disciplinary measure should only be for just and sufficient cause related to professional conduct, for example: persistent neglect of duties, gross incompetence, fabrication or falsification of research results, serious financial irregularities, sexual or other misconduct with students, colleagues, or other members of the academic community or serious threats thereof, or corruption of the educational process such as by falsifying grades, diplomas or degrees in return for money, sexual or other favours or by demanding sexual, financial or other material favours from subordinate employees or colleagues in return for continuing employment.<sup>90</sup>

The words ‘standards of professionalism’ are quite familiar to Australian lawyers, representing words normally implied in professional contracts. The expression ‘the canons of responsible scholarship’ is not unfamiliar to Australian academics. The terms do not mean that each time academics speak they must limit their conversation to their disciplines, but if they choose to launch an attack on their university, dean, vice chancellor or council they will need to bring that sense of responsibility and professional standard of care to their discourse. If what they say is pure speculation and not identified as such, or patently untrue, or unsupported by any evidence they are indeed displaying a lack of professionalism and are outside the bounds of academic freedom protection. They are not exercising an academic freedom right, they are abusing it.

UNESCO states that the individual duties of academics

in their academic freedom are: (c) to base their research and scholarship on an honest search for knowledge with due respect for evidence, impartial reasoning and honesty in reporting;

and

(k) to be conscious of a responsibility, when speaking or writing outside scholarly channels on matters which are not related to their professional expertise, to avoid misleading the public on the nature of their professional expertise;<sup>91</sup>

Much of this is clearly demonstrated by the New Zealand decision in *Rigg v University of Waikato*. Rigg was not dismissed because he exercised his academic freedom to speak, he was dismissed because he breached his professional standard of care. He either deliberately misrepresented the truth, or in a matter likely to cause serious disruption in the workplace, he did not check his facts, or in the language of UNESCO, did not undertake an ‘honest search for knowledge with due respect for evidence, impartial reasoning and honesty in reporting’. The New Zealand Visitor could so readily apply the AAUP tests that Finkin refers to because they are universal across the academy and indeed across all professions, the professional must act professionally.

One word of caution about tests based on professionalism and the canons of responsible scholarship is that in some professions and academic disciplines these expressions could represent nothing more than old and conservative ways, old scholarship and old knowledge, or the thinking of dominant and powerful elites. Was Socrates acting according to the professional standards of his time in Athens? Did Copernicus’ claim that the sun and not the earth was the centre of the universe meet the scholarship criteria of the scientists of the day? They largely rejected it until Johannes Kepler, Galileo Galilei (himself required to recant) and ultimately Sir Isaac Newton provided further scientific support. The dictates of ‘professionalism’ cannot be used to hamper knowledge discovery and dissemination. So is there a way around this dilemma? The answer is surprisingly uncomplicated. Universities must ensure that their notions and definitions of professionalism allow for the non acceptance of existing theories or ‘truths’, and there must be scope for rejecting so called professional standards that operate outside or inside the university. This can be done in the university’s research policy document.<sup>92</sup>

### (iii) *Misconduct and the Nature and Objects of a University*

An examination of the nature of a university will assist in an understanding what academic professional conduct (and misconduct) means. This in turn requires an understanding of what universities are and the scope of what they do. UNESCO has also resolved on the meaning of a university:

Institutions of higher education, and more particularly universities, are communities of scholars preserving, disseminating and expressing freely their opinions on traditional knowledge and culture, and pursuing new knowledge without constriction by prescribed doctrines. The pursuit of new knowledge and its application lie at the heart of the mandate of such institutions of higher education.<sup>93</sup>

In 1998 a Full Bench of the Australian Industrial Relations Commission had to determine whether Australian universities are agents of the state. In finding that they were not, the Commission examined the nature of a university. Using Griffith University as an example the Commission examined s 4 of the *Griffith University Act 1971*(Qld):

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

be noted that the State therefore performs a primary role in the foundation of all Australian universities.

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

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

'... The objects or functions of a university are to provide facilities for teaching and research in such branches of learning as the statute may determine, to confer degrees and generally to promote university education and the advancement of knowledge.'<sup>94</sup>

As noted by the Commission these teaching and research functions relating to knowledge dissemination and pursuit of new knowledge are found in the legislation establishing universities. For example, the *Universities Legislation Amendment (Financial and Other Powers) Act 2001*(NSW) has amended the incorporating legislation of the public universities in New South Wales to provide this object:

- (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.

And a common function:

- (2) The University has the following principal functions for the promotion of its object:
  - (b) the encouragement of the dissemination, advancement, development and application of knowledge informed by free inquiry<sup>95</sup>

A consistent theme in university legislation is the pursuit and dissemination of knowledge. It follows that a university acting according to its functions cannot lawfully and reasonably act so as not to disseminate or to decrease knowledge. A university with such a function lawfully cannot lie, or even seek to hide truth in any of its dealings. This positive obligation to tell and seek new knowledge distinguishes universities from business corporations which, while they are bound not to mislead and deceive in their business dealings,<sup>96</sup> do not usually have an express obligation to disseminate and increase knowledge.<sup>97</sup>

#### (iv) *Reciprocity of Obligation between University and Academic: Relevance to Misconduct*

It follows from the previous discussion that a university will be bound to bring its knowledge values to its dealings with society, and for present purposes, more importantly to its members, often expressed in the university act as its students and staff. Accordingly a university lawfully cannot ask its staff member to lie even in trivial ways on its behalf. On the other hand, conduct of an academic which is contrary to the dissemination or increase of knowledge function is, almost by definition serious misconduct, because it amounts to a rejection of the university function which an employee is bound as a member to uphold. In this way the obligations of university to academic and academic to university are reciprocal, they are tied together either by the knowledge functions described in the act establishing the university, or where this is unstated<sup>98</sup> by the very nature of a university. Does such reciprocity exist at law?

In *Associated Dominion Assurance Society Pty Ltd v Andrew*<sup>99</sup> Jordan CJ, citing that part of Dixon and McTiernan JJ's judgment in *Blyth v Bushnell*<sup>100</sup> where they talk of the necessary confidence between employer and employee goes on to make the point that 'it may be that the duties mentioned by their Honours are reciprocal'.<sup>101</sup> Subsequently in the New Zealand Court of Appeal decision *Auckland Shop Employees Union v Woolworths*<sup>102</sup> (NZ) Cooke J made similar comments:

It may well be that in New Zealand a term recognising that there ought to be a relationship of confidence and trust is implied as a normal incident of the duty of fidelity. It would be a corollary of the employee's duty of fidelity.<sup>103</sup>

More recently the House of Lords in *Mahmud and Malik v Bank of Credit and Commerce International SA*<sup>104</sup> has found that the 'contracts of employment of these two former employees each contained an implied term 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.'<sup>105</sup> The House of Lords has given further support to the *Mahmud* principle in *Johnson (AP) v Unisys Limited*.<sup>106</sup> *Mahmud* has been supported in subsequent Australian cases,<sup>107</sup> though if Jordan CJ is correct the need for a 'necessary confidence between employer and employee' places this proposition in Australian law at an earlier time.

This is important in defining the scope of academic contracts of employment and the nature of the duties of fidelity owed by university staff to their university. The academic's duty of fidelity is intimately connected to his/her obligation to teach and research, the university's obligation to allow the employee to meet his/her contractual obligations to it, and the university's statutory teaching and research function. If the university acts in a way which stifles, chills or censures an academic's individual obligation to discover and disseminate knowledge thereby damaging the relationship of trust and confidence between employer and employee, the *university* and not the academic could be acting in breach of contract. It has been shown that universities undoubtedly have knowledge discovery and dissemination as part of the research and teaching functions. To achieve this they need to provide a climate where academics, acting professionally, can achieve the same functions in exercise of their membership and contractual obligations to the university.<sup>108</sup>

#### (v) *Misconduct and the obligation to act professionally*

If an academic acts against the teaching and research function he/she will breach his/her contractual obligations. An academic cannot simply refuse to deliver classes claiming too high a workload, because he/she would be neglecting their duty to teach.<sup>109</sup> A scientist who fudges his/her data cannot claim to be advancing knowledge, nor can a lecturer who poorly researches his/her teaching area and delivers a lecture full of factual errors argue academic freedom to do this. This obligation to act professionally is not a new one. Metzger notes that in the United States it goes back to 1915:

The view that faculty members may properly be disciplined for talking and writing unprofessionally, just as they may properly be disciplined for behaving unprofessionally, was proclaimed and exposted by the 1915 Declaration of Principles ...<sup>110</sup>

One test which may prove very useful in determining whether an academic is acting professionally is to test whether the speech of the academic interferes with either the knowledge discovery and dissemination process or the exercise of an academic freedom right of other

academics. It may be recalled that the prevailing definition of serious misconduct in Australian universities includes ‘serious misbehaviour of a kind which constitutes a serious impediment to the carrying out of an academic’s duties *or to an academic’s colleagues carrying out their duties*’. [emphasis added] Speech or writing which is of a bullying nature or constitutes intimidation or severe disruption could constitute a denial of academic freedom in colleagues or students rather than any lawful exercise of it by the academic. Such conduct would have a chilling effect on fellow academics or students who choose to maintain their silence, repeat unquestioningly the ‘doctrines’ of the colleague or teacher or simply avoid the research area for fear of upsetting their aggressive or obnoxious fellow. In this way the manner of speaking may be of more danger to the aggressive academic than what is said, because the manner may portray a complete lack of respect for the discovery and dissemination process and rights of others.

### *Fidelity, Confidentiality, and Obeying Directions*

I now return to the three matters canvassed at the beginning of this paper which emerge from *Concut* and *Blythe Chemicals*.

#### (i) *Duties of fidelity in a University*

Can an academic speak out directly against their university, for example in the way the unionist criticised his employer in *Federated Ship Painters & Dockers Union of Australia v Cockatoo Docks & Engineering Co Pty Ltd*? At the risk of repeating the point, the most telling obligation placed on an academic is to seek out and disseminate knowledge in an academy which, by definition, itself *must* hold that value and that function. It is difficult to see how an academic acting professionally and loyally to this knowledge function can fail to act loyally to his university. On the other hand, academic freedom can never carry with it a right to tell an untruth, or as Rabban puts it the norms of academic freedom would never allow plagiarism, student indoctrination, the blind following of a religious or political authority, or the dictates of a granting body to distort research outcomes.<sup>111</sup> Thus assertions about the management of a university would place a heavy onus on the academic to prove the assertion. Failure to do so could amount to misconduct because the criticism places a pall over academic colleagues and can act as a serious impediment to their credibility, and *their* exercise of academic freedom.

One could attempt to define an academic contract narrowly so as to limit the academic speech to the academic’s area of expertise. This is the approach taken in a New Zealand Universities Academic Audit Unit report. The authors say that academic freedom applies only to academics or scholars, and even then only in one’s own field of authority or expertise’. Later they adopt a narrower formulation:

In discussing academic freedom, we have emphasised that it can only be exercised within staff members’ own discipline(s), where they possess what may be unchallenged expertise.<sup>112</sup>

This approach presents real dangers to the knowledge discovery function itself, defining knowledge discovery and dissemination to limited and existing academic boundaries and expertise. Some commentators on the Andrew Fraser/Macquarie University matter criticised Fraser for speaking outside his discipline and would confine academics to their discipline. Others commented on his alleged lack of expertise in an area he chooses to speak on.<sup>113</sup> Confining academics to their discipline would have unfortunate consequences, for example, a lecturer

in public management could criticise management practices in the university, but a professor of biological science could not. A lecturer in education could comment on the low admission standards in his/her area but not across other disciplines even if that person had incontrovertible evidence of a problem across many other disciplines in the university. Taken literally, the authors' test based on 'unchallenged expertise' might prevent or restrict a junior lecturer from publishing even in their discipline, for who is to make the judgement that they now have the appropriate quantum of 'unchallenged expertise'?

It is submitted that a better approach is to resort again to the concept of professionalism. An academic's legal duty to act professionally and responsibly require academics to disclose their limitations (or the limitations in their research) especially when commenting outside their specialisation or discipline area, as UNESCO puts it 'to avoid misleading the public on the nature of their professional expertise.'<sup>114</sup> Applying this to the recent Andrew Fraser matter it is submitted that if he uses Macquarie University's name when he makes claims re race and intelligence he should either add as a caveat that he speaks in a matter outside his university expertise as an academic lawyer, or he should list his particular academic expertise to comment on the matter. It may be that he in fact did this, such caveats are not always reported in the press. This itself increases the exposure of the academic to a harsh university response and demonstrates the risks we face when we do speak outside our fields.

(ii) *Disclosure of confidences in a university*

Academics should not assume that some notion of academic freedom gives them a licence to disclose confidential information or that they are necessarily protected by whistleblower legislation.<sup>115</sup> Accordingly an academic who prematurely disclosed a colleagues' invention harming the chances of the university gaining patent protection could hardly claim an academic freedom protection and may face an action for breach of confidentiality.

Slightly more difficult is the case where an academic discloses a discovery when the university had made a decision not to disclose it, perhaps for fear of upsetting a donor.<sup>116</sup> An obvious example might be an academic who upon finding a new cause of cancer is prevented by his/her university from disclosing that fact for fear of upsetting a donor corporation who happens to manufacture the cancer causing agent. The dissemination of knowledge duty of the academic *and* statutory function of the university would make it extremely difficult to dismiss the academic for that disclosure. A university will have a particular difficulty in arguing that it has any right to deny, hide or disguise truth,<sup>117</sup> a truth 'never finally possessed but must be endlessly discovered'.<sup>118</sup> For example, if senior management at a university discovered that a professor's research findings were based on fabricated data a university could not deliberately hide this fact, similarly a university that discovered errors in its marking methods would have an obligation to disclose this and could not hide this out of fear of damage to its image.

These obligations flow, it is submitted, from the definition and nature of an Australian university and from the fact that all Australian universities are established under statute, mostly with clear research and teaching obligations directly linked to new knowledge discovery and dissemination. Furthermore, no university is likely to deny such a function even if it was not expressly stated in the university act. Accordingly an academic may be able to argue that the obligation the university has to seek and disseminate knowledge places the university in some difficulty under its statute if it deliberately seeks to obstruct or hinder the knowledge discovery and dissemination process.



### (iii) *Lawful and reasonable instruction in a university*

As noted above a lawful and reasonable instruction must be within the scope of employment. The knowledge discovery and dissemination function can significantly broaden that scope in an academic contract. The specific aims of a particular academic or university cannot overpower these all embracing duties and functions. As a guiding principle an instruction to do something which is contrary to knowledge discovery and dissemination cannot be within the scope of employment nor can it be lawful and reasonable. What if facts similar to *Lane v Fasciale* were to occur in the context of an Australian university? Assume the governing council decided a university should be closed and had issued instructions that the decision must not be publicly criticised by staff. Might its vice chancellor speak out against the decision of its governing council to close the university? Would the outcome be different for a lecturer who opposed the council's decision to close the department he/she worked in? In *Lane* the judge drew a distinction between senior and junior staff though in one way this distinction should not be maintained in a university.<sup>119</sup> All academic staff will be bound to uphold the knowledge obligations on the university. Accordingly they will have rights to challenge untruths promulgated about the closure, provided they can prove their case, and can ignore the instruction. Taking an even higher moral ground they can argue that the general prohibition on public discussion by academics in relation to the university is *per se* contrary to knowledge discovery and dissemination, a function council itself is bound to uphold.

Finally, could the university council require an academic to withdraw a remark he/she has made about the closure, whether or not an initial instruction has been made not to speak? The answer is surprisingly straightforward, if the employee cannot show that what they said is true, they will be well advised to withdraw, though such withdrawal did not protect Rigg in *Rigg v Waikato*.

## CONCLUSIONS

This article did not examine the increased casualisation<sup>120</sup> of the academic workforce in Australia or its effects on academic freedom, though it is readily acknowledged that these non tenured academics are particularly vulnerable if they speak out against their employer. Such academics may find that their short term or sessional appointments are simply not renewed. Casual academics are often quite junior in the academy with little economic or industrial power. There is also anecdotal evidence that many of these casual staff are being offered Australian Workplace Agreements which are unlikely to contain any express academic freedom clauses.

An academic's speech can bring about that academic's dismissal, there being no absolute right of academic freedom in Australian Universities. There is a requirement of professional responsibility in the intra and extra mural speech of academics. In speech, as in all other forms of academic behaviour, academics are subject to the prevailing misconduct rules at that institution.

There is no absolute or unqualified legal right of academic freedom in Australian universities. On the contrary, academic freedom carries with it attendant obligations. For example an indignant cry of academic freedom could never justify the dissemination of that which is knowingly false, poorly researched, or the product of negligently prepared or falsified data. These matters are as much the 'enemy' of academic freedom as the university, church, corporation or state which seeks to censor or control the utterances of its academics.

Academics as scholars devoted to the discovery and dissemination of knowledge must act professionally in all aspects of their duties. Furthermore their universities must afford them the

opportunity to do that. An examination of professional conduct looks to both what is done and the manner in which it is done:

- An academic whose work is poorly researched cannot claim academic freedom protection as an excuse.
- Acting professionally cannot mean that the work is performed in a manner that intimidates or bullies students or other academics.
- Academic freedom operates within the law, so professional conduct requires cognisance of laws operating both within and outside the university.
- *Prima facie* professional conduct requires the academic to operate within the rules and ethics of his/her profession as an academic, and within his/her professional discipline if there is one. However, if the academic in his/her teaching and research is actually questioning or rejecting the methods, practices or ethics of the discipline or the academy itself, the academic needs to indicate that his/her work is not done according to traditional or standard methods which he/she rejects.
- A professional exercise of academic freedom carries with it an obligation to disclose any limitations or qualifications on the speech or writing of the academic.
- Acting professionally also requires an academic to disclose when the academic is simply voicing an opinion as opposed to a fully researched position, and the fact that the academic does not speak for the university, unless these matters are abundantly obvious.

An academic has the right to criticise the university provided there is no express contractual provision or binding policy to the contrary, and all representations are made honestly and professionally. Much has been said about the professional pursuit of knowledge, suggesting that an academic who is honestly and truthfully on that path has little to fear from his/her speech. An academic who makes an assertion about his employer university could well be placed in a situation where to claim the academic freedom privilege in his/her defence he/she will have to prove the truth of what was said or at least that the claim was made in circumstances where an academic acting honestly and professionally would be justified in making the public assertion about their university. An academic asked to withdraw a remark criticising the university would need to do so promptly or be very confident that it does meet the canons of responsible scholarship, and does not contravene an express contractual provision or a rule contained in binding policy, or a provision of an enterprise bargaining agreement.

An academic must exercise particular care when criticising the university, including its management practices or executive. The *Steele case*<sup>121</sup> and *Rigg v University of Waikato*<sup>122</sup> powerfully illustrate the dangers academics face when they choose to criticise publicly their employers. Modern universities spend many thousands of dollars marketing and promoting image, and will defend this investment against comments from their staff that go to matters such as standards (*Steele*) or safety (*Rigg*). Sadly this, and the heavy evidentiary onus that will be placed on academics to prove their assertions, will have a chilling effect on the likelihood of individual academics voicing opinions on intra mural matters.

Rigg did not discharge the onus and Steele may have been in some difficulty gaining sufficient evidence to prove his claims if the university had conducted a misconduct investigation.

The *university* also faces duties in relation to academic freedom flowing from the university's contractual obligations to its employees and its obligations to carry out its statutory functions. The institutional search for knowledge often dictated in the university statute requires a level of tolerance of heterodox thought within the academy lest today's heterodoxy be tomorrow's

orthodoxy. The university has an obligation to provide the conditions for the pursuit of knowledge by its academics, and also to ensure that such pursuit is not done at the expense of the academic freedom rights of others in the academy. Academic freedom imposes duties and obligations on the academic *and* the university.

The university has a right to expect that its academics will assist and not act against its obligations under its statute. Accordingly universities should not fail to act in circumstances (perhaps ironically because they might be concerned *not* to trample on academic freedom) where an academic in purported exercise of his/her academic freedom has spoken unprofessionally in ways which could do serious damage to the university. The best example of this is *Rigg v University of Waikato* where the University did act.

### ENDNOTES

1. *Lane v Fasciale* (1993) 35 AILR 425 (¶339), Supreme Court of Victoria No BC9304146 10 June 1993, Butterworths On Line unreported judgments
2. A history of Australian academic freedom disputes is described in Jackson J, *Legal Rights to Academic Freedom in Australian Universities*, Unpublished PhD thesis, University of Sydney, 2002
3. *NTEIU v University of Wollongong* [2001] FCA 1069 (8 August, 2001). The unsuccessful appeal is *University of Wollongong v NTEIU* [2002] FCAFC 85 (28 March, 2002)
4. quoted in *The Australian*, August 10, 2005 [http://www.theaustralian.news.com.au/common/story\\_page/0,5744,16204273%255E12332,00.html](http://www.theaustralian.news.com.au/common/story_page/0,5744,16204273%255E12332,00.html) (date accessed 14 September, 2005)
5. *Concut Pty Ltd v Worrell* [2000] HCA 64 (14 December 2000)
6. *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66
7. McGarry GJ 'The Contract of Employment and Freedom of Speech' (1980 – 82) 9 *Sydney Law Review* 332 at 339, This article is the seminal piece in this field.
8. *R v Darling Island Stevedoring & Lighterage Co Ltd; Ex p Halliday; Ex p Sullivan* (1938) 60 CLR 601, per Dixon J. On whether an employee must obey a lawful but unreasonable order see McGarry GJ, *The Employee's Duty to Obey Unreasonable Orders* (1984) 58 ALJR 327. More recently the test was applied in a speech case, *Lane v Fasciale* note 1.
9. *Federated Ship Painters & Dockers Union of Australia v Cockatoo Docks & Engineering Co Pty Ltd* (1946) 57 CAR 137
10. Note 9 at 138
11. Note 9 at 138
12. *Nokia Telecommunications Pty Limited v Davis* Industrial Relations Court of Australia, Decision no 549/96, 10 October, 1996
13. Note 12 at para 12
14. *Hague v Boniface Hospital* (1936) 3 DLR 363
15. Note 7 at 342
16. *Robertson v North Island College* (1980) 119 DLR(3d) 17
17. Note 16 at 39
18. He was subsequently dismissed by the college council and denied his appeal rights and was granted damages for wrongful dismissal.
19. Not just of the employment contract but also of possible fiduciary duties which may arise independently of the employer / employee relationship such as where a person holds or possesses property, in this case the confidential information, on behalf of another. There is also the possibility that if the disclosure is made to wilfully cause harm or disruption to the employer that the employer may have an action in tort against the employee: see note 7 at 338
20. *Gartside v Outram* (1856) 26 LJ Ch 113
21. Note 20
22. *Steel Corporation v Granada TV Ltd* [1981] 1 All ER 417

23. *Lion Laboratories Ltd v Evans* [1985] QB 526, [1984] 2 All ER 417
24. *Associated Dominion Assurance Society Pty Ltd v Andrew* (1949) 66 WN (NSW) 176
25. Note 24 at 178
26. Note 24 at 178
27. *A v Hayden* (1984) 156 CLR 532
28. *Allied Mills Industries Pty Ltd v Trade Practices Commission* (1981) 34 ALR 105
29. Note 27 at 545
30. Note 27 at 572
31. *Hayden* was discussed in *Woodroffe v National Crime Authority* [1999] FCA 1128
32. McGarry argues that because an employee could be dismissed for drawing attention to conduct falling short of a misdeed, for example, a company's commercial maladministration, the law should be liberalised in the employee's favour: McGarry GJ Note 7 at 341
33. Note 1
34. Note 1
35. *R v Darling Island Stevedoring and Lighterage Co Ltd; ex parte Halliday & Sullivan* (1938) 60 CLR 601
36. Note 1 citing *R v Darling Island Stevedoring and Lighterage Co Ltd; ex parte Halliday & Sullivan* (1938) 60 CLR 601 at 621
37. Note 1
38. Note 1
39. Note 1
40. *Sweezy v New Hampshire* (1956) 354 US 234
41. 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 *Sweezy v New Hampshire* (1956) 354 US 234.
42. *Pickering v Board of Education* (1968) 391 US 563
43. Note 42 at 569, 574
44. *Connick v Myers* (1983) 461 US 138
45. Note 44 at 153
46. Finkin MW 'Intramural Speech, Academic Freedom and the First Amendment' (1988) 66 *Texas LR* 1323 at 1331
47. Note 46 at 1332, Olivias notes that "within a year of *Connick* college professors were consistently losing claims they might have won under the broader conception of protected activities in *Pickering*. Olivias MA 'Reflections on Professorial Academic Freedom: Second Thoughts on the Third "Essential Freedom"' (1993) 45 *Stanford LR* 1835 at 1839
48. *Waters v Churchill* (1994) 511 US 661
49. *Jeffries v Harleston* (1995) 52 F.3d 9
50. See O'Shea K.F. The First Amendment (1997) 24 (2) *Journal of College and University Law* 132;
51. *Jeffries v Harleston* (1995) 52 F.3d 9 at 14,15
52. Brooks BG 'Adequate Cause for Dismissal: The Missing Element in Academic Freedom' (1995) 22 (2) *Journal of College and University Law* 331 at 346
53. Note 52 at 346
54. Newman S.A. 'At Work in the Marketplace of Ideas: Academic Freedom, the First Amendment, and *Jeffries v Harleston*' (1995) 22 (2) *Journal of College and University Law* 281 at 288
55. Hiers RH 'New Restrictions on Academic Free Speech: *Jeffries v Harleston II*' (1995) 22 *Journal of College and University Law* 217
56. Note 55 at 275
57. See *Carley v Arizona Bd of Regents* (1987) 737 P2d 1099, the Court also accepted the use of student evaluations as a measure of 'teaching fitness'. (at 1105)
58. See *Lovelace v Southeastern Massachusetts University* (1986) 793 F.2d 419 at 425 cited with approval in *Carley v Arizona Bd of Regents* (1987) 737 P2d 1099 at 1102
59. *Cooper v Ross* (1979) 472 F Supp 802 and cases cited therein.

60. *Adamian v Jacobsen* (1975) 523 F.2d 929 discussed in RH Miller *The Role of Academic Freedom in Defining the Faculty Employment Contract* (1981) 31 Case Western Reserve Law Review 608 at 628
61. *Lynch v Indiana State University Board* (1978) 378 NE2d 900 at 905
62. Kaplin WA & Lee BA *The Law of Higher Education* 3rd ed 1995 Jossey Bass San Francisco at 306–312
63. *Hetrick v Martin* (1973) 480 F.2d 705
64. *Clark v Holmes* (1972) 474 F.2d 928
65. *Lovlace v Southeastern Massachusetts University* (1986) 793 F.2d 419
66. *Parate v Isibor* (1989) 868 F.2d 821
67. *Martin v Parish* (1986) 805 F.2d 583 but compare *Di Bona v Matthews* (1990) 269 Cal Rep 882.
68. Finkin MW Note 46 at 1326
69. Finkin MW Note 46 at 1341
70. Finkin MW Note 46 at 1343
71. Yudof MG *Intramural Musings* (1988) 66 Texas Law Review 1351 at 1355
72. Finkin MW Note 46 at 1332 and 1333. See also Rabban: ‘an individual professor who departs from the scholarly standards that justify academic freedom can be disciplined or even dismissed.’ Rabban DR *Does Academic Freedom Limit Faculty Autonomy?* (1988) 66 *Texas Law Review* 1405 at 1409 and Rabban DR ‘A Functional Analysis of “Individual” and “Institutional” Academic Freedom under the First Amendment’ (1990) 53 *Law and Contemporary Problems* 227 at 234
73. *Rigg v University of Waikato* [1984] 1 NZLR 149
74. Note 73
75. Note 73 at 207
76. Note 73 at 207
77. Note 73 at 207 and see Metzger: ‘Does it really offend the Constitution to so much as examine the question of whether faculty members’ utterances outside the classroom reflect on their professional fitness for office? If it does, farewell the notion that rights entail responsibilities, that academic privilege should be wedded to conscientious conduct, and all the other classic maxims of professionalism.’ WP Metzger ‘Professional and Legal Limits to Academic Freedom’ (1993) 20 *Journal of College and University Law* 1 at 13
78. *The Association of University Teachers (UK) Bulletin*, 1974, No 54, at 8, quoted in *Rigg v University of Waikato* [1984] 1 NZLR 149 at 202
79. *Burns v Australian National University* (1982) 40 ALR 707
80. For a detailed analysis see note 2 at 307–312
81. University of Sydney *Academic and Teaching Staff Agreement 2003 – 2006* [http://www.usyd.edu.au/personnel/agreements/2003\\_2006/academic\\_teaching\\_staff/AS\\_toc.htm](http://www.usyd.edu.au/personnel/agreements/2003_2006/academic_teaching_staff/AS_toc.htm)
82. *Miller v University of New South Wales* 1307/99 S Print S0551 (29th October, 1999) 1307/99 S Print S0551 <http://www.austlii.edu.au/au/cases/cth/IRCommA/1999/1233.html>  
This matter has resulted in extensive litigation subsequent to this decision, but not on the meaning of ‘serious misconduct’. See *Miller v University of New South Wales* [2003] FCAFC 180 (14 August 2003)
83. *Habili Saira v Northern Territory University* (1992) 109 FLR 46
84. Note 83
85. *Rice v University of Queensland* matter QI 1042 of 1995, 13 March, 1998 <http://www.austlii.edu.au/au/cases/cth/irc/980009.html>
86. Note 85 at 37
87. *Constitution of the Republic of South Africa* 1996 s.16; *Education Reform Act 1988* (UK), s.202; *Education Act 1989* (New Zealand) s.161; *Universities Act 1997* (Ireland) s.14.
88. Hamblly stated: ‘The traditions and values of academic freedom are firmly established at university level and moves by the government to spell these out in legislation are fraught with problems’ Hambley F, *Comments on Academic Charter for Financial Review*, Australian Vice Chancellors’ Committee 18 May, 1990. The same phrase appears in a letter sent by the Chairman of the Australian Vice Chancellors’ Committee, Professor Brian Wilson, Vice Chancellor of the University of Queensland to the Minister

- for Education at that time. Copy of letter to the Hon Peter Baldwin, Minister for Higher Education and Employment Services, undated, contained in University of Queensland Archives S435 Subject Files of the Vice Chancellor, Professor Brian Wilson.
89. *Resolution Concerning the Status of Higher-Education Teaching Personnel*, Resolution of the General Conference of UNESCO, 29<sup>th</sup> Session, Paris, 11 November, 1997, Records of the General Conference 26 at 30
  90. Note 89 at 32
  91. Note 89 at 31
  92. Thus clause 2.11 of the *Policy on Quality in Research Practice* at Southern Cross University provides: ‘Research and Scholarship thrive on debate, critical analysis and in some cases, the questioning of conventional disciplinary or professional practices. A researcher who chooses to dissent from conventional disciplinary or professional practices should inform and seek advice from the Director of Postgraduate Studies and Research and Head of the appropriate School, Centre or College at the earliest opportunity. In all cases, a researcher must conform to established codes of ethical practice and legal obligations.’ The clause is not without its own chilling effects but it at least provides a mechanism to protect the dissident researcher.
  93. Note 89 at 27
  94. *National Tertiary Education Industry Union and Australian Higher Education Industrial Association* 526/98 N Print Q0702 <http://www.osiris.gov.au/html/decisions/98/MISC-98/2/IA011590.htm>, at para 2.3.3 citing *Halsbury’s Laws of Australia* Vol 10 Chapter 160 at 302 – 411
  95. The inclusion of the words ‘free inquiry’ in both the object and functions of New South Wales universities strengthens the arguments made in this Article.
  96. See for example under s 52 of the *Trade Practices Act 1974* (Cth)
  97. Modern Australian vice chancellors and other university ‘executives’ who seek to ‘corporatise’ their universities might do well to note the difference.
  98. Some university acts do not describe the functions of a university, leaving these to be defined by the use of one word ‘university’. Thus section 3 of the University of Western Australia Act 1911 simply provides: There shall be from henceforth for ever in the State of Western Australia a University to be called ‘The University of Western Australia’ with such faculties as the Statutes of the University may from time to time prescribe. The Melbourne University Act 1958 in s 4 commences: “A University is hereby declared to have been established on the 11th day of April 1853 at Melbourne. The university functions are not afterwards described.
  99. *Associated Dominion Assurance Society Pty Ltd v Andrew* (1949) 66 WN (NSW) 176
  100. *Blyth Chemicals v Bushnel* (1933) 49 CLR 66 at 81
  101. *Associated Dominion Assurance Society Pty Ltd v Andrew* (1949) 66 WN (NSW) 176 at 178
  102. *Auckland Shop Employees Union v Woolworths* [1985] 2 NZLR 372
  103. Note 102 at 376
  104. *Mahmud and Malik v Bank of Credit and Commerce International SA* (1997) 3 WLR 95
  105. Note 104 at 98
  106. *Johnson (AP) v Unisys Limited* [2001]UKHL 13
  107. see for example *Gambotto v John Fairfax Publications Pty Ltd* [2001] NSWIRComm 87 (1 May 2001), and *Blaikie v SA Superannuation Board* (1995) 64 IR 145. It seems also that Kirby J in the High Court decision in *Concut Pty Ltd v Worrell* [2000] HCA 64 (14 December 2000) may have been hinting at the *Mahmud* proposition 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]
  108. Fundamentally misunderstanding the link between academic freedom and professional duty two American commentators have even suggested that ‘professors who do not see the need for protecting their academic freedom’ could ‘bargain it away for higher salaries.’ McGee RW and Block WE ‘Academic Tenure: an Economic Critique’ 14 *Harvard Journal of Law and Policy* 545 at 547.
  109. *Habili Saira v Northern Territory University* (1992) 109 FLR 46
  110. Metzger WP ‘Professional and Legal Limits to Academic Freedom’ (1993) 20 *Journal of College and*

111. Rabban DR 'Does Academic Freedom Limit Faculty Autonomy?' (1988) 66 *Texas Law Review* 1405 at 1410.
112. Jones DG, Galvin K, Woodhouse D *Universities as Critic and Conscience of Society: The Role of Academic Freedom*. New Zealand Universities Academic Audit Unit, March 2000 at 8.
113. 'It is dishonest to suggest that free speech is equally available to all. Some of us are entrusted with the ability to speak authoritatively, and to be listened to, because of the roles we occupy in society. This is why it is imperative for other academics to denounce Fraser's continuing capitalisation on his academic title and institutional affiliation. Fraser has no academic research history in the field of race and ethnicity studies.': Aitken et al, Letter to the Editor, 'The Australian' 17 August, 2005 [http://www.theaustralian.news.com.au/common/story\\_page/0,5744,16282018%255E12332,00.html](http://www.theaustralian.news.com.au/common/story_page/0,5744,16282018%255E12332,00.html) (Date accessed 15 September, 2005)
114. Note 89 at 31
115. It is necessary to check each Act in each State to see whether they cover university staff.
116. See Eisenberg RS 'Academic Freedom and Academic Values in Sponsored Research' (1988) 66 *Texas Law Review* 1363.
117. As Rabban citing the 1915 Declaration comments: 'The 1915 Declaration stresses that all true universities, whether public or private, are public trusts designed to advance knowledge by safeguarding the free inquiry of impartial teachers and scholars. Any university that restricts the academic freedom of professors necessarily violates its public trust.' Rabban DR, Note 111 at 1412.  
Speaking of the 'open search for truth' MacIver says: "The institution distinctively dedicated to this service is the university.... From this function the claim to academic freedom derives. This freedom is not to be thought of as a privilege, not as a concession, nor as something that any authority inside the institution may properly grant or deny, qualify or regulate, according to its interest or discretion. It is something instead that is inherently bound up with the performance of the university's task, something as necessary for that performance as pen and paper, as classroom and students, as laboratories and libraries. R MacIver *Academic Freedom in our Time* quoted in Malin M and Ladenson 'University Faculty Members' Right to Dissent: Toward a Unified Theory of Contractual and Constitutional Protection' (1983) 16 *Uni of California at Davis Law Review* 933 at 935.
118. Metzger WP 'The 1940 Statement of Principles on Academic Freedom and Tenure' (1990) 53 *Law and Contemporary Problems* 1 at 13
119. Compare however *Jeffries v Harleston* (1995) 52 F.3d 9 considered supra
120. The recent Senate inquiry *Universities in Crisis* devotes a significant amount of detail to casualisation and its effects citing the Chair of the Australian Vice Chancellor's Committee (the AVCC), Professor Chubb, as indicating that increased casualisation had 'profound implications for the quality of the educational environment; and a worsening position in terms of international comparators.' AVCC figures also showed 'the proportion of university staff employed as casuals had more than doubled in the past decade, from 9 per cent in 1990 to 18 per cent in 2000. The increase had been most dramatic for teaching-only staff – 90 per cent of whom were casuals compared with 30 per cent ten years ago.' Australian Senate, Senate Employment, Workplace Relations, Small Business and Education References Committee *Universities in Crisis*, Canberra, 27 September 2001 at para 3.90. Casualisation is addressed in the Report at 9.52 – 9.62.
121. Note 3
122. *Rigg v University of Waikato* [1984] 1 NZLR 149

