

‘WE NEED TO TALK ABOUT YOUR ASSIGNMENT’: THE REQUIREMENTS OF PROCEDURAL FAIRNESS WHEN ACADEMIC MISCONDUCT IS FIRST SUSPECTED

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The credibility of Australian universities and their degrees recently came under national and international scrutiny in the wake of contract cheating scandals where students purchased assignments from internet websites, including the ‘MyMaster’ website. As well as threatening the reputation of universities, findings (and even allegations) of academic misconduct can have serious detrimental implications for students whose future careers and livelihoods may be jeopardised. This paper makes recommendations as to how universities should proceed when a suspicion of academic misconduct exists in order to fairly balance the interests of both universities and students. It highlights the importance of an academic staff member having a preliminary discussion with a student at the stage at which that staff member has a suspicion that a student may be guilty of academic misconduct and is in the process of deciding whether or not to make a formal allegation against the student. In doing so, it examines whether, and to what extent, any procedural fairness requirements apply, or should apply, at this preliminary stage with reference to relevant case law including X v University of Western Sydney (No 3).

I INTRODUCTION

In 2014 and 2015, Australian universities came under intense scrutiny for their practices and procedures surrounding contract cheating (also known as ‘ghost writing’) in assessments.¹ In fact, several of these scandals culminated in domestic and international concern and attention, including an exposé on the Australian

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† The authors would like to thank Dr Narrelle Morris, Professor Dale Pinto, Associate Professor Aviva Freilich, Professor Joan Squelch and two anonymous referees for their comments on an earlier draft of this paper.

1 Clarke and Lancaster use the term ‘contract cheating’: see generally Robert Clarke and Thomas Lancaster, *Eliminating the Successor to Plagiarism? Identifying the Usage of Contract Cheating Sites* (23 September 2014) CiteSeerX <<http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.120.5440>>.

Broadcasting Corporation's Four Corners investigation program.² Such dishonest conduct by students strikes at the heart of academic integrity, and can result in serious reputational risks for universities. Thus universities are under more pressure than ever before to prevent, detect, and adequately punish students who are found to have committed academic misconduct, which can involve contract cheating, but also extends to collusion and plagiarism.³

Findings of academic misconduct can have a serious detrimental impact on both universities and students. This is because as well as having the potential to damage the reputation of a university, an adverse finding of academic misconduct also has the potential to destroy the reputation of a student, and their future career options. This is especially evident in the very serious ramifications for law students, who may be denied admission as legal practitioners, or later be 'struck off' the roll of legal practitioners, if they fail to disclose adverse findings of academic misconduct before seeking admission. Findings of academic misconduct can similarly have very serious consequences for students studying to pursue careers in professions such as medicine and accounting. The residency status of international students can also be adversely affected as a result of such findings.

It is therefore imperative that allegations of academic misconduct be investigated properly and thoroughly, and that the students involved should be afforded 'procedural fairness' (also known as 'natural justice')⁴ during the investigation of an allegation of academic misconduct, and before a final determination is made. This includes informing the student of the allegation against them, and giving them an opportunity to respond before a final determination is made⁵ by an unbiased decision-maker. Generally, universities do appear to comply with

2 In 2015, what became known as the 'MyMaster Cheating Scandal' resulted in the University of New South Wales, University of Newcastle, University of Technology Sydney and Macquarie University bringing misconduct proceedings against students who contracted with the MyMaster web page to write assignments for them, and submit online tests. It was reported that students from 16 universities used the MyMaster web site: Jean Kennedy, 'Major Universities Crack Down on Cheats Using MyMaster Essay Writing Service', *ABC News* (online), 14 April 2015 <<http://www.abc.net.au/news/2015-04-14/major-universities-investigate-cheating-scandal/6390164>>. The MyMaster web site was written in Chinese, and targeted international students. The highly detrimental impact caused to the reputation of Australian universities is illustrated by the cancellation of the degrees of two students involved in this scandal, and the prevention of another 10 students from graduating: see 'Macquarie University Cancels Degrees and Fails Students Involved in MyMaster Cheating Scandal', *ABC News* (online), 28 May 2015 <<http://www.abc.net.au/news/2015-05-28/macquarie-university-fails-mymaster-students-cancels-degrees/6504012>>. The scandal culminated in a report by the New South Wales Independent Commission Against Corruption, 'Learning the Hard Way: Managing Corruption Risks Associated with International Students at Universities in NSW' (Report, Independent Commission Against Corruption, April 2015), which found that universities must increase their efforts to eliminate academic misconduct: see 'ICAC Urges Universities to Curb Cheating in International Student Industry by Boosting Protocols', *ABC News* (online), 16 April 2015 <<http://www.abc.net.au/news/2015-04-16/icac-urges-unis-to-curb-cheating-by-boosting-protocols/6397766>>.

3 While contract cheating can be regarded as a form of plagiarism, it is suggested that it should be in a separate category of misconduct as explained in more detail later in this paper.

4 See Judith Bannister, Gabrielle Appleby, Anna Olijnyk, *Government Accountability: Australian Administrative Law* (Cambridge University Press, 2015) 459 who state that, '[t]he terms "natural justice" and "procedural fairness" are synonymous'.

5 *X v University of Western Sydney* (No 3) [2013] NSWSC 1329 (11 September 2013) 29 [81] (*X v UWS*).

these requirements in investigating a formal allegation of academic misconduct against a student, and making a final determination.

However, it is equally imperative that before a formal allegation of misconduct is made there are reasonable grounds to justify it. Part of the process of determining whether a mere suspicion of academic misconduct has any reasonable basis may involve a preliminary discussion with the student shortly after the alleged misconduct is suspected. This will usually be between the student and an academic staff member.⁶ Ensuring that a formal allegation is reasonably justified is significant, given that an allegation of academic misconduct against a student can itself have serious consequences for the student's reputation and future career.⁷ Further, in recent years there has been an increased understanding of mental health issues in the general and student populations, including in disciplines such as law and medicine, which have significant reported rates of anxiety and depression.⁸ Consequently, universities need to be mindful that making an allegation of misconduct can be extremely stressful for a student, and can exacerbate student anxiety and other mental health issues.

6 This is most often the unit coordinator, who is sometimes referred to as the 'unit controller' or 'academic convenor'.

7 There is some uncertainty in particular Australian jurisdictions as to whether an allegation of academic misconduct itself may have to be disclosed if there has been no formal finding of misconduct under the university's academic misconduct rules. For example, *Legal Profession Act 2004* (Vic) s 2.3.3(1) provides that it is relevant to consider, with respect to a person's suitability for admission, 'whether the person is or has been the subject of disciplinary action' in determining whether they are a 'fit and proper person to be admitted to the legal profession'. This Victorian legislation was referred to in *Re OG (A Lawyer)* (2007) 18 VR 164 where the Supreme Court of Victoria considered whether a legal practitioner should be struck off the roll of legal practitioners for failing to disclose collusion in a business unit while he was studying towards a Bachelor of Business and Bachelor of Laws double degree at Victoria University. OG had been given a zero mark for the assignment, but no formal misconduct finding had been made against him and yet, the court still ordered that he be struck off the roll of legal practitioners: at 164. For a discussion of this uncertainty with respect to the *Legal Profession Act 2004* (Vic), see Matthew Groves, 'Your Cheating Art Will Tell on You' (2008) 82(8) *Law Institute Journal* 43. This case is also discussed in Michelle Evans, 'Plagiarism and Academic Misconduct by Law Students: The Importance of Prevention over Detection' (2012) 17(2) *International Journal of Law & Education* 99, 107–9.

8 Australian Institute of Health and Welfare, *Life Stages* (2016) <<http://www.aihw.gov.au/australias-health/2014/in-brief/life-stages/>> states that:

The 2007 National Survey of Mental Health and Wellbeing found that an estimated 671 100 or 26% of young people aged 16–24 were suffering from a mental disorder. Of the 3 categories of disorders investigated in this survey, 15% of young people had anxiety disorders, 13% had substance use disorders and 6% had affective disorders (such as mania or depression).

In a survey of medical practitioners and medical students, Beyond Blue, a not-for-profit association whose aims include increasing awareness about anxiety and depression, found similarly high rates (when compared to the general population) of mental health issues amongst medical students to the general student population: Beyond Blue, 'National Mental Health Survey of Doctors and Medical Students' (Research Report, Beyond Blue, October 2013) 5. In addition, 1 in 5 medical students reported that they had thoughts of suicide in the previous 12-month period, which was 'substantially higher' than the general population: at 84. Mental health issues amongst law students have also been well documented: see generally Norm Kelk, Georgina Luscombe, Sharon Medlow and Ian Hickie, 'Courting the Blues: Attitudes towards Depression in Australian Law Students and Lawyers' (Monograph, Brain & Mind Research Institute, University of Sydney, January 2009). See also Christopher Kendall, 'Report on Psychological Distress and Depression in the Legal Profession' (Report, Law Society of Western Australia, March 2011).

The question of whether procedural fairness needs to be afforded at the stage at which a staff member is making a decision as to whether to make a formal allegation of academic misconduct against a student is not ‘clear-cut’ and can lead to confusion. For example, is there a requirement that a staff member have a preliminary discussion with a student in order to determine whether there are reasonable grounds to justify a formal allegation of misconduct? If so, are factors such as the timing of any discussion with the student, the amount and degree of prior notice that should be given, and who should be present at the discussion (for example, a support person for the student, such as a student guild member, or another academic staff member as a witness/observer) significant? Alternatively, if the rules of procedural fairness do not apply at this preliminary stage, should they apply or are they irrelevant at this stage?

University academic misconduct rules focus on the procedures involved in a formal academic misconduct investigation with reference to the requirements of procedural fairness. However, they tend to be silent in relation to the preliminary stage at which an academic staff member has a suspicion that a student may be guilty of academic misconduct and is in the process of deciding whether or not to report it for further investigation.⁹ Similarly, the academic literature on the subject primarily focuses on the formal investigation and not on the parameters of any preliminary discussion.¹⁰ This paper examines the significance of the preliminary stage and assesses whether, and to what extent, the principles of procedural fairness apply at this stage.

This paper commences by examining the general principles of procedural fairness and providing an overview of the processes commonly used by universities in considering academic misconduct by students, with reference to these general principles and the circumstances in which they apply in this context. Next, it discusses the possible consequences of a finding, or even an allegation, of academic misconduct to a student’s life and future career, including by reference to relevant Australian cases. It then examines different examples of academic misconduct and considers whether the application of the principles of procedural fairness during the formal investigation of an allegation of academic misconduct is, in itself, sufficient to ensure that fairness is afforded to students, specifically in situations where academic misconduct may not be ‘clear-cut’. It questions whether an equally critical stage to ensure that fairness is afforded to students is that at which the staff member has a suspicion that a student may be guilty of academic misconduct and is deciding whether or not to report it and if so, the manner in which this can best be achieved. Finally, this paper makes recommendations as to the law in relation to the application of the rules of procedural fairness when a

9 For example, Curtin University’s Academic Misconduct Rules provide that ‘[a] Staff Member or Associate who has reason to believe that a student may be guilty of Academic Misconduct must report the matter to an Authorised Officer’, but does not explain how this belief is to be formed and what, if anything, the staff member can or cannot do to determine whether they have ‘reason to believe’ that the student may be guilty of Academic Misconduct: University of Technology Council, *Academic Misconduct Rules* (at 25 July 2014) r 2.1(1).

10 See, eg, Bruce Lindsay, ‘University Hearings: Student Discipline Rules and Fair Procedures’ (2008) 15 *Australian Journal of Administrative Law* 146; Bruce Lindsay, ‘Student Plagiarism in Universities: The Scope of Disciplinary Rules and the Question of Evidentiary Standards’ (2011) 16(1) *International Journal of Law & Education* 27.

suspicion of academic misconduct exists but before a formal allegation is made. Specifically, it considers how universities should proceed when a suspicion of academic misconduct exists and argues that, even if procedural fairness is not applicable at this initial stage, it should be, in order to more adequately balance fairness to the student with the maintenance of academic integrity.

II PROCEDURAL FAIRNESS AND UNIVERSITY ACADEMIC MISCONDUCT PROCESSES

'Procedural fairness' and 'natural justice' are terms that are often used interchangeably.¹¹ The term 'procedural fairness' has, more recently, become more commonly used,¹² perhaps because the concept concerns the process of decision making, rather than the decision itself.¹³ Additionally, the descriptor 'fairness' better accords with the merits review process conducted by administrators and statutory tribunals, whereas 'justice' connotes judicial decision-making.¹⁴

Procedural fairness is a common law principle, and is also applied as a principle of statutory interpretation:¹⁵ a judge-made principle, with its scope and application developed and qualified by the courts over time. It comprises two rules: the hearing rule, and the bias rule. At a basic level, a person who may be adversely affected by a decision is required to be informed that a decision will be made;¹⁶ informed of the general nature of the allegations being made against them and the 'general scope and purpose of the hearing';¹⁷ and to have an opportunity to respond to any prejudicial allegations before a final decision is made.¹⁸ The rule

11 See Bannister, Appleby and Olijnyk, above n 4.

12 See *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476, 490 (Gleeson CJ) quoted in Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworths, 3rd ed, 2012) 561; Roger Douglas and Michael Head, *Douglas and Jones's Administrative Law* (Federation Press, 7th ed, 2014) 493.

13 Matthew Groves, 'The Evolution and Entrenchment of Natural Justice' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 205, 206.

14 See *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 365–7 (Deane J) for a discussion of the distinction between judicial and statutory decision-making.

15 See, eg, *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ) ('*Plaintiff S10/2011*');

one may state that 'the common law' usually will imply, as a matter of statutory interpretation, a condition that a power conferred by statute upon the executive branch be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power.

16 *Cooper v Board of Works for the Wandsworth District* (1863) 14 CB NS 180, [190] ('*Cooper*'); *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487, 496.

17 *Dainford Ltd v Independent Commission Against Corruption* (1990) 20 ALD 207, 209 (Young J), quoted in Roger Douglas, *Administrative Law* (LexisNexis Butterworths, 2nd ed, 2004) 201.

18 *Kioa v West* (1985) 159 CLR 550, 588 ('*Kioa*'); *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 411. See *Durney v Deakin University* [2014] VSC 577 (24 November 2014) where a student alleged that he was not given adequate notice to respond to adverse allegations before being excluded from the University. These claims were dismissed by McMillan J, who held that Durney had sufficient notice because the notices were sent to his student email address: at [54]. Under s 13A of the *Electronic Transactions Act 1999* (Cth), the student was deemed to have received the emails when they were 'capable of being retrieved' (effectively when they appeared in his email inbox): at [49].

against bias requires that the decision-maker should not have prejudged the matter or the person affected by the decision. This includes actual bias and perceived bias (also referred to as apprehended bias) — where a fair-minded person would have a reasonable apprehension of bias.¹⁹ The bias rule is not of central relevance in this paper because this paper focuses on the considerations and procedures a staff member may engage in when they first suspect academic misconduct, such as having a discussion with a student — this primarily concerns the hearing rule.

If a statute expressly provides that procedural fairness must be afforded, then it must be afforded to the extent and in the manner that the statute provides. Sometimes a statute will simply provide that a person must be afforded procedural fairness before a decision is made that affects them, thus leaving the exact requirements to be determined with reference to common law principles and the facts and circumstances of the individual case. Other statutes may specifically detail what procedural fairness will entail (for example, by stating that a person must receive written notice of the allegations, and/or that they must be given a specific number of days in which to respond to the allegations in writing). Hence, what will be required to afford procedural fairness will vary widely from case to case, depending on the specific facts and circumstances of each individual case and the wording of the relevant statute.²⁰

Where a statute is silent about procedural fairness, the courts may imply a duty to afford it if a person's 'legal rights, interests,²¹ or legitimate expectations' may be affected by a decision.²² In a university context, Beech-Jones J in *X v UWS* commented about the 'expectations' of university students:

The expectation of a young person to continue with their University education is an important interest even if it may not amount to a legal right. Depending upon the legal framework governing a student's relations with a University and the exigencies of the particular case, this expectation should not be defeated for reasons related to an allegation of misconduct unless a fair opportunity to be heard is afforded.²³

However, the concept of 'legitimate expectation' has recently been rejected by the High Court. Significantly, in *Plaintiff S10/2011 Gummow, Hayne, Crennan and Bell JJ* criticised the concept of 'legitimate expectation', which they stated 'adds nothing or poses more questions than it answers and thus is an unfortunate

19 See *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70, 89 (Mason CJ, Brennan J), 102 (Gaudron, McHugh JJ) where there was no actual bias, but a reasonable apprehension of bias which justified the disqualification of two members of the Australian Broadcasting Tribunal who had already made a finding of guilt from a subsequent inquiry. See also *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 for an example of where it was held that a fair-minded person would have a reasonable apprehension of bias by two Judges due to comments they made about the party in a previous case: at 300.

20 See *Kioa* (1985) 159 CLR 550, 584–5 (Mason J), 614 (Brennan J).

21 Originally, procedural fairness only had to be afforded if a person's legal rights, for example property rights, may have been adversely affected by a decision: see, eg, *Cooper* (1863) 14 CB NS 180, [187].

22 See, eg, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1.

23 [2013] NSWSC 1329 (11 September 2013) [3].

expression which should be disregarded'.²⁴ Further criticism of the concept of 'legitimate expectation' was expressed by the High Court in *Minister for Immigration and Border Protection v WZARH* by Kiefel, Bell and Keane JJ, with their Honours proposing an even broader test to determine when procedural fairness must be afforded.²⁵ Their Honours stated that

The 'legitimate expectation' of a person affected by an administrative decision does not provide a basis for determining whether procedural fairness should be accorded to that person or for determining the content of such procedural fairness. *It is sufficient to say that, in the absence of a clear, contrary legislative intention, administrative decision-makers must accord procedural fairness to those affected by their decisions.* Recourse to the notion of legitimate expectation is both unnecessary and unhelpful. Indeed, reference to the concept of legitimate expectation may well distract from the real question; namely, what is required in order to ensure that the decision is made fairly in the circumstances having regard to the legal framework within which the decision is to be made.²⁶

In summary, in rejecting the concept of 'legitimate expectation', the High Court clarified that a decision-maker should accord procedural fairness to a person affected by a decision as a general rule when a statute is silent about whether it should apply. The courts may, however, decide there is no duty to afford procedural fairness if the wording of the statute and the circumstances of the case expressly or impliedly provide that it is not appropriate to do so.²⁷

Given that this paper focuses on the stage at which an academic staff member is considering whether to make a formal allegation against a student, it is important to note that the courts regard a decision to make such a formal allegation to be one of many in a chain of decision-making which leads to the ultimate determination of academic misconduct. The academic staff member is not regarded as making a final and conclusive decision at this stage. Instead, the academic staff member is viewed as making a recommendation that the matter warrants determination by a formal process. This formal process may involve formal investigation by the school or department or (depending on what is provided for in the university statute) referral to a faculty or university disciplinary panel or tribunal.

The legal position, as defined by the courts, is that, subject to the wording of the university statute and the individual facts and circumstances of the case, the rules of procedural fairness generally apply before a *final* decision is made that may affect a student's rights, interests or legitimate expectations, but not to a preliminary recommendation as to whether the matter should be determined by

24 *Plaintiff S10/2011* (2012) 246 CLR 636, 658 [64]–[66].

25 (2015) 326 ALR 1, 7–8 [28]–[30].

26 *Ibid* 8 [30] (Kiefel, Bell and Keane JJ) (emphasis added). Similarly, Gageler and Gordon JJ stated that 'the concept can distract from the true inquiry into the opportunity that a reasonable administrator ought fairly to have given': at 13 [61].

27 See, eg, *Riverside Nursing Care Pty Ltd v Bishop* (2000) 100 FCR 519. This more particularly applies to the hearing rule, because arguably the rule against bias arises even in the absence of a legitimate expectation: see, eg, Creyke and McMillan, above n 12, 641–2, who argue that 'the bias rule applies universally to all administrative decision-making'.

a formal process.²⁸ Indeed, to use the words of Mason CJ in *South Australia v O'Shea*, 'the decision making process, [must be] viewed in its entirety'.²⁹

Applying Mason CJ's comments to a university academic misconduct context, the decision-making process will be viewed as a whole to ascertain whether the student has been able to make submissions on all prejudicial allegations and material before a final finding of misconduct is made. This was confirmed in *X v UWS*,³⁰ in which the plaintiff was accused of non-consensual sexual contact with Ms Y at a student residence on the University campus. Ms Y made a complaint to the Director of Campus Safety and Security at the University, who made a recommendation to the Deputy Vice-Chancellor, Corporate Strategy and Services ('DVC') to suspend X from the University. Subsequent to receiving this recommendation, the DVC made a decision to refer the matter to a Student Non-Academic Misconduct Investigation Committee pursuant to the University's Student Non-Academic Misconduct Policy and to immediately suspend X from the University until the Committee made a final determination of the matter. A letter was provided to X to this effect.

The Court in *X v UWS* was asked to determine whether X was required to be afforded procedural fairness and be given an opportunity to be heard before the DVC could make the decisions to immediately suspend X and refer the matter to the Committee.

Beech-Jones J found that there had been a failure to afford procedural fairness to X in relation to the DVC's decision to suspend him. X had not been told that his suspension from the University was even being considered, let alone provided with any notification of the factors that were to be relied upon in making the determination to suspend him.³¹ He was therefore found to have been denied the opportunity to be heard before the decision to suspend him was made, and the decision to suspend him was held to be invalid.³²

28 This is also the view taken by Lindsay in Bruce Lindsay, 'Student Conduct and University Discipline' in Sally Varnham, Patty Kamvounias and Joan Squelch (eds), *Higher Education and the Law* (Federation Press, 2015) 104, 111.

29 (1987) 163 CLR 378, 389 ('*O'Shea*'). In *O'Shea*, procedural fairness was afforded at the recommendatory stage, as opposed to the final stage. However, the principle remains that the decision-making process must be viewed as a whole. O'Shea was afforded a hearing before the Parole Board of South Australia, where he was represented by a lawyer who made submissions on his behalf. The Parole Board recommended to the Governor that O'Shea should be released on licence. However, the Governor in Council decided that O'Shea should not be released. O'Shea argued that he had been denied procedural fairness because he was not given the opportunity to make submissions about the recommendation that was being sent to the Governor in Council before the decision was made by the Governor in Council. A 4:1 majority of the High Court held that there had been no contravention of the hearing rule. In a frequently quoted passage, Mason CJ noted the importance of viewing the decision making process as a whole:

The hearing before the recommending body provides a sufficient opportunity for a party to present his case so that the decision-making process, viewed in its entirety, entails procedural fairness. If the decision-maker intends to take account of some new matter, not appearing in the report of the recommending body, and the party has had no opportunity of dealing with it, the decision-maker should give him that opportunity: at 389 (citations omitted).

30 [2013] NSWSC 1329 (11 September 2013).

31 Ibid [65].

32 Ibid [64].

However, as to the decision of the DVC to refer the allegation to a Committee, Beech-Jones J held that this decision was not itself a decision that adversely affected the student and so procedural fairness did not have to be afforded to the student at this stage.³³ His Honour did comment though that the deliberations of the Committee would require procedural fairness to be afforded.³⁴ In making this decision, his Honour made reference to the case of *Wilde v University of Sydney*,³⁵ where Macready AJ held that 'natural justice' did not apply to the findings of a preliminary report in relation to a student's conduct which, in his Honour's view, did not have any adverse consequences for her, and made the following comments:

The report cannot lead to anything adverse to the plaintiff because nothing flows from it. The findings made in the report do not have any binding effect on the plaintiff. Both the report and the plaintiff's statement of 10 November refer to the factual material the existence of which is used to set in train a proper investigative process to consider that factual material. In that subsequent investigative process ... there is adequate provision for the rules of natural justice to apply. The plaintiff is given appropriate notice of the charges and the chance to refute them.

I cannot see how in any way the University, in deciding whether or not to put in train such a process, is first obliged to give notice of the fact that it is considering doing so to the plaintiff. One wonders for what purpose notice should have been given.³⁶

In view of the above, the rules of procedural fairness do generally apply before a final decision of academic misconduct is made against a student but not to the stage before a formal allegation is made. Given the courts' unwillingness to imply a duty to afford procedural fairness at this preliminary stage, whether, and when, these rules will apply will be subject to the wording of the relevant university statute or any delegated legislation in the form of 'regulations' or 'rules'.³⁷

There are generally significant similarities between the academic misconduct rules of universities in all Australian jurisdictions, with many commonalities between the procedures commonly used by universities. Lindsay has analysed the content of the hearing rule across 16 Australian university misconduct statutes (at the stage after a formal allegation of misconduct has been referred for determination), in order to assess whether the procedures contained within them

33 Ibid [55].

34 Ibid.

35 [2002] NSWSC 954 (15 October 2002).

36 Ibid [37]–[38], quoted in *X v UWS* [2013] NSWSC 1329 (11 September 2013) [53].

37 For example, Curtin University is established under the *Curtin University of Technology Act 1966* (WA). Section 34 of this Act allows the Council to make statutes 'with respect to all matters pertaining to the University' including the good 'management, good government and discipline of the University'. *Statute No 10 — Student Disciplinary Statute*, 19 February 1975 ('*Statute No 10*') made by the Council of Curtin University under s 34 of this Act was published in Western Australia, *Government Gazette*, No 20, 4 April 1975, 1064. This is consistent with other university statutes and associated delegated legislation throughout Australia. A university's statute, and specifically its delegated legislation, may set out general principles in relation to student misconduct, including a requirement that a student be given the opportunity to respond before a final determination is made as to whether misconduct has occurred. It may also allow for the making of policy to regulate or provide for the regulation of student misconduct and to give effect to the statute: see, eg, *Statute No 10* s 5(1).

were fair to students.³⁸ This analysis revealed substantial commonalities in the content of these rules across these universities. Specifically, Lindsay notes that:

- university disciplinary tribunals are commonly inquisitorial (as opposed to adversarial) in nature;³⁹
- all university statutes surveyed required written notice to be given before a hearing (usually one to two weeks) and that all but two required ‘particulars’ of the allegations to be provided to the student beforehand;⁴⁰ and
- students are usually not entitled to legal representation, but can sometimes have other representation at a hearing.⁴¹

However, Lindsay’s analysis relates to the formal investigation and determination of academic misconduct claims, and not to the stage when an academic staff member first suspects misconduct and is considering referral for investigation. Indeed, the procedural requirements of this preliminary stage are ones on which university misconduct statutes and related regulations and policies are often silent. For example, Curtin University’s Academic Misconduct Rules provide that ‘[a] Staff Member or Associate who has reason to believe that a Student may be guilty of Academic Misconduct must report the matter to an Authorised Officer’, but does not explain how this belief is to be formed and what, if anything, the staff member can or cannot do to determine whether they have ‘reason to believe’ that the student may be guilty of Academic Misconduct.⁴²

In summary, the case law illustrates that, in the event of a lack of guidance provided by a university’s legislation, courts will not imply a duty to afford procedural fairness to a student prior to a formal allegation of academic misconduct being made against them. So, for example, a preliminary discussion by an academic staff member with a student prior to a decision of whether to make a formal academic misconduct allegation against the student is not necessary and even if it is afforded, does not attract the requirements of procedural fairness. This is because this preliminary stage is perceived as not leading ‘to anything adverse to the [student] because nothing flows from it’, merely, being ‘used to set in train a proper investigative process ... [in which] there is adequate provision for the rules of natural justice to apply’.⁴³ However, it is asserted that further careful consideration needs to be given as to whether, and the extent to which the requirements of procedural fairness *should* apply at this preliminary stage. It is argued that a formal allegation of academic misconduct against a student may lead to more adverse consequences to a student and their future than may have been judicially considered. Given these potential consequences for the student,

38 Lindsay, ‘University Hearings: Student Discipline Rules and Fair Procedures’, above n 10.

39 Ibid 154.

40 Ibid 155.

41 Ibid 155, 162.

42 Curtin University of Technology Council, *Academic Misconduct Rules* (at 25 July 2014) r 2.1(1). See also Monash University Council, *Monash University (Council) Regulations* (at 19 October 2015) r 31(1) which provides that ‘[a] member of staff of the University who has reasonable grounds to believe that a student has committed an act of misconduct must report the matter to the responsible officer, either orally or in writing’.

43 *Wilde v University of Sydney* [2002] NSWSC 954 (15 October 2002) [37], quoted in *X v UWS* [2013] NSWSC 1329 (11 September 2013) [53].

a staff member making the decision to make a formal allegation of misconduct against a student should accord procedural fairness to the student.

III THE POSSIBLE CONSEQUENCES OF ALLEGATIONS AND FINDINGS OF ACADEMIC MISCONDUCT ON A STUDENT AND THEIR FUTURE

A finding, and even an allegation,⁴⁴ of academic misconduct can have serious and detrimental ramifications on a student's study progression, future career options, and potentially their reputation and mental health. This section will examine several of these consequences through an examination of the case law and commentary concerning findings of academic misconduct against university students.

The case law involving findings of academic misconduct against university students predominantly relates to law students. In order to be admitted to practice in the legal profession in Australia, a person must prove that they are suitable to enter the profession — a 'fit and proper' person to practice⁴⁵ — and a finding of academic misconduct may go to proving otherwise.

Evans has discussed several significant cases where formal findings of academic misconduct against law students in their undergraduate studies by university misconduct committees (as well as more informal findings at a school or department level) resulted in their subsequent removal from the roll of legal practitioners (referred to as being 'struck off'), or in a denial of their admission as legal practitioners. They include the case of *Re OG (A Lawyer)*⁴⁶ in which the applicant was struck off the roll of legal practitioners because of an academic misconduct finding against him at a university level (resulting in his being awarded a zero grade for his assignment), which he had not accurately disclosed to the Victorian Legal Practitioner Admissions Board prior to seeking admission.⁴⁷ They also include *Re AJG*⁴⁸ and *Re Liveri*,⁴⁹ where the applicants were also denied admission as legal practitioners because of formal findings of academic misconduct against them, although they had disclosed these findings to the Queensland Legal Practitioners Admissions Boards.

Evans also discusses cases where, although findings of academic misconduct against law students resulted in challenges to their admission as legal practitioners, the court ultimately allowed the applicants to be admitted and practice as solicitors. These students nevertheless had to endure the time, cost

44 See above n 7, which discusses the uncertainty in Australian jurisdictions as to whether an allegation of academic misconduct may itself have to be disclosed.

45 Evans discusses this requirement in the context of relevant state and territory legislation. See Evans, above n 7, 101–3.

46 (2007) 18 VR 164. This case is discussed by Evans, above n 7, 107–9.

47 See Evans, above n 7, for an outline of this case.

48 [2004] QCA 88 (15 March 2004). This case is discussed by Evans, above n 7, 104–5.

49 [2006] QCA 152 (12 May 2006). This case is discussed by Evans, above n 7, 105–6.

and stress of court proceedings. In *Law Society of Tasmania v Richardson*⁵⁰ the Supreme Court of Tasmania was asked to determine whether Scott Richardson, and his parents (who, as solicitors, had moved his admission), should be struck off the Court's roll of legal practitioners. The issue was that Richardson had not disclosed a finding of academic misconduct made against him when seeking admission as a legal practitioner, and his parents had moved his admission with knowledge of this finding.⁵¹ The challenge to Richardson's admission was made even though the adverse finding against him had been set aside on appeal to the University's Discipline Appeals Committee.

The facts established in *Richardson* were that Scott Richardson was asked by a fellow student to assist him with his assignment, as the latter had not attended lectures which were relevant to completing the assignment. Scott showed his fellow student his own draft assignment and discussed possible answers to each question with him, making notes during this discussion. Scott then provided his fellow student with a copy of his draft assignment containing his handwritten notes, but did not give him permission to copy from them. However, the other student did substantially copy Richardson's assignment, a fact evidenced by obvious similarities between the two assignments. Without giving Richardson or his fellow student an opportunity to be heard, an allegation of academic misconduct was subsequently made against Richardson and his fellow student.⁵²

In dismissing the application to have Richardson removed from the roll of legal practitioners, Crawford J made it clear that in his view Richardson's only fault in relation to the allegation of academic misconduct had been to provide his fellow student with a copy of his draft assignment, and there was no evidence to suggest that he had done this for the purpose of assisting his fellow student to commit an act of collusion.⁵³ As his Honour said, Scott did not understand from the University Disciplinary Committee's determination what it was that he had done wrong, and his Honour expressly indicated that he did not understand it either.⁵⁴ Yet, despite all this, Richardson was forced to endure the emotional stress of a legal challenge to his fitness to practise, his character and his honesty, which could have resulted in his removal from the roll of practitioners and significant damage to his future.

Law is, of course, not the only profession in which academic misconduct may be relevant. For instance, Freckelton and Wardle have considered the relevance of academic misconduct and plagiarism generally to a determination of whether

50 [2003] TASSC 9 (18 March 2003) ('*Richardson*'). This case is discussed by Evans, above n 7, 103–4. Similarly, in *Re Humzy-Hancock* [2007] QSC 34 (26 February 2007), the applicant's admission was challenged by the Legal Practitioners Admissions Board of Queensland on the basis of an adverse finding of academic misconduct against him while he was a university student — however, the challenge did not succeed and Humzy-Hancock was admitted as a legal practitioner. This case is discussed by Evans, above n 7, 106–7.

51 Scott Richardson discussed with his Lecturer, Head of School and his parents (both lawyers) whether he should disclose the allegation. All were of the view that disclosure was not required because it was unclear as to exactly what the findings of the Committee were, and Scott was in the process of appealing the decision: *Richardson* [2003] TASSC 9 (18 March 2003) [39]–[73].

52 *Ibid* [31]–[36].

53 *Ibid* [36].

54 *Ibid* [40].

a medical practitioner constitutes a fit and proper person to hold registration in that profession. Wardle refers to several cases in which a finding of academic misconduct was considered to be relevant to this question, thus impacting on the future of the impugned party.⁵⁵ Similarly, in the accounting profession, eligibility for registration as a tax agent or business activity statement agent is dependent on whether the Tax Practitioners Board is satisfied that the applicant is a 'fit and proper person'.⁵⁶ In the end, as Freckelton has commented, 'for professions like law, medicine and accounting, among others, which have at their heart an assertion of trustworthiness, [ignoring the issue of plagiarism] is not an option'.⁵⁷

Lindsay also comments on the fact that findings of academic misconduct may affect the residency status of international students. He specifically states that 'disciplinary action, academic penalties, restrictions on enrolment, suspension, exclusion or expulsion from an institution may imperil a student's right to stay in Australia, require them to leave the country, or lead to their removal from Australia'.⁵⁸

Lindsay argues that, where findings of academic misconduct will likely result in grave consequences beyond immediate academic consequences for the student, such as in relation to law (or medical or accounting) students or international students, different evidentiary standards should be applied by the relevant decision-maker.⁵⁹ More consideration may also be required before the making of any formal allegation of misconduct in relation to students for whom disciplinary action has serious consequences, as well as for students generally.⁶⁰ Arguably, this requires a review of the extent to which the rules of procedural fairness should apply, if at all, at the stage at which a staff member is making a determination as to whether there are reasonable grounds to justify an allegation — including a consideration as to whether a preliminary discussion between the staff member and a student at this stage should be required.

55 Jon Wardle, 'Plagiarism and Registered Health Professionals: Navigating the Borderlands between Scholarly and Professional Misconduct' (2013) 21 *Journal of Law and Medicine* 399. See also Ian Freckelton, 'Plagiarism in Law and Medicine: Challenges for Scholarship, Academia, Publishers and Regulators' (2010) 17 *Journal of Law and Medicine* 645, 658.

56 *Tax Agent Services Act 2009* (Cth) s 20-5(1).

57 Wardle, above n 55, 400, quoting Freckelton, above n 55, 658.

58 Lindsay, 'Student Plagiarism in Universities', above n 10, 30–1, 39. Lindsay refers to relevant immigration laws including the *Education Services for Overseas Students Act 2000* (Cth), the *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007* (Cth), the *Migration Act 1958* (Cth) and *Migration Regulations 1994* (Cth). These enactments require a university to supervise the progress of international students and to report a lack of progress to the Department of Immigration, which could result in a cancellation of their visa. On this basis, any suspension or deferral of a student's enrolment for academic misconduct would need to be reported.

59 Lindsay, 'Student Plagiarism in Universities', above n 10, 39–40.

60 Lindsay himself has recommended that there be a '[g]reater emphasis on preliminary investigation into claims of misconduct ... prior to any reference to a hearing' due to the increased number of misconduct cases and the time and resources that need to be allocated to deal with them; Bruce Lindsay, 'Rates of Student Disciplinary Action in Australian Universities' (2010) 52(2) *Australian Universities' Review* 27, 31.

IV DEMONSTRATING THE NEED FOR MORE CONSIDERATION TO BE GIVEN TO THE STAGE BEFORE A FORMAL ALLEGATION OF ACADEMIC MISCONDUCT IS MADE

A consideration of different examples of ‘Academic Misconduct’ further demonstrates the need for more significant attention to be given to the making of a formal allegation against a student.

‘Academic Misconduct’ is a broad and potentially misleading term because it arises in many different forms and contexts. Indeed, there does appear to be some disagreement as to the relevance of intention to a finding of such conduct, both amongst universities and academic scholars. Several Australian universities define ‘Academic Misconduct’ with reference to dishonest intent. For example, *Statute No 10* defines ‘Academic Misconduct’ to include ‘conduct by a [s]tudent ... that is *dishonest* or unfair in connection with any academic work’.⁶¹ However, as established by Lindsay, intent is not necessarily a requirement for a finding of academic misconduct in most Australian institutions.⁶²

Academic literature seems to be similarly divided on the role that intention and dishonesty play in a determination of the existence of academic misconduct. For example Freckelton, in his editorial about plagiarism, states, ‘[a]t the heart of plagiarism, whether it be of ideas or verbatim, is intellectual dishonesty’.⁶³ Freckelton also describes plagiarism as a ‘form of theft’.⁶⁴ However, other academic commentators see intention and dishonesty as being far less critical to a finding of academic misconduct⁶⁵ — yet, these commentators do not ‘clarify or advance understanding of where, beyond questions of intention and dishonesty, the limits of ... academic misconduct should lie’.⁶⁶

Despite the uncertainty surrounding the role of intent and dishonesty for a finding of academic misconduct, it is argued that Lindsay is correct in his assertion that the relevant conduct must always be ‘wrongful’ for academic misconduct to exist, being at the very least, significantly careless or negligent.⁶⁷ Lindsay cites the Victorian case of *Wild*, a case in which a professor at La Trobe University was found to be guilty of plagiarism and ‘gross misconduct’, as extending plagiarism (and academic misconduct) to encompass acts of carelessness and

61 *Statute No 10* s 4 (emphasis added).

62 Lindsay, ‘Student Plagiarism in Universities’, above n 10, 30–1.

63 Freckelton, above n 55, 656.

64 *Ibid.*

65 Lindsay, ‘Student Plagiarism in Universities’, above n 10, 32. See also Sutherland-Smith who notes the disagreement between academics with respect to the relevance of intention in determining plagiarism, with some arguing that dishonest intention must be ascertained, and others holding the view that ‘all acts of copying are plagiarism, and intention is therefore automatically proven’: Wendy Sutherland-Smith, ‘Hiding in the Shadows: Risks and Dilemmas of Plagiarism in Student Academic Writing’ (Paper presented at the Joint Australian Association for Research in Education and New Zealand Association for Research in Education Conference, Auckland, New Zealand, 29 November – 3 December 2003) 7.

66 Lindsay, ‘Student Plagiarism in Universities’, above n 10, 32.

67 *Ibid* 32–4.

negligence.⁶⁸ However, as submitted by Lindsay, '[g]iven the seriousness of a charge of plagiarism [or academic misconduct], concepts of "carelessness" and "negligence" are not to be used lightly, and ought not to be confused with inexperience, incapacity, or a developing competence and proper opportunity for learning'.⁶⁹ They should similarly not be confused with naivety on the part of a student.

With respect to law students, a review of the case law relating to the effect that a finding of academic misconduct against a student while at university or otherwise has on the right to practise as a barrister and solicitor shows that in this context, Australian courts place great significance on intent — specifically, whether the relevant conduct was of a dishonest nature. Generally, Supreme Courts have denied admission where the applicant's conduct was of a dishonest nature, but have permitted admission where they did not consider the applicant to have acted dishonestly.⁷⁰

Some forms of misconduct can readily be classified as intentionally dishonest, significantly careless or reckless and therefore easily fall within the definition of academic misconduct. These include more traditional forms of academic misconduct such as cheating in invigilated tests or examinations by using notes in a closed book exam, or copying from another student sitting nearby. A report handed down in July 2015 by the University of Sydney noted an increase in students paying impersonators to sit their examinations for them.⁷¹ This is an issue that may arguably become more prevalent with large units that enrol many hundreds of students. Other common forms of academic misconduct include collusion (when two students write a joint assignment and submit the assignment as two separate assignments);⁷² plagiarism (for example, where a student copies large passages from a book, journal article or online source such as a web site, without attribution); or purloining (where one student steals another student's assignment without their consent or knowledge).

Another straightforward example of academic misconduct includes conduct akin to falsification of research. Evans provides specific examples of this form

68 *Re La Trobe University; Ex parte Wild* [1987] VR 447, 455, cited in *ibid* 32–3.

69 Lindsay, 'Student Plagiarism in Universities', above n 10, 33.

70 See, eg, Evans, above n 7. Evans discusses two cases where the Supreme Court permitted admission where it did not regard the applicant to have acted dishonestly (*Richardson* [2003] TASSC 9 (18 March 2003); *Re Humzy-Hancock* [2007] QSC 34 (26 February 2007)). Evans also discusses the following cases where the Supreme Court denied admission in circumstances where the applicant's conduct was of a more deliberate and dishonest nature (*Re AJG* [2004] QCA 88 (15 March 2004); *Re Liveri* [2006] QCA 152 (12 May 2006)) and where a practitioner was struck off the roll of practitioners for plagiarism that was disclosed after admission where the applicant's behaviour was also deemed to be dishonest (*Re OG (A Lawyer)* (2007) 18 VR 164).

71 Academic Misconduct and Plagiarism Taskforce, 'An Approach to Minimising Academic Misconduct and Plagiarism at the University of Sydney — Part 1: Prevention and Detection' (Report, University of Sydney, 2015) 23. For a media discussion of the Report's findings, see Alexandra Smith, 'Students at Sydney University Use Impersonators to Sit Their Exams', *The Sydney Morning Herald* (Sydney), 11 August 2015.

72 In 2012, approximately 70 students were suspended from Harvard University after colluding in a take-home test in the 'Government 1310, Introduction to Congress' unit. It was reported that 279 students were enrolled in the unit, more than half were suspected of collusion, and around 70 were suspended: Richard Pérez-Peña, 'Students Accused of Cheating Return Awkwardly to a Changed Harvard', *The New York Times* (New York), 16 September 2013.

of academic misconduct in a law school context, referring to law students who fabricated case authorities in law assignments, or referenced a conversation with a public official that never occurred.⁷³ There have been recent reports of such conduct also occurring in medical schools.⁷⁴

The internet has had a significant and detrimental impact on academic integrity by providing ready access to extensive materials that can be ‘cut and pasted’ by students. This ‘cutting and pasting’ constitutes another unequivocal form of academic misconduct. However, it does not end there. The internet has now become a forum where academic misconduct is commercialised by web sites offering to write ‘custom’ assignments for a fee,⁷⁵ edit and improve them for a fee, or offering ‘ready-made’ assignments that students can purchase.⁷⁶ Students can even select from different levels of quality so as to avoid or reduce the risk of detection.⁷⁷ This has come to be known as ‘contract cheating’,⁷⁸ because the student solicits for a third party to write their assignment (the first element), contracts with the third party to write or improve their assignment for them for a fee (the second element), and then passes off the assignment as their own by submitting the work for academic credit (the third element).⁷⁹ It is interesting that although there is clearly dishonest behaviour and intent on the part of a student who engages in contract cheating, many of these websites represent themselves as providing

73 Evans, above n 7, 101. One of the authors also encountered the situation where students were required to attend court and write a ‘court report’ on a trial. A student submitted a written court report; however, a number of factual errors (such as referring to the Judge as ‘he’ when she was a woman) raised the suspicions of the unit coordinator. After a discussion with the student, it became apparent that the student did not attend court at all and instead relied on the written transcript of proceedings.

74 In early 2015, 70 University of Sydney medical students, out of a year group of 200, were found to have committed a range of forms of academic misconduct in the Integrated Population Medical Program. This program required students to find a person living with a chronic illness, and observe them for 12 months while completing a range of assessment tasks. An academic staff member attempted to contact a patient to thank him for his involvement, only to discover that he had died. The academic misconduct committed in this case included falsifying patient interviews that had never occurred, claiming to have interviewed patients after they had died, and falsifying medical records, including patient details and meeting dates: see Alexandra Smith, ‘Sydney Uni Scandal’, *The Sydney Morning Herald* (Sydney), 6 June 2015. See also Natalie O’Brien and Alexandra Smith, ‘Cheating Scandal: Sydney University to Review Medical Study Unit’, *The Sydney Morning Herald National* (online), 6 June 2015 <<http://www.smh.com.au/national/education/cheating-scandal-sydney-university-to-review-medical-study-unit-20150606-ghi5d2.html>>.

75 See, eg, Masters Essay, which is targeted to students in Canada: Masters Essay (2016) <www.mastersessay.com>. The fee scale differs depending on the type of assignment requested, and how many days the web site has to write the assignment — the more urgent, the higher the fee.

76 As well as the ‘MyMaster’ website, which appears to have been removed from the internet, and the Masters Essay website (ibid), other websites offering these ‘services’ for payment are available. Dozens of these websites are reviewed by Topaussiewriters (2016) <<http://www.topaussiewriters.com>>, with the top ranked sites including australianwritings.com, bestessays.com.au, and aussiewriter.com.

77 See, eg, Australian Writings, *Order Now* (2016) <<https://www.australianwritings.com/order/>>, which offers ‘standard’, ‘premium’ or ‘platinum’ quality assignments.

78 Clarke and Lancaster, above n 1. For further discussion of ‘contract cheating’, see Mary Walker and Cynthia Townley, ‘Contract Cheating: A New Challenge for Academic Honesty?’ (2012) 10 *Journal of Academic Ethics* 27.

79 While contract cheating can be regarded as a form of plagiarism (because it involves passing off the work of another person as one’s own without attribution), it is suggested that it should be in a separate category of misconduct, with each of its three elements being separately actionable as academic misconduct. That is, the soliciting, contracting, and the passing off are each separately actionable.

a quality service to meet a market demand of busy students. For example, one website claims that their custom written assignments are 'plagiarism-free'.⁸⁰

Despite the fact that a student's conduct may seem to be at first instance a 'clear cut' case of one of the above examples and therefore constitutes academic misconduct, there are several examples of conduct that are less 'clear cut' than they appear at first instance, and on further inquiry, it may be revealed that such conduct does not constitute academic misconduct. For example, when presented with two assignments that look substantially similar, an academic may initially conclude, on the papers, that the two students have willingly collaborated to write the one paper, which they submitted as two papers. However, there may be a different explanation. For example, what looks like collusion may in fact be purloining — that is, one student may have 'stolen' the assignment from another unsuspecting student who has left it on the photocopier, or on a shared computer in student accommodation.⁸¹ *Richardson* is an illustration of a similar scenario.⁸² Such situations may reveal no dishonesty on the part of at least one of the students involved but, rather, foolishness or naivety — not to be confused with significant 'carelessness' or 'negligence' as explained by Lindsay and discussed above.

It is argued that the application of certain procedural fairness requirements at the stage prior to the making of a formal allegation of academic misconduct against a student, including a requirement for a preliminary discussion to take place between a staff member and a student, could be critical to clarifying the position in relation to a student's conduct and could avoid the adverse consequences to the student associated with putting them through a formal investigation process. Such a discussion could also assist to save a university's cost, time and resources in pursuing unjustifiable proceedings. In this regard, it is noted that widely used software applications for detecting plagiarism, such as Turnitin,⁸³ have their limits and are no substitute for a face-to-face discussion between an academic staff member and a student. Indeed, Turnitin 'neither detects nor prevents plagiarism per se' but 'produces "originality reports"'.⁸⁴ These reports compare the written

80 In response to the question, 'Are your assignments free from plagiarism?', the 'Assignment Helps' website states: 'We, at Assignment Helps, assure you excellent assignments and our quality checkers ensure that error-free assignments are delivered to you. We make use of digital and manual methods to analyse the work produced by our expert assignment writers. You can expect plagiarism-free assignments from us': Assignment Helps, *FAQ's* (2014) <<https://www.assignmenthelps.com.au/faqs/>>. For an examination of academic literature on why students cheat, see Edward Brent and Curtis Atkisson, 'Accounting for Cheating: An Evolving Theory and Emergent Themes' (2011) 52 *Research in Higher Education* 640.

81 For example, one of the authors found a boyfriend to have stolen his girlfriend's assignment from a shared computer in their home without her knowledge or consent. Another scenario observed by the authors is that involving a student who provided a copy of their assignment to another to assist them. For example, a student, claiming to have personal and/or emotional issues, has convinced another student to provide them with a copy of their assignment, not for the purpose of copying it, but allegedly to make sure he or she was 'on the right track' with the assignment. Alternatively, a student may have asked a friend to check a draft of their assignment (which the friend appropriated and adapted without their knowledge or consent).

82 *Richardson* [2003] TASSC 9 (18 March 2003).

83 See Turnitin (2016) <<http://www.turnitin.com/>>.

84 Geoffrey T Crisp, 'Staff Attitudes to Dealing with Plagiarism Issues: Perspectives from One Australian University' (2007) 3(1) *International Journal for Educational Integrity* 3, 4 (emphasis altered).

work uploaded to Turnitin with all student papers in the Turnitin database as well as billions of web pages and millions of academic books and publications.⁸⁵ As explained by Crisp, whether a student's work contains plagiarised material is still a judgment call made by a staff member.⁸⁶ Further, Turnitin may be entirely unhelpful in relation to the detection of an assignment authored by a third party in the context of 'contract cheating' or otherwise. The software is also susceptible to circumvention by other means, for example, by a student translating a piece of assessment into another language using translation software, and then using the same software to translate the assessment back into the original language, resulting in different wording to the original.⁸⁷ This may leave a staff member who, for example, has been provided with an exceptional piece of work from a very average student with doubts as to whether the work is the student's own. In these circumstances, should the staff member immediately make a formal allegation of academic misconduct to the relevant authority or should they first make their own inquiries to determine whether their doubts are reasonable, including engaging in a discussion with the student about their work? Indeed, such a preliminary discussion may reveal that the student in question has worked extremely hard on the relevant piece of assessment to improve their grades or alternatively, had been previously affected by personal issues which had a detrimental impact on their work but which no longer exist.

A further scenario highlighting the importance of affording a student the chance to be heard before a formal academic misconduct allegation is made arises in relation to international students for whom English is not a first language. Assessments submitted by these students with sophisticated English expression may raise a suspicion of third party authorship in the mind of the staff-member. However, a discussion with the student may reveal that the student has made a substantial effort to improve their written English through obtaining tutoring or English lessons, or utilising dictionaries and other translation services to produce a high quality piece of work in a foreign language. In this context, a discussion between the unit coordinator and the student may be essential because referring a foreign student into a formal process without first discussing their assignment could expose the staff member, and also the university, to an allegation of racial discrimination.⁸⁸

Given that some forms of academic misconduct are less obvious at first instance, it is asserted that it is unfair and detrimental to students to propel them into a formal misconduct investigation on the basis of an ill-founded suspicion, formed without giving the student an opportunity to be heard. Indeed, the consequences of referral are potentially so great that a referral decision should be treated as a final one which attracts procedural fairness. If a simple discussion between the academic staff member and the student prior to a formal investigation

85 For example, 'WriteCheck', one of the services offered by Turnitin, compares papers to over 45 billion web pages and over 130 million published works from academic books and journals: Turnitin, *Features* (2015) WriteCheck <<http://en.writecheck.com/features/overview/>>.

86 Crisp, above n 84, 4.

87 The authors submitted a paragraph of this paper in English into Google Translate (at <<https://translate.google.com/>>) which was translated into Spanish. The Spanish version was then translated back into English, and the result was a paragraph with different wording to the original English paragraph.

88 See, eg, *Equal Opportunity Act 1984* (WA) s 44(2)(c).

being commenced reveals an innocent explanation, and thus the absence of any dishonest attempt to gain an unfair advantage or 'wrongful' conduct on the part of the student, then the matter is best, and most efficiently, dispensed with at that stage.

The following section provides some recommendations as to the law in relation to the application of the rules of procedural fairness when a suspicion of academic misconduct exists but before a formal allegation is made, in order to balance fairness to the student and the maintenance of academic integrity.

V CONCLUSION — BALANCING UNIVERSITY INTEGRITY WITH STUDENT RIGHTS

For the reasons explained in this paper, it is argued that the requirements of procedural fairness during a formal academic misconduct investigation are in themselves insufficient to ensure that fairness is afforded to students. There is a need for a greater focus on the preliminary stage, being before a formal allegation of academic misconduct is made against a student, and for procedural fairness to be afforded to the student at this preliminary stage.

As explained, Australian courts are unwilling to imply a duty to afford procedural fairness to students before a formal allegation of academic misconduct against them is made. However, it is argued that this approach needs to be reviewed in view of the adverse consequences to a student that can result from a decision to make a formal allegation against them. In any event, universities should make provision in their academic misconduct statutes for procedural fairness to be afforded to students at this stage. At the very least, university statutes should not mandate automatic referral into a formal process without a preliminary discussion. The ability of the academic and student to have frank and open discussions about matters of academic integrity is an important step in ensuring that universities adequately deal with academic integrity issues. If this discussion is prohibited or curtailed, there is a risk that academic staff may make unwarranted allegations against students, thus exposing students particularly in programs such as law, medicine and accounting, to unnecessary and damaging consequences beyond the academic, as well as causing the university to expend cost, time and resources in pursuing unjustifiable proceedings. Alternatively, academic staff members may choose not to make a formal allegation of misconduct for fear that they will expose the student to future career and other detriment by referring them into a formal process when there is some doubt if the allegation can be justified.

It is recommended that universities should consider amending their academic misconduct statutes to afford students procedural fairness at the stage when academic misconduct is first suspected. It is argued that this should be in the form of a simple, non-prescriptive statement in the statute that procedural fairness should be afforded at this preliminary stage. Exactly what must be afforded should not be prescriptive. For example, whether the student can bring a support person, if a second academic staff member should observe the discussion, and the extent

of the notice that should be given to the student prior to the discussion, should be left as matters of academic judgement, because the nature, types and seriousness of academic misconduct vary, as do the circumstances surrounding individual allegations of academic misconduct, and indeed the individuals themselves.

For example, depending on the circumstances of the student, such as their spoken English proficiency or whether they have a registered equity plan, it may be appropriate for the student to be invited to bring a support person, such as a friend or guild representative to the initial discussion. However, care must be taken here to protect the student's privacy. Specifically, it is inappropriate for an academic staff member to discuss the performance of one student in front of another without express consent from the student with whom the discussion is taking place. However, it may not be appropriate, and may even cause undue stress to the student, if they are asked to bring a support person for a discussion about relatively minor referencing errors that could amount to carelessness, as opposed to dishonest intent.

This then leads to the issue of whether notice should be given to the student, and what should be disclosed in this notice. Having prescriptive notice requirements (for example, requiring the student to be given a number of days' written notice and detailing that the proposed discussion will be about a specific type of academic misconduct) are more applicable to a formal misconduct investigation, rather than a preliminary discussion. It is argued that the ability of academic staff members to informally discuss academic matters with their students should not be curtailed by unnecessary administrative limitations such as notice requirements. Such limitations strike at the heart of academic freedom and impinge on the proper exercise of academic judgement and the educational relationship between academics and their students.

In many cases, it is also appropriate for an observer to sit in on the preliminary discussion. However, depending on the circumstances, it may be intimidating for a student to face questioning from two or more academic staff members. Additionally, there is a risk that if another academic member of staff is present, they may teach the student, or mark the student's work in the future, raising the issue of perceived bias against the student. So, a member of administrative staff might be a more appropriate observer. Having a third party observer also provides protection for both the student and the academic staff member against allegations of inappropriate behaviour or intimidation. It is argued that whether an observer is required, and who the observer should be, are matters of academic judgement, and will vary depending upon the individual circumstances of the case. For example, if what is suspected is serious academic misconduct (for example, suspected contract cheating), having an observer who is an academic staff member may be appropriate. However, for minor referencing errors that could be attributed to carelessness or ignorance (with no dishonesty), it may be sufficient to conduct the preliminary discussion in the absence of an observer.

It seems clear that the stage at which a staff member has a suspicion of academic misconduct on the part of a student and is considering whether or not to refer the student into a formal decision making process requires more attention, both at

a judicial and a university level. Enabling a student a chance to be heard when academic misconduct is first suspected would seem critical in circumstances where the adverse consequences of the allegation itself may be seriously detrimental to a student, potentially causing psychological distress, jeopardising their future career options and possibly even having an effect on their immigration status. Further, an automatic allegation of misconduct, when there is an insufficient basis to justify it, is a waste of university resources, and is potentially a waste of court resources too.

It is strongly recommended that universities give consideration to amending their statutes to provide for the application of the rules of procedural fairness when academic misconduct is first suspected, including the inclusion of a requirement that the staff member engage in a discussion with a student at this preliminary stage. However, it is contended that any amendments should enable the academic staff member to exercise their academic judgement and common sense in determining how this discussion should proceed.