PROTECTING ACADEMIC FREEDOM IN AUSTRALIAN HIGHER EDUCATION THROUGH THE IMPOSITION OF RESTRICTIONS ON INVESTIGATORY SUSPENSION

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Academic freedom has received considerable recent attention, most notably with the former Chief Justice of the High Court of Australia, Robert French AC, releasing a report containing a Model Code for the Protection of Free Speech and Academic Freedom in early 2019. Although the Model Code endeavours to ensure that academic freedom is protected, it is asserted that for it to adequately serve its purpose, additional legal safeguards in the form of reasonable university disciplinary procedures must exist to avoid arbitrary disciplinary measures being taken against academics. This article argues that for academic freedom to be sufficiently protected, appropriate protections must not only exist to protect an academic from arbitrary dismissal but also from arbitrary suspension. It analyses the disciplinary procedures contained in the Group of Eight university enterprise agreements at the time of writing and relevant cases such as Jin v University of Newcastle *and* Imberger v University of Western Australia *to demonstrate that there currently is a risk of academic staff members being arbitrarily suspended by their universities as a consequence of an exercise of academic freedom. It proposes a model term to be incorporated into future enterprise agreements to supplement the Model Code and reduce this risk.*

I INTRODUCTION

Academic freedom has received considerable recent attention in Australia. The recent cases concerning Professor Peter Ridd and James Cook University ('JCU')[1]

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1 See *Ridd v James Cook University* (2019) 286 IR 389 ('*Ridd*'); *James Cook University v Ridd* (2020) 382 ALR 8 ('*JCU v Ridd*'); *James Cook University v Ridd [No 2]* [2020] FCAFC 132; *Ridd v James Cook University* (2021) 394 ALR 12 ('*Ridd 2021 HCA Appeal*').

and Associate Professor Gerd Schröder-Turk and Murdoch University[2] have resulted in considerable media attention, with both Ridd and Schröder-Turk garnering significant public support for what has been considered to be their championing of academic freedom.[3] Media attention has also been directed towards other issues concerning academic freedom such as, among others, the suspension of the student activist, Drew Pavlou, by the University of Queensland,[4] and the deletion of social media posts by the University of New South Wales relating to the 'deteriorating situation in Hong Kong' and the diminishment of human rights in the region.[5] Such recognition in the media illustrates that academic freedom is a matter of public interest and importance.

Further recent recognition of the importance of academic freedom and the right of academic staff to exercise such freedom has been given by the courts.[6] Notably, the High Court of Australia in the case of *Ridd v James Cook University* ('*Ridd 2021 HCA Appeal*') highlighted the concept of intellectual freedom, referring to it as 'a concept with a long history, the core content of which has crystallised over the last century'.[7] The High Court noted that:

> 'Intellectual freedom' is often referred to interchangeably with 'academic freedom' and 'intellectual academic freedom'. Sometimes, however, intellectual freedom is

2 See generally 'Applications for File: Gerd Schroder-Turk v Murdoch University', *Commonwealth Courts Portal* (Web Page, 19 June 2020) <https://www.comcourts.gov.au/pas/file/Federal/P/WAD303/2019/actions>; *Schröder-Turk v Murdoch University [No 2]* [2019] FCA 1434. It is noted that Murdoch did subsequently resolve this litigation with Associate Professor Gerd Schröder-Turk out of court: see, eg, Elise Worthington, 'Murdoch University Withdraws Case against Four Corners Whistleblower, Promises Independent Governance Review', *ABC News* (online, 12 June 2020) <https://www.abc.net.au/news/2020-06-12/murdoch-university-withdraws-legal-action-against-whistleblower/12348012>; Robert Bolton, 'Whistleblower Will Still Press for Unis Reform', *The Australian Financial Review* (Sydney, 15 June 2020) 12.

3 See, eg, Gideon Rozner, 'Peter Ridd Wins Biggest Victory on Free Speech in a Generation' (Media Release, Institute of Public Affairs, 16 April 2019) <https://ipa.org.au/publications-ipa/peter-ridd-wins-biggest-victory-on-free-speech-in-a-generation>; Tara Reale, 'Justice for Murdoch University Whistleblower Associate Professor Gerd Schroeder-Turk', *Change.org* (Petition) <https://www.change.org/p/murdoch-university-justice-for-gerd>.

4 See, eg, Fergus Hunter and Max Koslowski, 'UQ Takes on Student over Criticism of Beijing', *The Sydney Morning Herald* (Sydney, 17 April 2020) 4; Antonia O'Flaherty, 'Petition Backs Right to Protest', *The Courier-Mail* (Brisbane, 17 April 2020) 3; Jocelyn Garcia, 'Student Fears for Free Speech', *The Sun-Herald* (Sydney, 26 April 2020) 18; Craig Johnstone, 'Anti-China Activist Left Hanging by Uni', *The Australian* (Sydney, 2 May 2020) 11; Clive Hamilton, 'Uni Sacrifices Student for China Romance', *The Australian* (Sydney, 6 May 2020) 10; Jennifer Oriel, 'Unis Must Put Free Speech above Power and Profit', *The Australian* (Sydney, 1 June 2020) 10.

5 Fergus Hunter and Eryk Bagshaw, '"Craven Cowardice": UNSW Condemned for Deleting Posts Critical of Beijing', *The Sydney Morning Herald* (online, 3 August 2020) <https://www.smh.com.au/politics/federal/craven-cowardice-unsw-condemned-for-deleting-posts-critical-of-beijing-20200803-p55hy5.html>. See also Tim Dodd, '"No Excuse for Our Failure", Says V-C over Tweet Removal', *The Australian* (Sydney, 6 August 2020) 2.

6 See eg, *Ridd* (n 1); *JCU v Ridd* (n 1); *Ridd 2021 HCA Appeal* (n 1); *National Tertiary Education Industry Union v University of Sydney* (2020) 302 IR 272; *National Tertiary Education Industry Union v University of Sydney* (2021) 309 IR 159.

7 *Ridd 2021 HCA Appeal* (n 1) 22 [29] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

> said to be wider than 'academic freedom', with the latter being confined to academic staff within universities or confined to those employed by a university or other institution of higher education, as opposed to anyone engaged in scholarly work.[8]

The Court further provided some justifications for intellectual freedom, stating that:

> One developed justification for intellectual freedom is instrumental. The instrumental justification is the search for truth in the contested marketplace of ideas, the social importance of which Frankfurter J spoke powerfully about in *Sweezy*. Another justification is ethical rather than instrumental. Intellectual freedom plays 'an important ethical role not just in the lives of the few people it protects, but in the life of the community more generally' to ensure the primacy of individual conviction 'not to profess what one believes to be false' and 'a duty to speak out for what one believes to be true'.[9]

Arguably the most significant recent development for academic freedom has been the release of the *Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers* in March 2019 ('*Review*') by Robert French AC, former Chief Justice of the High Court of Australia ('High Court').[10] The *Review* was commissioned by the Minister for Education the Hon Dan Tehan MP, primarily in response to a number of high-profile cases relating to protests against visiting speakers on Australian university campuses and attempts to 'de-platform' them.[11] Although French did not find there to be 'a systemic pattern of action by higher education providers … adverse to freedom of speech or intellectual inquiry in the higher education sector',[12] he considered that 'even a limited number of incidents … may have an adverse impact on public perception of the higher education sector'.[13] Indeed, in the *Review*, French placed great significance on the need for academic freedom, referring to it as 'a defining characteristic of universities and similar institutions',[14] and proposed a Model Code for the Protection of Free Speech and Academic Freedom ('Model Code') to be adopted by universities and other higher education providers.[15] Following the

8 Ibid 22–3 [29] (citations omitted). Cf the definition provided by French: Robert S French, *Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers* (Final Report, March 2019) 18 ('*Review*'). French made it clear that any definition of academic freedom must incorporate intellectual freedom but must also go beyond it. The definition of academic freedom will be further explored in Part II.

9 *Ridd 2021 HCA Appeal* (n 1) 23 [31] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ) (citations omitted), quoting Ronald Dworkin, 'We Need a New Interpretation of Academic Freedom' (1996) 82(3) *Academe* 10, 11 with respect to the ethical justification.

10 French (n 8).

11 Ibid 18–19.

12 Ibid 217.

13 Ibid.

14 Ibid 18. Although the *Review* also assessed the status of the protection of freedom of expression generally within Australian higher education institutions, this article focuses on the adequacy of the protection of academic freedom.

15 Ibid 230–6.

original release of the Model Code, French liaised with the University Chancellors Council, which led to some (mostly minor) revisions to the Model Code.[16] References to the 'Model Code' in this paper are references to the Model Code with these revisions.

The Model Code has three objects, which reflect the importance of 'freedom of lawful speech', 'academic freedom' and 'institutional autonomy'.[17] With respect to academic freedom, the Model Code seeks to

> ensure that academic freedom is treated as a defining value by the university and therefore not restricted nor its exercise unnecessarily burdened by restrictions or burdens other than those imposed by law and set out in the Principles of the Code.[18]

Academic freedom itself is defined in the Model Code.[19] French proposed that Australian higher education institutions adopt the Model Code, largely to 'restrain the exercise of overbroad powers to the extent that they would otherwise be applied adversely to freedom of speech and academic freedom without proper justification'.[20] The Model Code could thereby act as a check on the exercise of power by a university, where that power could impact upon the ability of academic staff and students to exercise academic freedom. Australian universities subsequently indicated an intention to incorporate the Model Code (or at least its guiding principles) in some form.[21] In December 2020, former Deakin University Vice-Chancellor Sally Walker released her review into the extent to which the Australian university sector was incorporating the Model Code.[22] Walker found that a majority had (at least partially) implemented the principles of the Model Code.[23]

16 See Sally Walker, *Review of the Adoption of the Model Code on Freedom of Speech and Academic Freedom* (Final Report, December 2020) 48–54 <https://www.dese.gov.au/higher-education-reviews-and-consultations/resources/report-independent-review-adoption-model-code-freedom-speech-and-academic-freedom>.

17 Ibid 48.

18 Ibid.

19 Ibid 48-49. See below Part II.

20 French (n 8) 219.

21 Universities Australia, 'Government Backs Importance of Freedom of Expression' (Media Release, 7 August 2020) <https://www.universitiesaustralia.edu.au/media-item/government-backs-importance-of-freedom-of-expression/>.

22 Walker (n 16); Dan Tehan, 'Evaluating Progress on Free Speech' (Media Release, Ministers' Media Centre: Department of Education, Skills and Employment, 7 August 2020) <https://ministers.dese.gov.au/tehan/evaluating-progress-free-speech>; 'Independent Review of Adoption of the Model Code on Freedom of Speech and Academic Freedom', *Australian Government: Department of Education, Skills and Employment* (Web Page, 3 June 2021) <https://www.dese.gov.au/higher-education-reviews-and-consultations/independent-review-adoption-model-code-freedom-speech-and-academic-freedom>.

23 Walker (n 16) 27.

Academic freedom is not a new concept in Australia.[24] Indeed, its value and its significance with respect to the employment of academic staff in Australia was recognised by both commentators and judges prior to the release of the *Review,* the *Ridd* decisions and the recent media attention surrounding the high-profile controversies relating to it.[25] There is little doubt that these commentators, judges and other supporters of academic freedom would welcome the Model Code. However, the authors assert that even if the Model Code is adopted by Australian universities, legal safeguards must be present in university disciplinary procedures for it to adequately serve its purpose in protecting academic freedom.

The need for Australian universities to have adequate disciplinary procedures in order to protect their academic staff from being penalised due to or as a consequence of academic freedom has been acknowledged by Australian academics since at least the 1950s and the case of *Orr v University of Tasmania* ('*Orr*').[26] Although *Orr* concerned the summary dismissal of Professor Orr by the University of Tasmania for allegations of misconduct, including most relevantly one relating to the seduction of a student,[27] many of his supporters at the time were 'of the view that [Professor] Orr had been dismissed because of his role in pressing for a Royal Commission into the University of Tasmania' and that it therefore concerned academic freedom.[28] Commenting on the case, Wootten noted that 'every case of the dismissal of a professor raises a question of academic freedom' and that 'freedom can only be guaranteed if the observance of proper procedure is obligatory in *all* cases'.[29]

In his 2002 PhD thesis, Professor Jim Jackson sought to assess the adequacy of university disciplinary procedures in protecting an academic from being dismissed due to or as a consequence of an exercise of academic freedom.[30] Reviewing the,

24 See generally Nigel Stobbs, 'Academic Freedom and University Autonomy' in Sally Varnham, Patty Kamvounias and Joan Squelch (eds), *Higher Education and the Law* (Federation Press, 2015) 203, 204–6.

25 See, eg, Jacquie Seemann and Katie Kossian, 'Employment Law' in Sally Varnham, Patty Kamvounias and Joan Squelch (eds), *Higher Education and the Law* (Federation Press, 2015) 163, 164; *University of Western Australia v Gray* (2009) 179 FCR 346, 388–9 [186] (Lindgren, Finn and Bennett JJ).

26 [1956] Tas SR 155 ('*Orr*'). An appeal by Orr to the High Court of Australia was unsuccessful: *Orr v University of Tasmania* (1957) 100 CLR 526 ('*Orr Appeal*').

27 For an account of the student's evidence, see 'Suzanne Tells of Love and Loathing', *The Argus* (Melbourne, 20 October 1956) 1, 5 <http://nla.gov.au/nla.news-article84392465>.

28 Jim Jackson, 'Orr to Steele: Crafting Dismissal Processes in Australian Universities' (2003) 7 *Southern Cross University Law Review* 220, 224 ('Orr to Steele').

29 JH Wootten, 'The Orr Dismissal and the Universities' (1957) 1(2) *Quadrant* 25, 26 (emphasis in original), quoted in ibid 230.

30 James Guy Jackson, 'Legal Rights to Academic Freedom in Australian Universities' (PhD Thesis, University of Sydney, 2002) 356–64 ('Legal Rights to Academic Freedom'); Jackson, 'Orr to Steele' (n 28) 241–9. It is noted that Professor Jackson has published further articles based on his PhD thesis in relation to academic freedom in Australian universities: see, eg, Jim Jackson, 'Express Rights to Academic Freedom in Australian Public University Employment' (2005) 9 *Southern Cross University Law Review* 107; Jim Jackson, 'Implied Contractual Rights

then current, Australian university enterprise agreements ('EAs'),[31] Jackson found that they generally provided for a degree of procedural fairness to be afforded to staff, such as the right to receive the written allegation(s) against them;[32] the right to be present at a disciplinary proceeding and to answer the allegation(s);[33] and the right to examine witnesses.[34] According to Jackson, these provisions provided 'strong protection' to academic staff against arbitrary dismissal.[35] These rights continue to exist in today's university EAs.[36]

However, dismissal is not the only option for employers faced with an allegation of misconduct against an employee. EAs can, for example, confer a right to suspend an employee during an investigation or as a disciplinary penalty. This article asserts that for academic freedom to be sufficiently protected, appropriate protections must not only exist to protect an academic from arbitrary dismissal but also from arbitrary suspension following an allegation of misconduct being made against them. An absence of such protections could lead to an academic being suspended under the guise of misconduct, but, in reality, due to an exercise of academic freedom. Given the significant negative consequences of suspension detailed later in this article, such a position is undesirable. Whether such a potential exists requires an examination of the extent to which Australian universities have

to Academic Freedom in Australian Universities' (2006) 10 *Southern Cross University Law Review* 139. The authors acknowledge the work of Professor Jackson, especially given the limited published work in this area. However, the authors have only expressly referred in this article to those of Jackson's works that directly relate to the specific topic under consideration, being university disciplinary procedures.

31 A detailed overview of EAs is beyond the scope of the present paper. However, it is important to note four points. First, Australian universities generally fall within the concept of a 'national system employer': *Fair Work Act 2009* (Cth) s 14(1) ('*FW Act*'). See also *Quickenden v O'Connor* (2001) 109 FCR 243 ('*Quickenden*'). Consequently, the provisions of pt 2-4 of the *FW Act* governing EAs are relevant. Second, the coverage of an EA is determined in accordance with s 53 of the *FW Act*, which provides that '[a]n enterprise agreement covers an employee or employer if the agreement is expressed to cover (however described) the employee or the employer': *FW Act* (n 31) s 53(1) (emphasis omitted). Additionally, there are specific provisions in the Act (ss 186(3)–(3A)) that are relevant when an employer seeks to make an EA with a group of their employees. Third, where an EA is applicable to a person (ss 51–2) and it is breached by that person (s 50), they will be in breach of a civil remedy provision. The significance of this is detailed in pt 4-1 of the *FW Act*. Fourth, where an EA applies, any relevant award will generally be inapplicable (s 57, but note the effect of s 57A). For more information on EAs under the *FW Act*, see Fair Work Commission, *Enterprise Agreements Benchbook* (Web Page, 12 July 2021) <https://www.fwc.gov.au/resources/benchbooks/enterprise-agreements-benchbook>. Employees not covered by EAs are beyond the scope of this article.

32 Jackson, 'Legal Rights to Academic Freedom' (n 30) 361; Jackson, 'Orr to Steele' (n 28) 247.

33 Jackson, 'Legal Rights to Academic Freedom' (n 30) 361–2; Jackson, 'Orr to Steele' (n 28) 247.

34 Jackson, 'Legal Rights to Academic Freedom' (n 30) 361–2; Jackson, 'Orr to Steele' (n 28) 247.

35 Jackson, 'Legal Rights to Academic Freedom' (n 30) 371; Jackson, 'Orr to Steele (n 28) 257. Jackson expressly noted that he was referring here to tenured academics as disciplinary processes would be of limited value to casual academics given that their short-term or sessional appointments could simply not be renewed: Jackson, 'Legal Rights to Academic Freedom' (n 30) 285; Jackson, 'Orr to Steele' (n 28) 256–7.

36 For a specific example (right to respond), see, eg, *University of Adelaide Enterprise Agreement 2017–2021* [2018] FWCA 1220, cls 8.1–8.3 ('*Adelaide EA*'). See especially at cl 8.2.5.5.

the power to suspend an academic staff member and what, if any, procedural fairness rights exist prior to a decision to suspend being made or implemented. This article examines these issues. Importantly, the article distinguishes between investigatory suspension, where an employee is kept away from the workplace during an investigation, and suspension as a penalty, where a suspension is imposed on the employee as a form of punishment for misconduct. It is the former with which this article is primarily concerned given that it occurs prior to any finding of misconduct and therefore, prior to any disciplinary proceedings in which procedural fairness rights to academic staff are generally required to be afforded, allowing more scope for a university to make an investigatory suspension arbitrarily.

This article begins with a discussion of the concept of academic freedom and the anticipated effect of the Model Code on this freedom. It then reflects on the nature and consequences of the suspension of an academic staff member, before turning to consider the extent of the power of Australian universities to impose investigatory suspensions on their academic staff members. Next, it examines the extent, if any, to which universities are required to afford procedural fairness to their academic staff before the making of these suspensions. It questions whether adequate protections exist to safeguard academic staff from being the subject of investigatory suspension due to or as a consequence of an exercise of academic freedom. Finally, the article makes recommendations as to how university EAs should be amended to better protect academic staff from arbitrary investigatory suspension, by imposing some limits on the power of universities to make such suspensions and providing for academic staff to be afforded a basic level of procedural fairness at the time of any suspension.

It is noted that this article focuses on the university sector and the specific need for adequate protections to exist to protect an academic from being the subject of an investigatory suspension due to or as a consequence of an exercise of academic freedom. However, in doing so, it identifies the issues associated with providing employers more generally with a power to suspend their staff no matter how trivial or spurious the nature of the allegation(s) of misconduct and with inadequate procedural fairness required to be afforded to the employee.

II DEFINING ACADEMIC FREEDOM WITH REFERENCE TO THE FRENCH *REVIEW*

Given that this article focuses on the university sector and the need to create a check on the use of investigatory suspension to ensure it is not used due to, or in consequence of, the exercise of academic freedom, it is necessary to define what is meant by 'academic freedom'. The concept of academic freedom, and its scope, has been subject to debate.[37] It has also developed over time.[38] Although it is

37 French (n 8) 13.

38 See generally *JCU v Ridd* (n 1) 27–8 [94] (Griffiths and SC Derrington JJ).

sometimes used interchangeably with intellectual freedom,[39] academic and intellectual freedom do not appear to be synonymous. As explained above, the High Court in the *Ridd 2021 HCA Appeal* referred to 'intellectual freedom' being '[s]ometimes … said to be wider than "academic freedom", with the latter being confined to academic staff within universities or confined to those employed by a university or other institution of higher education, as opposed to anyone engaged in scholarly work'.[40] However, French has approached the two terms in a different way. For French, academic freedom is 'a term of uncertain meaning',[41] whereas intellectual freedom is arguably more straightforward referring to 'free intellectual inquiry in relation to learning, teaching and research'.[42] French makes it clear that any definition of academic freedom must incorporate intellectual freedom, but must also go beyond it and that '[a]ny principle or code relating to academic freedom should incorporate a definition which embodies its essential elements for Australian purposes, including relevant aspects of freedom of speech, freedom of intellectual inquiry and institutional autonomy'.[43] According to French, a further aspect of academic freedom to be incorporated into the definition is the ability of academic staff to engage in 'intra-mural criticism', that is, criticism about the university and the way in which it is governed.[44] A comprehensive definition of academic freedom is provided in the Model Code[45] and now (since the introduction of the *Higher Education Support Amendment (Freedom of Speech) Act 2021* (Cth)) in sch 1 of the *Higher Education Support Act 2003* (Cth).[46]

Given the current push for universities to adopt the Model Code with its definition of academic freedom,[47] it would appear that it will be this definition that will be of

39 See, eg, *Ridd 2021 HCA Appeal* (n 1) 22–3 [29] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

40 Ibid 23 [29].

41 French (n 8) 18.

42 Prior to the enactment of the Higher Education Support Amendment (Freedom of Speech) Bill 2020, s 19-115 of the *Higher Education Support Act 2003* (Cth) ('*HES Act*') required that a 'higher education provider that is a *Table A provider or a *Table B provider must have a policy that upholds free intellectual inquiry in relation to learning, teaching and research'. The term 'free intellectual inquiry' has now been replaced by 'freedom of speech and academic freedom'. Table A providers are listed in s 16-15 and include the majority of Australian universities; Table B providers are listed in s 16-20 and are Bond University, The University of Notre Dame Australia, University of Divinity, and Torrens University Australia.

43 French (n 8) 18.

44 Ibid 118. Arguably, it is possible to reconcile the perspectives of the High Court in the *Ridd 2021 HCA Appeal* and French. Specifically, intellectual freedom is broader with respect to the question of who (ie it will extend beyond academic staff) while academic freedom is broader with respect to the what (ie it is not limited to just intellectual freedom).

45 Walker (n 16) 48–9.

46 *HES Act* (n 42) sch 1 cl 1(1) (definition of 'academic freedom').

47 As discussed above, subsequent to the release of the *Review* and the Model Code, Australian universities have agreed to adopt the Model Code with an investigation headed up by former Deakin University Vice-Chancellor Sally Walker as to the extent to which these universities are doing so having recently been completed: see Walker (n 16); 'Government Backs Importance of Freedom of Expression' (n 21).

most relevance in the Australian higher education sector in the coming years. Therefore, it is this definition that is primarily adopted for the purposes of this article.[48] Broadly speaking, the definition of academic freedom in the Model Code has multiple components: namely, intellectual freedom, intra-mural criticism, freedom of association, and the 'autonomy of the higher education provider'.[49] However, the Model Code does limit the extent to which these freedoms exist, making them subject to 'prohibitions, restrictions or conditions' that are 'imposed by law' or 'imposed by … reasonable and proportionate regulation' (linked to teaching and research, wellbeing, and other legal obligations) or 'imposed by the university by way of its reasonable requirements as to the courses to be delivered and the content and means of their delivery'.[50] As these provisions make apparent, while academic freedom is a fundamental part of the Model Code, there is not an unrestricted right to exercise it.

Academic freedom, when exercised consistently with the Model Code, cannot be found to constitute misconduct or result in any negative consequences for an academic staff member or a student.[51] In this way, the Code goes a significant way in attempting to ensure that academic freedom is treated as an integral part of Australian higher education.[52] However, this article asserts that for the Model Code to sufficiently serve its purpose, reasonable university disciplinary procedures must exist to prevent arbitrary findings and penalties being made against academic staff under the guise of misconduct (to circumvent the Model Code) but really due to or as a consequence of an exercise of academic freedom. Such penalisation can occur in various ways including by investigatory suspension which, even if not intended to be imposed as a penalty, has a punitive effect. The effect of suspension is explained further below.

48 It is noted that although the authors agree generally with the limits imposed on academic freedom set out in the Model Code, they do have some concerns around the parameters of these limits. However, these concerns are beyond the scope of this article. For a discussion of two of these concerns, see Pnina Levine and Rob Guthrie, 'The Ridd Case and the Model Code for the Protection of Free Speech and Academic Freedom: Wins for Academic Freedom or Losses for University Codes of Conduct and Respectful and Courteous Behaviour?' (2020) 47(2) *University of Western Australia Law Review* 310, 323; Pnina Levine and Haydn Rigby, 'To What Extent Should Academic Freedom Allow Academics to Criticise Their Universities?' (2022) 48(1) *Monash University Law Review* (forthcoming).

49 Walker (n 16) 48–9. It is noted that the definition of academic freedom provided for in the Model Code is applicable to both academic staff and students, but not to staff who do not have an academic role. Originally, there was an additional component to the definition of academic freedom in the Model Code ('the freedom of academic staff, without constraint imposed by reason of their employment by the university, to make lawful public comment on any issue in their personal capacities'). The revised Model Code has moved it to Principle 2 of the 'Principles of the Code', relating to freedom of speech.

50 Ibid 52.

51 Ibid.

52 Ibid 48.

III THE NATURE AND CONSEQUENCES OF THE SUSPENSION OF AN ACADEMIC STAFF MEMBER

Since the case of *Orr*,[53] there has been general consensus that the relationship between Australian universities and their academic staff is governed by a contract of employment.[54] Therefore, the nature of the relationship between employer and employee and the legal framework governing this relationship is of significant relevance to this article. Core to a conceptualisation of the employment relationship, is power, and specifically, power imbalance. As noted by Kahn-Freund, '[t]he main object of labour law has always been, and I venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship'.[55]

Such a 'protective' view can be contrasted with a 'neo-liberal' perspective,[56] where a lower level of legal intervention is seen as desirable.[57] This article adopts a protectionist approach, primarily because of the considerable power (as will be discussed later in the article) that universities have with respect to the use of investigatory suspension under the relevant industrial instruments.

Suspension is one of potentially many measures that can be used by an employer in the context of employee discipline, provided the employer has some authorisation to implement it.[58] It can be defined as 'the temporary removal of an employee from the duties of the employee's position'.[59] As explained above, although suspension may be imposed as a penalty, this article is primarily concerned with investigatory suspension, which occurs prior to any finding(s) of misconduct being made against an employee. Even if it can be argued that investigatory suspension is not punitive, being just 'a holding operation, pending inquiries',[60] it unquestionably has a punitive effect.

An employee can be suspended either with or without pay. Where suspension is imposed without pay, the impact on the employee is readily apparent: they are not paid for the time during which they are suspended. However, a lack of payment is only one possible effect of suspension. Academic commentary has recognised that

53 *Orr* (n 26).

54 Jackson, 'Legal Rights to Academic Freedom' (n 30) 197. Academic staff may also have another status within universities, that of membership: see below Part IV.

55 Otto Kahn-Freund, *Labour and the Law* (Stevens and Sons, 2nd ed, 1977) 6.

56 Andrew Stewart et al, *Creighton and Stewart's Labour Law* (Federation Press, 6th ed, 2016) 5–8.

57 Ibid 7.

58 See, eg, *Avenia v Railway & Transport Health Fund Ltd* (2017) 272 IR 151, 189–95 [148]–[174] (Lee J) ('*Avenia*'); Carolyn Sappideen et al, *Macken's Law of Employment* (Lawbook, 8th ed, 2016) 320–1 [7.20]–[7.30] and the case law cited therein; *Encyclopaedic Australian Legal Dictionary* (online at 9 June 2020) 'disciplinary action: employment'.

59 *Encyclopaedic Australian Legal Dictionary* (online at 9 June 2020) 'suspension: employment'.

60 *Lewis v Heffer* [1978] 1 WLR 1061, 1073 (Lord Denning).

the value of work is more than financial.[61] Pocock, for example, has commented on how work can help shape a person's identity, and contribute to their skill development.[62] Putra, Cho, and Lin, approach the question of intrinsic reward from a motivational perspective. They comment that employees 'who are intrinsically motivated at work tend to have higher job satisfaction and higher job performance because they feel their job is interesting, challenging, and meaningful'.[63] Clearly, therefore, there is more to work than simply financial reward and suspension even when on full pay will, albeit temporarily, take those intrinsic benefits away.

The courts have similarly acknowledged the importance of the 'non pecuniary attributes of work' and the adverse effects of suspending an employee with or without pay.[64] For example, as Bromberg J put it in the Federal Court case of *Quinn v Overland*,[65] a case involving the suspension of an employee in the Victorian Public Service:

> There is now a greater recognition than ever that employment is important to an employee not simply because it provides economic sustenance. Workplaces are a hub of important human exchanges which are vital to the wellbeing of individual workers. Work provides employees with purpose, dignity, pride, enjoyment, social acceptance and many social connections. … These non pecuniary attributes of work are important and their denial can be devastating to the legitimate interests of any worker, either skilled or unskilled. [66]

Further illustration of how suspension has been viewed by legal decision-makers can be found in some of the adverse action case law.[67] In relation to alleged adverse action by an employer against their employee, suspension has been held to amount to an alteration of 'the position of the employee to the employee's prejudice';[68] put

61 See, eg, Barbara Pocock, 'Meaningful Work in the 21st Century: What Makes Good Jobs Good, and What Gives Them Their Occasional Dark Sides' (Foenander Public Lecture, University of Melbourne, 21 October 2009) <https://fbe.unimelb.edu.au/__data/assets/pdf_file/0020/661502/Foenander_24th_2009.pdf>; Eka Diraksa Putra, Seonghee Cho and Juan Liu, 'Extrinsic and Intrinsic Motivation on Work Engagement in the Hospitality Industry: Test of Motivation Crowding Theory' (2017) 17(2) *Tourism and Hospitality Research* 228, 231–2.

62 Pocock (n 61) 2, 7–9.

63 Putra, Cho and Liu (n 61) 231–2, citing Teresa M Amabile et al, 'The Work Preference Inventory: Assessing Intrinsic and Extrinsic Motivational Orientations' (1994) 66(5) *Journal of Personality and Social Psychology* 950; Frederick Herzberg, 'One More Time: How Do You Motivate Employees?' (1968) 46(1) *Harvard Business Review* 53.

64 *Quinn v Overland* (2010) 199 IR 40, 60 [101] (Bromberg J) ('*Quinn*').

65 *Quinn* (n 64).

66 Ibid 60 [101].

67 Adverse action is found in the general protections in the *FW Act* (n 31) pt 3-1. These provisions prevent specified parties to a work relationship (or a prospective work relationship) from engaging in certain conduct against another party because of a prohibited reason: see at s 342(1) items 1–7. See also at ss 340–1, 346–7, 351.

68 *FW Act* (n 31) s 342(1) item 1(c). See, eg, *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd [No 3]* (2013) 216 FCR 70, 93–4 [107]–[115] (Murphy J) ('*Visy Packaging*').

another way, suspension in and of itself has been considered to be enough to cause a detrimental impact upon the employee. In explaining why a suspension could constitute adverse action, Murphy J held in *Visy Packaging* that:

> In my view the removal of an employee from their employment against his or her will, even temporarily, will usually be adverse to their interests. To say otherwise would be to deny the benefit one gains from the successful pursuit of activity in a field of expertise. The observation that active employment is a source of more than simply financial benefit is neither new, nor should it be considered controversial …[69]

It is arguable that the damaging effects of a decision to suspend an employee are magnified in the case of a university, due to the nature of academic work and academia constituting a comparatively close-knit community. Indeed, given that there are relatively few Australian university employers, and that there are often connections between universities including through staff movement and research collaboration, anonymity for academic staff is limited making it harder to evade reputational harm. The detrimental consequences of a decision to suspend an academic staff member were recently recognised by the Federal Court in *Milam v University of Melbourne*.[70] Anastassiou J held that the potential effect of Professor Milam's suspension was 'not readily compensable by an award of damages', and that the suspension could both negatively impact upon Professor Milam's 'ability to advance [her] work to a … successful conclusion' and also lead to reputational damage.[71] These consequences were also alluded to by Gilmour J in the case of *Imberger v University of Western Australia* ('*Imberger*'), who referred to them as 'significant adverse consequences' with '[i]ssues of standing, reputation, personal health, amongst others, form[ing] part of that adverse matrix.'[72] The reputation of an academic staff member is likely to follow them; an academic with a questionable reputation may find it extremely difficult to secure work.

Universities may also attract more media attention than the average private employer by nature of their 'ivory tower' status and because they are publicly funded institutions.[73] Although disciplinary matters should be treated in the

69 *Visy Packaging* (n 68) 94 [114], citing *Squires v Flight Stewards Association of Australia* (1982) 2 IR 155, 164 (Ellicott J), *Blackadder v Ramsey Butchering Services Pty Ltd* (2005) 221 CLR 539, 549 [32] (Kirby J), 566–7 [80] (Callinan and Heydon JJ) and *Quinn* (n 64) 60–1 [101]–[103] (Bromberg J). It is noted that suspension has not been viewed as adverse action in all cases. For example, a suspension was seen as 'merciful' in *Liquor Hospitality and Miscellaneous Union v Arnotts Biscuits Ltd* (2010) 188 FCR 221, 233 [57] (Logan J). See also *Martens v Indigenous Land Corporation* [2017] FCCA 896, [57]–[58] (Jarrett J).

70 (2019) 285 IR 309 ('*Milam*'). See also *Imberger v University of Western Australia* [2014] FCA 1456, [9] (Gilmour J) ('*Imberger*').

71 *Milam* (n 70) 316 [19]–[20].

72 *Imberger* (n 70) [9]. In that case, his Honour further acknowledged that the allegations themselves (which, as explained further below, were 'completely denied' by Professor Imberger) were 'deeply distressing' to him and 'perhaps even caused harm to his health', particularly given 'his very lengthy service to the [university], across half a century, as well as his considerable standing here and overseas in the academic and scientific community': at [22].

73 Although public universities are the greatest beneficiaries of public funding, private universities can be the recipients of this funding too. For example, under the Commonwealth Grant Scheme,

strictest of confidence, it is possible that they will make the media, and the staff member could be perceived to be guilty of misconduct in the eyes of the public, simply because they were subject to investigatory suspension. The authors suggest that Gilmour J was being too optimistic when he remarked in *Imberger*:

> Should there be any publicity concerning this case, then any fair reporting of it will, undoubtedly, make clear that the suspension does not mean that there is any substance whatsoever in the allegations. It would be quite unfair for it to be thought that the [university] has suspended [its employee] because it considers the allegations or any of them to have any merit whatsoever.[74]

Given the potentially significant negative impacts of even an investigatory suspension, it is argued that fear of such impacts could dissuade academics from exercising their academic freedom, where the power to impose investigatory suspension can be exercised arbitrarily. Further, the arbitrary suspension of an academic could lead to considerable damage to the reputation and credibility of the academic and in this way, prevent them from further meaningfully exercising their academic freedom. To avoid such a situation, it is necessary to ensure that the ability of universities to use investigatory suspension is subject to appropriate limitations. To determine what limitation(s) are required, however, it is first necessary to explore the extent of the power held by universities to make such suspensions.

'Commonwealth supported places are available for domestic undergraduate students at all public universities and a few private providers in selected priority areas like nursing and education': David Campbell, 'Fact Check: Do Australian Taxpayers Subsidise Over Half the Cost of Each Student's Higher Education?' *ABC News* (online, 16 July 2018) <https://www.abc.net.au/news/2017-06-14/fact-check-do-taxpayers-subsidise-over-half-higher-education/8605406>. See also 'Higher Education Providers' 2018–2020 Commonwealth Grant Scheme Funding Agreements', *Australian Government: Department of Education, Skills and Employment* (Web Page) <https://www.dese.gov.au/collections/higher-education-providers-2018-2020-commonwealth-grant-scheme-funding-agreements>.

74 *Imberger* (n 70) [23]. It is noted that between December 2014 and April 2015 Imberger was subject to several newspaper articles in Western Australia with rather inflammatory headlines: see, eg, Grant Taylor, 'Top Academic Sacked and Another Demoted', *The West Australian* (online, 5 April 2015) <https://thewest.com.au/news/australia/top-academic-sacked-and-another-demoted-ng-ya-388334>; Paul Murray, 'Professor Jorg Imberger on Hiding to Nothing', *The West Australian* (online, 25 March 2015) <https://thewest.com.au/opinion/paul-murray/professor-jorg-imberger-on-hiding-to-nothing-ng-ya-102567>; Amanda Banks, 'Professor in Uni Probe', *The West Australian* (online, 23 December 2014) <https://thewest.com.au/news/australia/professor-in-uni-probe-ng-ya-382846>.

IV THE POWER OF AUSTRALIAN UNIVERSITIES TO USE INVESTIGATORY SUSPENSION AGAINST ACADEMIC STAFF

A *Universities as Employers*

As explained above, the relationship between universities and their staff has been considered to be that of employer and employee at law.[75] Indeed, university decisions made in relation to their staff have generally been viewed as being of a private and contractual nature and therefore, not subject to judicial review.[76] This is despite the fact that decisions of public bodies are generally subject to judicial review,[77] and Australian universities are public bodies, being statutory bodies established under legislation.[78] The High Court has also acknowledged that decisions made by a university in relation to its staff are not decisions made 'under an enactment' for the purposes of judicial review legislation.[79] Indeed, although the case of *Griffith University v Tang* involved the question of whether a student was entitled to a review of a university decision to exclude her from a PhD program under judicial review legislation, a majority of the High Court in that case indicated that decisions taken by a university in relation to its staff are made in accordance with the contractual agreement between the parties.[80] This was despite the university's capacity to contract being a power granted under its statute.[81]

However, the establishment of an employer-employee relationship does not mean that academics only have one status, that of employee. It has been argued that in addition to their status as employees of a university, the incorporation of Australian universities makes academics members of the university pursuant to company law

75 Seemann and Kossian (n 25) 163.

76 See, eg, *Hall v University of New South Wales* [2003] NSWSC 669 ('*Hall*'); *Whitehead v Griffith University* (2003) 1 Qd R 220; *Australian National University v Lewins* (1996) 68 FCR 87; *Australian National University v Burns* (1982) 5 ALD 67.

77 See, eg, *R v Criminal Injuries Compensation Board; Ex parte Lain* [1967] 2 QB 864, 882 (Lord Parker CJ), cited in *Hall* (n 76) [80] (McClellan J).

78 This legislation gives the university various functions and powers including, for example, the power to enter into contracts and for its Council to appoint staff and to manage and control its affairs. For a discussion of the establishment of Universities and their governance structures, see Joan Squelch, 'The Legal Framework of Higher Education' in Sally Varnham, Patty Kamvounias and Joan Squelch (eds), *Higher Education and the Law* (Federation Press, 2015) 4.

79 The existing judicial review legislation is as follows: see *Administrative Decisions (Judicial Review) Act 1989* (ACT) Dictionary (definition of 'decision to which this Act applies'); *Judicial Review Act 1991* (Qld) s 4; *Judicial Review Act 2000* (Tas) s 4; *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3(1) (definition of 'decision to which this Act applies'). The term 'under an enactment' does not appear in Victorian judicial review legislation: *Administrative Law Act 1978* (Vic) s 2 (definition of 'decision').

80 (2005) 221 CLR 99, 128–9 [81]–[82] (Gummow, Callinan and Heydon JJ) ('*Griffith University*').

81 Ibid.

principles,[82] a status which in theory should give them the same rights as company shareholders.[83] Further, many of the statutes which incorporate Australian universities expressly refer to academics as members of the university.[84] Although this is a matter that is 'usually forgotten',[85] it was referred to in the case of *University of Western Australia v Gray* as follows:

> [A]cademic staff are part of the membership that constitutes the corporation and as such are bound by the statutes, regulations, etc of the university. Their membership is integral to their status and place in the university. To define the relationship of an academic staff member with a university simply in terms of a contract of employment is to ignore a distinctive dimension of that relationship.[86]

Yet, at this stage, the law is unclear as to what further rights this status may provide to academic staff members in relation to any decision made by an employer university that affects them, such as a decision to suspend them.[87]

In view of the above and in the absence of an express agreement to the contrary, it would appear that academic staff have no clear additional common law or statutory rights in relation to a university's decision to suspend them than other employees.[88] The common law and statutory rights of employers to suspend an employee will be considered below.

B *The Common Law and Statutory Rights of an Employer to Suspend an Employee*

Despite the potential impact of a decision by an employer to suspend an employee, limited academic consideration has been given to the law associated with disciplinary suspension.[89] In 1989, Ronald Clive McCallum identified the lack of Australian scholarship on the topic of suspension and therefore, he wrote an article seeking, among other things, to '[fill] … a gap in the literature'.[90] However, in the

82 See, eg, Seemann and Kossian (n 25) 163–4; Suzanne Corcoran, 'First Principles in the Interpretation of University Statutes' (2000) 4(2) *Flinders Journal of Law Reform* 143, 149.

83 Seemann and Kossian (n 25) 164.

84 See, eg, *University of Tasmania Act 1992* (Tas) ss 5(1)(b)–(c); *Southern Cross University Act 1993* (NSW) ss 4(b), 26; *University of Wollongong Act 1989* (NSW) s 4(c).

85 Jackson, 'Legal Rights to Academic Freedom' (n 30) 197.

86 *University of Western Australia v Gray* (2009) 179 FCR 346, 388 [185] (Lindgren, Finn and Bennett JJ), quoted in Seemann and Kossian (n 25) 164.

87 See Seemann and Kossian (n 25) 164.

88 Jackson explains that '[o]ld arguments that university staff have another status, that of "officer" have not survived the *Orr* case or the modern industrial law regulatory model controlling universities and their employees': Jackson, 'Legal Rights to Academic Freedom' (n 30) 197–8.

89 Ronald Clive McCallum, 'Exploring the Common Law: Lay-Off, Suspension and the Contract of Employment' (1989) 2(3) *Australian Journal of Labour Law* 211, 211–12.

90 Ibid 233.

almost 30 years since McCallum wrote his paper, there has been little further academic consideration of the topic.

Perhaps the reason for the lack of attention on the subject of disciplinary suspension is the apparently unambiguous state of the law relating to the right of an employer to suspend an employee. Indeed, there is no general common law right to suspend an employee without pay for misconduct, even if that misconduct would justify summary dismissal.[91] So, if an employer suspends an employee without pay, and the employee is ready and willing to work, then the employer will be found to be in breach of the employment contract.[92] The position is slightly more complex where the disciplinary suspension takes the form of suspension on full pay. Recent case law has found that an employee will generally be required to comply with a suspension on full pay in accordance with the duty of obedience, provided that the suspension amounts to a 'lawful and reasonable direction'.[93] An employer's suspension of an employee on full pay has been held to constitute a lawful and reasonable direction where the employee has been the subject of allegations of behaviour which constitute 'a risk to the safety, health and welfare of [an employer's] staff and/or its fulfilment of its duty to provide a safe place of work for its staff'.[94] However, the existence of such a risk may still not be enough to justify an indefinite suspension.[95]

Despite the common law position, there are a number of sources that can provide an employer with the express legal authority to suspend an employee with or without pay.[96] Many contracts of employment today explicitly provide an employer with a right to suspend an employee on disciplinary grounds. It is not uncommon to find similar provisions in EAs. Legislation is also used to overcome the challenges associated with the lack of a common law right to suspend.[97]

Whether or not an employer has a common law right to suspend an employee, or a right created pursuant to a contract of employment or an EA, they still need to ensure that they do not contravene pt 3-1 of the *Fair Work Act 2009* (Cth) ('*FW*

91 See, eg, *Australian Workers' Union v Stegbar Australia Pty Ltd* [2001] FCA 367, [24] (Finkelstein J). See generally Sappideen et al (n 58) 319 [7.10].

92 This is provided that there is no provision in a relevant statute, award, enterprise agreement, etc authorising suspension without pay: see generally Sappideen et al (n 58) 319–22 [7.10]–[7.40]; Andrew Stewart, *Stewart's Guide to Employment Law* (Federation Press, 6th ed, 2018) 293 [12.18].

93 See generally *Avenia* (n 58).

94 Ibid 194 [170] (Lee J). In some cases, the employer may have a duty to conduct an investigation: at 194 [168] (Lee J).

95 See, eg, *Downe v Sydney West Area Health Service [No 2]* (2008) 71 NSWLR 633, 683 [413]–[414] (Rothman J). Note, however, that the duty of mutual trust and confidence, to which Rothman J refers, has subsequently been rejected by the High Court of Australia: see *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 ('*Barker*'). See also *Avenia* (n 58) 199 [190] (Lee J).

96 See generally Sappideen et al (n 58) 319–22 [7.10]–[7.40].

97 See, eg, *Public Sector Management Act 1994* (WA) s 82.

Act').[98] As explained above, suspension can constitute adverse action within the scope of s 342 of the *FW Act*. The suspension must not be made 'because' of a prohibited reason.[99] The exercise of a workplace right is a prohibited reason,[100] with a 'workplace right' being defined in s 341 to include a situation where a person 'is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body.'[101] As an EA is a workplace instrument,[102] if a university EA contained a provision conferring a right on academic staff to exercise their academic freedom, the university would be acting unlawfully if it suspended an academic for exercising this right.[103]

Most university EAs appear to contain provisions relating to academic freedom. In his *Review*, French noted that 36 out of the 38 EAs canvassed contained such provisions.[104] However, the authors assert that the legislative protections provided for in the *FW Act* are not sufficient to protect an academic from being the subject of an investigatory suspension due to or as a consequence of academic freedom given that any protection provided is dependent on the inclusion of academic freedom provisions in their current and future EAs. The inclusion of such provisions is not guaranteed even in the wake of the Model Code, with some desiring to shift academic freedom from EAs to (the more easily amended) university policy.[105] If academic freedom became a matter for university policy, it could potentially be unilaterally amended or removed by the university. Such a development would be undesirable because it would significantly weaken academic freedom in Australia. Indeed, the Model Code 'appears to preserve the paramountcy of [EAs] at the expense of the application of the Model Code'[106] in

98 While pt 3-1 of the *FW Act* (n 31) uses the ordinary meaning of employee, the scope of the part is restricted by a constitutional connection requirement: at ss 15, 335, 338. Such a requirement would likely be met in the case of a university. See, eg, *Quickenden* (n 31) 261–2 [51]–[52] (Black CJ and French J), where the University of Western Australia was held to be both a trading and financial corporation, and therefore, would meet the definition of constitutional corporation for the purposes of the *FW Act*.

99 *FW Act* (n 31) ss 340, 346, 351. See generally Stewart (n 92) 327–32 [14.13]–[14.16].

100 *FW Act* (n 31) s 340(1)(a)(ii). The protection in s 340 is broader than simply the exercise of a workplace right.

101 Ibid s 341(1)(a).

102 Ibid s 12 (definition of 'workplace instrument'). See also Fair Work Commission, 'Meaning of Workplace Right', *General Protections Benchbook* (Web Page, 15 June 2018) <https://www.fwc.gov.au/meaning-workplace-right>.

103 The university would be required to show that it did not act for a prohibited reason: *FW Act* (n 31) s 361. Further, the university could also be in breach of the academic freedom provision in the EA, which could itself amount to a contravention of the *FW Act*: at s 50.

104 French (n 8) 177.

105 See generally Bernard Lane, 'Write Uni Free Speech into Law, Demands Union', *The Australian* (Sydney, 24 June 2019) 7. See also Nicola Berkovic, 'Academic Freedom Row Set to Play Out in Court', *The Australian* (Sydney, 22 May 2020) 7, in which Berkovic refers to '[t]en Australian universities [that] have tried to strip protections for intellectual freedoms from their enterprise bargaining agreements'.

106 Levine and Guthrie (n 48) 323.

that the Model Code does not contain any provision requiring universities to incorporate the principles of the Model Code into their workplace agreements.[107] In any event, even where a claim for relief pursuant to the *FW Act* may be available to an academic subject to investigatory suspension because of their exercise of academic freedom, any additional safeguards that may deter a university from implementing such a suspension would be desirable and are worthy of consideration.

C *The Right of Universities to Use Investigatory Suspension Pursuant to Their EAs*

Seemann and Kossian have observed that a distinguishing feature of EAs in the university sector is the higher level of procedural detail around employee misconduct and discipline.[108] As referred to above, in his 2002 PhD thesis, Jackson reviewed the disciplinary procedures provided for in all university EAs[109] (apart from Bond and Notre Dame, both of which did not then have EAs)[110] after the 2001–02 enterprise bargaining round.[111] He examined the level of protection for academic staff who have had allegations of misconduct made against them and might be facing dismissal.[112] He identified significant similarities between EAs, with specific commonalities between the procedures to be applied by universities to matters involving allegations of 'misconduct' or 'serious misconduct'.[113]

107 Ibid. The Model Code provides only that '[a]ny power or discretion conferred on the university under any contract or workplace agreement shall be exercised, so far as it is consistent with the terms of that contract or workplace agreement, in accordance with the Principles of [the] Code': see Walker (n 16) 51. While amending the Model Code to, for example, include a requirement to include academic freedom in EAs is something that the authors are supportive of, potential reform of the Model Code itself is beyond the scope of the present paper.

108 Seemann and Kossian (n 25) 166.

109 It is noted that at the time of Jackson's research, there were 39 Australian universities: Jackson, 'Legal Rights to Academic Freedom' (n 30) 5. For a current list, see *HES Act* (n 42) ss 16-15–16-20. See also at s 16-22.

110 Jackson, 'Legal Rights to Academic Freedom' (n 30) 356–64; Jackson, 'Orr to Steele' (n 28) 241–9.

111 Jackson noted that at the time of his examination, the University of the Sunshine Coast was still using a 1998 agreement which applied the *Universities and Post Compulsory Academic Conditions Award 1995* ('*Bryant Award*') in relation to the relevant issues: Jackson, 'Legal Rights to Academic Freedom' (n 30) 357.

112 Jackson, 'Legal Rights to Academic Freedom' (n 30) 338–71. See generally Jackson, 'Orr to Steele' (n 28).

113 'Misconduct' was defined in the *Bryant Award* to mean 'conduct which is not serious misconduct but which is nonetheless conduct which is unsatisfactory' while 'Serious misconduct' meant

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

Bryant Award (n 111) cls 5(d)–(e).

Jackson explained that these procedural similarities could be attributed to their being sourced from the *Australian Universities Academic Staff (Conditions of Employment) Award 1988* ('*1988 Award*'), the *Universities and Post Compulsory Academic Conditions Award 1995* ('*Bryant Award*') and the subsequent work done to ensure some uniformity by the National Tertiary Education Union ('NTEU'), the national representative body of academic employees, and the Australian Higher Education Industrial Association ('AHEIA'), the national representative employer body.[114] As explained above, Jackson concluded that these EAs afforded adequate protection for academics facing dismissal.[115]

As to the question of whether the EAs provided the university with an express right to suspend their staff, Jackson noted that most EAs had 'borrowed' from cl 12 of the *Bryant Award* in expressly allowing a university to suspend an academic staff member with or without pay, with the decision to suspend being generally at the discretion of the Vice-Chancellor.[116] Relevantly, cl 12 of the *Bryant Award* provided that:

> 12 - DISCIPLINARY ACTION FOR MISCONDUCT/SERIOUS MISCONDUCT
>
> …
>
> (b) Any allegation of misconduct/serious misconduct shall be considered by the CEO. If he/she believes such allegations warrant further investigation the CEO shall:
>
> (i) notify the academic in writing and in sufficient detail to enable the academic to understand the precise nature of the allegations, and to properly consider and respond to them;
>
> (ii) require the academic to submit a written response within 10 working days.
>
> (c) At the time of notifying the academic in accordance with subclause (b) the CEO may suspend the academic on full pay, or may suspend the academic without pay if the CEO is of the view that the alleged conduct amounts to conduct of a kind envisaged in section 170DB (1)(b) of the Act such that it would be unreasonable to require the employer to continue employment during a period of notice.
>
> Provided that:
>
> (i) where suspension without pay occurs at a time when the academic is on paid leave of absence the staff member shall continue to receive a salary for the period of leave of absence;

114 Jackson, 'Legal Rights to Academic Freedom' (n 30) 355; Jackson, 'Orr to Steele' (n 28) 241.

115 Jackson, 'Legal Rights to Academic Freedom' (n 30) 371; Jackson, 'Orr to Steele' (n 28) 257. As referred to above and discussed further later in this article, this seems to still be the case.

116 Jackson, 'Legal Rights to Academic Freedom' (n 30) 361; Jackson, 'Orr to Steele' (n 28) 246. Jackson observed that there were some exceptions to this general right and procedure. For instance, the University of Melbourne then required any suspension of a staff member to be with pay, whilst Curtin University's EA was entirely silent on the issue of pay: Jackson, 'Legal Rights to Academic Freedom' (n 30) 361; Jackson, 'Orr to Steele' (n 28) 246.

> (ii) the academic may engage in paid employment or draw on any recreation leave or long service leave credits for the duration of the suspension without pay;
>
> (iii) the CEO may at any time direct that salary be paid on the ground of hardship.
>
> (iv) where a suspension without pay has been imposed and the matter is subsequently referred to a Misconduct Investigation Committee, the CEO shall ensure that a Misconduct Investigation Committee at its first meeting determine whether suspension without pay should continue and that committee shall have the power to revoke such a suspension from its date of effect.[117]

So pursuant to the *Bryant Award*, the Vice-Chancellor of the university (or equivalent)[118] had a seemingly unlimited power to use investigatory suspension in relation to an academic that was the subject of an allegation of misconduct or serious misconduct if the suspension was made with pay. However, the university could only use investigatory suspension without pay if the alleged conduct amounted to serious misconduct, being 'misconduct of a kind' such that if it were proven, 'it would be unreasonable to require the employer to continue the employment during the notice period'.[119]

A review of the EAs of the Group of Eight universities ('Go8') at the time of writing reveals that since the time of Jackson's thesis, the scope of the power of universities to make investigatory suspension decisions against their academic staff members may be widening and becoming broader than that which was provided for under the *Bryant Award*. Although investigatory suspension is an issue for all universities and their academic staff as demonstrated by the range of universities that are the subject of the case law relating to such suspension as discussed further below, the Go8 were selected by the authors as a sample of these universities for review given their high profile status in that they include some of the most highly ranked and well-established universities in Australia.[120] The Go8 consists of the University of Adelaide, the Australian National University, Monash University, the University of Melbourne, the University of New South Wales, the University of Queensland, the University of Sydney, and the University of Western

117 *Bryant Award* (n 111) cl 12.

118 'Chief Executive Officer' was defined in the *Bryant Award* to mean 'the Vice-Chancellor of the University, or where applicable, a college director, or a person acting in a Chief Executive Officer's position, or as his or her nominee': ibid cl 5(a).

119 At the time of the *Bryant Award*, s 170DB(1) of the *Industrial Relations Act 1988* (Cth) provided for the circumstances under which an employer could terminate an employee's employment. Specifically, it provided that:

> (1) An employer must not terminate an employee's employment unless:
>
> (a) the employee has been given either the period of notice required by subsection (2), or compensation instead of notice; or
>
> (b) the employee is guilty of serious misconduct, that is, misconduct of a kind such that it would be unreasonable to require the employer to continue the employment during the notice period.

120 'About the Go8', *Group of Eight Australia* (Web Page) <https://go8.edu.au/about/the-go8>.

Australia.[121] Each of the Go8 EAs has at least one clause relating to the management of employee misconduct (or alleged misconduct). Further, all provide for the university (or a representative such as the Deputy Vice-Chancellor) to use an investigatory suspension power. The investigatory suspension can be with pay or without pay. The relevant clauses are identified in the Table below.

Table 1. Go8 Enterprise Agreement Disciplinary Clauses

University	Enterprise Agreement	Management of Misconduct Clause	Investigatory Suspension Power Clause(s)	Investigatory Suspension with / without pay Clause(s)
University of Adelaide	*University of Adelaide Enterprise Agreement 2017–2021* (‘*Adelaide EA*’)[122]	cl 8.2	cl 8.2.4	cl 8.2.4.1
Australian National University	*The Australian National University Enterprise Agreement 2017–2021* (‘*ANU EA*’)[123]	cl 71	cls 71.8–71.9	cl 71.8
Monash University	*Monash University Enterprise Agreement (Academic and Professional Staff) 2019*[124]	cl 60	cls 60.4–60.5	cl 60.4
University of Melbourne	*University of Melbourne Enterprise Agreement 2018*[125]	cl 1.35	cl 1.35.7	cls 1.35.7.1, 1.35.8.2
University of New South Wales	*University of New South Wales (Academic Staff) Enterprise Agreement 2018*[126]	cl 28.3	cl 28.3(e)	cl 28.3(e)(1)
University of Queensland	*The University of Queensland Enterprise Agreement 2018–2021*[127]	cl 39	cl 39.3	cl 39.3(a)

121 ‘Go8 Members’, *Group of Eight Australia* (Web Page) <https://go8.edu.au/about/members>.

122 *Adelaide EA* (n 36).

123 [2018] FWCA 1591 (‘*ANU EA*’).

124 [2020] FWCA 3575 (‘*Monash EA*’).

125 [2019] FWCA 1846 (‘*Melbourne EA*’).

126 [2019] FWCA 2297 (‘*UNSW EA*’).

127 [2019] FWCA 1505 (‘*UQ EA*’).

University of Sydney	*University of Sydney Enterprise Agreement 2018–2021* (‘*Sydney EA*’)[128]	cl 384	cl 384(e)	cl 384(e)
University of Western Australia	*The University of Western Australia Academic Employees Agreement 2017* (‘*UWA EA*’)[129]	cl 34	cl 34.6	cl 34.6

One notable feature of the Go8 EAs is that there is a difference in the extent to which each university can make investigatory suspensions. For example, cl 8.2.4.1 of the *Adelaide EA* is in the following terms:

> At any time in this process a staff member may be suspended from duty (with or without pay) where:
>
> (a) the Area Manager forms the view that prima facie allegations amount to Serious Misconduct; and/or
>
> (b) the alleged Misconduct or Serious Misconduct is of a nature that causes imminent and serious risk to property or the health and safety of a person or animal; and/or
>
> (c) their continued presence on campus presents a serious risk either to the University, its staff and/or students; and/or
>
> (d) they refuse or fail to respond to allegations of Misconduct or Serious Misconduct.[130]

As can be seen from the above extract, the *Adelaide EA* places significant limits on the use of investigatory suspension both with pay and without pay, with the ability of the university to make such a suspension being largely dependent upon the nature of the allegations made against the staff member.

The *Sydney EA* is illustrative of another approach taken in the Go8 EAs in relation to investigatory suspensions.[131] It distinguishes between the power of the university to make an investigatory suspension with pay and its power to make such a suspension without pay. Clauses 384(e) and (f) state:

> (e) Any time after the staff member’s Supervisor or a relevant Delegate becomes aware of allegations that the staff member may have been engaged in Misconduct or Serious Misconduct, the relevant Delegate may suspend the staff member with or without pay.

128 [2018] FWCA 2265 (‘*Sydney EA*’).

129 [2017] FWCA 6097 (‘*UWA EA*’).

130 *Adelaide EA* (n 36) cl 8.2.4.1.

131 *Sydney EA* (n 128) cls 384(e)–(f).

> (f) A staff member may be suspended without pay only if:
>
> (i) the relevant Delegate considers that there is a possibility of a serious and imminent risk to another person or to the University's property or that the allegations are sufficiently serious that it is considered possible that the staff member may be dismissed if the allegations are proven; or
>
> (ii) the staff member has been notified that the relevant Delegate proposes to recommend the termination of the staff member's employment and the staff member has requested a review of that decision.[132]

As can be seen from the above extract, restraints are placed on the ability of the university to make an investigatory suspension without pay but the university's power to make such a decision with pay is relatively unconstrained.

A third approach is that adopted in the *UWA EA*. Clause 34.6 of the *UWA EA* states: 'At any time during this process the Employee may be suspended with or without pay or directed to perform suitable alternative duties'.[133]

This clause allows for the University of Western Australia ('UWA') to suspend a member of its staff with or without pay as soon as any allegation has been made against them, even where the allegation is not sufficient to amount to serious misconduct.

The need for any employer, including a university, to have the right to keep an employee out of the workplace to allow for an investigation to be conducted into any allegation(s) of misconduct is apparent. However, given the adverse impacts of suspension and the need to protect academic freedom, it is argued that universities should not have an unlimited power to use investigatory suspension and that such a position should be maintained whether the suspension is with or without pay. Consequently, the authors prefer the wording of the *Adelaide EA* with respect to the form of an investigatory suspension power although it is acknowledged that this will not prevent issues arising concerning the construction of the terms of the clause and whether there a reasonable basis for concluding that the misconduct alleged is of the nature contemplated by its terms.[134]

The next question addressed in this article concerns the extent to which universities are currently required to afford any procedural fairness rights to their academic staff before the use of investigatory suspension. It questions the adequacy of these

132 Ibid.

133 *UWA EA* (n 129) cl 34.6.

134 It is noted that in the case of *Milam*, the relevant EA empowered the University of Melbourne's 'Executive Director (Human Resources) or the Provost in consultation with the Executive Director (Human Resources)' to suspend a staff member on full pay where serious misconduct had been alleged: *University of Melbourne Enterprise Agreement 2013* [2014] FWCA 1133, cl 61.18. The Federal Court found that the questions of the 'proper construction of "misconduct" and, in particular, "serious misconduct" as defined in the Enterprise Agreement' and whether the preliminary allegations made against Milam could reasonably be considered to amount to serious misconduct raised a 'serious question to be tried' which, 'in turn raise[d] the question of whether the [University] [was] empowered to suspend [Professor Milam] pursuant to ... the Enterprise Agreement': *Milam* (n 70) 315 [15] (Anastassiou J).

rights in safeguarding academic freedom and ensuring that the risk of an academic being suspended due to an exercise of such freedom is further reduced if not eliminated.

V THE EXTENT TO WHICH UNIVERSITIES ARE REQUIRED TO AFFORD PROCEDURAL FAIRNESS TO THEIR ACADEMIC STAFF BEFORE USING INVESTIGATORY SUSPENSION

A *What is 'Procedural Fairness'?*

As explained by Evans and Levine, the terms 'procedural fairness' and 'natural justice' are regularly used synonymously,[135] although the term 'procedural fairness' is now used more frequently to refer to the *process* to be engaged in by administrative decision-makers or statutory tribunals when making decisions that may adversely affect a person. A comprehensive explanation of procedural fairness was given by McClellan J in *Hall v University of New South Wales* ('*Hall*').[136] In *Hall*, Professor Hall, a senior member of staff at the University of New South Wales, challenged the validity of a report prepared by an External Independent Inquiry ('Inquiry') that had been established by the Vice-Chancellor to investigate whether Hall was guilty of misconduct. Hall argued that he had been denied procedural fairness in the Inquiry's preparation of its report.[137] In his decision, McClellan J quoted from Mason J's judgment in *Kioa v West* as follows:

> The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.[138]

McClellan J explained that a 'fundamental element of procedural fairness is the hearing rule or the "right to be heard"'.[139] His Honour identified the aspects of this

135 Michelle Evans and Pnina Levine, '"We Need to Talk about Your Assignment": The Requirements of Procedural Fairness when Academic Misconduct is First Suspected' (2016) 42(2) *Monash University Law Review* 339, 343, citing Judith Bannister, Gabrielle Appleby and Anna Olijnyk, *Government Accountability: Australian Administrative Law* (Cambridge University Press, 2015) 459.

136 *Hall* (n 76).

137 Ibid [58]. It is noted that *Hall* related to the procedural fairness to be afforded to Professor Hall by the External Independent Inquiry which had been established pursuant to the University's Act under its Terms of Reference as distinct from under the terms of its EA: at [23].

138 Ibid [69], quoting *Kioa v West* (1985) 159 CLR 550, 584. It is noted that recently there has been some judicial rejection of the concept of 'legitimate expectations' being relevant to the hearing rule: see, eg, *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 335 [30] (Kiefel, Bell and Keane JJ), 343 [61] (Gageler and Gordon JJ).

139 *Hall* (n 76) [68].

right, which would vary depending on the circumstances of the case but would generally include:

> a reasonable opportunity to make submissions … notice of various matters … including: the time, date and place of the hearing … the subject matter … and potential adverse consequences of the decision … [and] the case to be answered … and adequate time to prepare submissions and gather evidence … disclosure of material to be relied upon by the decision-maker … disclosure of any adverse conclusion not obviously open on the known material …[140]

Another significant element of procedural fairness is the rule against bias.[141] This requires that a decision-maker act honestly and impartially without any preconceived judgements concerning the object of the decision-making.

B *The Role of Procedural Fairness in Employment Law*

The question of whether employment law should incorporate the concept of procedural fairness is a complex one. Procedural fairness, by its inherent nature, will impose requirements upon a party to act in a particular way (at least in so far as a procedure is concerned). It therefore restricts the ability of a party to act at will. Whether such a consequence is desirable in an employment context is debatable and will depend upon whether a protective or neo-liberal view is adopted.[142] At common law, there is no obligation imposed on an employer to afford an employee procedural fairness prior to dismissal, let alone prior to a suspension.[143] In the case of *Intico (Vic) Pty Ltd v Walmsley*,[144] Buchanan JA stated:

> The employer is exercising a contractual right in dismissing an employee for misconduct. The employer is not bound to act reasonably, or to give reasons or accord the employee an opportunity to be heard. The question whether the employer is contractually entitled to dismiss his employee depends upon whether the facts emerging at trial demonstrate breach of contract; it does not depend on whether the employer has heard the employee in his own defence.[145]

Ormiston JA and Eames JA both made similar observations to Buchanan JA.[146] Previously, the duty of mutual trust and confidence may have provided an avenue

140 Ibid (citations omitted).

141 The doctrine of procedural fairness is comprised of two rules — the hearing rule and the bias rule, with both originating in the common law but with the application of both being very much dependent on the statutory framework within which a decision is made: see Matthew Groves, 'Exclusion of the Rules of Natural Justice' (2013) 39(2) *Monash University Law Review* 285, 285.

142 For an overview of the protective and neo-liberal views, see above Part III; Stewart et al (n 56) 5–8.

143 See generally Sappideen et al (n 58) 185–6 [5.260]–[5.270].

144 [2004] VSCA 90.

145 Ibid [17].

146 Ibid [3] (Ormiston JA), [25] (Eames JA).

to attempt to integrate some procedural fairness into the use of suspension;[147] however, the duty was conclusively rejected by the High Court in the case of *Commonwealth Bank of Australia v Barker*.[148] Consequently, the common law is unlikely to provide any support for the imposition of procedural fairness considerations with respect to investigatory suspension.

Despite the above, procedural fairness is not completely foreign to employment law. Unfair dismissal in the *FW Act* is a useful illustration.[149] Part 3-2 of the *FW Act* allows an application for unfair dismissal to be brought before the Fair Work Commission ('FWC') for a finding that the dismissal was unfair.[150] A core consideration with respect to unfair dismissal is whether the dismissal was 'harsh, unjust or unreasonable'.[151] Whether a dismissal is 'harsh, unjust or unreasonable' is determined by reference to a range of factors, set out in s 387 of the *FW Act*.[152] These include:

> (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct … and
>
> (b) whether the person was notified of that reason; and
>
> (c) whether the person was given an opportunity to respond … and
>
> (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
>
> (e) if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal …[153]

Sections 387(b) through (e) introduce elements of procedural fairness into unfair dismissal.[154] It is argued later in this article that this combination of a rationale for action (here dismissal, but later suspension) and procedural fairness is an appropriate check on the ability of a decision-maker to act arbitrarily.[155]

Procedural fairness has also been held to be required in relation to the dismissal of public office-holders in Australia under statute.[156] The case of *Jarratt v Commissioner of Police for New South Wales* is a useful illustration of such a

147 See generally Sappideen et al (n 58) 172–6 [5.140]–[5.160].

148 *Barker* (n 95) 195 [41] (French CJ, Bell and Keane JJ).

149 *FW Act* (n 31) pt 3-2.

150 Ibid s 394.

151 Ibid s 385(b).

152 Ibid s 387.

153 Ibid. See also ibid ss 387(f)–(h).

154 See Stewart (n 92) 403–4 [17.19].

155 See below Part VI.

156 See generally Stewart (n 92) 370 [16.17].

requirement.[157] In that case, Gleeson CJ noted that natural justice would apply in relation to the removal of a person from public office under the *Police Service Act 1990* (NSW), unless expressly excluded.[158] In Gleeson CJ's words:

> Where Parliament confers a statutory power to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, Parliament is taken to intend that the power be exercised fairly and in accordance with natural justice unless it makes the contrary intention plain.[159]

McHugh, Gummow and Hayne JJ reached a similar conclusion.[160]

C *What about the Protection of a Third Party?*

The article has so far considered the protective view of employment law, and indicated that with such a view, the imposition of procedural fairness in the use of investigatory suspension may be appropriate. However, there may be a third party whose interests must be considered also, namely the victim of any alleged misconduct. Consider, for example, an allegation of sexual harassment made by an academic against another member of staff. In such a situation, the university would clearly have a duty with respect to that co-worker. At common law, an employer will owe a duty of care to their employees.[161] Further, that duty is non-delegable.[162] In addition to the common law duty, an employer will owe a duty to their employees pursuant to the occupational health and safety legislation. At the time of writing, in Western Australia, that duty is found in s 19(1) of the *Occupational Safety and Health Act 1984* (WA).[163] In the harmonised jurisdictions, the equivalent duty is held by a 'person conducting a business or undertaking' and is with respect to a 'worker'.[164] Where the third party is not a fellow employee, the question as to competing obligations may be more complicated, but the third party would still likely be owed a duty under the occupational health and safety legislation.[165] It is beyond the scope of the present article to test the limits of these obligations (for example, whether they extend to cover pure economic loss). What is key, however, is that there is a need to ensure balance between the protection of the employee under investigation and the protection of those who may have been the victim of the alleged misconduct, and

157 (2005) 224 CLR 44.

158 Ibid 56 [24].

159 Ibid 56–7 [26].

160 Ibid 70 [88]. See also the judgements of Callinan and Heydon JJ.

161 See, eg, *Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18, 25 (Dixon CJ and Kitto J); *McLean v Tedman* (1984) 155 CLR 306, 311–12 (Mason, Wilson, Brennan and Dawson JJ).

162 *Kondis v State Transport Authority* (1984) 154 CLR 672, 688 (Mason J).

163 *Occupational Safety and Health Act 1984* (WA) s 19(1) ('*OSH Act*'). Note, however, Western Australia is currently in transition to the *Work Health and Safety Act 2020* (WA).

164 See, eg, *Work Health and Safety Act 2011* (Cth) s 19(1) ('*WHS Act*').

165 See, eg, ibid s 19(2); *OSH Act* (n 163) s 21(2).

that such a balance can be relevant to the use of investigatory suspension.[166] The unfair dismissal provisions discussed above indicate that it is possible to balance the tension, and that the circumstances of the particular case will be influential.

D *The Extent to which University EAs Require Universities to Afford Any Procedural Fairness to Academic Staff Before Suspending Them*

As noted above, in order to suspend a member of academic staff, the university must have legal authority to do so. As discussed, for those universities in the Go8, that power can be found in their EAs, albeit with different parameters.[167] A university must comply with the provisions of its EA, or risk finding itself in breach of the *FW Act*.[168] Given the significant impacts that suspension, even investigatory suspension, can have on an employee, it is necessary to consider what (if any) safeguards are in place in university EAs to prevent investigatory suspension powers being used arbitrarily. An assessment of those safeguards is the purpose of this section of the article. In particular and with reference to the Go8 EAs, it considers the degree to which procedural fairness is required to be afforded to academic staff prior to an investigatory suspension decision being made against them. The starting point of such a discussion is the *Bryant Award*.[169] Pursuant to cl 12 of the *Bryant Award*, the CEO of a university had to 'notify the academic in writing and in sufficient detail [of any allegation(s) against them] to enable the academic to understand the precise nature of the allegations, and to properly consider and respond to them'.[170] It was only at the time of the provision of this notice that the CEO could suspend the academic.[171]

In the current Go8 EAs, a sharp distinction can be drawn between procedural fairness generally, and procedural fairness prior to the use of investigatory suspension. There are relatively strong protections with respect to the former. For example, some EAs explicitly note that procedural fairness is generally applicable to the disciplinary process.[172] The *ANU EA* is one such example. Clause 70.5 of the agreement states: 'Procedural fairness and natural justice will apply. Those involved in any disciplinary action or grievance process have a duty that any

166 See, eg, *Avenia* (n 58) 194 [168]–[170] (Lee J), where the employer's duties with respect to health and safety at common law and under the occupational health and safety legislation were relevant to the question of whether the suspension was a lawful and reasonable order.

167 *Adelaide EA* (n 36) cl 8.2.4; *ANU EA* (n 123) cls 71.8–71.9; *Monash EA* (n 124) cls 60.4–60.5; *Melbourne EA* (n 125) cls 1.35.7–1.35.8; *UNSW EA* (n 126) cl 28.3(e); *UQ EA* (n 127) cl 39.3; *Sydney EA* (n 128) cl 384(e); *UWA EA* (n 129) cl 34.6.

168 *FW Act* (n 31) s 50. See also *McAleer v University of Western Australia* (2007) 159 IR 96.

169 *Bryant Award* (n 111) cl 12.

170 Ibid cl 12(b)(i).

171 Ibid cl 12(c).

172 See, eg, *ANU EA* (n 123) cl 70.5; *Monash EA* (n 124) cl 58.3; *UQ EA* (n 127) cl 36.3.

decision is not affected by favouritism, bias or conflict of interest and they must act fairly and impartially'.[173]

The right to be notified of an allegation of misconduct against a staff member, and to have an opportunity to respond, can also be found in each of the Go8 EAs.[174] It is therefore clear that at some point in the disciplinary process, the staff member will receive procedural fairness; the question, however, is whether it will be received prior to the use of an investigatory suspension power by the university. Clause 8.2.4.2 of the *Adelaide EA* is the clearest. It states: 'At the time of suspending the staff member from duties the Area Manager will notify the staff member in writing of the reason for their suspension from duty'.[175]

Clause 8.2.4.2 is unambiguous. At the time of the suspension the staff member will know why they have been suspended. It is argued that such a requirement is desirable; it is not burdensome on the university (they will have to notify the staff member at some point), and if the university cannot articulate at the time of suspension why the employee is being suspended, then there is a strong argument that the suspension is not appropriate in the circumstances.

Other current Go8 EAs are not as clear with the lack of clarity resulting from the use of somewhat vague language in the provisions authorising the use of investigatory suspension. For example, cl 71.8 of the *ANU EA* commences with the following: 'The University may, at any time while the process for managing misconduct is in progress, suspend a staff member with pay, or without pay'.[176]

Similarly, cl 34.6 of the *UWA EA* states: 'At any time during this process the Employee may be suspended with or without pay or directed to perform suitable alternative duties'.[177]

It is the phrase 'at any time' that creates the ambiguity. While the employee will (eventually) be notified of the allegation(s) against them and have a chance to respond, the university may not be required to notify the employee of the allegation(s) in advance of using its investigatory suspension power.

173 *ANU EA* (n 123) cl 70.5.

174 *Adelaide EA* (n 36) cl 8.2.5; *ANU EA* (n 123) cl 71.26; *Monash EA* (n 124) cl 60.2; *Melbourne EA* (n 125) cl 1.35.4; *UNSW EA* (n 126) cl 28.3(d); *UQ EA* (n 127) cls 39.6–39.7; *Sydney EA* (n 128) cl 384(c); *UWA EA* (n 129) cl 34.5. Note: where the misconduct is seen to be minor, a university may attempt to deal with it by way of discussion with a supervisor (or similar), in which case the right to be notified and opportunity to respond are more informal in nature.

175 *Adelaide EA* (n 36) cl 8.2.4.2.

176 *ANU EA* (n 123) cl 71.8.

177 *UWA EA* (n 129) cl 34.6.

Although there are relatively few cases in which a university's decision to suspend a member of its staff has been challenged before a court or tribunal,[178] the cases of *Jin v University of Newcastle* ('*Jin*')[179] and *Imberger*[180] help illustrate some of the issues resulting from the ambiguity of the provisions of university EAs relating to the right of an academic staff member to be notified of an allegation of misconduct against them prior to the use of investigatory suspension.[181]

1 Jin v University of Newcastle

In September 2010, an investigation was commenced into the work practices of Professor Jin, the Chair of Information Technology at the School of Design, Communications and Information Technology, Faculty of Science and Information Technology at the University of Newcastle, by the university's Associate Director of Risk and Assurance.[182] Some months later, the Associate Director notified Jin that several cash expenses that had been processed by him were, 'following a preliminary assessment, considered not to … compl[y] with

178 A review of the recent case law concerning disputes between universities and their staff enabled the authors to identify the following cases concerning, although not necessarily exclusively, a university's decision to suspend a staff member: *Milam* (n 70); *Imberger* (n 70); *Walker v University of Sydney* [2013] NSWSC 104 ('*Walker*'); *Jin v University of Newcastle* [2013] FWC 418 ('*Jin*'); *Tiver v University of South Australia* [2010] 195 IR 369 ('*Tiver*'); *Sheikholeslami v University of NSW [No 3]* [2008] FMCA 35 ('*Sheikholeslami*'). The reason for the minimal number of cases could be because most conflicts between universities and their staff, including those that relate to university suspension decisions, settle prior to going to litigation. For example, the case of *Walker* refers to Professor Walker having executed a deed of release in favour of the university in relation to, among other things, its decision to suspend her employment: *Walker* (n 178) [25]. A staff member may also not have the money, time or the inclination to bring an action against a university and they may also be concerned that it might further prejudice their employment at the university and do additional damage to their reputation.

179 *Jin* (n 178). The decision in *Jin* was appealed, however, the appeal does not discuss the suspension in any depth and so will not be explored further: *Jin v University of Newcastle* (2013) 237 IR 25.

180 *Imberger* (n 70).

181 As noted above, there have been other cases relating to a university's decision to suspend a staff member but these cases do not appear to have concerned any ambiguity of the provisions of the university EAs relating to the staff member's right to be notified of an allegation of misconduct prior to a suspension decision being made against them. For example, in the case of *Tiver*, there was no question of any ambiguity in the terms of the relevant EA. Rather, the case concerned whether Dr Tiver had been sufficiently notified of the allegations of misconduct against her to trigger the use of the investigatory suspension power. In finding that she had not, the Full Bench of the Fair Work Commission determined that 'the suspension of Dr Tiver and the reference of the matter to a Disputes Committee — are invalid': *Tiver* (n 178) 383 [40] (Watson and Kaufman SDPP, Cargill C). It is noted that although in *Sheikholeslami*, one of Dr Sheikholeslami's contentions did relate to the construction of the relevant EA in that case, it is the authors' view (as held by Smith FM) that there was clearly no such ambiguity. Specifically, Dr Sheikholeslami argued that it was not open to the University of New South Wales to suspend her given that on a true construction of this EA, 'a suspension without pay [could not] be imposed before the full disciplinary procedures [had] been followed': *Sheikholeslami* (n 178) [141]. However, the EA clearly provided that '[a]nytime after an allegation of misconduct or serious misconduct has been received by the Deputy Vice-Chancellor, the Deputy Vice-Chancellor may suspend the employee': at [135]. Smith FM found that the construction contended by Dr Sheikholeslami was 'clearly not intended under the Enterprise Agreement': at [142].

182 *Jin* (n 178) [12].

legal obligations and policies' and 'may constitute corrupt or criminal conduct and may also constitute serious misconduct'.[183] Jin 'welcom[ed] the enquiry and provided a spreadsheet with explanations'.[184] However, this response was not satisfactory to the university.[185] Subsequently, Jin was notified by the Deputy Vice-Chancellor (Services) ('DVC') that allegations had been received 'which, if proven, could constitute misconduct or serious misconduct' under the *University of Newcastle Academic Staff Enterprise Agreement 2010* ('*Newcastle EA 2010*').[186] Accordingly, the DVC had decided to suspend Jin without pay 'pending the finalisation of the investigation and any consequent action'.[187] Jin's employment was terminated approximately a year later.[188] Jin then applied to the FWC arguing, among other things, that the university's decision to suspend him was inconsistent with the *Newcastle EA 2010* on two grounds. First, that he had not been notified of the allegations against him in sufficient detail to allow him to consider and respond to them prior to the decision being made to suspend him. Secondly, the university had itself not finalised the allegations against him before making the decision to suspend him.[189]

In his decision, Smith DP found that, on the evidence, the university had failed to both notify Jin and to finalise what the allegations were before the suspension decision had been made.[190] However, whether the university was required to do these things pursuant to its EA came down to an interpretation of cls 11.4 and 11.5 of the *Newcastle EA 2010*. Clause 11.4 related to what the Deputy Vice-Chancellor had to do where they formed the view that an allegation required 'further investigation'.[191] The clause included a requirement for the DVC to

> notify the staff member of the allegations in writing and in sufficient detail to enable the staff member to understand the precise nature of the allegations and to properly consider and respond to them; and require the staff member to submit a written response within 10 working days unless, where required, the matter has been referred to an external body …[192]

Clause 11.5 empowered the DVC to use investigatory suspension:

183 Ibid [14].

184 Ibid [15].

185 Ibid.

186 Ibid [16]; *University of Newcastle Academic Staff Enterprise Agreement 2010* [2011] FWAA 435 ('*Newcastle EA 2010*').

187 *Jin* (n 178) [16].

188 Ibid [17].

189 Ibid [19].

190 Ibid [30].

191 *Newcastle EA 2010* (n 186) cl 11.4.

192 Ibid.

> At any time after [the] allegation of misconduct/serious misconduct has been received by the appropriate Deputy Vice-Chancellor, the Deputy Vice-Chancellor may suspend the staff member on full pay, or may suspend the staff member without pay if the Deputy Vice-Chancellor is of the view that the alleged conduct amounts to serious misconduct such that it would be unreasonable to require the University to continue employment during a period of notice.[193]

The central question, with respect to the suspension aspect of the case, concerned whether the investigatory suspension power (ie cl 11.5) could be used prior to the notification required by cl 11.4. Smith DP reviewed the general rules with respect to the interpretation of EAs (based on those relevant to the interpretation of awards).[194] He then noted that the answer to the question would depend on whether the 'operation of the clauses 11.4 and 11.5 [were] sequential or [could] operate independently of each other'.[195] Smith DP adopted the sequential interpretation of cls 11.4 and 11.5.[196] He noted that '[w]ithout clarity in relation to allegations of misconduct or serious misconduct, it is difficult to see how a decision could be made to suspend a staff member, particularly without pay'.[197] Consequently, the university needed to notify Jin of the allegation(s) prior to the use of the investigatory suspension power. However, and importantly, Smith DP's interpretation did not require that all of cl 11.4 be resolved prior to the exercise of cl 11.5.[198] In a summary of the suspension issue, Smith DP held:

> I find that before a staff member may be suspended with or without pay for serious misconduct, any allegations to that effect must be notified to the staff member in accordance with clause 11.4(i). However, I also find that once having notified the staff member in accordance with that clause, the Deputy Vice-Chancellor may suspend, with or without pay, the staff member provided that the requisite satisfaction is reached and that it would be unreasonable to require the University to continue the employment during a period of notice.[199]

The *Newcastle EA 2010* in *Jin* illustrates the complexity around the use of 'at any time' as discussed above.[200] It is argued that the interpretation of cls 11.4 and 11.5 by Smith DP in *Jin* was appropriate, particularly because such an interpretation reduces the potential for arbitrary suspension. Pursuant to this interpretation, the

193 Ibid cl 11.5.

194 *Jin* (n 178) 7–9 [24]–[29], referring primarily to the principles as summarised by Madgwick J in *Kucks v CSR Ltd* (1996) 66 IR 182.

195 *Jin* (n 178) [31].

196 Ibid [32].

197 Ibid.

198 Ibid [34].

199 Ibid [36].

200 A similar approach to that of Smith DP in *Jin* was taken by a Full Bench of the FWC in *Tiver* in relation to the interpretation of the somewhat similar provisions in the *University of South Australia Academic and Professional Staff Collective Agreement 2006*: see *Tiver* (n 178) 382–3 [36]–[40] (Watson and Kaufman SDPP, Cargill C).

university would need to have at least crystallised the nature of an allegation(s) against the staff member before they could suspend them.

2 Imberger v University of Western Australia

In the Western Australian Supreme Court case of *Imberger*,[201] Gilmour J had to consider the operation of sch D of the *University of Western Australia Academic Staff Agreement 2014* ('*UWA EA 2014*').[202] Professor Imberger was a Winthrop Professor and the Director of the Centre for Water Research at UWA where he had been employed for approximately 35 years.[203] In late 2014, UWA's Senior DVC exercised her power under cl 5 of sch D to suspend Imberger on full pay. She notified Imberger of this by way of a letter.[204] On this, Gilmour J commented:

> The letter, which was in the most general of terms, disclosed that [the Senior DVC] was in receipt of a report concerning allegations made by a number of former students in relation to [Imberger]. The students were not identified, nor were any details of the allegations. They were characterised in the letter as allegations 'which, if true, would constitute serious misconduct'.[205]

Imberger applied for interlocutory relief that, among other things, the decision to suspend him on full pay be set aside until the hearing of his substantive application.[206] Clause 5 of sch D of the *UWA EA 2014*, and its interpretation, were crucial to the decision. Clause 5.1 of the *UWA EA 2014* provided:

> If a report of an allegation of serious misconduct is such that it would be unreasonable for the University to continue the employment of the employee, the Vice-Chancellor or Senior Deputy Vice-Chancellor may suspend the employee about whom an allegation(s) has been made on full pay, or without pay taking the following provisions into account …[207]

Clause 5.2 continued:

> Where the University considers suspending an employee with or without pay, the employee will be advised in writing and given 5 working days to respond in writing or in person. The matter of suspension will then be considered and determined. Following determination or where there is no response from the employee within 5 days, the decision will be confirmed in writing.[208]

201 *Imberger* (n 70).

202 [2014] FWCA 5448 ('*UWA EA 2014*').

203 *Imberger* (n 70) [1].

204 Ibid [2].

205 Ibid.

206 Ibid [6].

207 *UWA EA 2014* (n 202) sch D cl 5.1.

208 Ibid sch D cl 5.2.

Imberger argued that cl 5.2 required that he be provided with sufficient information about the allegation(s) against him prior to the use of suspension by the university.[209] Gilmour J did not agree.[210] According to Gilmour J, the better view was that the notification to be given to an employee under para 5.2 was simply to enable the employee to provide submissions in relation to the issue of suspension, not as to the truth of the allegation(s).[211] Gilmour J thus interpreted the *UWA EA 2014* as affording very little, if any, procedural fairness to a university staff member subject to an investigatory suspension, despite his acknowledgment of the very harmful consequences of such a suspension.[212] Reflecting the discussion earlier in the article about the consideration of third parties' interests with investigatory suspension, Gilmour J explicitly referred to the potential protection of a third party (here the student(s) in question).[213]

In summary, although it can be seen that the current Go8 EAs make provision for procedural fairness rights to be afforded to university staff during disciplinary proceedings, in many cases there is a degree of uncertainty as to the extent to which procedural fairness, if any, is required before the use of an investigatory suspension power. The cases of *Jin* and *Imberger*, while not necessarily identical to the current university EAs, do highlight some of the issues that emerge, most notably, the question of when the staff member must be provided with full details of the allegation(s) against them. In *Jin*, Smith DP read the clauses of the EA sequentially, to find that such notification was required prior to the use of the suspension power,[214] while in *Imberger*, Gilmour J found that detailed information was not required.[215] The next section of the article proposes recommendations for the reform of university EAs to more clearly incorporate procedural fairness into investigatory suspension.

VI RECOMMENDATIONS AND CONCLUSION

Academic freedom is an important feature of the Australian university sector.[216] Consequently, academic staff should feel empowered to exercise their academic freedom within the limits of the Model Code.[217] To be able to do that, however, academic staff need to feel comfortable that their exercise of academic freedom will not result in any adverse consequences for them including those resulting from

209 *Imberger* (n 70) [14].

210 Ibid.

211 Ibid [15].

212 Ibid [9].

213 Ibid [16].

214 *Jin* (n 178) [36].

215 *Imberger* (n 70) [14]–[15].

216 French (n 8) 18.

217 Walker (n 16) 48–54.

an investigatory suspension. Based on the Go8 EAs reviewed for the present article,[218] it is apparent that in some cases, universities are being provided with almost unlimited power to make investigatory suspension decisions against their academic staff whether with or without pay. An analysis of the Go8 EAs also suggests that although academic staff are entitled to considerable procedural fairness during any disciplinary proceedings against them, the extent to which they may be required to be afforded any procedural fairness before they can be the subject of an investigatory suspension can be very uncertain. It is recognised that there is a tension with respect to investigatory suspension, namely the balancing of the interests of the academic staff member suspended and those of the university and any relevant third party (for example, those affected by the alleged misconduct). The relevant question is how should these different interests be balanced?

As noted earlier in the article, the authors prefer a protective view of employment law,[219] but recognise the need to ensure that any protection(s) offered to academic staff are not overly restrictive for the university. It is posited that the tension can best be resolved through two amendments to university EAs. First, the approach to the availability of the investigatory suspension power set out in the *Adelaide EA* should be adopted.[220] It is the authors' view that the *Adelaide EA* is the best compromise between the interests of the academic and the university because the limits of the investigatory suspension power are delineated (for example, to 'Serious Misconduct' or where there is a 'serious risk to property or the health and safety of a person or animal'),[221] particularly when compared to a provision like cl 34.6 of the *UWA EA*, which appears to grant much greater power to the university.[222]

Second, the question of procedural fairness prior to investigatory suspension can be resolved through the introduction (or reintroduction) of the essence of cl 12 of the *Bryant Award* into university EAs.[223] To do so, cl 8.2.4.2 of the *Adelaide EA* could be altered as follows to create a model term:

> At the time of suspending the staff member from duties the authorised officer will notify the staff member in writing of the reason(s) for their suspension from duty (including the precise nature of any allegation(s) against them) and in sufficient detail to allow the staff member to properly consider and respond to the allegations.[224]

218 *Adelaide EA* (n 36); *ANU EA* (n 123); *Monash EA* (n 124); *Melbourne EA* (n 125); *UNSW EA* (n 126); *UQ EA* (n 127); *Sydney EA* (n 128); *UWA EA* (n 129).

219 Stewart et al (n 56) 5–7.

220 *Adelaide EA* (n 36) cl 8.2.4.1.

221 Ibid.

222 *UWA EA* (n 129) cl 34.6.

223 *Bryant Award* (n 111) cl 12.

224 The original text of cl 8.2.4.2 of the *Adelaide EA* (n 36) is: 'At the time of suspending the staff member from duties the Area Manager will notify the staff member in writing of the reason for their suspension from duty'. This amended version includes text taken from the *Bryant Award*: see *Bryant Award* (n 111) cl 12(b)(i).

The model term is straightforward. It is also not burdensome. The obligation placed by the model term is simply to provide information to the staff member. Consistent with the comment made by Smith DP in *Jin*, it is appropriate that the university be in a position where they can provide a justification for the course of conduct that they seek to take.[225] It is the authors' view that such a model term should be incorporated into every university EA that empowers the university to use investigatory suspension. Compliance with the model term would then be mandatory,[226] and a staff member suspended in breach of the model term could seek a remedy.[227] Notably, as the model term does not affect the availability of investigatory suspension, it can be introduced whether or not the first recommendation is adopted.

In conclusion, the suspension of an academic staff member may be necessary on occasion, for example, to investigate an allegation of misconduct. However, suspension, even for such a purpose, can be detrimental.[228] Therefore, there is a need to ensure that the power to suspend is not used arbitrarily. This is particularly important in relation to academic staff and academic freedom. The Model Code,[229] while helpful, is by itself insufficient. More is needed to ensure that academic staff are not subjected to investigatory suspension because they exercised their right to academic freedom. The case law discussed earlier in the article, namely *Jin*[230] and *Imberger*,[231] illustrates some of the challenges associated with investigatory suspension in EAs. To reduce ambiguity and protect academic staff, while still recognising the interests of both the university and any relevant third party, this article has proposed, first, that the availability of investigatory suspension be delineated and limited, and second, a model term. The model term requires detailed notification of the reason(s) for the suspension to be provided at the time of suspension. It is the authors' view that incorporating these recommendations into university EAs will provide greater clarity to those involved and will help to safeguard academic freedom through the reduction of arbitrary suspension.

225 *Jin* (n 178) [32].

226 *FW Act* (n 31) s 50.

227 Ibid s 539.

228 As noted earlier, there is considerable commentary around the intrinsic value that people receive from work: see, eg, Pocock (n 61); Putra, Cho and Liu (n 61) 231–2; *Quinn* (n 64) 60 [101] (Bromberg J). This is lost in a situation such as suspension where people are prevented from working.

229 Walker (n 16) 48–54.

230 *Jin* (n 178).

231 *Imberger* (n 70).