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JUDICIAL OPINION, THE FEDERAL REGISTRATION OF FAUSA AND THE DAWKINS RESTRUCTURE: CONCEPTS OF THE UNIVERSITY AND SUI GENERIS REVISITED[1]

INTRODUCTION: THE PROBLEM AND THE LITERATURE.

THE Latin word *universitas* has two meanings. It means something in its entirety, the whole nature of things, and therefore the world, the universe. By connotation the word in judicial Latin means a number of persons associated into one body, a company, a community, a guild; a corporation or a society.[2] A university, therefore, may be assumed to be the corporation of those whose occupation is the disciplined understanding of the entirety of the world and the universe. It is a term that has philosophic, corporative and occupational meaning. In the present, these three aspects of universities have become distinct conceptual categories that do not necessarily refer to the whole but have distinct aspects in an industrial society. Because universities do not conform to the processes and governance of rational organisation, academia has experienced difficulty in fitting with the industrial categories of modern society.

Until the *Australian Social Welfare Union Case* of 1983 (hereafter *ASWU Case*),[3] academics were not able to be part of the usual industrial relations procedures of the Conciliation and Arbitration Commission, as universities

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1 FAUSA is the acronym for the Federated Australian University Staff Association.

2 Lewis & Short, *A Latin Dictionary* (Oxford University Press, Oxford 1975).

3 *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297 (hereafter referred to as the "*ASWU*" case).

and academic staff were not considered to be 'industrial'. Judicial inquiries into universities as work enterprises had found them sui generis. It was when the *ASWU Case* allowed a return to the broad judicial interpretation of the term 'industry' to be applied to professional employees that the way was open for academics to form a unitary organisation. There is, to date, no account of how judicial argument and debate on academic work over the past thirty five years have related to concepts of the university and how that judicial argument was subsequently ignored by the Dawkins 'Restructure', again raising questions as to the nature of the university. This paper will discuss that debate.

The major sources for this examination lie in the decisions of the Industrial Registrar of the Conciliation and Arbitration Commission and Full Bench of the High Court, in Reports of Inquiry to the Parliament of the Commonwealth of Australia, in the relevant Acts of that Parliament, in Ministerial policy and discussion papers for that Parliament and in the *National Wage Case* of 1987: Second Tier Settlement for Academic Staff in Higher Education Institutions.[4]

In the scholarly literature, a very small number of papers have discussed the legal issues surrounding the federal registration of FAUSA. These have been by Gleeson, Ford, and Rothnie.[5] Only one of these, Rothnie, has appeared in the legal literature. The others have been published in the scholarly journals of higher education or education.

4 The Commonwealth Arbitration Reports (CAR) are incomplete for 1987-1989 and hence there is no *CAR* citation for the *National Wage Case of 1987.* Reference to the case can be found at (1987) 29 AILR ¶94.

5 Gleeson, "The Teachers' Industrial Revolution: Implications of Federal Registration" (1984) 18 *Education News* 24; Ford, "The Future of Academic Unions: Implications of Recent Legal Cases" (1984) 27 *Vestes* 7; Rothnie, "Restoring the Frontiers of an Unruly Province: Intergovernmental Immunities and Industrial Disputes" (1985) 11 *Monash UL Rev* 120. Two other papers in the higher educational literature mention the *ASWU Case* in relation to the federal registration of FAUSA but do so in the light of the history of academic unionism and not from the perspective of the legal debate surrounding the nature of universities and their concomitant industrial forms. These papers are: Muffet, "The Making of Academic Unions in Australia" (1986) 8 *Journal of Tertiary Educational Administration* 105; O'Brien, "Universities, Technology and Academic Work: A Reconsideration of the Murray Committee on Australian Universities (1957) in the Light of Dawkins (1987-1988)" (1990) 12 *Journal of Tertiary Educational Administration* 255.

Information and summary papers by Wallis,[6] the former General Secretary of FAUSA, and conference and staff seminar papers by Conolly,[7] the former Executive Director of the previous Australian Universities Industrial Association (AUIA), dealing with FAUSA's registration as a unitary body with the Commonwealth Conciliation and Arbitration Commission are also valuable sources. They are not in the published literature and were obtained from the archives of their respective organisations. Decisions of the Industrial Registrar of the Conciliation and Arbitration Commission used in this paper are the full transcripts also found in the archives of FAUSA, rather than the reported summaries.

CONCEPTS OF THE UNIVERSITY AND THE NATIONAL INDUSTRIAL MILIEU OF ACADEMICS IN AUSTRALIA

The findings of Justice Eggleston in 1964 and 1970,[8] of Justice Campbell in 1973,[9] along with the decisions of Justice Gaudron in 1980[10] in the Conciliation and Arbitration Commission and the Full Bench of the High Court in 1982[11] on industrial matters pertaining to universities agree with

6 Wallis, "Mechanisms for the Determination of Salary and Conditions of Academic Staff" (FAUSA Information Paper, Melbourne 1979). Wallis, Appendix A to "Mechanisms for the Determination of Salary and Conditions of Academic Staff".

7 Conolly, "Industrial Relations and the Universities" (Paper presented at the Australian Universities Administrative Staff Conference, place unspecified 1979). See also Conolly, "The AVCC, The Universities and Industrial Relations" (Paper presented to the University of Melbourne, Combined Heads of Sections Seminar, Melbourne 1983); Conolly, "Industrial Relations and The Universities" (Paper presented at Administrative Staff Course, place unspecified 1984); Conolly, "The Industrial Relations Agenda for Higher Education" (Paper presented to the Conference, "Industrial Relations in Higher Education After the White Paper", University of Sydney, 18 November 1988).

8 Eggleston, *Report of the Inquiry into Academic Salaries* (AGPS, Canberra 1964); Eggleston, *Inquiry into Academic Salaries* (AGPS. Canberra 7 May 1970).

9 Aust, Inquiry into Academic Salaries, *Report* (1973).

10 *Decision - University Health and Research Employees and Non-Academic Staff, Federated Clerks Union of Australia and Australian National University in Relation to Wages and Conditions* (1980) 239 CAR 90 at 90-96 per Gaudron J (hereafter referred to as "*The Gaudron Decision*"); *Decision (In the Matter of an Application for the Registration of the Association of Australian University Staff as an Organisation of Employees,* Melbourne 1981) at 4 per Marshall (hereafter referred to as "Marshall, *Decision*") reported in summary form as Marshall, *Union Registration* (1981) 23 AILR 222. The transcript can be found in the archives of FAUSA.

11 *R v McMahon; Ex parte Darvall* (1982) 151 CLR 57. The principal reference used in this paper is the transcript of the decision of the full bench of the High

the classic perceptions of the university as delineated by writers since the nineteenth century such as Newman, Veblen, Ortega Y Gasset, Flexner, Jaspers and Kerr.[12] With the exception of Kerr,[13] these writers understood universities to be institutions which focus the experience of the spirit of mind or truth as delineated by study of academics in the disciplines and the subsequent impartation of that study through teaching to the community with the consequence that it fuses with the culture of society as graduates join the society and implement their university education. The concept of a university has come to mean a specialised kind of organisation separate from the industrial society around it. In addition to the philosophic considerations, Kerr and Veblen assert that in a real sense the university is its faculty, its scholars working within the disciplines with "idle curiosity".[14]

Universities in Australia are autonomous under States' enabling Acts for each university. Academics are employed by university councils and this employment creates the professional and industrial milieu for academics. Thus, academics are at the same time discipline experts across national bounds yet materially employed at a specific university in national geographic space. This distinctive nature of academic employment has led to experiments in the industrial relations system in Australia to find a suitable method of setting academic salaries and protecting academic conditions.

The society in which Australian academics work has been one where industrial matters have been settled by industrial tribunals at the State or Federal levels. In s51(xxxv) of the Australian Constitution, the powers of

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Court found in the archives of FAUSA. References to both are given because the wording differs on occasion though the meaning is the same.

12 Newman, *The Idea of A University Defined and Illustrated* (Basil Montagu Pickering, London 1873); Veblen, *The Higher Learning in America: A Memorandum on the Conduct of Universities by Business Men* (Sagamore Press, New York 1957); Ortega Y Gasset, *Mission of the University* Nostrand trans (Kegan Paul, Trench, Trubner & Co, London 1946); Flexner, *Universities, American, English and German* (Columbia University Teachers' College Press, New York 1930); Jaspers, *The Idea of the University* Reiche & Vanderschmidt trans (Beacon Press, Boston 1959); Kerr, *The Uses of the University* (Harvard University Press, Cambridge, Mass 1963).

13 Kerr views the university in the United States as a structure of disciplinary fiefdoms in competition, a "multiversity", and concludes that there is a need for unity such as has been delineated by the other writers.

14 Kerr, *The Uses of the University* p100; Veblen, *The Higher Learning in America: A Memorandum on the Conduct of Universities by Business Men* pp108, 112-114, 117-118, 164, 166.

the Commonwealth Parliament include "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State".

The crux of s51(xxxv), for the purposes of this paper, lies in the judicial interpretation of the adjective 'industrial'. The meaning of the term 'industrial' had not been defined in the *Conciliation and Arbitration Act* 1904 (Cth), but s4 provided the following interpretation of the word 'industry':

a) any business, trade or manufacture, undertaking, or calling of employers;

b) any calling, service, employment, handicraft, or industrial occupation or vocation of employees; and

c) a branch of industry and a group of industries.

These categories form a broad definition of what constitutes an industry for the purposes of settling a dispute. As a "vocation of employees" it could be argued academic practice came within the ambit of the definition.

By 1929, two significant judicial interpretations of the term 'industrial', as defined by the Act, had been made by the High Court. The first of these was the judgment in *Jumbunna Coal Mine NL v Victorian Coal Miners Association*,[15] known as the *Jumbunna Case*, concerning the mining industry in Victoria in 1908. Chief Justice Griffith and O'Connor J of the High Court defined an industrial dispute in very broad terms.[16] However, in the 1929 case, *Federated State School Teachers of Australia v State of Victoria*,[17] Knox CJ, Gavan Duffy, Stark and Rich JJ rejected this broad interpretation. The term 'industry' was from then onwards to be delineated by the modes of primary or secondary industries, the industries of material production.[18]

15 (1908) 6 CLR 309.
16 At 331.
17 (1929) 41 CLR 569 (hereafter "*State School Teachers' Case*").
18 At 576-577, 579, 581, 591; Isaacs J alone dissented against this ruling, arguing that the formal educative processes did lead to the creation of productive wealth.

THE INDUSTRIAL POSITION OF ACADEMICS UNTIL THE 1970S

According to Wright, being excluded from the industrial relations arena was not initially a problem for academics.[19] Before World War II Australian academics viewed themselves as gentlemanly professionals. In the 1930s they had considered becoming a branch of the Association of University Teachers of Great Britain. However, for Australian academics at this time, an academic staff association savoured too much of unionism, even though academic salaries had been cut in the Depression. The change in attitude to staff associations came after World War II through the large increase in student enrolments, underprovision of staff and makeshift accommodation.

During the 1950s the policy, established by the Chifley Government in 1945, of using the wage-labour system, standardised by the Commonwealth Conciliation and Arbitration Commission, as *the* instrument for the distribution of wealth, lead to substantial increases in professional salaries and in salaries in general.[20] In 1955 the Commonwealth Public Service revised salaries following the *Metal Trades Margins Case* of 1954.[21] Local negotiating arrangements meant that the increase in salaries flowed on very slowly to academics, as universities liked to have autonomy over their financial affairs and were dependent on the States, not the Commonwealth, for aid in funding.[22]

A development of the 1950s that was to be important for academics was that the Association of Professional Engineers, Australia (APEA) obtained registration under the *Conciliation and Arbitration Act* 1904 (Cth) on the grounds that engineering was ancillary to industry as defined by the 1929 decision of the High Court.[23] In the circumstances of price and wage rises

19 Wright, "Australian University Staffs, Their Past and Their Prospects" (1977) 20 *Vestes* 3.

20 McEachern, "Corporatism and the Business Response to the Hawke Government" (1986) 21 *Politics* 42. As is well known, the principle behind these revisions was that those with less skill or less responsibility could expect to approach more closely the standard of material comfort formerly enjoyed by the highly paid. This was accomplished by an adjustment of margins for skill in relation to the basic wage.

21 *Amalgamated Engineering Union v Metal Trades Employers Association* (1954) 83 CAR 3.

22 Eggleston, *Report of the Inquiry into Academic Salaries* pp10-11.

23 *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Association of Professional Engineers* (1959) 107 CLR 208.

this meant that professional engineers' wages rose in accord with rises of the trades and para-professionals' salaries and wages.

The registration meant that academic engineers were not industrially equal to their professional colleagues, nor as well paid. Recruitment of engineers to university positions became difficult. The extraordinary developments in science and technology were further encouraging student demand for education and training in the technologies. There had also been difficulty in recruiting academics for science and arts faculties as the Commonwealth Public Service was more financially attractive since the *Metal Trades Margins Case*.[24]

A final factor which led to the need for academics to have nationally set salaries, rather than salaries negotiated by individual universities and their staff associations, was the release of the Murray Report in 1957[25] and the subsequent establishment of the Australian Universities Commission (AUC) in 1958. The labour intensiveness of academic work showed itself through the expenditure required for salaries. As the number of academic staff increased, so university costs escalated.[26] The problems raised by these trends were:

a) a uniform national standard for academic salaries

b) the frequency of salary determinations for academics, and

c) the establishment of some machinery to determine academic salaries Australia-wide.

The question these problems posed was: could the traditional concept of a university have industrial reality?

THE JUDICIAL INQUIRY INTO ACADEMIC SALARIES

This question was answered by the establishment of the Academic Salaries Tribunal (AST) in 1974.[27] During the processes which led to the formation of the AST significant decisions were made regarding the place of academics in the scheme of industrial relations in Australia. The first of

24 Aust, Committee on Australian Universities, *Report* (1957) pp61, 122. Aust, Australian Universities Commission, *First Report* (1960) p3.
25 Aust, Committee on Australian Universities, *Report* (1957) p61.
26 At p122.
27 *Remuneration Tribunals Act* 1974 (Cth) s11.

these was the unilateral decision by the Salaries Committee of the AUC in 1963[28] which correlated the benchmark for academic salaries with that of research scientists of the Commonwealth Scientific and Industrial Organisation (CSIRO) since they were the only Commonwealth Public Service staff, other than university academics, to engage in research. It could only be a partial correlation as CSIRO research scientists did not teach.

The lack of consultation by the Salaries Committee of the AUC with universities, academic staff or State governments led to a protest for which the Menzies Government through Senator Gorton, the Minister-in-Charge of Commonwealth Activities in Education and Research, devised the instrument of a judicial inquiry into academic salaries.[29] The judicial inquiry became the means by which academic salaries came to be set nationally in the 1960s and early 1970s. There were three of these judicial inquiries, as noted earlier in this paper, headed by the President of the Commonwealth Conciliation and Arbitration Commission, each extending the range of inquiry into the academic grades until by 1973 they encompassed tutors to vice-chancellors.

A major decision as to the nature of academic work was made by the first of these judicial inquiries into professorial salaries by Eggleston J in 1964. This inquiry was important because, as Eggleston J observed, for the first time in its history Australia was trying to live mainly from its own intellectual resources, and work to standards set within its own boundaries.[30] He found that university governance and academic work were sui generis. Justice Eggleston could not discover any organisation where staff positions over the whole range, in functions and responsibilities, were sufficiently like university positions to really justify a reference to some appropriate scale of salaries established in an industrial, commercial or bureaucratic organisation served by a developed mechanism for salary adjustments.

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28 Aust, Australian Universities Commission, *Second Report* (1963) p104 The proportioning of salaries for academic grades was unique in that the salaries of the lower academic grades, such as lecturer, were fractions of the salary of a professor which formed the base. This was the reverse of the form in industry, commerce or bureaucracy in which the lowest grade was the base, and increases (margins for skill) were due to higher qualifications for different levels and increases due to status within organisational hierarchy.

29 Gorton, *Letter to Professor Madgewick, Chairman, Australian Vice-Chancellors' Committee - Re: Inquiry to be conducted by Mr Justice Eggleston* (18 May 1964) p1. This was found in the archives of the AVCC.

30 Eggleston, *Report of the Inquiry into Academic Salaries* pp13, 16, 27-28.

There was no industrial, bureaucratic or commercial position directly comparable to that of a university professor. A decision had to involve a social judgement as well as the status of academics. The findings of ggleston J accord organisationally with the conceptual writers on the ature of universities. As well as recommending an increase in rofessorial salaries, Eggleston J recommended triennial reviews of academic salaries.[31]

In the 1970 Inquiry, which included lecturers, Eggleston J revised his opinion about the non-adversarial governance of universities. He found a want of adversaries in the submissions to his inquiry and he noted that submissions from FAUSA, universities and the Australian Vice-Chancellor Committee (AVCC) all supported each other.[32] The adversaries were to be governments, State and Federal. The Inquiry into Academic Salaries of 1973 by Campbell J confirmed the opinions of the Eggleston Inquiry of 1964 as to the nature of universities and academic work: that they were sui generis.[33] It was this Inquiry which recommended the establishment of the AST and extended the range to include tutors and very senior academic staff such as vice-chancellors, senior academic administrators, librarians and the like.[34]

FAUSA'S POSITION ON FEDERAL REGISTRATION IN THE MID-1970S

The AST, once established as a sub-tribunal of the Remunerations Tribunal in 1974, was limited in its scope. It could not address particular questions in the salary area in isolation: it could only act in the context of a general review. In addition, the AST could only determine academic salaries in the Australian Capital Territory and Northern Territory, and only recommend on salaries for academics in the States. It could make no recommendations or determinations on the conditions of academic work.[35]

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31 The 1967 academic salaries decision excluded the AVCC and was directly negotiated between the Minister-in-Charge, Commonwealth Activities in Education and Research and FAUSA. This was the first time the Minister became directly involved in negotiations for academic salaries rather than the co-ordinating body, the AUC. The basis on which the 1967 decision on academic salaries was made is unknown and was not available for the 1970 Inquiry.

32 Eggleston, *Inquiry into Academic Salaries* p18.

33 Aust, Inquiry into Academic Salaries, *Report* (1973) p7.

34 At pp82, 85.

35 *Remuneration Tribunals Act* 1974 (Cth) ss12C, 12D. This was amply demonstrated by the review of study leave from 1976-1978 which removed

By the late 1970s to early 1980s, FAUSA found the AST too slow because it could not be activated by associations of academic staff nor universities, but was self-activating. FAUSA wanted, as well, to stop the necessity of staff associations having to take matters to States' Industrial Tribunals due to these limitations. It also wanted to prevent other professional associations, registered with the Conciliation and Arbitration Commission, from registering academics in professional faculties and thus undermining its own position as the peak industrial body for academics.[36]

The events which eventually forced FAUSA to seek federal registration as a unitary body came the year after the establishment of the AST. In the period from 1975 to 1977, professional associations were seeking a federal award which could cover sections of general staff in universities rather than the academics but with categories which could include academics in various professional faculties and schools. To offset the threat of losing coverage for some of its academic professional members, FAUSA argued that university academics could not be defined as 'industrial' workers in accordance with the *State School Teachers' Case* of 1929.[37]

ATTEMPTS TO REGISTER UNIVERSITY GENERAL STAFF IN A FEDERAL ASSOCIATION - THE GAUDRON DECISION

According to accounts by Wallis,[38] the General Secretary of FAUSA, and Conolly,[39] former Executive Director of the AUIA in 1979, the Health and Research Employees Association (H&REA) had joined with the

study leave as an entitlement of academics and replaced it with the Outside Studies Program, a scheme of rationed and competitive study leave.

36 Wallis, "Mechanisms for the Determination of Salary and Conditions of Academic Staff" p2; Wallis, Appendix A to "Mechanisms for the Determination of Salary and Conditions of Academic Staff" p8.

37 At pp4-5. See Wallis, "Mechanisms for the Determination of Salary and Conditions of Academic Staff" p2. In 1975, FAUSA objected to an application for federal registration by the Federation of Professional Officers Association (State Public Services and Instrumentalities). The Health and Research Employees Association (H&REA) had also shown an interest in many areas of non-academic staff coverage. In 1976-77, FAUSA objected to the registration of the Association of Computer Professionals, the University Library Officers Association, and the Association of Architects, Engineers, Surveyors and Draughtsmen, on the same grounds as its objection to the registration of general staff by the other unions.

38 Wallis, Appendix A to "Mechanisms for the Determination of Salary and Conditions of Academic Staff" p5.

39 Conolly, "Industrial Relations and the Universities"p 1.

Association of Architects, Engineers, Surveyors and Draughtsmen of Australia, the State Public Services Federation, the Federated Clerks Union of Australia and the University Library Officers Association in dispute with the universities in regard to coverage of university general staff. The matter was moving ahead towards resolution in a Federal award when the Queensland Government challenged the Commonwealth Conciliation and Arbitration Commission's power and jurisdiction to determine the matter on the grounds that universities and their employees were not engaged in an industry within the meaning of s51(xxxv) of the Constitution.[40]

The representatives of the universities' general staff met the Queensland Government's challenge on the 'industry' question by bringing evidence to illustrate that at least some of the functions of universities were closely allied with industry and in some cases universities were in a symbiotic role with the banks and credit unions in *R v Marshall: Ex parte Federated Clerks Union of Australia*, known as *The Credit Union Case*,[41] and in *R v Cohen: Ex Parte Motor Accidents Board*, known as *The Motor Accidents Insurance Board Case*.[42] The arguments of the general staff representatives were to be important for FAUSA when it proceeded to present its case for Federal registration for academic staff.

The decision of Gaudron J, 29 May 1980, in the Commission, on the jurisdictional submission of the Queensland Government, found that some categories of university general staff could not be covered by a Federal Award. She found it as "relevant to make the distinction that the work is only minimally or slightly industrial as to observe that someone is a little bit pregnant".[43] The finding of Gaudron J was in agreement with the definition of 'industry' as given in the decision of the High Court in the *State School Teachers Case* of 1929.[44] The submission of the universities was found to ignore the primary purpose of universities, namely the furtherance of knowledge by teaching and research. This purpose made universities neither industrial in character nor so inextricably intertwined with industry as to make them industrial.[45]

40 At p1. *The Gaudron Decision* (1980) 239 CAR 90.
41 (1975) 132 CLR 595.
42 (1979) 141 CLR 577. Conolly, "The AVCC, The Universities and Industrial Relations" p3.
43 *The Gaudron Decision* (1980) 239 CAR 90 at 93.
44 (1929) 41 CLR 569.
45 (1980) 239 CAR 90 at 91-92.

Justice Gaudron opined that the points of contact between universities and industry generally were not essential for industry any more than they were essential for universities.[46] Points of contact between universities and industry were not essential for universities to be universities. Universities were to be encouraged because they might make knowledge and research relevant to life as it was at that time organised in Australian society.

The relevance of the universities' quest, therefore, could not invest the activities of universities with the necessary industrial character so as to render all non-academic employees persons capable of being involved in an industrial dispute within the meaning of the *Conciliation and Arbitration Act* 1904 (Cth).[47] The matter appeared settled. Justice Gaudron's decision accorded with that of Eggleston J in 1964 and was in general agreement with the concepts of the university as expressed by the most significant writers, discussed earlier in this paper. This, however, was not the end of the issue.

FAUSA SEEKS FEDERAL REGISTRATION

The experience of other unions interested in extending their coverage to university general and academic staff, coupled with the experience with the New South Wales Teachers' Federation in the proceedings and negotiations leading to the registration of the Union of Academic Staff Associations (UASA) NSW, caused the FAUSA Executive to re-evaluate the option of federal registration in 1978, only a year after FAUSA had declared its support for the 1929 decision of the High Court in relation to academics.[48]

The decision to seek federal industrial coverage for academics meant reversing FAUSA's previous stand that the work of academics in universities was not 'industrial' according to the statutory definition of the term. Even though it had to reverse its previous stand, FAUSA opposed any suggestion that universities were in any way analogous to government departments or even government statutory authorities. It did not support the concept of compulsory unionism.[49] FAUSA's stance was that it firmly opposed any moves to reduce the independence of the universities, except

46 At 92.

47 As above.

48 Wallis, Appendix A to "Mechanisms for the Determination of Salary and Conditions of Academic Staff" p5.

49 Wallis, "Mechanisms for the Determination of Salary and Conditions of Academic Staff" pp5-6.

in so far as outside determination of staff salaries and conditions was concerned.[50]

FAUSA wanted codification of the traditional conditions of academic work. Equally as much as salaries, conditions of service particularly needed protection in times of tight funding restraints on universities.[51] The 1976-1978 review on study leave and the consequent rationalisation of study leave as the Outside Studies Program had made this very clear to FAUSA.

If FAUSA registered as a federal industrial organisation, it would have the recommendations of the AST incorporated in an award, which would then bind the universities as employers. If challenged, traditional conditions of service, which could not be dealt with by the AST, could be dealt with by the Conciliation and Arbitration Commission.[52] There was no way in which FAUSA could have foreseen the very contradictory outcome that federal registration was going to have on conditions for academic practice.

In order for FAUSA to achieve federal registration as an organisation of employees for academic staff in universities, the question which had to be answered was similar to that posed by Eggleston J. Could academics be considered as engaged in an industry within the meaning of the Constitution of Australia and within the regulations of the *Conciliation and Arbitration Act* 1904 (Cth)? This question was posing deeper questions. Was there any possibility of comparability between universities and academic work, which had been found sui generis by Eggleston J, and work and organisation of a commercial, bureaucratic and industrial nature? Justice Eggleston had answered this question in the negative and based his decisions accordingly; so had Gaudron J.

There was a further question which needed to be answered: would not a conciliation and arbitration system of industrial relations, whose parameters were based on a concept of the rationality of work and organisation within the constraints of known principles, compel universities and academics to conform to that system's assumptions of work and organisation? This question was to be answered with the Dawkins 'Restructure' and its outcomes.

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50 At p5.

51 At p2. Wallis, Appendix A to "Mechanisms for the Determination of Salary and Conditions of Academic Staff" p8.

52 At p8. Wallis, "Mechanisms for the Determination of Salary and Conditions of Academic Staff" p2.

In its submission as a unitary body, the Association of Australian Academic Staff (AAAS), before the Industrial Registrar of the Conciliation and Arbitration Commission.[53] In its submission FAUSA reasserted the arguments of the general staff associations of the ancillary nature of universities to industry, arguing that academic staff were ancillary to or connected with industry. This had been the test with regard to the registration of white collar occupations since *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Association of Professional Engineers* (1959).[54]

In emphasising the aspects of the service universities provide to their host communities, FAUSA was, of necessity, limiting the concept of universities to the teaching and consultation of the professional faculties and the teaching and consultation of the applied outcomes of its pure disciplines. This narrowing of the boundaries of academic work would have the effect of veiling to some degree the basic research of science and humanities faculties and the teaching of these subjects within these faculties. In fact, FAUSA tailored the notion of sui generis to fit the statutory requirements as judicially interpreted since the *Professional Engineers Case.*

The majority of objections against FAUSA's submission to register the AAAS were settled by demarcation agreements between the parties by August 1980 two and a half years later.[55] The Universities of Sydney and Melbourne[56] and the University of Western Australia Staff Association[57] objected on the grounds that members of FAUSA were not employed in, or in connection with, any industry or calling within the meaning of the Act, so that it could not be said that they were engaged in an industrial pursuit or pursuits.

The University of Sydney and the University of Melbourne argued the AVCC point of view that the autonomy of universities implied that academic staff matters should not become formalised employer/employee relationships under non-university arbitration.[58] The University of

53 At p2. Conolly, "The Industrial Relations Agenda for Higher Education" p3.
54 Marshall, *Decision* at 5.
55 At 1. Wallis, Appendix A to "Mechanisms for the Determination of Salary and Conditions of Academic Staff" p9; Conolly, "Industrial Relations and the Universities" p5.
56 At p5.
57 Wallis, Appendix A to "Mechanisms for the Determination of Salary and Conditions of Academic Staff" p9.
58 As above.

Western Australia Staff Association formally questioned centralisation by a registered unitary body on the basis that universities were self-managing and self-determining autonomous enterprises.[59] Thus, its arguments supported those of the Universities of Sydney and Melbourne. The University of Western Australia Staff Association's position correlates with the opinion of Eggleston J in 1964.

FAUSA retaliated by making a submission designed to reinforce the contention that the activities of universities were essential to the efficient conduct of a wide cross-section of Australian industries. It was also designed to show that the link between the universities and industry was stronger than that found to exist between credit unions and industry.[60] The precedents used by FAUSA in its case before the Industrial Registrar were the judgements in the *Jumbunna Case* (1908), the *Credit Union Case* (1975) and the *Motor Accidents Insurance Board Case* (1979).[61] FAUSA also argued its case on the nexus of teaching to research. It argued that the teaching performed in universities was a different type of teaching to that carried out by state school teachers because it was linked directly to the nature of research undertaken. It was not a simple impartation of what was already known.[62]

According to Rothnie, academics had an ambiguous occupation if defined in industrial terms.[63] The teaching role of academics made them industrially akin to school teachers while their research role made them industrially akin to professional engineers. For salaries the benchmark had been confirmed in 1964 as the salary of a research scientist with the CSIRO, as noted earlier in this paper. This is an illustration of how an industrial relations system defined by the parameters of the organisation for primary and secondary industry has difficulty dealing with an enterprise that is holistic in governance and operation. The Industrial Registrar, on hearing FAUSA's claim, deferred proceedings until Gaudron J handed down her decision on the Queensland Government's objections to the registration of university general staff.[64]

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59 As above.

60 Marshall, *Decision* at 9.

61 At 9.

62 At 9.

63 Rothnie, "Restoring the Frontiers of an Unruly Province: Intergovernmental Immunities and Industrial Disputes" (1985) 11 *Monash UL Rev* 120 at 166.

64 Conolly, "Industrial Relations and the Universities" p5.

Once the decision of Gaudron J was given, the Industrial Registrar of the Conciliation and Arbitration Commission gave his decision on the registration of the (now renamed) Association of Australian University Staff (AAUS) on 31 March 1981.[65] He noted the arguments put forward by FAUSA, but then proceeded to follow the arguments of Gaudron J which supported the interpretation of a university as occupied with more than the immediate material production within society and the concerns arising from this production.[66] On these grounds FAUSA was refused registration with the Conciliation and Arbitration Commission.[67]

DARVALL'S CASE 1982[68]

FAUSA did not accept the opinion of the Industrial Registrar. It obtained a favourable legal opinion as to the viability of financing an appeal in the High Court.[69] *Darvall's Case* was heard before the full bench of the High Court on 18 February 1982.[70]

The full bench of the High Court which heard FAUSA's appeal consisted of Gibbs CJ with Mason, Murphy, Aicken and Brennan JJ. In giving judgment on the matter the Full Bench considered two matters: the purposes and effects of universities and the correctness of the views of Griffith CJ and O'Connor J in the *Jumbunna Case*.[71]

Chief Justice Gibbs and Brennan J found that the functions of universities, although essential to society, were not ancillary or incidental to industry except in a remote and indirect way.[72] Chief Justice Gibbs found it impossible to hold that staff of universities were employed in or in connection with industry or engaged in industrial pursuits.[73] Justice Mason, likewise, found that the role of the modern university was so important and so autonomous in its own right, and so multifaceted, that it was impossible to classify its activities as incidental or ancillary to

65 Marshall, *Decision* at 6.

66 At 4-5.

67 At 11-12.

68 *R v McMahon; Ex Parte Darvall* (1982) 151 CLR 57.

69 Conolly, "The Industrial Relations Agenda for Higher Education" p2.

70 See FAUSA, *High Court Hearing of Our Federal Registration Application* (Memorandum to Executive, Industrial Matters Committee/Staff Association Secretaries, Melbourne 11 March 1982) p2.

71 (1982) 151 CLR 57 at 59-75. Justice Aicken died before the decision was handed down.

72 At 63, 74.

73 At 63.

industry.[74] These judges argued that FAUSA should have presented a case to demonstrate the correctness of the interpretation of the term 'industry' as had been presented by Griffith CJ and O'Connor J in the *Jumbunna Case*, as opposed to the decision of the High Court in 1929 which subsequently narrowed the interpretation of the term 'industry'. If the 1908 interpretation was correct then a different decision would have had to be made.

Justice Murphy agreed with the opinions of Gibbs CJ, Mason and Brennan JJ that the argument should have been that the views of Chief Justice Griffith and Justice O'Connor in the *Jumbunna Case* were correct. However, Murphy J went further: he asserted that the nature of what constituted an 'industrial dispute' had been misinterpreted and that the opinion of Griffith CJ and O'Connor J in the *Jumbunna Case* was correct.[75]

Unlike the other judges, but like his predecessor Isaacs J, Murphy J found that university employees, academic and others, were undoubtedly in a calling, service, employment or vocation of employees within the statutory definition of 'industry'. However, FAUSA had not presented an argument on the basis of the claim that the *State School Teachers' Case* and *Pitfield v Franki (Firemens' Case)*[76] were wrong.[77] FAUSA claimed only that universities were incidental or ancillary to industry, therefore the Industrial Registrar should not be directed to re-determine the application for registration on what was an incorrect basis.[78] The judicial interpretation of what constituted the nature of a university remained consonant with the classic perceptions of a university. The case at issue was one of judicial interpretation of the statutory definition of industry, not the nature of universities.

THE INTERVENTION OF THE COMMONWEALTH SOLICITOR-GENERAL IN THE *AUSTRALIAN SOCIAL WELFARE UNION CASE*[79]

As FAUSA's case had been rejected as a result of the argument presented rather than a rejection of the matter itself, FAUSA sought leave to

74 At 67.
75 At 71-72, 74.
76 (1970) 123 CLR 448 at 458, 467, 472-473.
77 *R v McMahon; Ex Parte Darvall* (1982) 151 CLR 57 at 73-74.
78 At 74.
79 *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297.

represent its main case. A hearing was set down for May 1983 to argue the proper interpretation of the term 'industrial' in the *Conciliation and Arbitration Act* 1904 (Cth).[80] Before FAUSA could re-apply to the High Court to present a case based on the interpretation of the term 'industrial' the ASWU presented its case in March 1983 along the same lines as FAUSA had intended to use.[81]

The decision in the *Australian Social Welfare Union Case* was finally handed down in June 1983. In that case, the Court returned to the wide interpretation of the word 'industrial' as given in the *Jumbunna Case*.[82] *Darvall's Case* had aided the reinforcement of the growing discontent and frustration of the High Court with the narrow test of the term 'industry'.[83] In *Darvall's Case*, the Commonwealth Solicitor-General "intervened to urge" that the High Court find the opinions of O'Connor CJ and Griffith J on the meaning of the term 'industry' were correct. The Solicitor-General argued that the Court adopt the broad interpretation of the term 'industrial' in the earlier case and that the reasoning in the later cases should no longer be applied.[84]

The Commonwealth Solicitor-General submitted that within s51(xxxv) of the Constitution the test for whether a dispute is industrial is: what precisely is the matter disputed? It is not the position in the industrial spectrum occupied by the disputants. If the claim is about the terms of engagement, the conditions of work or circumstances of the relationship between those engaged and their engagers, the dispute is industrial, whatever type of work done or whatever the engager's business or industry. The definition of industry was based on the criterion that an industry existed where there was an employee/employer relationship irrespective of the nature of the occupation or production.

The intervention of the Commonwealth Solicitor-General in the *Australian Social Welfare Union Case* appears little known. In published sources,

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80 FAUSA, *High Court Decision - Registration* (Information paper to Staff Association Secretaries and Executive Industrial Matters Committee, Melbourne, 13 October 1982) p1; Conolly, "Australian Industrial Relations Scene and the Universities" pp2-4.

81 At p3. *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297 at 297.

82 At 313-316.

83 At 299.

84 At 299-300. Conolly, "The AVCC, The Universities and Industrial Relations" p3; Anonymous, "Review of 'Industrial Dispute' Power" (1983) April *The Legal Reporter* 6; "Federal Jurisdiction 'Industrial Dispute'" (1983) 25 AILR 284.

other than those cited above which refer to this decision,[85] there is no mention that it was with this intervention that the High Court changed its decision as to the interpretation of the term 'industry'. The intervention by the Commonwealth Solicitor-General in the *Australian Social Welfare Union Case* enabled FAUSA to proceed with registration as a unitary body before the Conciliation and Arbitration Commission. FAUSA, as the AAUS, was formally registered as a federal organisation of employees with the Conciliation and Arbitration Commission on 18 November 1986.[86]

THE ACADEMIC INDUSTRY DEFINED

The industry registered under the Conciliation and Arbitration Act was defined as the employment of persons in, or in connection with, universities in the Australian Capital Territory, the Northern Territory and the States of New South Wales, Victoria, Tasmania, Western Australia, South Australia and Queensland in any one or more of the stated classifications or in any class of work which forms a substantial part of the duties of such classifications.[87]

85 Gleeson, "The Teachers' Industrial Revolution" (1984) 18 *Education News* 24; Muffet, "The Making of Academic Unions in Australia" (1986) 8 *Journal of Tertiary Educational Administration* 114; O'Brien, "Universities, Technology and Academic Work: A Reconsideration of the Murray Committee on Australian Universities (1957) in the Light of Dawkins (1987-1988)" (1990) 12 *Journal of Tertiary Educational Administration* 255; Rothnie, "Restoring the Frontiers of an Unruly Province: Intergovernmental Immunities and Industrial Disputes" (1985) 11 *Monash UL Rev* 120.

86 McMahon, *Decision In the Matter of an Application for the Registration of the Australian Association of University Staff as an Organisation of Employees - Conciliation and Arbitration Act (1904)* Melbourne (1986) at 1; the decision is reported in summary form at (1986) 28 AILR ¶502 (34). The document used here was found in the archives of FAUSA. FAUSA, *Federal Registration* (Memorandum, Melbourne, 7 July 1983) p1. There were technicalities of procedure which had required a new association to be established. As the Association of Australian University Staff (AAUS) had been rejected for registration in *Darvall's Case* (1982) 151 CLR 57, it could only be revived at considerable expense to FAUSA. The advice of the Industrial Registrar to FAUSA was that a new body should be constituted as the reworded "Australian Association of University Staff", which kept the acronym. In 1988, the AAUS' title was changed to the Federated Australian University Staff Association so that the familiar acronym, FAUSA, could be maintained. There were then two parallel organisations, FAUSA (unincorporated) and FAUSA (registered) which did not amalgamate.

87 McMahon, *Decision In the Matter of an Application for the Registration of the Australian Association of University Staff as an Organisation of Employees -*

The classifications of employees were delineated as the grades of professors down to tutors, demonstrators and instructors; professorial fellows down to the grades of junior research fellows.[88] The classifications of employees now included senior research assistants and junior research assistants in specified States; deans, chairs and heads of departments; librarians in specified grades at specified universities; vice-chancellors, deputy vice-chancellors, and pro-vice-chancellors; registrars, bursars, university secretaries, business managers, comptrollers along with specified grades of senior administrative staff at specified universities. The word 'down' where used for the gap of qualification and experience as between professors, tutors, demonstrators and instructors connotes a vertical bureaucratic hierarchy not the traditional horizontal guild hierarchy of scholarship.

As well as these classifications, there were the directors and deputy directors of institutes, specialist centres and units, including, at specified universities, physicians, senior student counsellors and university archivists; wardens and heads of university halls, residences and colleges; university architects and university engineers at specified universities.[89]

There also was a range of other particular occupations at specified universities, such as language teachers, education officers, and the curator of an Anthropology Museum.[90] Employees expressly debarred from eligibility of membership were those performing clerical duties, including accounts and secretarial workers. The range of university occupations registered was far greater than the academic staff covered by Campbell J in 1973.

The traditional roles, duties, responsibilities and activities of the various academic and university positions were not defined under industrial law, but assumed to be defined in the statement of those positions. The statement of the positions and occupations as the definition for an industry does not actually guarantee the autonomy of the academic or the university, which had been found by Eggleston J in 1964. The academic grades were upheld under the Structural Efficiency Principle of the August 1989 *National Wage Case*[91] Decision (SEP Agreement) as agreed between

Conciliation and Arbitration Act 1904 (Cth) Melbourne (1986) at 1. The copy used was found in the archives of FAUSA.

88 As above.

89 At 2.

90 At 2-4.

91 (1989) 31 AILR ¶286.

the Australian Higher Education Industrial Association (AHEIA), the Australian Teachers Union (ATU), FAUSA and the Union of Australian College Academics (UACA) in 1991.[92]

The academic grades B through to E remain based on responsibility and experience and not on a different qualification for each grade. Academic grade A, associate lecturer, replaced tutor and senior tutor. The difference made by the SEP Agreement was that Academic A was now a career grade, Associate Lecturer, whereas tutor had been an apprenticeship for an academic career.

The interconnection between research, teaching, administration, consultation, and academic practice is not given any precise definition in industrial law. As defined, these positions give no specific indication of the self-managing structure of academic practice or show how these positions form the whole university. As these positions are listed they could easily belong to a rational bureaucratic organisation of work, rather than one that is sui generis but their range is in accord with the concept of the university.

The industry for which the Australian Universities Industrial Association (AUIA) became the registered employer body was defined as the industry of the provision within Australia of university facilities for study, education, research, instruction, teaching, training and for the advancement of knowledge.[93] The definition of the university mirrors the

92 *Agreement Between the Australian Higher Educational Industrial Association (AHEIA) and the Australian Teachers Union (ATU), the Federated Australian University Staff Association (FAUSA) and the Union of Australian College Academics (UACA) as to Academic Award Restructuring Pursuant to the Structural Efficiency Principle of August 1989 National Wage Case Decision - Final Phase* (Melbourne 30 January 1991) at 10-16. This agreement was never registered with the Industrial Relations Commission. The copy used was obtained from the office of the National Tertiary Education Union (NTEU) in Sydney. A very good and detailed exposition can be found in McCulloch, "Academic Restructuring: A Preliminary Overview" (1991) 17 *Unicorn* 92 at 96. This agreement brought university and CAE academic positions and salaries into line for the first time.

93 *Rules of the Australian Universities Industrial Association* Incorporating Amendment to Rule 23(4) approved by the Industrial Registrar on 20 January 1987 and Amendment to Rules 8, 12, 17, 19, 32 and 35 and new Rules 23(6) and 35(2) approved by the Industrial Registrar on 20 January (1988). *Conciliation and Arbitration Act* 1904 (Cth) s2. Obtained from the archives of the AVCC. On 11 April 1985, the AUIA was registered with the Industrial Registrar, prior to the registration of FAUSA. The AUIA, now the Australian Higher Education

definition of industry as in the case of academic staff. It defines the university only by the material facilities necessitated by the research and teaching roles of academics. That these are the outcome of the activity of scholarship, of the sui generis nature of academic practice is not regarded.

The term 'university facilities' glosses over the community service role of academics through consultation and the self-direction and self-management of academics as a university. The disregard of the latter means that the distinctive feature of the university, as a body of academics self-governing in their disciplines and then unified by self-government as the university, is not actually defined in industrial law. University and academic autonomy and practice are assumed, not protected, by industrial law.

There is also a contradiction in the definitions of the industry of higher education as manifest in the university. Neither industrial definition comes to grips with the fact that because of the collegiate nature of the university, academic staff are both employees and managers, as had been the basis of objection of the Academic Staff Association of the University of Western Australia. Many staff take part in deciding whom to employ, how to allocate duties and whom to promote, a fact that does not sit easily with divisions of work and management in rational organisation.

According to Professor Scott, a former Chairman of the AVCC, though the Federal Government funds the universities for salaries, it refused to take the role of national employer of academic staff before the Commission.[94] The Government argued that, as the vice-chancellors are the legal employers of academic staff at universities under States' enabling Acts, the AUIA had to accept the adversary role of employer in the Commission. This was a reversal of the opinion of Eggleston J in 1970 as to adversaries in universities' industrial issues.

Vice-chancellors and other senior academic staff and university staff are employees according to the definition of the university given by the Conciliation and Arbitration Commission as an industry delineated by its employees in a particular class of work. Yet at the same time the vice-chancellors in particular represent the industry, the employing provision of university facilities according to the registration of the AUIA. This

Industrial Association (AHEIA), is separate from the AVCC, which the AVCC's constitution demands, even though the vice-chancellors are its members.

94 Scott, "The Force of Destiny: Industrial Relations in Australian Universities" (1986) 29 *Australian Universities' Review* 29 at 31.

ambivalence indicates the difficulty of defining a university according to normal industrial standards. This complexity supports the 1964 and 1973 opinions of Eggleston and Campbell JJ and the objections to registration of the Universities of Sydney and Melbourne, respectively. It also demonstrates how difficult it was for universities and academic staffs to fit assumptions of industrial organisation governance and process.

THE DAWKINS RESTRUCTURE - UNIVERSITIES AS ADJUNCT TO INDUSTRY

While FAUSA was obtaining industrial registration with the Conciliation and Arbitration Commission, corporatist policies were taking shape in the national arena which were to involve universities and academics. The intervention of the Commonwealth Solicitor-General in the *Australian Social Welfare Union Case,* urging a return to the opinion of O'Connor and Griffith JJ in the *Jumbunna Case*, came in April 1983 just after a corporatist Labor Government had been elected in March.[95] The coincidence of timing of these two events combined with the subsequent ability of academics to register with the Conciliation and Arbitration Commission was to prove extremely opportune for the new Government to implement its corporatist policies in regard to higher education.

The trend was indicated in 1984, when the Labor Government stressed the role of higher education in the Commonwealth Tertiary Education Commission (CTEC) Report for the 1985-87 triennium as fostering growth in science, technology and management based courses.[96] The emphasis on these fields gives a very specific policy direction as to the nature and purpose of universities, thus focusing on the narrower purposes of professional education and highlighting those aspects of a university education found useful to commercial and industrial production.

Continuing this trend, in 1987 and 1988, through the federal industrial relations policies of both the Government and the ACTU, through policy papers and through a new Act of Federal Parliament to redefine the nature, functions and purpose of higher education, the universities were soon to be restructured in a way that could not have been foreseen by FAUSA as a possible outcome of Federal industrial registration. It was a restructure

95 Anonymous, "Review of 'Industrial Dispute' Power" (April 1983) *The Legal Reporter* 6; Ewer & Higgins, "Industry Policy Under the Accord: Reform Versus Traditionalism in Economic Management" (1986) 21 *Politics* 28.

96 Aust, Commonwealth Tertiary Education Commission, *Report for the 1985-1987 Triennium: Recommendations and Guidelines* (1984) p13.

which was to ignore the already substantial and consistent body of judicial interpretation of the nature and purposes of universities and was to force universities and academic staffs to fit with industrial and commercial notions of work and organisation.

The change was to come after the Commonwealth Department of Trade published *Australia Reconstructed,*[97] a report of the mission undertaken by the Trade Development Council, the Department of Foreign Affairs and the Australian Council of Trade Unions (ACTU) to middle-ranking corporatist economies in Europe such as Norway and Sweden in June 1987. The report recommended that Australia should develop a central, national, economic and social objective which was negotiated, set and given substantial support by government, unions, business and community groups.[98] Among the recommendations to implement this central objective, it advised a National Development Fund be set up which, among other items, would incorporate a research package. The research would not only be the responsibility of unions themselves, or of union-based research institutes, but would also involve greater demands on university research. The perceived need was to develop in Australia a "Production Consciousness" and culture both in industry and the community.[99] The Report stated that to help achieve this there should be formal trade union inputs to courses at universities, Colleges of Advanced Education (CAEs) and Colleges of Technical and Further Education (TAFEs).

The instrument to achieve this was the two tier wage system of Accord Mark III which had been instituted with the *National Wage Case* of March 1987 in the Commonwealth Conciliation and Arbitration Commission. The second tier demanded a productivity increase from workers in return for a wages increase to be paid as a superannuation benefit. The significant part of the second tier was that the productivity increases had to be negotiated between employers and employees. According to Burgess, the recommendations of *Australia Reconstructed* in 1987 became, in effect, the basis for the restructuring of every aspect of Australian industrial and social life.[100] They were to have a particular bearing on the restructuring of academic employment. The advised solutions of *Australia Reconstructed*, as they affected universities, were to be incorporated in

97 Aust, Department of Trade, *Australia Reconstructed* (Report of the ACTU/TDC Mission to Western Europe, 1987) pv.

98 At pp185, 196.

99 At pp201-203.

100 Burgess, "Wages and Industrial Relations" (1987) 22 *Economics* 3.

Government policy for universities after the July 1987 Federal election as a part of the restructuring of higher education.

THE FORMATION OF THE DEPARTMENT OF EMPLOYMENT, EDUCATION AND TRAINING AND THE DAWKINS RESTRUCTURE

The 1987 Federal election created a watershed when the Labor Government was returned to power and the Honourable John Dawkins, the previous Minister for Trade, became Minister for Employment, Education and Training.[101] The first step of the new Minister, in bringing universities within the ambit of the above aims, was to create a new Government Department, the Department of Employment, Education and Training (DEET), from the previous Department of Education with elements of the former Departments of Employment and Industrial Relations and Science. The super-department brought together an array of advisory structures, bodies and program administration arrangements.[102] The Minister now had responsibility for a range of education, training and employment programmes including CTEC. The primary allegiance of the Department was to the Minister.[103] It was not a buffer between universities and the Minister like CTEC had been, but the means by which the Minister could intervene directly into the affairs of universities.

In December, 1987, immediately after the establishment of DEET, Dawkins issued the Green Paper on Higher Education which proposed to change the direction, purposes and functioning of universities in Australia.[104] The proposed changes reflected the recommendations of *Australia Reconstructed.* All the institutions of society were to concentrate on increased material production in order to compete in the global economy.

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101 Aust, Department of Trade, *Australia Reconstructed* (Report of the ACTU/TDC Mission to Western Europe, 1987) piii; Dawkins, *Consultations on Employment, Education and Training Advisory Structures* (Media Release, Canberra, 15 October 1987) p1. As Minister of Trade in 1986-87, Dawkins had restructured the Department of Trade.

102 Dawkins, *Consultations on Employment, Education and Training Advisory Structures* (Media Release, Canberra, 15 October 1987) p1; Dawkins, *Advisory Structures and Administration of the Department of Employment, Education and Training: Background and Proposal* (Media Release, Canberra, 15 October 1987) p1.

103 AVCC, *New Higher Education Advisory Arrangements* (Media Release, Canberra, 15 October 1987) p1. Obtained from the archives of the AVCC.

104 Dawkins, *Higher Education: A Policy Discussion Paper* (AGPS, Canberra December 1987) pp1-2, 8.

In the Green Paper, the Minister made it clear that the Government wanted academic salaries and conditions of employment to be embodied in a federal award. The Minister expressed the Government's wishes for the new academic staffing system, in broad terms, as: ensuring salaries and employment conditions did not restrict the movement of academic staff in response to changes in priorities and areas of demand; allowing a significant degree of flexibility in the use of academic staff resources across the higher education sector, while protecting the employment rights of individuals, and providing an environment in which individual excellence in teaching and research can be recognised and rewarded, while inadequate performance is not protected.[105] The Government, therefore, "intends to pursue a federal award for academic staff" to achieve these outcomes.[106]

The Minister declared in the Green Paper that the tying of salaries to flexible staffing conditions of employment for academics would be made possible through the channel offered by the second-tier wage and salary increases of the National Wage Agreement of March 1987. The Green Paper specifically stated that "future negotiations [of the Conciliation and Arbitration Commission] must accommodate the new setting for higher education".[107] The Federal registration of FAUSA provided the tool for the Minister to restructure universities and academic work in a manner not experienced under any previous Government.

With less than two months for community discussion, the recommendations of the Green Paper became law in the *Employment, Education and Training Act* (Cth), passed in January 1988 and assented to in June 1988.[108] This Act formulated the amalgamation of universities and CAEs into a Unified National System of Higher Education (UNS) with its attendant Councils that was to be detailed in the White Paper on Higher Education later that year.[109] The Act gave a strong role to business and unions in determining policy for higher education,[110] making universities very much ancillary to industry and commerce. The Labor

105 At pp55-64.

106 At p56.

107 At p55; "Second Tier Settlement for Academic Staff in Higher Education Institutions" Appendix D to Dawkins, *Higher Education: A Policy Statement* (AGPS, Canberra, July 1988) pp133-137.

108 *Employment, Education and Training Act* 1988 (Cth) s2.

109 Section 3. Dawkins, *Higher Education: A Policy Statement* (AGPS, Canberra July 1988) p28.

110 *Employment, Education and Training Act* 1988 (Cth) s11.

Government appears to have taken no account of judicial decisions in taking this stance.

PRODUCTIVITY OF ACADEMICS DEFINED BY MATERIAL CONCEPTS OF INDUSTRY

For the implementation of the restructuring of universities, as decided by the full bench of the Conciliation and Arbitration Commission in the *National Wage Case* of 1987 in the Second Tier Settlement for Academic Staff, the Australian Universities Industrial Association (AUIA) and FAUSA agreed to certain measures.[111] These specified what had been broadly demanded by the Government in the Green Paper as measures to increase flexibility in academic staffing which would justify the granting of second tier wage increases by the Commission, even though "the Commonwealth does not have direct powers to implement detailed reform in this area".[112]

The resources were early retirement, redundancy and dismissal schemes, an appropriate number of term appointments, flexible hierarchies and a national higher education award as broadly demanded in the Green Paper. These were specifically sought by the Minister for inclusion in the meetings of FAUSA, AUIA representatives and other bodies.[113] According to the full bench of the Commission, the measures on which FAUSA and the AUIA had to agree were dispute procedures for the resolution of individual disputes; increased student loads for higher education staff; staff development programs; staff assessment procedures; procedures for dismissal or termination of employment; facilitation of staff mobility; voluntary early retirement; redeployment; retraining and voluntary retrenchment; continuing and non-continuing employment.[114]

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111 "Second Tier Settlement for Academic Staff in Higher Education Institutions" Appendix D to Dawkins, *Higher Education: A Policy Statement* pp133-137. This appears to be the only extant published copy of this agreement. The Industrial Relations Commission has no copy of agreements prior to 1993 or awards for academic staff prior to December 1988. The Commonwealth Arbitration Reports (CAR) are also incomplete for 1987-1989. A copy was not obtainable from the office of the National Tertiary Education Union (NTEU), Sydney.

112 Dawkins, *Higher Education: A Policy Discussion Paper* pp56-64.

113 The meetings were held on 24 & 26 May 1988 and 2, 3, & 7 June 1988: *Quickenden v Federated Australian University Staff Association* (1988) 25 IR 440 at 441-442 per French J; Dawkins, *Higher Education: A Policy Discussion Paper* pp56, 57-64.

114 "Second Tier Settlement for Academic Staff in Higher Education Institutions" Appendix D to Dawkins, *Higher Education: A Policy Statement* pp134-136.

These correlate very closely to the broad demands of the Minister for flexibility in the use of academic staff resources in the Green Paper and the specific principles sought for inclusion by the Minister at the meeting of 24 May 1988 with the AUIA, FAUSA and other bodies, as outlined previously.

Academic work and universities were to be brought into line with work and structures of commercial or bureaucratic organisations, even though this did not fit with the definition of universities and academics as an industry for federal registration, as given earlier. The definition for registration was based on the broad meaning of the word 'industry' as given in the *Australian Social Welfare Union Case*: that is, whether an employer/employee relationship existed, not whether certain organisational procedures existed. The measures demanded by the Government in the Second Tier Settlement for Academic Staff also imply that all callings, services, employment, handicrafts, or industrial occupations or vocations of employees are essentially the same in structure and in process by virtue of the fact that employees are in the position of receiving a wage or salary.

There is no indication in any of the Minister's statements, nor in the determination of the Second Tier Agreement, by any party to that agreement, of the awareness of the relational concept of the term 'industry' which had allowed FAUSA to register with the Commission. The argument here is that a relational definition of an industry requires a detailed examination of the processes of any productive enterprise, including universities, to understand what the complexity of relations is. It precludes simplistic categorisation according to managerial procedures. A relational concept of universities as industry should find them sui generis in accord with the opinion of Justice Eggleston who had conducted such an inquiry. In 1985, universities had not changed in form since that decision in 1964. In 1986, academics had not won the right to federal industrial legislation because universities were ancillary to the material production of society but because an employer/employee relationship existed. The determinations of the Arbitration and Conciliation Commission allowed the Government, under the Accord, to intervene directly in the working lives of academics in a manner that no previous government had been able to.

Most of the means for efficiency are procedures that allow for the removal of staff. The productivity measures of facilitation of staff mobility, voluntary early retirement, redeployment, retraining and voluntary

retrenchment, continuing and non-continuing employment were the productivity trade-offs required by the Minister in the Green Paper and sought for inclusion at the meeting on 24 May 1988. Staff assessment procedures are the only items that do not require a removal of staff. In the light of the manner in which academic work is carried out, redundancy can also result in the removal of certain disciplines and their knowledge from Australian higher education, and thus society, making a mockery of the term 'university' for an Institute of Higher Education.

It ignores the fact that the scholarship, knowledge and methods of research need not necessarily be transportable from one discipline to another, as the existence of the different disciplines and fields of study testify. Acceptance of all of these measures for the efficient productivity of higher education was necessary in order to gain an increase in academic salaries, as noted earlier. The full bench of the Commission itself disclaimed that all parties agreed that productivity was a very difficult matter to measure and determine in the higher education industry, which contained areas in which it was not possible to quantify the savings which any individual item of agreement might generate.[115]

FAUSA and the Federated Council of Academics representing academics in CAEs, vice-chancellors and principals had little choice but to accept the package.[116] The interests of universities and academics, as universities and academics, had been short-reined by the consensus (corporatist) process of industrial relations applied within a context of economic rationalism.[117] FAUSA's opposition in the late 1970s to universities being deemed analogous to government departments or government statutory bodies was no longer possible in the corporatist climate of the late 1980s.

Only after these two issues were made law, one in Commonwealth Parliament, one in the Commonwealth Arbitration and Conciliation Commission, did the Minister issue the White Paper on Higher Education which, in July 1988, formulated in detail the Unified National System

115 At p133.

116 FAUSA and the Federated Council of Academics defined universities and CAEs by the economic role of higher education as the provision of highly skilled labour power to industry, the public sector and the professions only. This made universities and CAEs appear very similar whereas the great difference was the concentration on research and scholarship in pure as well as applied disciplines and the inculcation of these to students, which characterised universities.

117 Smyth, "Theories of the State and Recent Policy Reforms in Australian Higher Education" (1991) 11 *Discourse* 48 at 56.

(UNS).[118] The UNS demanded the corporate managerialist purposes, structures and profiles of commercial organisation for universities. Managerial powers as distinct from their powers as *primus inter pares* were given to vice-chancellors as Chief Executive Officers of universities. The managerial role, imposed on the traditional collegiate role of the vice-chancellors, made them subordinate to the Minister through DEET.[119] There could be little discussion of the changes, as the recommendations had already been legislated; there could only be discussion on the details of how universities would comply with the demands of the White Paper.

THE UNS - SUI GENERIS VINDICATED

The UNS created new universities from the former CAEs through amalgamation with existing universities or by amalgamating several CAEs into one university. There have been problems with the amalgamations between universities and CAEs because of their different emphases towards academic work.[120] There were problems within CAEs themselves as they were transformed into a single multi-campus university, such as Charles Sturt University.[121] The press even reported that the amalgamations also proved to be costly, not cheaper,[122] evidencing what Blandy had assessed as "diseconomies" of scale.[123] DEET reported that, with the imposition of university status and inclusion into the full spectrum of academic practice, CAE academics were finding the demands

118 *Employment, Education and Training Act* 1988 (Cth) s25. Dawkins, *Higher Education: A Policy Statement* p107.

119 At pp29-30, 41-42, 102-104, 129-130. See also Smyth, "Theories of the State and Recent Policy Reforms in Australian Higher Education" (1991) 11 *Discourse* 48 at 56.

120 Aust, Department of Employment, Education and Training, *Study of the Labour Market for Academics* (Report prepared by Sloan, Baker, Blandy, Robertson, and Brummitt of the National Institute of Labour Studies, Flinders University, 1990) pp226-227. There was not necessarily a natural co-joining as, for example, in the cases of the University of New England and Northern Rivers CAE, which separated after bitter wrangling, Northern Rivers CAE now being Southern Cross University. Likewise the amalgamation of La Trobe University and the University College of Northern Victoria, Bendigo was not a willing one. DEET itself was forced to acknowledge that the Institute of Early Childhood Studies and Macquarie University in NSW had not been a happy amalgamation. Only the Swinbourne Institute of Technology resisted pressure to amalgamate with the result that it was granted university status in its own right in 1992.

121 As above, p207.

122 West, "The Amalgamating Years: Mergers a Case of More Pain than Gain" *The Australian*, 22 January 1992, p14.

123 Blandy, "A Green Paper Mark Sheet" (1988) 10 *Journal of Tertiary Educational Administration* 19.

of full university academic work and the obtaining of requisite qualifications for full status as university academics, that is, knowledge of research and scholarship, an immense strain on top of their teaching duties, which were heavier than those of university academics.[124]

Vice-chancellors, such as Professor Gilbert (University of Tasmania), Professor McNicol (The University of Sydney) and Professor Penington (The University of Melbourne), found that the tension created by the clash of values created by the attempt to apply rationalistic managerial modes of governance to universities posed a threat to the effective working of universities.[125] In 1988, French J declared that the restructuring of universities and the way they were to be funded and conducted was "notorious".[126] The reactions of vice-chancellors to these tensions and the experiences of academics and universities with amalgamation subsequently validated his observation. These problems again demonstrate the validity of the conclusions of Justice Eggleston's Inquiry in 1964 and the subsequent general agreement of judicial opinion as to the nature of universities.

An attempt to narrow the advancement of knowledge to those areas specified as economically desirable by the Green Paper[127] and recommended by *Australia Reconstructed*[128] was quietly legislated in the *Higher Education Funding Act* (Cth) 1992. Section 61 of that Act specifies that the work of universities and the scholarship of academics must "enhance the contribution of Australia's research capabilities to national economic development and international competitiveness and the attainment of social goals".[129] However, serving national goals assumes the continuity of the government-of-the-day for a consistent interpretation of those goals. It dangerously gives the Minister of Employment,

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124 Aust, Department of Employment, Education and Training, *Study of the Labour Market for Academics* (Report prepared by Sloan, Baker, Blandy, Robertson, and Brummitt of the National Institute of Labour Studies, Flinders University, 1990) pp204-205, 226-227.

125 Gilbert, "Current Issues and Future Developments in Higher Education" (1991) 13 *Journal of Tertiary Educational Administration* 117; McNicol, "Managing To-morrow's Universities" (1991) 13 *Journal of Tertiary Educational Administration* 131; Penington, "Collegiality and Unions" (1991) 13 *Journal of Tertiary Educational Administration* 7.

126 *Quickenden v FAUSA* (1988) 25 IR 440 at 440.

127 Dawkins, *Higher Education: A Policy Discussion Paper* pp1-4.

128 Aust, Department of Trade, *Australia Reconstructed* (Report of the ACTU/TDC Mission to Western Europe, 1987) pp185, 196.

129 *Higher Education Funding Amendment Act (No 2)* 1992 (Cth) s61(2A)(b).

Education and Training a control over the knowledge base of the nation. What Minister, parliament or political party is so omniscient as to determine what discovery in knowledge society needs, let alone what obscure new insight or discovery may lead to progress in civilisation let alone national prosperity?

CONCLUSION

The events of 1987 and 1988, leading up to the issuing of the White Paper, showed no knowledge of judicial opinion on the nature of universities and why they had not been considered ancillary to material production. Corporatist policies assumed that there was only one definition of the term 'industry' and all that is defined by that term must comply with an assumption that all work is of the same process, structure and governance. The result of this lack of recognition is shown in the tensions and strains that have accompanied the formation of the UNS.

The attempt to find a mechanism by which academic salaries could be uniformly and nationally set shows that academic practice, as examined by extensive judicial reviews conducted between 1964 and 1973, correlates with views expressed by philosophic writers on the concepts of the university. For FAUSA to register with the Conciliation and Arbitration Commission, the question that was required to be answered proved to be not one of the nature of universities and academic practice but of the validity of the opinion of the High Court in 1908 in regard to the definition of the term 'industry' in the Australian Constitution and the *Conciliation and Arbitration Act* 1904 (Cth).

The judicial interpretations of the purpose of universities, their governance and the nature of academic practice as expressed during the 1960s, 1970s and 1980s, if heeded, may have saved universities, CAEs and academics in Australia much pain and the government much expense. Sui generis is still the apt description for the structure of universities and the enterprise and practice of academics in disciplines and fields of study that require appropriate governance and industrial relations. Universities, to be universities, require a unity of philosophic, corporative and occupational aspects. Institutes of Higher Education do not appear to require this unity.