

Academic freedom as insubordination: the legalisation of the academy

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Abstract *Australian academics, like their overseas counterparts, have, over recent years, felt an attenuation of the freedom traditionally ascribed to the academic. This attenuation has been accompanied by termination of employment, legal proceedings, and limitations placed on use of facilities or previously enjoyed freedoms. This paper considers the notion of academic freedom, and its traditional justification. It assesses the basis of that justification in the changing environment of higher education, and asserts that the need for academic freedom is not diminished by the commercialisation of the academy. Quite the reverse is the case. The paper considers the legal justifications for attacks on academic freedom, and the premises upon which they are based, with a view to arming the academic against such justifications.*

Introduction

The sacking of a Wollongong University molecular biologist for his refusal to recant allegations of 'soft marking' has further stimulated concern about the role of academic debate in the public arena in the era of the market-oriented university. The sacking was subsequently found to be unlawful: *NTEIU v. University of Wollongong* [2001] FCA 1069 (8 August 2001) (Lawnham, 2001a, p. 33; Lawnham, 2001b, p. 33). Steele subsequently parted with the university as one of the conditions of an (otherwise) confidential settlement (Lawnham, 2002, p. 3. See also Sawyer, 2001, p. 39). Another case was aired by *The Courier Mail* on 3 February 2001. In that case the marks of four overseas students who had originally failed the assessment in a unit were increased on the basis of further assessment. The university conducted an internal report into the matter (Smith, 2001. See also a discussion paper produced by Kayrooz *et al.*, 2001).

The response of the Australian Vice Chancellors has been to defend the universities in a number of media releases and interviews (Knight, 2001, Carlton, 2001, Hamilton 2001a–d).

His subsequent reinstatement was described as a victory for academic freedom. 'I'm outspoken in the world of science. I'm outspoken in the world of politics of

science and the politics of academic affairs—I call a spade a spade ... [Today's decision] is a triumph for academic and intellectual freedom in Australia.' ('University wrong to sack professor', 2001, p. 12).

The case is not without precedent: staff have been denied the use of university facilities for making irreverent comments, (Dow, 2001) and universities have promulgated codes of conduct to protect their public image. (Healy, 1998, p. 35; Osborne, 1999; 'VUT email ban on irreverent professor', 1999, p. 1; Macintyre & Marginson, 2000, p. 58). Even student newspapers and websites have been affected by the new culture of image preservation, with student editors prosecuted for publication of articles considered to be an 'incitement to criminality' (*Michael Brown & Ors v. the members of the Classification Review Board of the Office of Film and Literature Classification* [1997] 474 FCA (6 June 1997) and *Michael Brown & Ors v. Members of the Classification Review Board of the Office of Film and Literature* [1998] 319 FCA (24 March 1998)) and student unions instructed to tone down the content of student bulletin boards (Peacock, 2002, p. 32). It is not difficult to understand the concern of university administration and management. The new environment of higher education has prompted spending on marketing, and the investment in their name must be protected. Nevertheless, it is interesting to consider the effect of this sensitivity on the idea of academic freedom. Regardless of whether it is conceded that issues relevant to the image of the university constitute matters that should be sacred to the principle of academic freedom, it is clear that this development heralds a further legalisation of higher education.

The concern of this paper is to consider the effects of new styles of university governance in the current market for higher education. Contemporaneous with, and perhaps as a result of, the new management style, the relationships between universities and their staff, and universities and their students, has become increasingly legalistic.

What is academic freedom?

There is no one understanding of academic freedom. The general thrust of the concept is that the academy should be free of any attempt to influence the direction or outcome of research through funding constraints or directed funding. However, the particulars of the concept of academic freedom must be carefully defined; it is not a liberty arbitrarily granted. It serves a societal purpose: '[f]reedoms are socially engineered spaces in which parties engaged in specified pursuits enjoy protection from parties who would naturally seek to interfere in those pursuits. One person's freedom is therefore always another person's restriction' (Menard, 1996, p. 3).

There must be some justification, from a societal point of view, for the maintenance of this space free of constraint. The justification is capable of confining the concept. The case for the maintenance of a space for academic discourse is made in terms of the value of the university as an institution in society.

The idea of academic freedom in Australia is intrinsically linked to the notion of a university as a 'public good', a site of nation-building and an

upholder of citizenship and democratic values (Marginson & Considine, 2000, p. 28). A greater emphasis on the private benefits of higher education and the commercial benefits of knowledge transforms the boundaries in which this idea of academic freedom has operated. (Neave, 1988, p. 39; Kayrooz *et al.*, 2001, p. 2)

According to Menand, academic freedom is the ‘key legitimating concept of the entire enterprise’ of the university, and lies at the ‘heart of political battles over the future of the public university’ (Menard, 1996, p. 3). Uncontroversially, the concept justifies non-interference in the academics’ ‘pursuit of knowledge. In its wider manifestations it suggests that account should be taken of the degree of university oversight of academic programs and research directions, and of government interference in institutional autonomy.

Definitions need to incorporate institutional autonomy, take account of the way that government policies structure research and teaching choices, and include the extent to which the institutional and policy environment allows opportunities for the pursuit of controversial or challenging ideas. (Kaplan & Schrecker, 1983; Marginson, 1997; Kayrooz *et al.*, 2001, p. 4)

The broader understanding of the concept justifies maintenance of a high degree of institutional autonomy, and individual autonomy within the institution. Correspondingly, it ‘embodies an acceptance by academics of the need to encourage openness and flexibility in academic work, and of their accountability to each other and to society in general’ (Tight, 1988). The duties of the academic, according to these presumptions, include the duty to speak out on matters relevant to society and the governance of the institution.

As with all freedoms, however, academic freedom constitutes a danger to civic—or at least civil—life. It is capable of being used to promote individualistic readings of, for instance, politics, philosophy or history, so that the university could be a harbour for ideas that are eschewed in the wider community. As was famously argued in the *Rabelais* case, it could be used to incite criminal behaviour (*Michael Brown & Ors v. the members of the Classification Review Board of the Office of Film and Literature Classification* [1997] 474 FCA (6 June 1997) and *Michael Brown & Ors v. Members of the Classification Review Board of the Office of Film and Literature* [1998] 319 FCA (24 March 1998)). As such, the university could be vulnerable to charges that it promoted intolerance, created an environment conducive to victimisation or harassment, or allowed an exclusionary culture to develop by failing to sanction hate speech. In recognition of this problem, speech codes have been adopted by many American universities which prohibit verbal or physical behaviour that stigmatises or victimises individuals on the basis of race, ethnicity, religion, national origin, sexual orientation, creed, ancestry, age, marital status, handicap or Vietnam-veteran status (Heumann & Church, 1997, p. 3 citing the speech code adopted at the University of Michigan) Australian limitations on intolerance are contained in state and federal legislation which prohibit discrimination on various grounds.¹ Common law restrictions on defamation have become problematic in the internet age (Dow, 2001).

Websites have been banned for promoting views which allegedly vilify certain groups (*Toben v. Jones* [2002] FCAFC 158, Shanahan, 2002, p. 13). Thus, there are already boundaries to the concept of academic freedom. The university is not only free to sanction non-conforming conduct of certain types; it is obliged to do so.

However, in relation to speech that is not readily definable as reprehensible on these extreme grounds, the university is capable of taking measures to limit free communication. It is this conduct—by which the university takes measures to protect its commercial reputation through placing limits on staff conduct—that is the main subject of this paper. It is suggested that the university, by sanctioning this conduct, is straying into an area that is properly a space left free for academic discourse.

As a countervailing argument, the unassailable position of the university as an employer lends a black-letter weight to the argument against academic freedom. The university employee's common law duties to the employer of fidelity and confidentiality, and the employer's right to manage and control, provide the university with clearly defined remedies in the event of transgression. The temptation to exercise that control grows with the growing value of the university name as a reputational asset.

Increasingly, systemic controls have crept into the university. 'Productivity' gains, used as bargaining points in negotiations for salary increases, such as revenue gains, employment flexibility, increase in the use of casual employment, suggestions of shifts to Australian Workplace Agreements, and pressures to move to fixed term contracts rather than to maintain the idea of tenure, change the language used to describe the university, allowing presumptions of strict market conditions and contract based relationships to be normalized.

Threats to traditional protection of academic freedom

Participation in governance

A traditional institutional protection for academic freedom is through the tradition of participation by faculty members in academic governance. 'By obtaining a voice in decisions of academic policy, faculty members are able to secure an area in which scholarship can thrive free from administrative restraint' ('Academic Freedom', 1968, p. 1049).

However, the modern environment of higher education, characterised by massification (Bargh *et al.*, 1996; Patterson, 1997; Kelsey, 1998, p. 52) and funding restraint, has placed intolerable pressure on the traditional methods of academic governance. The shift from a small number of elite institutions to a mass system of higher education playing a substantial part in the policy of government is a characteristic of many modern systems of higher education (Meek & Wood, 1997). Prior to this shift, the governance of universities tended to be based on the collegial model. University governance today has tended to adopt a more managerial approach. The motivation for this shift has been a concern about the ability of the traditional

collegiate structure to manage effectively.² The Hoare Report said that '[e]ffective governance is a matter which needs to be reconsidered in the light of the current and developing environment for higher education. Universities can probably no longer rely on their traditional governance forms if they are to operate fully effectively' (Hoare Committee Report, 1995, p. 45). Their collegial structure and decision making patterns are commonly cited as constraints to university management. For instance, the West Report suggested that collegial decision-making was incompatible with the need for timely responses to business imperatives, particularly in an era of increasing student choice (The West Report, 1998, p. 111).

More recently and in Australia, a survey of business leaders made similar comments, alleging that universities' 'creaky governance stifles decision-making' and that '[m]anagement systems need a radical overhaul' (Illing, 2002, p. 29; *Meeting the Challenges—The Governance and Management of Universities*, 2002). The inevitable pressures to obtain non-government sources of funding make it difficult for universities to ignore these criticisms, and the desirability of a shift in management styles has become a truism.

It is generally acceded that 'over the past decade the environment in which universities operate, and the academic enterprise itself, have changed dramatically. This presents a range of challenges to the way in which universities are governed and managed and poses questions about what they are accountable for and to whom.' (*Meeting the Challenges—The Governance and Management of Universities*, 2002, p. 2). However, the debate about the appropriate governance structures in the changing environment of higher education is based on the premise that the changed environment is an appropriate one. The alteration of a governance structure to accord with the new idea of the university effectively locks participatory academic debate out of decision-making, including decision-making about the appropriate university model to be adopted.

Although it is clear that a variation in management styles in the various universities always existed—between, for instance, the ancient civic universities and the red-brick and 'new' universities in England, and the corresponding differences between the sandstone elite of Australia and the previous colleges of advanced education—the movement away from collegiate decision-making is still marked.³

The pejorative description of this trend as a 'new managerialism' is grounded in a general feeling that the '“gentleman amateur administrator” of a past era' has been replaced with 'the professional/managerial university executive officer' (Bessant, 1995): a move that the individual academic experiences as a loss of an effectual voice.

Thus, the increasingly 'managerial' approach is frequently compared unfavourably with a 'collegiate' style of management; nevertheless there is no inherent incompatibility between academia and managerialism. It is the incidence of 'hard' managerialism which attract criticism. Academics, perhaps, would have no quarrel with the effects of 'soft' managerialism, which sees 'higher education as an autonomous activity, governed by its own norms and traditions, with a more effective and rationalised management still serving functions defined by the academic community itself.' (Trow, 1994, p. 11) Hard managerialists 'are resolved to reshape and

redirect the activities of [the academic] community through funding formulas and other mechanisms of accountability imposed from outside the academic community, management mechanisms created and largely shaped for application to large commercial enterprises' (Trow, 1994, p. 12). This is the form adopted in Australia and the UK. The idea is to make universities sufficiently similar to commercial firms to enable assessment and management in roughly similar ways.

This gives rise to the obvious question—why replicate business in the university? If businesses are better at doing what universities do than universities are, why have universities? If businesses do not do certain things as well as universities do, why replicate the organisational structures of business in the university?

One may also comment, as an aside, that the governance of commercial organisations can hardly be said to be universally appropriate. Governance of commercial organisations, and regulation to assure good governance, is a matter of some debate. Perhaps the speed of decision-making, asserted by 'business leaders' to be a mark of good management structures, is also a contributor to that laxity in governance characteristic of many failed organisations.

The question of tenure

Traditionally, the principal device by which the institution protects academic freedom is the system of tenure. Once the general competence of an academic has been established, the system of tenure protects him or her against arbitrary dismissal, which may be motivated by hidden ideological causes ('Academic Freedom', 1968, p. 1049).

Considered in the context of the employment relationship between the university—as a corporate entity, rather than as the traditional community of masters and scholars—and its people, the business model introduces a new set of conventions to the working environment. Whereas members of a university may have previously understood their role to be one amongst a number of scholars, the more recent overlaying of business principles have introduced hierarchical structures in which they have an attenuated and an increasingly defined role.

The shift to contractualism as a method of defining legal relationships has also played a part in the redefinition of the role of an academic. This is part of an overall legalisation of university relationships. The inevitable response of a managerialist university to the intolerable pressure on funding and the consequent pressure to protect reputational assets in a commercialised environment is to control and direct those within its influence. Thus, a university may promulgate codes of conduct to regulate the public comments of staff, may create new administrative positions for the negotiation of the marketplace, or may create a corporate arm through which it carries out some external activities. The activities of the corporate arm of the university would be protected—to some extent—by the conventions of confidentiality in the marketplace which provide legal sanctions for insubordination. Basically, the university is relying on contractual rights as an employer to protect its investment, and the investment of public funding, in the reputational asset.

The translation of tenured positions, through various mechanisms, into contract-based provisions, leads to the perception of vulnerability, if not the reality. A recent campaign by the National Tertiary Education Union (NTEU) in support of a sacked academic suggests that the perception is grounded in reality.

The NTEU believes a decision by University of Queensland not to renew the contract of a senior academic and outspoken opponent of the University's plans to introduce full fees, is a serious attack on freedom of speech and a warning to all university staff who do not have protection against arbitrary dismissal, including those on casual or fixed term contracts. (NTEU, 2002)

The staff member in question was an Associate Professor who had performed well and had been promoted during the period of his contract and whose teaching activities remained an ongoing obligation for the university. The NTEU attributed his dismissal to his 'vocal opposition to the University's proposal for full fee paying domestic undergraduate students and his insistence on management compliance with the current enterprise bargaining agreement' (NTEU, 2002).

The increasing casualisation of academic staff provides a threat to the traditional protection provided by tenure in a more direct manner.

Between 1991 and 2000, the share of full time equivalent academic staff employed full-time decreased from 81 to 74 per cent, while the fractional full-time share increased from 6 to 7 per cent. Casual staff, as a proportion of total staff, increased from 13 to 19 per cent. Academic staff increased by 15 per cent over the period. Full time academics increased by 4 per cent, while the number of fractional full-time academics increased by 41 per cent, and casual academic staff increased by 66 per cent. (Commonwealth Department of Education, Science and Training, *Higher Education at the Crossroads* Issues Paper, 'Striving for quality: learning, teaching and scholarship' 2002 [273])

The flexibility afforded by an increasingly casual workforce place the manager in a position to respond rapidly to the environment created by budgetary constraints and increasing private income.

In Australia, the political will which has resulted in the de facto casualisation of the university workforce has been supplemented by a push towards replacing tenure with Australian Workplace Agreements (AWAs) under the *Workplace Relations Act* 1996 (Cth). These are statutory individual agreements, approved by a statutory officeholder, the Employment Advocate. Although employment at universities is constitutionally a state matter, the Howard Federal Government has made clear its willingness to persuade organisations to bring their industrial relations' functioning inside the AWA system by withholding funding until they agree to move over to AWAs. The Federal Government has attempted this strategy in other contexts in which it 'held the purse strings'. If this strategy was implemented in the university sector, it is likely that tenure would be on the bargaining table.

Incidental restrictions on the freedom of the academic

The university can apply a number of controls over the activities of the academic. These controls are typically mediated by contract, but there are other statutory controls which will not be considered in detail. For instance, the preparation of research and teaching materials by an academic may be affected by rules relating to intellectual property (see Monotti, 2000), and thus a university—or an organisation with whom it has contracted—may be in a position to control the release of research findings or the subsequent utilisation of those findings by an academic.

The degree of freedom enjoyed by an academic over matters such as syllabus content can be significantly constrained by legal regimes by which the university and its employees are bound. In particular, consumer protection statutes⁴ can, indirectly, result in restrictions on the academic's control over the curriculum. For instance, if the administrative requirements of the university necessitate the publication of the subject syllabus in promotional documentation, the academic is constrained by consumer protection statutes governing misleading and deceptive conduct to teach to that syllabus. The university can then place further restrictions on the academic by prescribing matters such as assessment limits, information to be made available to students, moderation processes and so on. The process of accreditation, either internally or through professional bodies, creates a further restriction on teaching content. If the course or subject has been accredited, and this fact is promoted to students or employers, an additional constraint applies to the academic teaching the subject.

These restrictions are a far cry from the German concept of *Lehrfreiheit*—freedom to teach—by which the professor was free in his or her choice of what to discuss in the classroom. Although that conceptualisation of academic freedom has never been fully realised in the Australian tradition, the mechanisms exist for substantial constraints upon the academic through a conjunction of legislative and administrative restrictions.

This is particularly the case where the individual can be liable for breach of penal provisions under the legislation. At least one university has promulgated warnings to all staff that the university insurance policy will not cover penalties for breach of these provisions by individual staff members. The university made no distinction in the level of seniority of staff concerned in the breach. However, it is clear that a well designed and promulgated compliance policy and program, to which senior management is fully committed, is significant to the severity of penalty imposed on an organisation and its individuals. Thus, there is a mismatch between the reality of the liability of the individual and the university's veiled threats, since, in the absence of an effective compliance policy, higher levels of management are likely to be most at risk.

The role of the contemporary university

The pressures which have resulted in this redefinition of university relationships originate from the increasingly pressing requirement that universities be called to

account for the use of public funds, and obtain more funding, and for that accounting to be in terms of commercial principles. It is arguable that the relationships will be affected by the perceived function of the university, as those functions are an expression of contemporary values.

This construction is suggestive of the attempt to prescribe objective values, the pressure to do which requires the creation of an external or absolute standard of truth (Smyth, 1985, p. 2). The ascription of a monetary value to students to assist the accounting for the use of public funds also requires that a monetary value be set to the facilities and services provided to students, so that the unfunded pastoral and familial obligations which were a feature of the old-style universities are no longer a valued part of the university, or are otherwise given a contractual value. The ends of the university then have their values ascribed to them on the basis of that set of standards. The role and value of an academic will be, to some extent, defined by his or her value as a teacher in income-generating courses, as a consultant in the service of the university, and perhaps as a researcher attracting government funds or contributing to the reputation of the university.

Thus, the alteration in the way in which the student and the academic are considered follows the alteration in the way in which the university is considered, to the degree that there may be a relationship of cause and effect. It has been suggested that the shift in the relationship of higher education to the society in which it exists has resulted in a change in the perception of the relationship between the university and the student, so that

[i]n the light of these changes, it is evident that a rational theory of the legal relationship between the student and the university can only develop within the context of the university as an instrument of society. In this concept, student-university relationships cease to be the private affairs the university has long considered them. The university's responsibility to its students is a responsibility to society. (Furay, 1970, p. 245)

It appears likely that the responsibility to society to educate its students is to be mediated and measured by the concepts of the market, which requires the mechanism of contract law to facilitate its transactions.

The tendency to consider university relationships as based upon contract has significant grounding in the tendency to view the university in market terms. 'The development of contract law has been important in the economic world because of its capacity to support complex market exchanges' (Davis *et al.*, 1997, p. 2). However, 'contracts are a device, sometimes useful, sometimes not', in promoting mutually beneficial relations' (Brennan, 1997, p. 27). The tendency of contemporary government policy to co-opt the idea of the contract is largely attributable to new management discourses. The increasing resort to contractualism is a consequence of the appearance of new social, political and economic conditions and new government problems. This led to a global move to bureaucratic reform characterised by 'new institutional economics' and new management discourses (Davis *et al.*, 1997, p. 3).

The features which characterised the development of this New Public Manage-

ment (Hood, 1991, p. 3)—freedom to manage, the setting of explicit standards and measures of performance, greater emphasis on outputs than procedures, the disaggregation of units in the public sector, a shift to greater competition in the public sector, a stress on private sector management styles, a stress on greater discipline and parsimony in resource use (Davis *et al.*, 1997, p. 3)—are features which any academic would recognise amongst the reforms which have shaped the last few years of university management. Managerialism in Australia did not necessarily imply a move to contracting, but it did lay the foundations for contracting (Davis *et al.*, 1997, p. 4).

Alford and O'Neill have described a contract state as 'one in which activity previously subject to some form of organisational hierarchy is governed by contracts (or quasi-contracts) between buyers and sellers, either inside or outside the public sector' (Alford & O'Neill, 1994). Contractualist principles have come to characterise not only the way in which the government approaches the administration of the higher education sector, but also the way in which the government is insisting the universities approach their relationship with their students and their staff. Just as the 'cascade of contracts' (Davis *et al.*, 1997, p. 3) approach to governance affects the wider body politic, it also has an effect on the community of the university. Yeatman says that the effect on the body politic can lead to the abandonment of the idea of the body politic: '[n]o longer are citizens presumed to be members of a political community which it is the business of a particular system of governance to express. Theirs becomes a radically disaggregated and individualised relationship to governance' (Yeatman, 1996).

The effects of legislation—academic freedom as insubordination

From the perspective of the academic, the contract-based relationship with the university introduces a level of control over public utterances. The need to protect the marketable reputation of the institution suggests to university management the need to create a clear set of boundaries to the public life of the academic. The contractualisation of the academic's relationship with the university enables these boundaries to be set through the relatively simple expedient of promulgating a code of conduct which set out the position of management on conduct of staff. This could be incorporated into the original employment documentation by reference, or included after the employment of the staff member, since it would not alter the fundamentals of the contract, and would merely be an elaboration on the right to control and manage vested in the university management. The sea change in the position of the academic and of the university would mean that this would not be contrary to the established usages of the university. Moreover, this would not always be contrary to legislated whistleblower protection, which tends to protect staff only from the repercussions of speaking out over improper conduct.⁵ The conduct here considered would not necessarily be improper conduct. It may be conduct which requires scrutiny in the public realm, such as suggestions that commercial activity is inappropriate, or could lead to a diminution in the quality of a degree, or could jeopardise independence in research. The introduction of a significant commercial

activities in collaboration with private bodies makes the specifics of such allegations commercial in confidence, and disclosure of any level of detail of such transaction would breach that confidentiality.

Yet such discussion is necessary, since the university is still, typically, a public body and the activities of the university are promoted by the public through funding and other support. The university is permitted to occupy a space in the public realm as one side of a social compact. The concomitant duty, on the part of the university, is to provide a commentary on matters of social significance. The operation of the university itself is a matter of social significance, and the muzzling of academics on the grounds that comment will detrimentally affect the reputation of the university prevents a full resolution of issues of public concern.

Conclusion

The question, then, is to what extent the interests of the university in minimising reputation risk clash with the interests of society in frank disclosure of matters relating to standards in the academy. It is valuable to suggest that university processes should be more transparent; there are many justifications for open disclosure of many university functions, the most self-evident of which is the amount of public funding expended on universities. Does this proposal answer the whistleblower question, or enhance our understanding of the role of the public academic and the principle of academic freedom? Basically, no. No amount of transparency can reveal the subtle pressures on an academic to conform, and the university, in league with the government on this question, is neither obliged nor inclined to provide the type of analysis necessary to provide informed debate on this question.

There are many answers to the academic's lament over the loss of freedom they have experienced over the years. The most obvious is that the freedom was an excuse—for sloth, for inefficiency, for irrelevance, for idiosyncrasy. Following that is the 'rubbish of the past' argument, that old methods must make way for new efficiencies, and that the new environment must be met with new methods. Academic freedom is portrayed as a luxury in the hands of a few, and the jealous zealots of economic efficiency rage against the participation of a few in such a occupational lurk.

It is difficult for an academic to answer such arguments without appearing to be self-serving. The problem is this: academic freedom is not for the benefit of the academic, or even of the institution. It is for the benefit of society at large, and society's failure to provide the environment in which this freedom can flourish will result in the loss of a valuable asset. It is difficult to speak out in favour of space and time in a society so manifestly deprived of both, but this must be done.

Acknowledgements

The author wishes to acknowledge the kind assistance and patient comments of Professor Harold Luntz on previous manifestations of this paper. Errors remain the author's own.

Notes

- [1] For instance, *Affirmative Action (Equal Opportunity for Women) Act* 1986 (Cth), *Disability Discrimination Act* 1992 (Cth), *Equal Employment Opportunity (Commonwealth Authorities) Act* 1987 (Cth), *Human Rights and Equal Opportunity Commission Act* 1986 (Cth), *Human Rights (Sexual Conduct) Act* 1994 (Cth), *Privacy Act* 1988 (Cth), *Racial Discrimination Act* 1975 (Cth), *Racial Hatred Act* 1995 (Cth), *Sex Discrimination Act* 1984 (Cth), *Anti-Discrimination Act* 1977 (NSW), *Disability Services Act* 1993 (NSW), *Privacy and Personal Information Protection Act* 1998 (NSW), *Equal Opportunity Act* 1984 (SA), *Anti-Discrimination Act* 1994 (NT), *Disability Services Act* 1992 (Tas), *Sex Discrimination Act* 1994 (Tas), *Discrimination Act* 1991 (ACT), *Equal Opportunity Act* 1995 (Vic).
- [2] See, in Australia, Higher Education Management Review Report of the Committee of Inquiry 1995, AGPS, Canberra (Hoare Committee Report), and the Commonwealth, Department of Employment, Education, Training and Youth Affairs, *Learning for life—Review of higher education financing and policy. Final Report* (1998) (the West Report) 2, and in the UK, the Committee of Vice Chancellors and Principals, *Report of the Steering Committee for Efficiency Studies in Universities* (1985) (The Jarratt Committee Report), the United Kingdom, *Report of the Committee on Standards in Public Life* (Cm 3270, 1995) (Nolan Committee Report) and subsequent Nolan reports, and the UK, *Report of the National Committee of Inquiry into Higher Education* (1997) (Dearing Committee Report) [15.32] to [15.68] of the main report, 236–47; Recommendations 54–60. Also in the UK, the Committee of University Chairmen has developed a guide which details the role and responsibilities of members: CUC (1995) [revised 1998] *Guide for Members of Governing Bodies* (Bristol, Higher Education Funding Council for England). See also the discussion in Simon Marginson and Mark Considine, *The Enterprise University* (2000), pp. 71–72.
- [3] For an account of the historical and policy context of the governance of higher education in the UK, for example, see Catherine Bargh, Peter Scott and David Smith, *Governing Universities—Changing the Culture?* (1996) 4ff. See also G Neave, ‘Homogenization, integration and convergence: The Chesire cats of higher education analysis’, in V. Lynn Meek, Leo Goedegebuure, Osmo Kivinen and Risto Rinne (Eds), *The Mockers and Mocked: Comparative Perspectives on Diversity, Differentiation and Convergence in Higher Education*, (1996), quoted in V. Lynn Meek and Fiona Q. Wood, Commonwealth of Australia, *Higher Education Governance and Management: An Australian Study*, 97/1 Evaluations and Investigations Program Higher Education Division, Department of Employment, Education, Training and Youth Affairs, (Canberra: AGPS, 1997), chapter 3.
- [4] Such as, for instance, the *Trade Practices Act* 1974 (Cth) s.52 and 53, and its state counterparts.
- [5] The *Whistleblowers Protection Act* 2001 (Vic) has as its purposes (a) to encourage and facilitate disclosures of improper conduct by public officers and public bodies; and (b) to provide protection for (i) persons who make those disclosures and (ii) persons who may suffer reprisals in relation to those disclosures; and (c) to provide for the matters disclosed to be properly investigated and dealt with.

References

- ‘ACADEMIC FREEDOM’ (1968) *Harvard Law Review*, 81, 1045.
- ALFORD, J. & O’NEILL, D. (1994) *The Contract State: Public Management under the Kennett Government*.
- BARGH, C., SCOTT, P. & SMITH, D. (1996) *Governing Universities—Changing the Culture?*.
- BESSANT, B. (1995) Corporate Management and its Penetration of University Administration and Government, *The Australian Universities’ Review*, 38, 59–62.
- BRENNAN, G. (1997) The Economic Concept of a Contract, in: G. DAVIS, B. SULLIVAN & A. YEATMAN (Eds), *The New Contractualism?*.
- CARLTON, M. *Mike Carlton* 2UE, January 16, 2001, 4:12 PM, interview with Stuart Hamilton
- COMMITTEE OF UNIVERSITY CHAIRMEN (1995) [revised 1998] *Guide for Members of Governing Bodies* (Bristol, Higher Education Funding Council for England).

- COMMONWEALTH, DEPARTMENT OF EMPLOYMENT, EDUCATION, TRAINING AND YOUTH AFFAIRS (1998) *Learning for life—Review of higher education financing and policy. Final Report (the West Report)*.
- COMMONWEALTH DEPARTMENT OF EDUCATION, SCIENCE AND TRAINING (2002) *Meeting the Challenges—The Governance and Management of Universities*, August 2002.
- COMMONWEALTH DEPARTMENT OF EDUCATION, SCIENCE AND TRAINING (2002) *Higher Education at the Crossroads* Issues Paper, 'Striving for quality: learning, teaching and scholarship'.
- COMMITTEE OF VICE CHANCELLORS AND PRINCIPALS (1985) *Report of the Steering Committee for Efficiency Studies in Universities* (The Jarratt Committee Report).
- DAVIS, G. SULLIVAN, B. & YEATMAN, A (Eds) (1997) *The New Contractualism?*
- DOW, S. (2001) Academic faces website charge, *The Age*, 10 July 2001.
- FURAY, S. (1970) Legal Relationship between the Student and the Private College or University, *San Diego Law Review*, 7, 244.
- HAMILTON, S. (2001a) Letter to the editor, *The Sydney Morning Herald*, 9 January 2001.
- HAMILTON, S. (2001b) Letter to the editor, *The Age*, 10 January 2001.
- HAMILTON, S. (2001c) Letter to the editor, *The Courier Mail*, 10 January 2001.
- HAMILTON, S. (2001d) Letter to the editor, *The Canberra Times*, 13 January 2001.
- HEALY, G. (1998) 'La Trobe lays down the law', *The Australian*, 22 July 1998, p. 35.
- HEUMANN, M. (1997) Church, T. *Hate Speech on Campus*.
- HIGHER EDUCATION MANAGEMENT REVIEW REPORT OF THE COMMITTEE OF INQUIRY (1995) (Hoare Committee Report), AGPS, Canberra (Hoare Committee Report).
- HOOD, C. (1991) A Public Management for all Seasons? *Public Administration*, 69, 3.
- ILLING, D. (2002) Suit the System, *The Australian*, 10 July 2002, p. 29.
- KAPLAN, C. & SCHRECKER, E. (Eds) (1983) *Regulating the Intellectuals: perspectives on academic freedom in the 1980s*.
- KAYROOZ, C., KINNEAR, P. & PRESTON, P. (2001) *Academic Freedom and Commercialisation of Australian Universities: Perceptions and experiences of social scientists*, Discussion Paper Number 37, The Australia Institute March 2001.
- KELSEY, J. (1998) Privatizing the Universities, *Journal of Law and Society*, 25, 51.
- KNIGHT, B. (2001) *Morning with Jon Faine* ABC 774 3LO, 19 January 2001, 8:32 am, interview with Stuart Hamilton, Executive Director of the Australian Vice Chancellors Committee.
- LAWNHAM, P. (2001a) Steele Sacked for Grading Claim, *The Australian*, 28 February 2001, p. 33.
- LAWNHAM, P. (2001b) Knives Out For Sacked Steele, *The Australian*, 7 March 2001, p. 33.
- LAWNHAM, P. (2002) Scientist quits after settling uni score, *The Australian* 8 July 2002, p. 3.
- MACINTYRE S. & MARGINSON, S. (2000) The university and its public, in: T. COADY (Ed.), *Why Universities Matter*, p. 58.
- MARGINSON, S. & CONSIDINE, M. (2000) *The Enterprise University*.
- MARGINSON, S. (1997) How Free is Academic Freedom? *Higher Education Research and Development*, 16, 359–369.
- MEEK, V. L. & WOOD, F. Q. (1997) *Higher Education Governance and Management: An Australian Study*.
- MENAND, L. (1996) The Limits of Academic Freedom, in: L. MENAND (Ed.), *The Future of Academic Freedom*.
- MONOTTI, A. (2000) Allocating the Rights in Intellectual Property in Australia: An Overview of Current Practices *Federal Law Review*, 27.
- NEAVE, G. (1996) Homogenization, integration and convergence: The Chesire cats of higher education analysis, in: V. LYNN MEEK, L. GOEDEGEBUURE, O. KIVINEN & R. RINNE (Eds), *The Mockers and Mocked: Comparative Perspectives on Diversity, Differentiation and Convergence in Higher Education*.
- NTEU (2002) Union believes victimisation of UQ Academic sends warning signal to university staff nationally, NTEU website, 26 September 2002, <http://www.nteu.org.au/news/890/4504>
- OSBORNE, M. (1999) The Draft Code of Conduct, *Message from the Vice Chancellor* 27 August 1999.
- OSMOND, W. (1999) VUT email ban on irreverent professor', *Campus Review*, 21–27 April 1999, p. 1.
- PATTERSON, G. (1997) *The University*.
- PEACOCK, T. (2002) Murdoch threatens student website, *The Australian*, 25 September 2002, p. 32.
- SAWYER, K. (2001) Disclose Encounters, *The Australian*, 7 March 2001, p. 39.

- SHANAHAN, A. (2002) History and ideology stir up the melting pot, *The Australian*, 24 September 2002, p. 13.
- SMITH, R. (2001) *Report of the Enquiry into Assessment Irregularity at QUT* 28 February 2001; accessed from www.qut.edu.au on 9 March 2001; copy on file with author.
- SMYTH, J. (1985) Educational Administration: A Critique of the Tradition, *Tradition and Turmoil in Educational Administration*, 2.
- TIGHT, M. (1988) So What Is Academic Freedom?, in: M. TIGHT (Ed.), *Academic Freedom and Responsibility*.
- TROW, M. (1994) Managerialism and the academic profession: The case of England, *Higher Educational Policy*, 7, p. 11.
- UNITED KINGDOM, *Report of the Committee on Standards in Public Life* (Cm 3270, 1995) (Nolan Committee Report) and subsequent Nolan reports.
- UNITED KINGDOM, *Report of the National Committee of Inquiry into Higher Education* (1997) (Dearing Committee Report).
- 'UNIVERSITY WRONG TO SACK PROFESSOR', *The Daily Telegraph* (Sydney), 9 August 2001, p. 12.
- YEATMAN, A. (1996) The New Contractualism: Management Reform or a New Approach to Governance?, in: P. WELLER & G. DAVIS (Eds), *New Ideas, Better Government*.

Statute Table

- Affirmative Action (Equal Opportunity for Women) Act* 1986 (Cth).
- Anti-Discrimination Act* 1977 (NSW).
- Anti-Discrimination Act* 1994 (NT).
- Disability Discrimination Act* 1992 (Cth).
- Disability Services Act* 1993 (NSW).
- Disability Services Act* 1992 (Tas).
- Discrimination Act* 1991 (ACT).
- Equal Employment Opportunity (Commonwealth Authorities) Act* 1987 (Cth).
- Equal Opportunity Act* 1995 (Vic).
- Equal Opportunity Act* 1984 (SA).
- Human Rights and Equal Opportunity Commission Act* 1986 (Cth).
- Human Rights (Sexual Conduct) Act* 1994 (Cth).
- Privacy and Personal Information Protection Act* 1998 (NSW).
- Racial Discrimination Act* 1975 (Cth).
- Racial Hatred Act* 1995 (Cth).
- Sex Discrimination Act* 1984 (Cth).
- Sex Discrimination Act* 1994 (Tas).
- Trade Practices Act* 1974 (Cth).
- Whistleblowers Protection Act* 2001 (Vic). *Workplace Relations Act* 1996 (Cth).

Case Table

- Michael Brown, Melita Berndt, Ben Ross, Valentina Srpanska v. the members of the Classification Review Board of the Office of Film and Literature Classification* [1997] 474 FCA (6 June 1997).
- Michael Brown & Ors v. Members of the Classification Review Board of the Office of Film and Literature* [1998] 319 FCA (24 March 1998).
- NTEIU v. University of Wollongong* [2001] FCA 1069 (8 August 2001).
- Toben v. Jones* [2002] FCAFC 158.

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