

Orr to Steele: Crafting Dismissal Processes in Australian Universities

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Introduction

This article investigates the nature of modern dismissal processes in Australian universities, as modified by award and enterprise agreements, so as to determine whether dismissal processes afford adequate protection for academics against arbitrary dismissal or other penalty. The rationale for this article is that academic freedom rights are a critical condition for the operation of universities and for the dissemination and discovery of knowledge. If suitable mechanisms covering termination of employment do not protect academic freedom then it is merely an aspiration lost in reality.¹ Accordingly, proper processes covering termination of employment lie at the very heart of academic freedom protection.²

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¹ This point was made by Justice Ellicott in *Arthur Lee Burns v The Australian National University* (1981–82) 40 ALR 707 where he said: “It is vital to the fulfilment of the University’s functions as an independent educational institution committed to the search for truth that the tenure of its professorial staff be free from arbitrary attack. I can think of no principle more basic to the existence of a university in a free society.”

² On this matter see the quotations from Wootten at note 19 and *Rice v University of Queensland* at note 46. This article does not define academic freedom. However, a detailed examination of this and a definition is contained in Jackson, J, *Legal Rights to Academic Freedom In Australian Universities* Unpublished PhD thesis, University of Sydney, 2002. In that thesis the present author concludes that “[t]here are legal rights to academic freedom in Australian universities. The rights vary, from, at best, clearly defined express rights in codes of conduct or enterprise agreements, to at worst, a good chance that courts would, subject to express contractual or enterprise agreement provisions to the contrary, find an implied academic freedom term linked to business efficacy along the following lines: An Australian university academic has legal obligations to teach and to research. Those obligations carry attendant duties to speak and to write and to do this in a responsible and professional manner. That professionalism carries with it further obligations to not restrict the speech or writing of colleagues or the learning of students, to work within the law, disclose limitations in the research, and not represent speech as that of the university or colleagues. If the academic chooses to criticise the university he/she may do so but that speech or writing carries the same attendant professional obligations as any other speech.” (at 388, 389).

Dismissal Processes: summary dismissal in the Orr Case

In 1956 an event took place in Tasmania which was of concern to Australian academics. This was the summary dismissal of Professor Orr on 16 March 1956 by the Council of the University of Tasmania following complaints to the Vice Chancellor in relation to a number of matters. These included complaints to the Vice Chancellor from:

- (i) M, a member of Orr's department, in which it was alleged that Orr asked M to supply him with M's lecture notes, or in the absence of notes, a tape recording of his lectures, and a threat that if M did not conform he would have to go.³ M also claimed that his refusal to sign a public letter composed by Orr complaining about aspects of the university caused Orr to become uncooperative with and inimical to M;⁴
- (ii) a student whom Orr had requested to oversee the building of his house without remuneration and to paint a mural in the house;
- (iii) a fellow academic that Orr was guilty of harassing and intimidating with threats, including threats to his career,⁵ and threats to sue him for defamation;
- (iv) an 18 year old student of Professor Orr and, more specifically, her father, that Orr had seduced her.

Orr challenged his dismissal in the Supreme Court of Tasmania and sued the University of Tasmania for wrongful dismissal claiming £10,000 in damages.

³ "Addendum to the Statement of the Council of the University of Tasmania in Reply to a Petition presented to his Excellency the Right Honourable Thomas Godfrey Polson Corbett, Governor of Tasmania and Visitor to the University of Tasmania" Archives of the University of Western Australia Fox 22, at 1.

⁴ Judge Green did not accept that this had happened. *Orr v University of Tasmania* Matter Number 278/1956, 19 November, 1956, Supreme Court of Tasmania at 1767. The reported judgment in *Orr* at [1956] Tas SR 155 is truncated to only 6 pages, and omits Judge Green's detailed consideration of the evidence. The complete judgment is 51 pages in length.

⁵ "Addendum to the Statement of the Council of the University of Tasmania in Reply to a Petition presented to his Excellency the Right Honourable Thomas Godfrey Polson Corbett, Governor of Tasmania and Visitor to the University of Tasmania" Archives of the University of Western Australia Fox 22, at 56.

Justice Green of the Supreme Court found that Orr's contract with the University of Tasmania was one of employment and the relationship of master and servant applied.⁶ This finding dismayed many academics at the time,⁷ though in the much longer term it was an important step in the application of the industrial relations system to, and the development of, unionisation in Australian universities.⁸ The judge went on to find that Orr had used his position to seduce his student and that this justified Orr's summary dismissal holding that:

Such conduct amounts to a complete repudiation of the duty which a professor owes to his University. If it could be permitted it would have the most grave consequences for the University, would inflict a very real injury upon it, and would destroy its standing and influence in the eyes of the world.⁹

⁶ *Orr v University of Tasmania* [1956] Tas SR 155 at 158.

⁷ For example the Orr supporters Professors Stout and Wright: see C Pybus *Gross Moral Turpitude; The Orr Case Reconsidered*, William Heinemann Australia 1993, at 212. These academics had difficulty reconciling the notion of academic community with the concept of university as master and academic as servant. Had they been aware that many university statutes confer university membership status on academics so that at law academics are *both* employees and members of their corporate body or community their concerns would have been removed. This issue, ignored in *Orr*, was debated after the case. Bartholomew and Nash argued that these dual roles mean that the dismissal of a academic who is both an employee and member of the university under its statute requires the application of the rules of natural justice: Bartholomew CW and Nash PG "Tenure of Academic Staff" (1959) Vol 1 No 5 *Vestes* 10 at 11. Similarly Professor Montrose argues that professors are members of the University, and dismissal requires proper notice and participation by the professor in a proper inquiry to establish whether grounds exist: Professor Montrose "The Legal Relation of University and its Professors" (1958) 29 *Universities Review* 44 at 46.

⁸ Professor Anderson in commenting on the Orr case agreed with John Kerr that the master / servant issue had been lost earlier when staff at the New South Wales University of Technology (now the University of New South Wales) had sought the intervention of the Arbitration Court in a matter. This, Anderson agreed "conceded, in effect, that the academics were not the University, that they were mere employees of it, and it was something different. I would go further and say that the mere existence of Staff Associations concedes the same thing..." Professor J Anderson, *The University and the Community, Implications of the Orr Case*, WEA 19 September, 1958, in Anderson papers, University of Sydney Archives, P042, Series 20, Range 1956 – 59 Box 46. Many academics on American campuses would no doubt agree, though unionisation is so entrenched and institutionalised through enterprise bargaining agreements in Australian universities that the issue rarely is raised.

⁹ Note 6 at 159.

Later, the judge said:

So far as I am concerned I am holding that a university professor is just as liable to be dismissed for misconduct as any other servant, and in a proper case, just as liable to have his contract terminated for misconduct as any other contracting person. I hold it to be misconduct for a professor to seduce his student and I further hold it to be misconduct for him to enter into a sexual relationship with his own student.¹⁰

In Green J's judgment only the seduction matter justified summary dismissal. The other allegations did not amount to misconduct, though they may show that the plaintiff was an unsatisfactory professor, circumstances which the judge thought could have been met by the University Council giving him six months notice under his contract. Though *obiter*, this literal interpretation of an academic employment contract, containing as it did a common clause allowing the university (and the employee) to terminate on the giving of six months notice, weakens any concept of academic tenure in Australian university contracts containing similar clauses. When read with Green J's earlier view that there is nothing special about university employment contracts, the conclusion is that "tenure", as widely understood among Australian academics, exists more as a political or industrial force than as a strict legal right.

Orr appealed to the High Court, but his appeal was dismissed. In their joint judgment, Dixon CJ, Williams and Taylor JJ saw the appeal as going to questions of fact and went on to consider whether evidence had been properly admitted, including evidence of a previous "triangular association" in Melbourne.¹¹ This left Green J's analysis of the law relating to academic contracts unchallenged. In strong language the High Court held that the evidence had been properly admitted, finding that Orr:

[H]aving observed her [Suzanne Kemp] feelings, became only too ready to take advantage of them and seduce her. The affair developed under the guise of the discussion of philosophical problems and, within a short period resulted in sexual intercourse taking place between them. Thereafter it occurred

¹⁰ Note 6 at 160.

¹¹ *Orr v University of Tasmania* (1957) 100 CLR 526 at 527, 528.

on a number of occasions. We have not the slightest doubt that this conduct on his part unfitted him for the position which he held and that the University was entitled summarily to dismiss him. We can only express our surprise that the contrary should be maintained.¹²

The High Court also rejected an interpretation of the University statutes which Orr argued overrode his employment contract and granted him tenure of employment until he attained the age of 65 years. The High Court read the contract so as to allow termination on six months notice or on good cause. Clearly, the High Court found that seduction of a student amounted to good cause.

Many of the supporters of Orr were of the view that Orr had been dismissed because of his role in pressing for a Royal Commission into the University of Tasmania. Typical of this view is that of Professor Stout:

Professor Sydney Sparkes Orr had not been in Tasmania long before he began to play a leading part in the movement within the University for an inquiry into its affairs; it was an open letter to the Premier written by him and published in the Hobart Mercury on October 28, 1954 which precipitated the Royal Commission on the University of Tasmania.¹³

The picture of Orr that emerges nearly half a century after his dismissal is not an auspicious one. At best, Orr placed himself in very compromising situations with a female student (though Eddy, one of Orr's supporters, thought *this* was an exercise of academic freedom),¹⁴ allowing his enemies to strike in an arbitrary manner, and

¹² Note 11 at 530.

¹³ AK Stout "The Orr Trials and Miss Kemp's Diary" *The Observer* June 14, 1958 at 259.

¹⁴ Professor Fox is caustic of Eddy's suggestion: "[Eddy] says that what Orr did on that occasion with a girl student (during 3 hours spent with her, from 8p.m., of which 2 hours were in the solitude of the Bellerive sandhills) was an exhibition of academic freedom & is normal practice of university men with their students male or female. Well, I ask you! What would you think if a daughter of yours were the object of such professorial solicitude, in the professed interests of philosophy, and were the subject for such an unusual mode of displaying academic freedom?"

thereby destroying his career. At worst, he was a sexual harasser who lied on his job application, plagiarised the material of his former colleague, impinged the academic freedom of his junior colleagues, did very serious damage to the University of Tasmania, taught poorly and published little.¹⁵ However, the Orr saga itself is very significant for academic freedom in Australia because it both stimulated discussion and severe criticism of the process used to summarily dismiss Orr and gave momentum to the development of formal and fair dismissal processes in Australian universities.

In 1958 the Australian Vice Chancellors' Committee obtained information from its member universities on Tenure of Academic Staff. The following Table is constructed from that Report and other available records.¹⁶ The effects of *Orr* had not yet brought about change, accordingly Table 1 gives a useful snapshot of dismissal rules in Australian Universities before and at the time of *Orr*.

Confidential letter from Professor AC Fox to Mr Holly 30 April, 1963 Archives of the University of Western Australia, Fox 22.

- ¹⁵ See C Pybus *Gross Moral Turpitude; The Orr Case Reconsidered*, William Heinemann Australia 1993, at 22, 37, 59, and 169 – 173.
- ¹⁶ *Terms of Appointment of Academic Staff Members*, results of letters to the Australian Vice Chancellors sent by Dr JF Foster, secretary to the AVCC, University of Queensland Archives Subject Files, "old series", c 1965 (1911 – 1965) Staffing Conditions of Appointment policy matters (30 Jan 1952–October 24 1960).

Table 1
Dismissal in Australian Universities in 1958

University	Category of Academic Staff	Termination Reason
Australian National University	Professors and readers: Permanent until 65; Senior Fellow and fellow: Initial appointment for 5 years then permanent until 65 unless strong reasons against this Senior research fellow and research fellow 3 to a maximum of 5 years.	Council may terminate if permanent incapacity or guilty of misconduct or academic becomes inefficient.
Canberra University College	Professor: Initial term of 5 years, reappointment until 65; Lecturer: Initial term of 3 years, reappointment by successive terms of no more than 3 years, until 65.	Council at its discretion may release prior to expiration of initial term. Termination of appointment without cause possible after 60. Council may dismiss or temporarily suspend for misconduct or inefficiency of which Council will be sole judge. Membership of Parliament terminates employment.
University of Adelaide	Professor: The term fixed by Council at the time of making the appointment, thereafter determinable by 6 months notice; Readers, Senior Lecturers and Lecturers: 3 years in the first instance, thereafter determinable by 6 months notice.	Council may dismiss or suspend professors whose continuance in office or in performance of duties shall be injurious to progress of students or to the interests of the University, subject to confirmation by Visitor. Retirement age for men 65, and for women 60.
University of Melbourne	Professor: Tenure for life under the statute, but in practice, contracts provided for retirement at 65; Associate Professors and Readers: Tenure until 65; Other academic staff: Tenure until 65.	Dismissal on grounds of - permanent incapacity or - has become inefficient or - has misconducted himself. Dismissal : appointments subject to behaviour, and performance of duties being satisfactory to Council, absolute vote of Council required to remove during term of office. Dismissal for misconduct or inefficiency by absolute majority of Council.

University	Category of Academic Staff	Termination Reason
University of New England	All staff: May retire at 60, but shall retire at 65.	Dismissal for misconduct by Council. Termination by 6 months notice which may be given by Council at any time. Absolute right to determine Professor's occupation of office without cause shown after the age of 60 years.
University of Queensland	Professors: appointed on 7 year contracts up to age 70. Other Staff: appointed on 5 year contracts up to age 70.	Removal for misconduct of which the Chancellor shall be the sole judge. If appointee unable to perform the duties of the position the Senate may terminate service except as above, appointments terminable by 6 months notice
University of Sydney	Professors: Tenure of office during good behaviour until retirement at 65, with limited power to extend until 70 years of age; Other academics: a distinction between "public teachers in the Schools of University" and independent Lecturers or Public Teachers. The latter were appointed for terms not exceeding 7 years.	Absolute right of Senate to determine occupation of office after 60 years of age. Senate power to remove for misconduct. Non professors could be terminated on six months notice.
University of Tasmania	All academic staff: tenure until 65 (males) or 60 (females), but year to year extensions possible until 70 or 65 respectively.	Terminable by either side on 6 months notice, no specific power to dismiss in the general conditions of appointment. Academics not allowed to sit in Parliament.
University of Western Australia	Professors: 7 years in the first instance, renewable at discretion of Senate for an indefinite period. Retirement at 65, but annual renewals possible until 70; Readers, Initial appointment 5 years with renewals of 5 years to 65 years; Senior Lecturers, Lecturers: Initial appointment 3 years with renewals of 3 years to 65 years.	Subject to termination after initial 7 year period by 6 months notice. Senate may at its discretion dismiss from office or suspend any professor who has been guilty of such misconduct as in the opinion of Senate renders continuance in office detrimental to the University, provided this is confirmed at a subsequent Senate meeting and confirmed by the visitor. Dismissal as for professor.

Table 1 demonstrates these features about dismissal in Australian Universities in 1958:

- Most Universities drew a distinction between professors and other staff. In some this emerged as a right to retire later, in others additional procedures were put in place in relation to dismissal, and in others, professors had tenure without the need to go through a three, five or seven year renewal process. For example, at the University of Sydney very little had changed since early times in its quite generous professorial clause, apart from the introduction of a mandatory retirement clause at 65, with limited power to extend until 70 years of age.¹⁷ Lecturing staff continued to enjoy much less: essentially they could be terminated on six months notice, though Chapter XXVIII of the University by-laws drew a distinction between “public teachers in the Schools of University” and independent Lecturers or Public Teachers. The latter were appointed for terms not exceeding seven years.¹⁸ Not surprisingly, academic freedom was not mentioned in the appointment conditions of professors or lecturers, though it can be surmised that the professors were in a far stronger position to speak out given both their higher status in the University and the requirement of cause for dismissal. Lecturers could be dismissed merely on six months notice;
- Only one university (Melbourne) offered life tenure for professors, but this University noted that though this was contained in its statute, it was not offered in contracts;
- Some universities did not have a procedure for dismissal. Others, for example the University of Western Australia, had a very formal and strict procedure. Most universities did not have a review panel. The Universities of Adelaide and Western Australia required recourse to the Visitor to confirm dismissal;
- Many universities offered very little permanent tenure *at law* because the contracts were subject to six months notice. Nevertheless, there is little evidence that this notice procedure was regularly used by the employer universities, as opposed to their

¹⁷ *Tenure of Academic Staff in Australian Universities*, p.5 30 October, 1958, AVCC, University of Queensland Archives S130, Subject Files, old series, c 1965 (1911-1965), Staffing Conditions of Appointment - Policy Matters, 30 January 1952 - 24 October 1960.

¹⁸ Note 17.

resigning employees. In the *Orr* case the University refused to accept Orr's notice, opting instead for summary dismissal. The Australian National University, and the Universities of Adelaide and Melbourne, did not have a six months termination clause. The University of Sydney had no such clause for its professors but did for other staff. The distinction which seems to be drawn where universities have a dismissal procedure for cause and a notice procedure is that misconduct operated as summary dismissal for cause, whereas notice required nothing more than a valid issue and the effluxion of time;

- Grounds for dismissal varied widely:

<i>incapacity</i>	ANU and Adelaide;
<i>misconduct</i>	ANU, Canberra University College, Melbourne, UNE, Queensland, Sydney, Western Australia;
<i>inefficiency</i>	ANU, Canberra University College, Adelaide, Melbourne;
<i>injurious to progress of students, or to the interests of the university</i>	Adelaide;
<i>subject to performance of duties being satisfactory</i>	Melbourne;
<i>unable to perform the duties of the position</i>	Queensland 6 months notice, UNE, Queensland, Sydney, Tasmania

Table 1 suggests that, in general, academics had weak procedural rights relating to dismissal in Australian universities.

Dismissal Processes: The immediate post *Orr* effects

Writing shortly after Orr's dismissal, Wootten noted that academics could be dismissed on the pretence of some grave cause whereas in fact the dismissal was due to economic or sectarian pressure. In answer to the question whether *Orr* raised an issue of academic freedom, he said:

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

It is idle to answer that the question does not arise because Professor Orr's dismissal was not in fact due to 'pressure from economic, sectarian or other groups desirous of restricting freedom of teaching in some particular'. This prejudices the issue, and misses the point that freedom can only be guaranteed if the observance of proper procedure is obligatory in *all* cases.

At the same time it may be noted the suggestion actually made on behalf of Professor Orr has been that he was prejudiced by dislike, not of his philosophy, but of his criticism of the administration of the University. A little reflection will show that the right to criticise certain aspects at least of University administration is a necessary incident of effective academic freedom, and that the possibility of bias arising from internal struggles within the University is a further reason for insisting on safeguards against arbitrary dismissal.¹⁹

Wootten²⁰ was critical of many aspects of the dismissal procedures used by the University of Tasmania and called for procedures of a quasi-judicial nature for handling serious allegations against members of the academic staff in Australian universities generally.²¹

19 Wootten JH, "The Orr Dismissal and the Universities" (1957) Vol 1 No 2 *Quadrant* 25 at 26.

20 Wootten was later to become Professor Wootten, Foundation Dean of the Law School at the University of New South Wales, and a Supreme Court Judge.

21 Note 19 at 29.

Orr's supporters petitioned the Visitor, Thomas Corbett, the Governor of Tasmania, to make a visit upon the University particularly in regard to the events "relating to or surrounding the dismissal of Professor Orr."²² The Governor took legal advice on the various complaints made, many of which related to the procedural aspects of inquiries prior to the dismissal, but rejected the relief claimed by the petitioners. In so doing the Visitor made a strong statement:

Issues relating to the tenure of members of the academic staff, and to the procedures and methods proper for an investigation and determination of disciplinary complaints against them, I regard as matters of fundamental importance to the well-being of the University. I am glad, indeed, to see from its answer that the Council takes a like view. I quote to you a passage from paragraph 6 of the Council's answer: 'On behalf of the Council, the Vice-Chancellor (Professor Isles) has consulted with his colleagues on the Committee of Australian Vice Chancellors with a view to the evolving, for consideration by the staff and Council, of standard procedures appropriate for the investigation of serious complaints against members of the academic staff.'²³

This consultation took place in 1962. For example, in October 1962 the Registrar at the University of Tasmania wrote to his opposite number at the University of Queensland noting that a Committee had been formed to:

[c]onsider and report on the desirability of more specific formulations concerning the tenure of members of the academic staff and standard procedures for the investigation of serious complaints against members of the academic staff.²⁴

22 *A petition to be presented to his Excellency, the Right Honourable the Lord Rowallan, Governor of Tasmania in his Capacity as Official Visitor to the University of Tasmania*, signed by James Milne Counsel and Others, Archives of the University of Western Australia, Fox 22, at 3.

23 *In the Matter of a Petition Presented to the Visitor of the University of Tasmania* 10 August, 1963 at 3, Archives of the University of Western Australia, Fox 22.

24 Letter from AS Preshaw, Registrar, University of Tasmania to CJ Connell, Registrar, University of Queensland 23 October, 1962, Archives of the University of Queensland, S130, Old Series Staffing Conditions of Appointment.

The letter also sought details on procedures actually used to investigate charges of serious misconduct by academics.

Eventually, dismissal procedures would be controlled by awards²⁵ and then through enterprise agreements, but the *Orr* case had put the matter firmly on the Australian Vice Chancellors' Committee's agenda. Following on from the University of Tasmania's lead the Australian Vice Chancellors' Committee was by 1968 questioning its members on dismissal procedures and circulating the results to the vice chancellors,²⁶ though it was to take a much longer time and unionisation of the academic workforce before detailed processes would be put in place on a national level. Nevertheless, this awareness of the importance of proper procedures for dismissal was the most important outcome of the *Orr* matter.

If the message concerning proper dismissal procedures was not clear, Orr and his supporters' stubbornness in keeping the dismissal in the minds of vice chancellors everywhere would have brought it home to them. Orr achieved this through defamation proceedings launched against the University of Tasmania and the Vice Chancellor which were not settled until May 1966,²⁷ just four months before his death and over ten years after his dismissal. The University had been subject to censure from the Federal Council of University Staff Associations from 7 December, 1960²⁸ until this was removed in February, 1966. Also a black ban was imposed on the filling of Orr's chair by the Australian Association of Philosophers in 1958,²⁹ and it was planned to be lifted in August, 1966.³⁰ The settlement required the University to make a public statement, to pay Orr \$32,000 plus interest, and to forgive the debts arising from costs awarded against Orr in *Orr v*

25 *Australian Universities Academic Staff (Conditions of Employment) Award 1988; Universities and Post Compulsory Academic Conditions Award 1995.*

26 Australian Vice Chancellors' Committee *Questionnaire*, 9 December, 1968, Archives of the University of New South Wales, Cn 373, Box 5.

27 Orr signed the offer of settlement on 11 April, 1966. This required acceptance by Council of the University of Tasmania which occurred in May, 1966.

28 Editors "Censure of the Administration of the University of Tasmania" (1961) Vol iv No 1 *Vestes* 69.

29 Hall R, "Dropping the Albatross" *The Bulletin*, 28 December, 1963 at 6. This article incorrectly stated that the Orr case was settled in 1963. Orr rejected the terms but was finally persuaded to sign in 1966.

30 Letter from WJ Ginnane to AK Stout dated 17 May, 1966, Stout papers, File 666, Archives of the University of Sydney.

University of Tasmania.³¹ The statement was very carefully crafted, and whilst admitting no fault noted that:

[A]nalyses of the matter... have drawn attention to matters widely regarded as unsatisfactory; and the view has consequently been urged upon the University that it acted wrongly in terminating the appointment of Professor Orr as it did...³²

Recognising the magnitude of the dispute, the settlement document noted that there were sincerely held views that there was a reasonable doubt as to the truth of the allegations against Orr which had:

[C]aused a widespread and continuing controversy which has had and is continuing to have harmful effects on the University and Australian Universities generally.³³

This successful use of proceedings by Orr further demonstrates the importance of proper process in academic dismissal cases, which would limit the opportunity for defamation proceedings against vice chancellors, or fellow employees, and gives support to Wootten's notion of quasi-judicial process.

However, *Orr* would soon be having its impact across the system. As an example, in 1964 the University of Queensland Senate, specifically noting *Orr*, established a Committee to prepare a statute preventing dismissal unless there was proper inquiry by a representative committee which allowed the academic a right to attend.³⁴ This completed a process of review of dismissal procedures which had begun some years earlier. The outcome of this review was a significant improvement on the clause which had prevailed for over half a century at that university giving the Chancellor sole power on matters of

31 Copy of signed but undated *Indenture* between the University of Tasmania, Keith Sydney Isles and Sydney Sparkes Orr, together with signed undertaking from Sydney Orr not to revoke signature, dated 11 April, 1966, at p 3, Fox 22, Archives of the University of Western Australia.

32 Note 31.

33 Note 31.

34 Report of meeting of Committee appointed by the Senate to prepare a statute regarding Dismissal of staff members, 6 May, 1964, University of Queensland Archives S130 Subject file *Old Series Conditions of appointment policy matters*.

misconduct. On occasion the earlier clause had been somewhat of an embarrassment to the University, the Vice Chancellor having received a letter from a candidate withdrawing his candidature for a professorship at the University for reasons including the clause. The Vice Chancellor felt obligated to write back agreeing that “no man should have the power to make such a decision” and indicating these provisions were being redrafted.³⁵

Even though Table I indicated there were dismissal procedures before *Orr* in some universities, *Orr* brought about a more focused approach to the problem from both the Australian Vice Chancellors’ Committee and staff associations.

Dismissal processes: Registration of a National Education Union and the Establishment of an Academic Award

The next most significant development occurred in the 1980s. This was the registration of Australia wide university employer and employee industrial bodies³⁶ culminating in the handing down of a federal award by the Australian Industrial Relations Commission. This was the *Australian Universities Academic Staff (Conditions of Employment) Award 1988*.³⁷ The 1988 Award covered a range of matters including very comprehensive procedures for disciplining academics. In the most serious cases, it allowed for dismissal following a misconduct investigation committee (MIC) recommendation. The 1988 Award no longer has general effect for reasons discussed below, nevertheless its procedures regulating dismissal were highly relevant predecessors to current procedures and warrant detailed discussion.

³⁵ Letter dated 15 September, 1961 to Vice Chancellor Schonell from CL Hamblin, and reply from Schonell dated 22 September, 1961, University of Queensland Archives S130 Subject file *Old Series Conditions of appointment policy matters*.

³⁶ This followed from the decision in *Queen v Coldham; Ex Parte Australian Social Welfare Union* (1983) 153 CLR 297 which ultimately allowed federal registration of an academic union.

³⁷ Referred to herein as the 1988 Award.

Clause 9 of the Award dealt with serious misconduct:

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

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

The procedures required allegations of serious misconduct to be investigated first by the chief executive officer (CEO).³⁸ If the CEO believed that an allegation of serious misconduct warranted further investigation, he or she was required to notify the staff member in writing of the nature of the acts or omissions which constituted the alleged serious misconduct “in sufficient detail to enable the staff member to know the precise nature of the allegations” and to properly consider and respond.

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

Where the CEO decided that a *prima facie* case for serious misconduct existed, he or she was required to refer the matter to a committee of investigation. The committee was to consist of a chair who was a senior member of the legal profession or a person with

³⁸ Usually the vice chancellor.

appropriate experience in industrial relations, appointed by agreement between the CEO and the president of the local branch of the union, a nominee of the CEO, and a nominee of the president of the local branch of the union.

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

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

[B]y proceeding forthwith to exercise one or more of the following powers, namely to:

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

Interpretation of the Award Provisions

An important decision on the operation of the 1988 Award is *Rice v University of Queensland*.³⁹ Dr Rice had been dismissed by the University of Queensland for a range of matters following a Committee of Investigation. Madgwick J of the Industrial Relations Court found that the Committee's report was not lawfully made out and accordingly there were not valid reasons for termination of Dr Rice's employment. In so finding, Madgwick J described the legal effect of the disciplinary provisions in the Award:

A unique system has been established to deal with supposed cases of serious misconduct. The Award's features include:

It expressly overrides otherwise relevant (express or implied) contractual terms between a member of the relevant industrial

³⁹ *Rice v University of Queensland* (980009), <http://www.austlii.edu.au/au/cases/cth/irc/980009.html>, QI 1042 of 1995, 13 March 1998.

organisation and a university (clause 9(b)). Thus the role of common law concepts is much diminished.

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

The requirement in subclauses (n) and (o) that the relevant administrative organs of the university must apply the findings of the Committee denudes them of the power even of charitably-intended indulgence; the powers of the administrators are thereby greatly reduced. Among other things, the Award stringently removes any capacity for a purely subjective approach by a Vice Chancellor. The countervailing benefit to the university would appear to be that it escapes the burden of appeals to their administrators' benevolence and of complaints about harshness by them.

The parties to the Award jointly choose the presiding member of the Committee.

It attempts, restrictively and exhaustively, to define serious misconduct.

Precision and detail in the formulation of allegations (subclause (d)(i)(1)) are made mandatory and the Committee's attention is confined to such allegations (subclause (1)(i) and (2)).

A graduated range of disciplinary responses is made available to the Committee, with the necessary implication that the most serious response, dismissal, is reserved for the most serious class of cases.

I agree with Spender J in *Chambers v James Cook University* (1995) 61 IR 121 at 137, that the Award is, as to presently relevant matters, a code.⁴⁰

⁴⁰ Note 39.

Madgwick J stressed that the Award required the University to give effect to the findings of the Misconduct Committee:

That is an unusual kind of provision. It both underlines the idea that the Award is a code as to disciplinary matters and is an integral part of that code. For any employer, it is essential that there be available a legal means of dealing with perceived disciplinary problems. Often this is left to what the common law will imply into the contract of employment. It may also be dealt with by express contractual terms. Or, award obligations voluntarily or involuntarily imposed may modify the express or implied contractual terms. Here, the Award ousts those terms entirely and substitutes its own regime. If that regime results in an obligation on the University as an employer to terminate an academic's employment, it seems to me to be fundamental to the proper functioning of the University that it comply with that Award requirement. Not to do so would displace the only legally available system of discipline. There are other likely important practical consequences of non-compliance. Those consequences may include justifiable staff or student unrest and/or political obloquy for the University or those governing it, to say nothing of the difficulty of attracting suitable senior people to the membership of the disciplinary committees contemplated by the Award.⁴¹

In another case under the 1988 Award, *Chambers v James Cook University of North Queensland*⁴² Boulton JR examined the operation of a committee formed to investigate allegations of sexual harassment. The academic had been dismissed by the Vice Chancellor following adverse findings by the committee. Boulton JR determined that the academic should be reinstated because the committee's decision was vitiated by errors of law. Specifically, he found there was a requirement that the matters constituting the alleged serious misconduct must be specifically defined,⁴³ and the employee must be

⁴¹ Note 39.

⁴² *Chambers v James Cook University of North Queensland* Industrial Relations Court of Australia, Queensland Registry, no QI158 of 1994, 10 Feb, 1995, <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/irc/950033.html>.

⁴³ Note 42 at 24.

informed of precisely what he or she is charged with.⁴⁴ Failure to do so denied natural justice to the employee. Furthermore, the committee did not apply the correct definition of serious misconduct as provided in Clause 9(i) of the Award, the test was not the one specifically applied: “professionally grossly negligent in his conduct”.⁴⁵

There was a further procedural concern in *Chambers*. The committee had allowed evidence of separate allegations of sexual harassment to be given at a common hearing in circumstances where the possibility of joint concoction of evidence may have destroyed the probative value of the evidence given by the complainants.

Following Boulton JR’s order reinstating Chambers, and Madgwick J’s holding that Rice had been unlawfully terminated, there could be no doubt that the dismissal procedures and definitions provided for in the 1988 Award would have to be strictly complied with, and would attract natural justice rules.

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

When framing the Award, the parties to it evidently had in mind such matters as the intrinsic social importance of the work of academic staff of universities, and the historical phenomenon that some with much to contribute to such work may not necessarily behave in particularly orthodox ways. It is evident that the parties were intent on doing a number of things aimed, on the one hand, at respect for academic freedom while, on the other, at distinguishing between the legitimate scope of such freedom and behaviour which would make it practically intolerable for the continuation of an academic’s employment.⁴⁶

This statement is a very important recognition of academic freedom. Madgwick J also recognised that academic freedom is not an absolute and the concept will be balanced against other “intolerable” behaviour. Interpreted strictly in this academic freedom context by judges such as Boulton JR and Madgwick J, the 1988 Award

44 Note 42 at 18.

45 Note 42 at 23.

46 Note 39 at 13.

disciplinary procedures provided powerful protection for academic freedom, though without once mentioning those words.

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

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

Just as Boulton JR had done in *Chambers*, Madgwick J recognised that misconduct investigation committee processes are subject to the rules relating to natural justice:

[T]his was a case where procedural fairness (or natural justice as it was, until recently, more commonly called) required that the Committee keep an open mind on the question of serious misconduct and the appropriate response, until the primary factual findings had been made and the parties had had the chance to make submissions. The Award cannot operate so as to exclude such a basic requirement or to excuse non-compliance with it; the Award cannot rise higher than its source, the Act which enabled it, the (then) *Industrial Relations Act (Cth)*. Nothing in that Act expressly warranted any denial of procedural fairness, and such a denial is not readily sanctioned by implication.

The 1988 Award was replaced by the *Universities and Post Compulsory Academic Conditions Award 1995* (known as the Bryant Award). However, political events weakened the award system. The election in 1995 of a Liberal National Party Government intent on workplace reform would see a serious reduction in the importance of the award system itself, and its partial replacement by a system of enterprise bargaining. Awards may now only contain a small list of 20

allowable matters,⁴⁷ and the list does not include disciplinary procedures for serious misconduct.

Dismissal processes under Certified Agreements

For universities this has meant the replacement of the national and uniform 1995 Award with “certified agreements” made at the individual university level⁴⁸ and the inclusion, if the parties so wish, of disciplinary and serious misconduct procedures in the agreement. The national union, the NTEU, which supports individual university branches in negotiations with their university insists, on the inclusion of disciplinary procedures, and as demonstrated below, these owe much to the 1988 and 1995 Awards. The presence of the NTEU, and to a lesser extent a national employer body, the Australian Higher Education Industrial Association (AHEIA), has ensured a reasonable level of similarity in these agreements but they are not uniform as to salary or other content.

Table 2 examines certified agreements in Australian Universities.

⁴⁷ Section 89A *Workplace Relations Act 1996* (Cth).

⁴⁸ Enterprise bargaining had in fact commenced under the previous Labor government, but the first University agreements began appearing in 1995 and were certified under s 170MAS of the *Industrial Relations Act, 1988* (Cth).

Table 2

Dismissal Processes in Certified Agreements: The 2001/2001 round

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

Abbreviations used in this Table

Natural justice:	Includes express reference to fairness
No law:	Representation is allowed but not by a practising lawyer
Law:	Representation is allowed by a lawyer or non lawyer
N/S:	Not stated
W/oP:	The university may suspend the academic with or without pay
Io:	Investigating Officer
I/MIC:	The employee has a choice between a MIC or an Investigating Officer
MIC:	Misconduct Investigation Committee
RP:	Review Panel
MRC:	Misconduct Review Committee
CR:	Committee of Review
RC:	Review Committee
DRC:	Disciplinary Review Committee
MP:	Misconduct Panel
SMIC:	Serious Misconduct Investigation Committee
RAC:	Review and Appeals Committee

Table 2 includes all Australian universities with the exception of Bond and Notre Dame Universities which did not have enterprise agreements in that round. The agreements are from the 2001 – 2002 enterprise bargaining round.

The analysis in Table 2 reveals good rights protecting academics against arbitrary dismissal in Australian universities which have entered into enterprise agreements.

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

actually adopts and applies the 1995 Award in its enterprise agreement.

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

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

....

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

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

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

issues relating to academic freedom, would inevitably go to the traditional tribunal with its attendant community notion of academics sitting in judgment over their colleagues.

The University of Sydney investigating officer procedures are similar to those at the University of Melbourne. The University of Western Australia also uses investigating officer procedures. However these are different again. At that university the IO serves the needs of the MIC and is appointed only *after* the matter has gone to the MIC “to conduct further inquiries as the Misconduct Investigation Committee considers reasonable and appropriate.” (Clause 4(a))

The 2000 Enterprise Agreement at the University of New South Wales also provided for an IO, but then, unusually, gave the academic the choice of using the IO process instead of a misconduct investigation committee: clause 14.3(g). That university is the first to certify an agreement under the 2003 round. Amendments to the IO and MIC procedures have been made: The choice of IO or MIC has been removed, though an election to use a review committee is given for serious matters. If an allegation of misconduct or serious misconduct is denied by the academic, the deputy vice chancellor will appoint one or more IO to undertake the misconduct investigation.⁴⁹ The IO reports to the deputy vice chancellor, who has to consider the report and under clause 14.2.4 make a determination as to whether misconduct or serious misconduct has occurred and what disciplinary action is appropriate. Where it is recommended to the vice chancellor that the academic be demoted, suspended, removed from a position which carries an allowance, or have her/his employment terminated, then the academic can elect to have the matter dealt with by a “Review Committee”: clause 14.3(c). This committee then operates in a similar manner to those in other universities.

Specific clauses summarised in Table 2 are now examined.

In camera

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

⁴⁹ UNSW (Academic Staff) Enterprise Agreement 2003 Clause 14.2.3(b).

Representation by advocate

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

Do rules of evidence apply

Only a few certified agreements mention the rules of evidence, stating that they do not apply. Such clauses are redundant, the *Evidence Acts* and rules of evidence would not apply to these non-judicial proceedings. Nevertheless, procedural fairness would require that decisions be based on “probative and relevant material evidence”.⁵⁰

Ban from campus and suspend pending outcome

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

In *Habili Saira v Northern Territory University*⁵¹ Kearney J interpreted the 1988 Award as not containing a natural justice requirement that there be a hearing prior to the vice chancellor’s

⁵⁰ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 for Deane J at 368.

⁵¹ *Habili Saira v Northern Territory University* (1992) 109 FLR 46.

decision to suspend. If suspension involved a loss of salary the outcome may be different⁵² but the outcome would turn on the wording of the enterprise agreement.

Obtain written allegations

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

Answer and be present, examine witnesses

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

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

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

Natural justice

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

⁵² See *Dixon v Commonwealth* (1981) 55 FLR 34.

The requirements of procedural fairness are governed by the circumstances of each case.⁵³ However, basic requirements are: the absence of any disqualifying bias, the providing of an appropriate opportunity to be heard, and a tribunal which does not act arbitrarily, irrationally or unreasonably, or act on immaterial or irrelevant considerations.⁵⁴

Furthermore, an academic not afforded proper procedural fairness by a university misconduct investigation tribunal could commence proceedings under s 170CE of the *Workplace Relations Act 1996* (Cth) on the ground that the termination was “harsh, unjust or unreasonable”. In determining this, s 170CG(3) requires the Commission to have regard to whether an employee was notified of the reason relating to her or his dismissal and whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee. If, on the other hand, the university simply chooses to summarily dismiss and not use its procedures, the action would be for breach of the enterprise agreement.⁵⁵ The unfair dismissal provisions of the *Workplace Relations Act 1996* (Cth) apply, *inter alia*, to “constitutional corporations”. Recently, the Full Federal Court has held that the University of Western Australia is a constitutional corporation.⁵⁶

Copy of committee report

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

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

⁵³ *Kioa v West* (1985) 159 CLR 550.

⁵⁴ Note 50 at 367, 368.

⁵⁵ See *NTEIU v University of Wollongong* [2001] FCA 1069 (8 August, 2001). The action in this case was for an interpretation of the enterprise agreement under s 413A of the *Workplace Relations Act 1996* (Cth), though the union also sought penalties for its breach.

⁵⁶ *Quickenden v Commissioner O'Connor of the Australian Industrial Relations Commission* [2001] FCA 303 (23 March 2001).

It is more likely an oversight rather than any intentional conduct on the part of universities to have omitted this right. In any case, a refusal to grant a party to the proceedings access to the written report would seem most unfair and thus challengeable under the natural justice/fairness clauses in these agreements. The report would usually be discoverable under freedom of information legislation or as part of subsequent judicial proceedings.

Finally, it should be noted that while the MIC processes are subject to natural justice rules, an academic could lose the right to a misconduct investigation committee by admitting in full that the conduct has occurred. This occurred in *Habili Saira v Northern Territory University*,⁵⁷ where Kearney J held that the academic's admission that he had not taught classes constituted an admission in full.

A possible weakness

A matter that is not resolved under certified agreements is the extent to which a vice chancellor is bound to follow the findings of fact of a MIC. It will be recalled that the 1988 Award MIC procedures were interpreted in *Rice v University of Queensland* as being:

It takes the independent powers and functions of fact-finding and discretionary judgment of the comparative seriousness of such infractions out of the hands of the administrative officers of the employing university and vests them in an independent and senior Committee...⁵⁸

The interpretation of an enterprise agreement obviously will turn on its wording, but if a disciplinary procedure follows the wording in the 1988 Award which provided:

The Chief Executive Officer shall, after receiving the report of the Committee, act on its finding by proceeding forthwith to exercise one or more of the following powers...

one would expect a similar interpretation, and one which gives a vice chancellor little discretion to make findings beyond those made by the MIC.

⁵⁷ Note 51.

⁵⁸ The full quote appears at note 40.

A recent commission of Senior Deputy President Duncan suggested *obiter* that a vice chancellor was not limited to the findings of the MIC in the matter being decided: He stated:

More importantly I have considered the arguments over what the Vice-Chancellor should consider. I do not accept the NTEU's argument that he is constrained by the findings of the Committee. As Mr Wedgwood pointed out the Vice-Chancellor prior to receipt of the Committee's report had necessary access to other material. The Committee is itself constrained and it would not be appropriate if the Vice-Chancellor were doubly restrained, once by the Committee's brief and then by its report. The limit, if any, on what is relevant is the only constraint.⁵⁹

In this matter the wording of the enterprise agreement was:

On receipt of the report of the Committee, and having considered all its findings on the facts related to the alleged misconduct or serious misconduct, the Vice-Chancellor may take disciplinary action.⁶⁰

This wording is not as directive as that in the 1988 Award, nevertheless it strains the wording to suggest it gives the vice chancellor an independent fact-finding role.

Furthermore, in a situation where an agreement is interpreted to give a vice chancellor power to make additional findings of fact outside those made by the MIC, that process should carry with it procedural fairness requirements similar to those applicable to the MIC. In other words, the evidence considered by the vice chancellor to support a different finding of fact should equally be tested in the presence of the academic. To act otherwise seriously weakens the value of the MIC process, and allows "a purely subjective approach by a vice

⁵⁹ *NTEIU v Southern Cross University* Enterprise Bargaining Agreement 2000 Australian Industrial Relations Commission 6 August, 2003 PR935798. http://www.airc.gov.au/documents/other/other_decisions.html date accessed 14 September, 2003.

⁶⁰ *Southern Cross University* Enterprise Bargaining Agreement 2000, cl 35.5.5. This clause is largely based on the 1995 Bryant Award.

chancellor”⁶¹ into the matter, the very thing Madgwick J’s interpretation of similarly worded clauses in the award did not allow.⁶²

May a university chose to ignore dismissal processes contained in an enterprise agreement?

The rights described above are indeed quite powerful. But what if a university simply chooses to ignore them and purports to exercise a power to dismiss it believes is contained in the *Workplace Relations Act*? This issue arose in an academic freedom context in *NTEIU v University of Wollongong*.⁶³

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

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

Accordingly, pursuant to clause 59 of the Enterprise Bargaining Agreement and Section 170CM(1)[c] of the *Workplace Relations Act 1996*, I advise you that your employment with the University of Wollongong is terminated, effective immediately.⁶⁴

What conduct had given rise to this action? The Vice Chancellor’s dismissal letter refers to statements made by Steele in the press on 9 January 2001 to the effect that Steele “had been told/instructed to increase the grades of honours students.” The letter indicates that according to the Vice Chancellor, Steele did not substantiate the claims, and later denied those claims. Upon being instructed to withdraw the

61 Note 40.

62 Note 40.

63 Note 55.

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

claims the letter asserts that he refused a request from his head of department “to correct the public record accordingly and to take appropriate steps to repair the obvious damage your remarks had caused to the reputation of the University of Wollongong.” Instead, the Vice Chancellor’s letter asserts that Dr Steele responded to his head of department with a letter circulated widely referring to “deeply flawed process of honour’s assessment”, “sham process of honours assessment” and “shonky marking practices”.⁶⁵

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

On 14 May, 2001 Steele, represented by the NTEU, sought an interpretation of the Enterprise Agreement before Justice Branson in the Federal Court. The specific legal question raised was whether the Vice Chancellor, having unilaterally decided that an academic has engaged in serious misconduct, as that term is used in s 170CM(1)(c) of the Act, was entitled to ignore the misconduct investigation procedures in clause 61 of the Agreement.

The relevant clause, cl 61.1 provided:

Before the Vice-Chancellor takes disciplinary action against a staff member for reasons amounting to misconduct or serious misconduct, the Vice-Chancellor must take the steps in this clause....

⁶⁵ 2001 (April) NTEU National Industry Bulletin at page 2, also available at <http://www.nteu.org.au/rights/tedsteele.pdf>.

Subsequent clauses provided for suspension from duties with or without pay, the formation of a committee, investigation and report to the vice chancellor who under clause 61.10.2 “may then take disciplinary action.” The clause continued:

Where the disciplinary action is to terminate the academic staff member the academic staff member will be provided with notice or payment in lieu of notice as provided for under Clause 14 of this Agreement provided that the University may terminate without notice the employment of an academic found to have engaged in conduct of a kind envisaged in Section 170CM(1)(c) of the Australian Workplace Relations Act such that it would be unreasonable to require the University to continue employment during a period of notice.

There was one other clause central to the University’s arguments. Clause 59.1 provided:

Other than as provided for in Clause 28 (Probationary Appointments) and Clause 26 (Incremental Progression) all decisions to discipline or terminate the employment of an academic staff member can only be taken by the Vice-Chancellor in accordance with Parts 6 and 7 of this Agreement.

It is to be noted that Part 7 included clause 61 above.

Clause 59.2 stated:

The University must not terminate the employment of an academic unless the academic has been given notice and/or compensation as required under Clause 14 of this Agreement provided that the University may terminate without notice the employment of an academic found to have engaged in conduct of a kind envisaged in Section 170CM(1)(c) of the Australian Workplace Relations Act such that it would be unreasonable to require the University to continue employment during a period of notice;

Relying on cl 59.2 the University argued that s 170CM allowed the University to summarily dismiss for serious misconduct as defined under the Act and the Regulations. Under regulation 30CA(1) serious

misconduct includes (a) wilful, or deliberate, behaviour by an employee that is inconsistent with the continuation of the contract of employment; and (b) conduct that causes imminent, and serious risk to: (i) the health, or safety, of a person; or (ii) the reputation, viability or profitability of the employer's business. Regulation 59(2) (c) defines serious misconduct to include refusal to carry out a lawful and reasonable instruction consistent with the employee's contract of employment. In the dismissal letter the Vice Chancellor referred to Steele's refusal to correct the public record or repair damage to the University.⁶⁶ The argument was that the University only needed to follow the Committee procedures in clause 61.9 where the conduct came within that definition but not within the definition in the Act and Regulations brought in via reg 59(2).

In the event, Branson J rejected the University's interpretation of the Enterprise Agreement:

I conclude that the purported distinction between the kind of misconduct envisaged by par!170CM(1)(c) of the Act and misconduct defined as "serious misconduct" by subcl!59.5 of the Agreement is so vague and ill-defined that the construction of cl!61 of the Agreement for which the respondent contends would prove unworkable. Nothing in the language of the Agreement, in my view, suggests that the parties to the Agreement intended to incorporate this purported distinction into the Agreement.

Another significant factor which tells against the premise on which the respondent's submissions are based is the actual wording of subcl!59.2 of the Agreement. In my view, if one has regard to the plain meaning of the words used in subcl!59.2 of the Agreement, it can be seen that the subclause is concerned with the notice, if any, or compensation in lieu of notice, that is required to be given to an academic staff member before his or her employment is terminated. The words of the subclause do not suggest that it is concerned with the procedures which are to be followed before a decision is reached to terminate the employment of a staff member.⁶⁷

⁶⁶ Note 55 at para 11.

⁶⁷ Note 55 at paras 31, 32.

Justice Branson saw no right in the University to dismiss under clause 59.2, finding that that clause dealt merely with notice or compensation in lieu of notice. The clause was subject to the procedures in clause 61.⁶⁸

This question could not have arisen under the misconduct procedures in the Award, because the Award provisions had been held to constitute a code thereby preventing any party from ignoring the procedures.⁶⁹ This point had not been tested under the new enterprise bargaining regime. Accordingly, the Steele case was a critical test for enterprise bargaining, particularly as it related to dismissal of Australian academics. If a vice chancellor was to be allowed to circumvent the misconduct investigation procedures in an enterprise bargain, academic freedom in Australia was under direct threat because these procedures, developed over the forty years post *Orr*, represented the main safeguard against arbitrary dismissal. In an explanatory statement regarding the judgment Branson J made this comment:

Nor was the Court required to address any issue touching on academic freedom or freedom of speech generally. The only issue on which the Court has ruled is an issue concerning the proper interpretation of the Agreement.⁷⁰

Accordingly, Branson J characterised her judgment as simply one of construction of an enterprise agreement. Apart from this, her Honour made no reference to academic freedom and, surprisingly, no reference to the academic freedom background and the history of the misconduct investigation procedures in the case, which would certainly have added considerable weight to her interpretation of the agreement. After all, but for academic freedom, why should universities have special and quite complicated dismissal procedures?⁷¹

⁶⁸ Note 55 at para 37.

⁶⁹ *Chambers v James Cook University* (1995) 61 IR 121 at 137; *Rice v University of Queensland* (980009), <http://www.austlii.edu.au/au/cases/cth/irc/980009.html>, QI 1042 of 1995, 13 March 1998.

⁷⁰ Note 55 Explanatory Statement, para 6.

⁷¹ Steele's case has parallels to the 1885 Canadian case *Re Wilson* (1885) 18 NSR 180 with a similar outcome. In that case, Professor Wilson published a letter in a newspaper said by the university to be injurious to the college and manifesting a contempt for authority subversive of discipline and likely to destroy the harmony

The University appealed against the decision of Branson J. The Full Court of the Federal Court rejected the appeal, fully supporting the reasons advanced by Branson J in her judgment.⁷² In delivering its judgment the court criticised the actions of the University in dismissing Steele:

It is unlikely any trade union, today, would accept a proposed enterprise agreement that permitted the employer to dismiss an employee for misconduct without prior warning and an opportunity to make a defence. Common fairness requires the provision of these rights. It is disappointing to find a university, of all employers, claiming not to be under an obligation of common fairness.⁷³

This comment indicates just how far academic rights have developed since *Orr*.

Conclusions

The major question in this article is whether dismissal processes afford adequate protection for academics against arbitrary dismissal or other penalty. It is acknowledged that this protection against arbitrary dismissal is of limited use where the academic is employed on a short term or casual contract basis. There the contract can simply be allowed to run its course and not be renewed, a critical issue for casual academics in Australian universities. Such staff do not have academic freedom protection in practice because they may have difficulty

and mutual confidence between the professor and the governing body of Kings College, Windsor. By majority, the court held that “Professor Wilson had no notice that the Governors would deliberate on the offence charged and consider the propriety of removing him from his office on account of it”: per Thompson J at 193. Accordingly, the dismissal failed on procedural grounds, “no man shall be condemned unheard”: per Thompson J at 193.

⁷² *University of Wollongong v National Tertiary Education Industry Union* [2002] FCAFC 85 (28 March 2002). Wilcox J, one of the appeal judges, was quoted in the press at the time of the case as saying in response to the University counsel’s argument: “Look, even murderers are entitled to be heard in their defence. The suggestion that an academic, whatever his or her offence, is not allowed to make a defence – for a university to put that proposition, I repeat, I just find it a shocking proposition.” Sydney Morning Herald, 28 February, 2002, at 3.

⁷³ Note 72 at para 35.

demonstrating a causal link between the non-renewal of their casual contracts and the exercise of an academic freedom right.

With this important caveat, the examination of dismissal processes in enterprise agreements in Australian public universities reveals that, in 37 Australian universities, there is strong legal protection for academics facing dismissal. It is vital in terms of academic freedom protection that such rights are not lost in the present Federal Government's workplace reform agenda and its quest for "flexible working arrangements".⁷⁴

The present legal protection includes rights to:

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

The decision in *NTEIU v University of Wollongong* maintained these rights, as did the Union's determination in that case to pursue their protection against a vice chancellor who had sought to ignore them.

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

⁷⁴ http://www.dest.gov.au/highered/programmes/workplace_reform/guidelines_roundtwo_wrp.htm#5

The Orr dispute also strengthened the role of staff associations in universities. These associations eventually grew into a powerful industrial union. At the time of *Orr* there was no federal union, and while the efforts of staff associations were able to put significant political and moral pressure on the University of Tasmania, they were not able to represent Orr in the litigation. Orr had to bear his own costs and those of the University⁷⁵ when he lost. The Steele case reflects significant growth in the industrial and legal power of unions. Steele was represented by a financially secure union which was prepared to pursue the case to its conclusion.

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

⁷⁵ The University forgave the debt relating to costs awarded in the University's favour in the 1966 settlement.