

STUDENT PLAGIARISM IN UNIVERSITIES: THE SCOPE OF DISCIPLINARY RULES AND THE QUESTION OF EVIDENTIARY STANDARDS

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This paper considers two problems often arising in relation to student plagiarism cases at academic institutions: the definitional limits or scope of the concept of plagiarism used by universities, and the standards of proof to be employed in plagiarism or other misconduct cases. The paper argues that, in respect of the first of these questions, the model of plagiarism as a disciplinary concept should be limited to circumstances where student conduct amounts to intentional or negligent breaches of relevant academic conventions. In respect of the second issue, the paper considers circumstances in which differences in evidentiary standards ought to apply, such as where law students or international students face disciplinary action.

I INTRODUCTION

The application of legal standards to university decision-making has been growing since the 1960s. Although once decried as the importation of ‘legal paraphernalia’ into academy,¹ the phenomenon is now well advanced. It is arguable that standardising tendencies in the application of legal rules to the academy can provide — perhaps in moderation — the benefit of greater certainty, transparency and consistency in decision-making. In this paper, I consider two sets of standard-setting problems affecting university decision-making in respect of students. The first of these is the non-legal problem of plagiarism, and specifically the contours and limits of the concept of plagiarism, including how that form of (mis)conduct may be informed by legal rules and standards. The second issue raised in respect of these disciplinary standards relates to the procedural question of evidentiary standards associated with proof in academic misconduct cases. Specifically, I consider application of *Briginshaw* principles to disciplinary cases involving law students and international students.

II UNCERTAINTIES IN ‘PLAGIARISM’

Academic misconduct generally, and plagiarism in particular, have become a major source of concern to universities over recent years. Studies of student transgression and ‘dishonesty’ have contributed to a perception that academic misconduct is widespread and plagiarism is foremost among the forms of misconduct perpetrated by students. As a form of scholarly rule-breaking, plagiarism may represent a particularly heinous form of misconduct in the academic community, one that the courts have weighed in on. As the Irish High Court has rather dramatically put it:

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Clearly, the charge of plagiarism is a charge of cheating and as such the most serious academic breach of discipline possible. It is also criminal in its nature.²

Academic plagiarism is consistent with (and extends) an ethical violation exhibited in scientific or intellectual misconduct, ‘when the intention is to deceive or demonstrate a serious disregard for the truth. As such, misconduct involves ... in some instances, a serious erosion of the rights of scholars and other to have the intellectual debt that others owe them acknowledged’.³

Yet, the problem of academic plagiarism is not nearly as straightforward as these statements would imply. Not least this is because the content of the concept of plagiarism has not been considered as closely as one would suppose and, in turn, the concept is, especially at its margins, ambiguous and unsettled. Further, academic plagiarism needs to be considered in the context of the educational function, and this fact can render the concept less amenable to clear prescription rather than more. Virginia Goldblatt has written:

It is vital for those developing academic misconduct procedures to distinguish between educative functions and punitive ones and this is particularly true of provisions relating to plagiarism. Initially the focus should be on the prevention of plagiarism; secondly on early intervention strategies; and only after that should attention turn to disciplinary consequences ...⁴

... the management of academic misconduct takes place within a legal framework, the parameters of which are determined by key cases and legal principles.

However, while these elements provide a context for the day to day handling of allegations of academic misconduct including plagiarism, the issues go beyond the narrow dictates of the law because the alleged offending occurs within the context of a learning relationship. The wider field of good practice involves the recognition of the importance of prevention of plagiarism and the need for an educative response to it whenever possible.⁵

Goldblatt’s affirmation of the educative function of misconduct procedures is no doubt a correct approach. Yet even in this treatment of the problem, the issue arises as to the precise parameters and limits of plagiarism. The question of the substantive content of plagiarism is implicit in the call for an educative approach, as an important distinction is made between conduct which may be treated educationally and that which ought to be dealt with by disciplinary means. There is an area of ambiguity, or even overlap, in between. It is in this area that judicial intervention has occasionally been called upon, such as in the *Humzy-Hancock* case.⁶ Mawdsley and Cumming⁷ have noted how the courts are now engaging in an extended ‘discussion’ over the meaning of plagiarism. A dispute over the content of the concept may turn on how an institution has constructed it. As a generality, the concept is worthy of greater scrutiny. Ambiguity and debate arise notably in respect of questions whether intention, ‘dishonesty,’ or ‘cheating’ are solely determinative of plagiarism. Must plagiarism always be intentional or ‘dishonest’? Is it always a form of ‘cheating’? If not, how are the limits to be defined and what is the scope of the concept? These definitional questions — and the principles and models that underpin plagiarism — have been given little sustained attention. These issues are significant because, in the course of disciplinary action, the question of substantive justice afforded a student may turn on the concept and meaning of plagiarism.

III ORIGINS OF PLAGIARISM

Academic analysis of the ‘plagiarism problem’ will, on occasion, include useful philological discussion of the origins of the concept, which owes its etymological roots to the Latin term *plagium*, referring to the enslavement of a freeman or theft of a slave. The parallel to misappropriation lies in the reference to a form of ‘piracy’, the analogy eventually acquiring the character of a dead metaphor and employed to refer to the appropriation of ideas or language without acknowledgment of or deference to the author. Its modern origins lie in literature and concepts of literary novelty, including where these issues intersect with copyright. The relationship of plagiarism and copyright has been the subject of academic concern,⁸ however academic opinion cautions against conflating the two:

In short, plagiarism and copyright infringement do share important characteristics, but for the most part remain distinct from one another. All cases of plagiarism are not cases of copyright infringement, and vice versa. And while all cases of copyright infringement may be legally actionable if monetary damages are proven, many cases of academic plagiarism offer no cause of action or private remedy whatsoever.⁹

Although there is academic and judicial opinion equating plagiarism with criminality,¹⁰ it is more arguable that, where it is legally actionable (as arising, for instance, from economic interests), plagiarism is a form of wrong,¹¹ whose content may be intentional or negligent transgression of rules of originality or authorship.¹² It is a consequence of intellectual authority, in its broadest sense. In the purely academic context, plagiarism represents an *ethical* prohibition against misattribution or misappropriation of the intellectual endeavours of other authors, notwithstanding that it may find expression in *quasi*-criminal or *quasi*-tortious language. Papy-Carder makes the important point that academic plagiarism is also (and principally) distinguishable from literary or other forms of plagiarism on policy grounds: ‘[p]lagiarism ... goes beyond [economic] interests and protects a third set of interests — those associated with scholarly institutions’.¹³ The prohibition against plagiarism, in the educational context, is no doubt aimed at moral protection for authors and intellectual rigour for students. But it is also aimed at protecting the standing and standards of the institution. The maintenance of academic standards is an appropriate and correct objective for the institution.¹⁴

IV SCOPE OF THE CONCEPT

It is my submission that, in the academic setting, a central point of contention in respect of plagiarism arises in its delineation as a *disciplinary* concept, that is, as a disciplinary subject as distinct from, for example, a question purely (or, at least, preponderantly) of educational judgment, intervention and procedure.

The distinction is important because once a decision goes beyond the limits of academic judgment, into the field of disciplinary action, the consequence, subject-matter and nature of decision-making changes. Not least, it becomes more serious. How decisions are handled also differs. There may be considerable academic content in disciplinary decision-making, and, as US judicial opinion exemplifies, this fact of academic content may have considerable impact on how the decision-making proceeds and the protections afforded to a student. For instance, *Napolitano v Trustees of Princeton University*¹⁵ demonstrates that US courts are reluctant to intervene in *any* decision in which academic judgment plays a role, other than where capricious or arbitrary decision-making can be proven. Deference to academic discretion also applies, if more narrowly, in the UK and Australian jurisdictions. Academic decisions may be reviewable at law

for unfairness or bad faith, where ‘extraneous’ factors enter into decision-making.¹⁶ In addition, there now appear to be other ‘circumstances where courts will intervene and make judgements of an academic nature’,¹⁷ notably where decisions of academic judgment affect admission to professional practice (in particular admission to legal practice), although reluctance to intervene in strictly academic decisions remains the norm.¹⁸

In decisions concerning academic discipline, including plagiarism, fact-finding will typically require academic assessment and knowledge. Student disciplinary bodies may apply their own academic expertise and knowledge to the proceedings.¹⁹ Yet, once it is determined that a decision falls within the sphere of plagiarism, *more than strictly academic content applies*. The question arises of contravention of academic rules and norms that are incidental to the performance of ‘purely’ educational tasks. While it may be relatively clear as a matter of fact that a student has failed to comply, sufficiently or entirely, with rules of academic convention, it may be less clear as to whether that conduct is, or ought to be treated as, a disciplinary issue. Arguably, the question turns upon a basic pedagogical premise, which I think Goldblatt grasps, as to whether the conduct in question may preponderantly or sufficiently be characterised as that which should be *corrected* or conduct that should be *penalised*.

The question is perhaps whether, on the one hand, a condition or rule of academic conduct has not been met, such as failure to adhere to citation conventions or present original work (negative criterion), or whether, in addition to that extant ‘omission’, the student’s conduct or actions can be characterised as improper (positive criterion).

A *Intention*

There are two circumstances in which academic plagiarism equates to misconduct (and is therefore subject to disciplinary action). The first, most renowned, category is where misappropriation of ideas, text or other intellectual content occurs as a matter of dishonesty, or in other words, where the conduct includes an element of intent. In this case, I refer to an intention by a student to misrepresent others’ ideas, work, or expression as the student’s own in order to gain some benefit or advantage, such as higher grades or passing a course of study. As Bills has noted: ‘[t]he role of “intent” may be the central issue to a student charged with plagiarism’.²⁰ He found that in a survey of US law schools approximately 64 per cent included ‘intent’ in the formulation of their plagiarism policy. By contrast, LeClerq²¹ found (only eight years later) only 28 per cent (42 out of 152) law schools surveyed required intent to be found in cases of plagiarism.

In Australian universities, express requirement in disciplinary rules, or relevant policy or guidelines, for intent to be proved in plagiarism cases is the exception rather than the rule. Table 1 refers to elements of plagiarism rules in selected Australian universities. It can be seen that nearly all investigated universities do provide a specific definition of plagiarism, either in statutory rules or (more commonly) in accompanying guidelines or policy. A large majority of institutions do not require intent as the test or threshold in their definition of plagiarism. To that end, the concept of plagiarism has wider effect. In instances where intent is required, the formulation of plagiarism is either in terms of a student ‘knowingly’ engaging in the practice (Curtin) or framed in terms of ‘academic fraud’ (Sunshine Coast). Where the issue of intent is arguable, the concept is framed in terms of ‘dishonesty’ (Adelaide) or is left without elaboration (Charles Darwin).

Table 1: Construction of the Concept of Plagiarism in University Rules, Selected Australian Universities²²

Institution	Specific definition	Statutory rule (S) or other guideline (G)	Intention required	Plagiarism threshold other than intention (if expressly stated)	Intention (if inapplicable)
University of Sydney	Y	G	N	'negligent'	
University of Technology, Sydney	Y	S	N	-	
University of Western Sydney	Y	G	N	-	
Charles Sturt University	Y	G	N	Other than 'inadequate attempts' at acknowledgement	and/or inappropriate
University of Newcastle	Y	G	N	-	
La Trobe University	Y	G	N	-	
Monash University	Y	G	N	'unintentional'	
Deakin University	Y	S	N	'has the effect of' being misleading	
Royal Melbourne Institute of Technology	Y	G	Possibly	-	
Swinburne Institute of Technology	Y	G	N	'careless' or 'minor'	
University of Wollongong	Y	G	N	'unintentional'	
University of Queensland	Y	G	N	'careless'	
University of Tasmania	Y	G	N	'unintentional'	
Queensland University of Technology	Y	G	N	-	
Griffith University	Y	G	N	'inadvertent'	
University of Western Australia	Y	G	N	'careless practices'	
Curtin University of Technology	Y	G	Y	NA	
University of the Sunshine Coast	N	G	Y	NA	
James Cook University of Queensland	Y	G	N	'without acknowledgment'	
Charles Darwin University	N	S	Possibly	-	
University of Adelaide	Y	G	Possibly	'dishonesty'	
Flinders University	Y	G	N	'lack of understanding and/or academic practice'	...poor
Total (N) = 22	Yes: 20	G=20, S=2	Y=2 (9.1%), Possibly=3 (13.6%), N=17 (77.3%)		

The question of intent imports a student's state of mind into the decision-making process, and effectively narrows the scope of the concept and hence the scope of misconduct falling under this head. Intention proved to be a critical factor in a review by the Queensland Supreme Court of findings of academic misconduct in *Re Humzy-Hancock*.²³ In that case, Griffith University Law School's Assessment Policy and Procedures defined plagiarism as including 'knowing presentation' of others' work as a student's own. Intent became the 'critical question'.²⁴ McMurdo J reviewed the University findings for the purposes of considering Humzy-Hancock's admission to practice. He found an absence of intent and distinguished the (former) student's 'poor work' from plagiarism.²⁵ His Honour's decision facilitated the applicant's admission. That decision has been criticised in principle and as contrary to other authorities, in the same jurisdiction, on the model of student misconduct applicable to the question of admission to legal practice.²⁶ The Corbin and Carter critique poses the question of intent (and by extension dishonesty) as merely one potential element in a wider concept of plagiarism. The 'strict' approach they advocate is one example of the attempt to subsume into plagiarism conduct that is both intentional and, in other respects, to be impugned. They advert to the notion of negligence as part of this wider sphere of conduct,²⁷ although in no systematic fashion. Regardless of the merits of the preference for a 'strict' approach to plagiarism and regardless of the merits of situating plagiarism within wider (academic and legal) ethical communities,²⁸ this type of critique does not clarify or advance understanding of where, beyond questions of intention and dishonesty, the limits of this form of academic misconduct should lie.

B 'Wrongful' Plagiarism Beyond Intention

If plagiarism is not limited to circumstances where intent can be proven, then what are the proper limits of that transgression? How far-reaching is the model of behaviour? How wide ought the reach of disciplinary action to be in these cases?

Patten AJ remarked in *Nguyen v Nguyen & Vu Publishers Pty Ltd and Van Thang Nguyen and Thien Huu Nguyen*,²⁹ a defamation case:

It was [the respondent's] extensive use of the means of expression employed by others without their acknowledgment or permission which constituted plagiarism, not the circumstances that he, quite legitimately, wrote about the same subject matter. His intentions, which may or may not have been reprehensible, are I think irrelevant.

In this opinion, plagiarism was found, regardless of intent. Academic opinion has sought to make similar points.³⁰ Yet, beyond the question of intent, plagiarism *qua* misconduct has its limits. In particular, those limits are expressed in the notion of *plagiarism as a non-intentional wrong*. For instance, it was remarked in *Carleton v ABC*³¹ (also a defamation case): '[i]t follows that not every copying or imitation of the work of another without attribution will be plagiarism. It must also be wrongful'.³² It has been argued that plagiarism is in fact an 'ancient tort' at law.³³ But it is more accurate to state that, in distinguishing scholarly plagiarism from an economic wrong (copyright), academic plagiarism applies a *model* of wrong, and specifically, beyond the question of intent, a *model of negligence*. It is strictly speaking an ethical 'wrong'. The *analogy* to tortious negligence is perhaps extended in the idea that, as a matter of policy, damage arising from academic plagiarism is to the integrity of educational institutions or to the actual value of educational qualifications.³⁴

The nature of plagiarism as a wrong was discussed in *Re La Trobe University; ex parte Wild*,³⁵ a visitorial case concerning findings of plagiarism against a professor at La Trobe

University. In *Wild*, ‘plagiarism committed entirely as a result of carelessness or negligence might be held to amount to gross misconduct in a professor’³⁶ and that ‘[i]t is sufficient to say that it does not necessarily contain an element of moral culpability or an intention to deceive’.³⁷ The threshold and content of such a wrong is extended, beyond intention, to encompass ‘carelessness or negligence’. By implication, such a framework incorporates into the threshold of misconduct what a person in the academy ought reasonably to know, and be able to apply, in the preparation and production of scholarly/academic work. As Higgins J stated in *Carleton v ABC*, plagiarism does not apply to any form of copying or reproduction. The practice, conduct or action must be put in a context: ‘[t]he notion of “copying” is always a matter of degree ... [t]he issue of “copying”, for example, house plans often revolves around breach of copyright. That breach is what imparts wrongfulness or impropriety’.³⁸ Citing *Flanagan v University College Dublin* in respect of the scholarly context, his Honour remarks

“the charge of plagiarism is a charge of cheating.”... Again, however, there is a distinction between the appropriation of ideas through research and the copying of the expression of those ideas by others without attribution.³⁹

Thus, leaving aside the question of intention, the issue of plagiarism as a particular type of ‘wrong’ — of ‘carelessness or negligence’ as it is expressed in *Wild* — to which some kind of sanction ought to apply, is conditioned by what a student ought to know and what academic skills s/he ought already to have acquired. In drawing the analogy to negligence further, it might be considered that a student is required to exercise a form of ‘care’ in their academic work. Yet, it is submitted that such a standard will be affected by two important factors:

1. It will be variable having regard to presumed experience, competence and knowledge of the student in the use of relevant academic conventions or practices. Hence, there is the reference in *Wild* to the issue of ‘misconduct in a professor’.⁴⁰ In this respect, the standard may be extended by analogy with, for example, standards of care applying to professionals: the standard objectively varies according to generally accepted levels of competent practice.⁴¹
2. The standard necessarily applies in an educational context, and the proper function and role of education, instruction, error and (where appropriate) correction is central to the operation of any model of ‘care’ (adherence to relevant academic practices and conventions) incumbent upon a student. This qualification reinforces Goldblatt’s point regarding a prevailing educational approach to plagiarism outside of the scope of intentional acts.

Given the seriousness of a charge of plagiarism, concepts of ‘carelessness’ and ‘negligence’ are not to be used lightly, and ought not to be confused with inexperience, incapacity, or a developing competence and proper opportunity for learning. It may be argued therefore that the issue of plagiarism as a ‘wrong’ only incrementally applies to undergraduate students as they progress through their course of studies.

Hence, while the concept may be wider than intention, ‘negligent’ plagiarism as ‘wrong’ ought to be measured against, and limited by:

1. knowledge of academic conduct and conventions reasonably assumed of a student at any point in advancement in their course (the reasonable ‘care’ the student ought to have taken), having regard to all the relevant circumstances;
2. detriment (‘damage’) caused to the institution, including the academic standards of the university (as against merely themselves or their own knowledge).

The generality of these principles may be further refined in particular circumstances, or in respect of particular classes of students. Additionally, they should be read against the seriousness of the (disciplinary) charge of plagiarism, as shall be considered below. For example, the issue of reasonable knowledge of academic conventions and practice might foreseeably include consideration of the time and circumstances a student has had to acquire a *practical, working knowledge* of those conventions. I would submit that mere formal induction or training in those conventions is insufficient, where they are subsequently not adhered to, to attract a charge of plagiarism as misconduct. Further, the notion of ‘damage’ visited upon the institution — by way of a threat to its academic standards — ought not reasonably to be supported where this may be the subject of corrective and educational action by the academic staff. As a matter of policy, therefore, if a breach of academic convention amounting to plagiarism can reasonably and satisfactorily be addressed by way of *instruction*, it does not acquire the characteristic of a detriment or ‘damage’. On the contrary, it may well be beneficial to the student and to the institution generally.

C *Beyond Dishonesty and Carelessness: The Limits of Misconduct and Consideration of Educational Problems in Plagiarism Cases*

Misappropriation of text or ideas may occur (eg, through copying of material without satisfactory attribution) as a result of ordinary ignorance or inexperience of the student, or for other relevant reasons outside of the scope of intention, carelessness or negligence. This may be the sort of conduct referred to by McMurdo J in *Re Humzy-Hancock* as ‘poor referencing’ or ‘poor work’.⁴² It is submitted that misappropriation arising from ignorance, inexperience or socio-cultural dislocation — which may technically be termed plagiarism — is distinguishable from conduct exhibiting ‘wrongfulness or impropriety’. The latter may fall within the scope of misconduct, while the former appears to me correctly to constitute an academic or educational problem, a problem of inadequate or incomplete competence rather than a ‘violation of the rules of conduct’.⁴³ On balance, it falls within the sphere of academic, rather than disciplinary, decision-making. Such a construction of academic misconduct needs to have regard to the (presumed) knowledge base acquired by the person facing the allegation. Regarding the circumstances in *Wild*’s case for instance, are the standards for misconduct ‘in a professor’ comparable to the standards applying to a student? The implication of the phrase ‘in a professor’ in that case would tend to suggest an appropriately variable standard. Such variability might also extend to students at different levels of ‘development’ or progression in their course.

The variable standard implied in *Wild* means that regard should be had to the pedagogical procedure and the academic model of the university; that is, the threshold of plagiarism ought reasonably to consider the developmental assumptions applied. Plagiarism needs to have regard to the nature of student experience.

1 *The Nature of Student Experience*

The model of undergraduate education extends the process of ‘formation’,⁴⁴ in which a student acquires academic ‘literacy’,⁴⁵ ‘lifelong learning attributes’,⁴⁶ intellectual and human ‘capabilities’,⁴⁷ or intellectual and personal autonomy. According to these principles, the educational process includes acquisition of competence and technique. This includes the ‘cultivation’ of academic methods, as well as knowledge of principles, assumptions and reasons underpinning them. It assumes maturation of the student as much as the cognitive accumulation of skills.⁴⁸ It might be anticipated from this model that in the course of the educational experience,

‘plagiarism’ might reasonably arise from inexperience, or insufficient inculcation in academic methods and techniques, or limits to the student’s confidence or other psychological factors.

Empirical study of the student experience, especially the ‘first year experience’, including those regarding plagiarism, reinforces this proposition. In his substantial 1970 study of university students, Little concludes: ‘[t]he major finding of this study is that there are severe limits to students’ intellectual autonomy’.⁴⁹ This early insight into student experience is reiterated in more recent research. In a 2000 report, surveying over 2600 first-year students, McInnis, James and Hartley⁵⁰ found that a substantial minority of students experienced a ‘very uncertain start at university’.⁵¹ Twenty-three per cent of students would have preferred a generalist, introductory first-year program, and more than one-third (34%) stated they were not prepared to choose a course when they left school. The problems of ‘transition’ to university (notably for school-leavers), and adaptation to academic rules and styles, have been prominent in this ‘first year experience’ literature.⁵² ‘Uncertainties’ are consistent with the model of ‘formation’, in which students not only acquire knowledge of content in an intellectual discipline but also the methods and (cultural) rules underpinning the discipline. The latter methods and rules may be considerably more subtle, contradictory and complex than university authorities (and teachers) perceive. In ethnographic research on students’ experience with the ‘social, cultural and literary practices of introductory level economics’, Richardson⁵³ finds anxiety and tension over the plagiarism question among students derives from contradictory early experiences with pedagogical practice in the academy. In particular, students are confronted with both the ‘canonical’ authority of the ‘introductory textbook’ and ‘exhortations’ to write and think critically and originally. For Richardson, plagiarism by new students may be viewed in the context of this tension:

When it came to writing answers to assignment questions, students felt themselves wedged between a rock and a hard place. How could they express in their own words that which was more effectively expressed in the textbook?⁵⁴

Further, tensions over plagiarism also arise from disjuncture between academic assumptions and expectations, and realities of developing or unformed academic literacy:

While academics gave careful consideration to the setting of assignment and examination questions, they nonetheless anticipated that students would already know how to write before coming into the course. The processes of learning new discourses, learning new content knowledge and being able to express these “in their own words,” as if they are indeed their own, was not seen as problematic, complex or particular difficult.⁵⁵

Generally, assumptions regarding ‘literary’ and intellectual development ought not to be overstated, especially in early year students. In this context, construction of plagiarism as a disciplinary problem, rather than as a pedagogical issue, may be inappropriate, and the scope of the concept ought to be refined accordingly. Ellery emphasises the need for a pedagogical approach to plagiarism at the early stages of university education:

With regard to addressing plagiarism in its overall context at a tertiary level, it seems logical to assume that there comes a point where institutional disciplinary procedures must be brought into play. The findings in this study indicate that the first year may be too early for such drastic measures. However, the lack of real engagement in plagiarism and referencing issues by some students in this study also point towards a combined carrot (using pedagogical processes with ongoing feedback and support) and stick (threat of discipline) approach being necessary from the outset if we are to address plagiarism in any meaningful way.⁵⁶

Song-Turner's study of international students identifies important issues specific to that 'cohort' of students, notably cultural dislocation and unfamiliarity with relevant academic traditions, which have a comparable effect to inexperience or academic 'illiteracy'.⁵⁷ Revision of the concept of plagiarism within university rules, according to schema that account for problems in academic practice (and implicitly accommodate a model of 'formation' in university students), has not gone entirely unheeded. Of the institutions noted above, the University of Queensland (UQ) has produced guidelines expressly recognising the issue of 'poor academic practice,' considering it in the context of plagiarism but additionally *distinguishing it from misconduct* strictly speaking:

2.1 Plagiarism defined

Plagiarism is the act of misrepresenting as one's own original work the ideas, interpretations, words or creative works of another. These include published and unpublished documents, designs, music, sounds, images, photographs, computer codes and ideas gained through working in a group. These ideas, interpretations, words or works may be found in print and/or electronic media.

Academic staff have a responsibility to students to explain clearly academic expectations and what constitutes plagiarism and to cultivate, with their students, a climate of mutual respect for original work.

Plagiarism can be divided into careless plagiarism and intentional plagiarism. The former is discussed in more detail in section 2.3 of this policy. Intentional plagiarism is likely to be treated as misconduct as explained in section 4.

2.2 Examples of plagiarism

The following are examples of plagiarism where appropriate acknowledgement or referencing of the author or source does not occur:

- Direct copying of paragraphs, sentences, a single sentence or significant parts of a sentence;
- Direct copying of paragraphs, sentences, a single sentence or significant parts of a sentence with an end reference but without quotation marks around the copied text;
- Copying ideas, concepts, research results, computer codes, statistical tables, designs, images, sounds or text or any combination of these;
- Paraphrasing, summarising or simply rearranging another person's words, ideas, etc without changing the basic structure and/or meaning of the text;
- Offering an idea or interpretation that is not one's own without identifying whose idea or interpretation it is;
- A 'cut and paste' of statements from multiple sources;
- Presenting as independent, work done in collaboration with others;
- Copying or adapting another student's original work into a submitted assessment item.

2.3 Poor academic practice

There will be instances when a student unintentionally fails to cite sources or to do so adequately. For example, a student

- may clearly recognise the need for referencing but references carelessly or inadequately for the context of the relevant discipline;
- has undertaken extensive research but, in the process, loses track of the source of some material;
- is ignorant of western academic conventions.

Careless or inadequate referencing or failure to reference will be considered poor academic practice and a demonstration of carelessness in research and presentation of evidence. The student may be required to correct the error or may lose marks. Academic staff have a responsibility to educate students about appropriate citation practices in the context of their discipline and provide clear examples of what is acceptable.⁵⁸

In the UQ example, ‘carelessness’ and ‘inadequacy’ are conflated terms. Reference merely to ‘poor academic practice’ would be preferable, yet the consideration and weighing of academic and disciplinary content in students’ (mis)conduct is nonetheless evident in this approach. Arguably, in substance, the UQ framework tends to distinguish between conduct that is intentional or negligent plagiarism and that which is essentially unsatisfactory from the viewpoint of academic competency.

V STANDARDS OF PERSUASION IN PLAGIARISM AND ACADEMIC MISCONDUCT CASES

In plagiarism cases, the fact-finding process may be rendered problematic by definitional uncertainties, and hence uncertainties as to the proper scope of a decision-maker’s authority. It may also acquire the added complexity of variable evidentiary standards applying to different classes of students. The significance of this question in university discipline is that, for different groups of students, the nature and/or consequences of the disciplinary decision may differ. This premise is an extension of the law of evidence and application of that law to non-court tribunals.⁵⁹

As a form of administrative tribunal,⁶⁰ student disciplinary proceedings apply the civil standard of proof to the fact-finding and decision-making process. The persuasive burden in respect of an allegation of fact against a student is that a decision-making body must be ‘reasonably satisfied’ of its occurrence on the ‘balance of probabilities’, or the ‘preponderance of probability’. It is established law that in forming a view on the civil standard, a decision-maker is required to take into account the gravity of the situation and consequences.⁶¹ The standard of proof is a variable standard. The so-called ‘*Briginshaw* test’ affects how such decisions are to be reasoned:

Reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of the allegation made, the inherent unlikelihood of an occurrence of the given description, or gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters, “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences ...⁶²

Gravity of consequences and seriousness of allegations are key considerations that may affect decision-making in university discipline. Circumstances in which those considerations apply would in particular be where findings of misconduct affect professional registration or where they affect residency status. As prime examples, law students fall into the former category, and international students (where they are susceptible to suspension or exclusion from the university, or restrictions on their enrolment) fall into the latter category.

A *Law Students*

The breadth of sanctions that may follow a finding of misconduct by university authorities may have serious ramifications for other persons, including graduates or alumni.⁶³ For example, university powers to revoke degrees⁶⁴ may imperil a person’s continuing practice in their profession or trade once they have graduated and been admitted to practice. Revocation of degrees

is an exceptional event, however. For law students, the significance of disciplinary action lies in the potential for findings of misconduct to preclude them from gaining admission to practice in the legal profession, or alternatively having the right to practice withdrawn. The issue for prospective lawyers is not so much the status of their (future) degree. Rather, the issue is that a finding of academic misconduct is relevant to the ‘character review of intending lawyers’,⁶⁵ or in other words, the test as to whether they are a ‘fit and proper’ (or ‘suitable’) person to practice in the profession. Conduct in academic life may now be part of the two-step process developed by the courts in the ‘character review’ process: consideration of prior events, including findings of misconduct, in the applicant’s life, and honesty and candour in revelation of prior events to the court.⁶⁶ The grounds for the character test lie in the particular nature of the duties of the lawyer to their client and to the court,⁶⁷ and to the protective function and public benefit of those controls.⁶⁸ Findings of academic misconduct at university have, more recently, been relevant to the character test and have led to admitted lawyers consequently being ‘disbarred’,⁶⁹ or graduates seeking admission facing the prospect of being denied admission.⁷⁰ The consequences, therefore, of disciplinary action at university can be a ruined career as well as the lost costs of the course undertaken.

Given the seriousness or gravity of consequences, application of *Briginshaw* principles to disbarment or admissions proceedings related to university misconduct are apposite. Those principles were applied relatively recently by the Victoria Supreme Court,⁷¹ where both steps in character review findings — academic misconduct (plagiarism and collusion) at university, as well as a lack of candour in disclosure — were considered against an admitted lawyer. In *Re OG*, the Court held:

In coming to those conclusions [that the practitioner had committed academic misconduct as a student] we bear in mind that these are in effect professional disciplinary proceedings and that, while the standard of proof is the civil standard, the degree of satisfaction for which that standard calls in this context is proportionate to the gravity of the facts to be proved. We have also given weight to the presumption of innocence and the exactness of proof expected in matters of this kind.⁷²

While this rule of law applies to a practising lawyer (hence reference to professional disciplinary proceedings), the same rule arguably applies to a graduate applying for admission.⁷³ The requisite gravity of consequences for law students in academic misconduct cases is reinforced by moves in various jurisdictions to include in Supreme Court admission rules requirement for express disclosure of academic misconduct.⁷⁴ As misconduct will not *per se* lead to disbarment or denial of admission, university proceedings, in that respect, are not directly ‘in effect professional disciplinary proceedings’. They are part of a chain of procedure that may have that consequence.

Supervising courts may exercise discretion to disbar or refuse admission as part of their inherent supervisory jurisdiction,⁷⁵ and there may be circumstances where incidents of academic misconduct do not impugn the prospective lawyer’s character sufficiently or irredeemably to prohibit them from being admitted.⁷⁶ In making decisions regarding admission, courts and/or admitting authorities may review university findings and decisions and come to different conclusions.⁷⁷ However, these factors do not diminish the ‘seriousness’ of the original allegation brought by an educational institution,⁷⁸ nor the gravity of the consequence that, at best, findings of misconduct may be scrutinised by a superior court. Those courts are unlikely to look on questions of academic misconduct lightly.⁷⁹

B *International Students*

For different reasons, the gravity of consequences for international students of findings of misconduct is relevant to the fact-finding process and the standard of persuasion brought to that process. That situation tends to go beyond questions of academic conduct, to any circumstances where disciplinary action (or indeed action for unsatisfactory academic performance) may place a student in breach of obligations imposed by visa conditions. As a result of disciplinary action, academic penalties, restrictions on enrolment, suspension, exclusion or expulsion from an institution may imperil a student's right to stay in Australia, require them to leave the country, or lead to their removal from Australia. Such an occurrence may impose considerable costs on a student, effectively mean they are unable to complete their studies, or affect future applications to enter or stay in Australia. Subject to Standard 13 of the *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007* (Cth) ('*National Code*'), made pursuant to the *Education Services for Overseas Students Act 2000* (Cth) ('*ESOS Act*'), a provider (including a registered university) may 'defer or temporarily suspend' a student's enrolment, including for 'misbehaviour'.⁸⁰ Subject to Standard 10 of the *National Code*, a provider must monitor a student's course progress, and a student is required to make 'satisfactory course progress' as a condition of holding a student visa.⁸¹ Where a provider terminates a student's 'studies',⁸² or where a student breaches their visa conditions,⁸³ the provider is obliged to inform the Secretary of the Department of Immigration. A student found not to be complying with visa conditions may have his/her visa cancelled,⁸⁴ leading them to be treated as an unlawful non-citizen⁸⁵ and 'removed' from Australia.⁸⁶

An international student's right to stay and study in Australia would be affected by disciplinary action in a number of circumstances. If a student is excluded or expelled for disciplinary reasons, they will no longer be meeting the conditions of their visa, which include requirements to be enrolled with an education provider and attend courses. A student may have their enrolment 'temporarily suspended' as a result of disciplinary action, under Standard 13, but that action would also place a student in breach of the requirement that they be enrolled in a full-time course of study. In this case, a student would also be liable to have their visa cancelled.⁸⁷ In addition, suspension of a student from all or part of their course would likely place them in breach of visa conditions relating to course progress and/or attendance (Condition 8202). Even where sanctions for misconduct are solely in the form of academic penalties, such as awarding reduced or failed grades, such action may represent, or contribute to, a breach of the student's obligations under the Migration Regulations regarding satisfactory course progress.

Disciplinary action against an international student might, therefore, by varying routes, cause the student's right to stay and study in Australia to be cancelled. The student may be removed from Australia, and a substantial investment in a full fee-paying course is effectively lost. The question as to whether a student visa-holder is compliant or not with their obligations under relevant legislation is one that will be determined ultimately by the Minister (or his/her delegate), subject to any process of tribunal or judicial review. In that context, it has been held that a higher standard of persuasion applies to fact-finding, in migration cases generally⁸⁸ and in student cases in particular.⁸⁹ Once disciplinary action has been given effect and a student's enrolment, progress or attendance status is affected, the scope for discretion in respect of either reporting (on the part of providers) or decision-making (on the part of the Minister or review tribunal) in student misconduct cases is limited, arguably more limited than in law students' 'character' cases. It is submitted that where disciplinary action would likely, or inevitably, lead to visa cancellation, high standards of persuasion and fact-finding would equally be applicable to disciplinary decision-

makers. The chain of consequences is, arguably, more straightforward in respect of ‘in-house’ misconduct cases concerning international students, than in comparable cases dealing with potential lawyers.

VI CONCLUSIONS

This paper considers two specific and problematic aspects of academic plagiarism, as that charge applies to university students. The first area of concern lies in the structure and limits of the concept of plagiarism. The second area of concern lies in the question of applicable evidentiary standards in fact-finding in plagiarism cases. Insofar as there is a general interest in ensuring some form of justice in the sphere of university discipline, the first category raises issues of substantive fairness and the latter issues of procedural correctness.

Both the conceptual model of plagiarism and the standards applicable to proving it are matters that are worthy of scrutiny in university decision-making. There has been limited sustained attention to either issue, even though either or both may have profound ramifications for students confronting charges of academic misconduct.

The concept of plagiarism is not necessarily transparent. Its contents may be unsettled by uncertain boundaries between action that ought to be proscribed and that which ought merely to be the source of correction and an extension of the academic model. The conceptual structure proposed *borrow*s from the law of torts: that, at its limits, academic plagiarism might be considered as arising from careless or negligent conduct of a person toward the use of intellectual sources employed in their own work. The inherent character of intellectual development, or ‘formation’, among university students further means that such standards have to be applied with regard to the practical knowledge students are assumed to have acquired in their course of studies.

In respect of evidence and the generation of proofs, the question of standards is less one of uncertainty or lack of clarity than one of variability. Notably, variable standards will apply, depending on the gravity of the consequences for the individual student. The circumstances of law students and international students are illustrative. It is argued that actions against those classes of students need to proceed under higher evidentiary standards, consistent with *Briginshaw* principles.

In the case of both sets of standards, university administrators might do well to establish clear guidelines on these facets of the decision-making process for decision-makers, if they have not already done so. It is not uncommon for internal, ‘lay’ decision-makers to sit in judgment of students in plagiarism cases. Briefing and guidance on these matters would contribute to higher quality, better reasoned and more correct decision-making where students confront these serious allegations.

Keywords: plagiarism; students; higher education; discipline; standard of proof.

ENDNOTES

- 1 HWR Wade, ‘Judicial Control of Universities’ (1969) 85 *Law Quarterly Review* 468.
- 2 *Flanagan v University College Dublin* (1988) IR 724, [20].
- 3 Peter Hernon and Philip Calvert, ‘Research Misconduct As Viewed From Multiple Perspectives’ in Ellen Altman and Peter Hernon (eds), *Research Misconduct: Issues, Implications and Strategies* (Ablex Publishing Corporation, 1998), 71.

- 4 Virginia Goldblatt, 'The Perils of Plagiarism: Processes for Managing Academic Misconduct' in *Proceedings of the 18th Annual Conference of the Australian and New Zealand Education Law Association*, Melbourne, 30 September–2 October 2009, 6.
- 5 Ibid 12.
- 6 *Re Humzy-Hancock* [2007] QSC 34.
- 7 Ralph D Mawdsley and J Joy Cumming 'Plagiarism Litigation Trends in the USA and Australia' (2008) 20 *Education and the Law* 3 209, 209.
- 8 See, eg, Mary Wyburn, 'The Intersection of Copyright and Plagiarism and the Monitoring of Student Work by Educational Institutions' (2005-2006) 11 *Australian and New Zealand Journal of Law and Education* 2 73; compare Stuart Green, 'Plagiarism, Norms and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights' (2002) 54 *Hastings Law Journal* 167; Debbie Papay-Carder, 'Plagiarism in Legal Scholarship' (1984) 15 *Toledo Law Review* 233; Robert Bills, 'Plagiarism in Law School: Close Resemblance of the Worst Kind?' (1991) 31 *Santa Clara Law Review* 103; Leon Yankwich, 'Intent and Related Problems in Plagiarism' (1960) 33 *Southern California Law Review* 233; Ronald Sandler, 'Plagiarism in Colleges in the USA'; Roger Billings, 'Plagiarism in Academia and Beyond: What is the Role of the Courts?' (2004) 38 *University of San Francisco Law Review* 391.
- 9 Papay-Carder, above n 8, 241–2.
- 10 *Flanagan v University College Dublin* (1988) IR 724; Green, above n 8.
- 11 See, eg, *Carleton v ABC* [2002] ACTSC 127, [110]-[113]; Billings, above n 8, places plagiarism directly in the sphere of tort (392): 'Plagiarism is an ancient tort that has managed to remain independent of the [US] Federal Copyright Act'.
- 12 Yankwich, above n 8; Bills, above n 8, 111–115; compare *Re Humzy-Hancock* [2007] QSC 34, *Re La Trobe University; ex parte Wild* (1987) VR 447.
- 13 Papay-Carder, above n 8, 241.
- 14 Compare *Ex parte Forster; re University of Sydney* (1963) SR(NSW) 723.
- 15 453 A 2d 263 (N J Super Ct, App Div 1982).
- 16 See *R v Higher Education Funding Council, ex parte Institute of Dental Surgery* (1994) 1 WLR 242.
- 17 J Joy Cumming, 'Where Courts and Academe Converge: Findings of Fact or Academic Judgment?' (2007) 12 *Australian and New Zealand Journal of Law and Education* 1 97, 105.
- 18 See *Thorne v University of London* (1966) 2 QB 237; *Clark v University of Lincolnshire and Humberside* (2000) 1 WLR 1988.
- 19 *Simjanoski v La Trobe University* [2004] VSC 180, [25]-[30].
- 20 Bills, above n 8, 111.
- 21 Terri LeClerq, 'Failure to Teach: Due Process and Law School Plagiarism' (1999) 49 *Journal of Legal Education* 236.
- 22 Sources (as at 27 December 2010): University of Sydney *Academic Board Policy: Academic Dishonesty and Plagiarism*; University of Technology Sydney *Student and Related Rules*; University of Western Sydney *Student Academic Misconduct Policy*; Charles Sturt University *Student Academic Misconduct Policy*; University of Newcastle *Student Academic Integrity Policy*; La Trobe University *Academic Integrity — Guidelines for Identifying and Avoiding Plagiarism*; Monash University *Plagiarism Policy*; Deakin University *Regulation 4.1(1) – Student Discipline*; RMIT University *Plagiarism: Policies and Procedures*; Swinburne University of Technology *Plagiarism Policy*; University of Wollongong *Acknowledgment Practice/Plagiarism Policy*; University of Queensland *Academic Integrity and Plagiarism*; University of Tasmania *A Guide to Academic Integrity for Students*; Queensland University of Technology *Academic Integrity*; Griffith University *Institutional Framework for Promoting Academic Integrity Among Students*; University of Western Australia *Academic Misconduct – Guidelines for Faculties and Other Teaching and Supervision Sections at UWA: Ethical Scholarship, Academic Literacy and Academic Misconduct*; Curtin University of Technology *Plagiarism Policy and Procedures*; University of the Sunshine Coast *Student Academic Integrity – Governing Policy*; James Cook University *Academic Acknowledgment and Plagiarism Policy*; Charles Darwin University *Charles Darwin (Student Conduct) By-Laws*; University of Adelaide *Academic*

Honesty and Assessment Obligations for Coursework Students Policy and Coursework Students: Academic Dishonesty Procedures; Flinders University *Assessment and Teaching: Policy on Academic Integrity*.

23 [2007] QSC 34.

24 *Re Humzy-Hancock* [2007] QSC 34, [14].

25 *Re Humzy-Hancock* [2007] QSC 34, [41], [42].

26 Lillian Corbin and Justin Carter, 'Is Plagiarism Indicative of Prospective Legal Practice?' (2007) 11 *Legal Education Review* 1 53; Corbin and Carter prefer (see at 54) the 'zero tolerance policy' expressed by the Chief Justice of Queensland in the Court of Appeal in *Re AJG* [2004] QCA 88. In *Re AJG*, the Court stated: 'Over the last couple of years, the Court has, in strong terms, emphasized the unacceptability of this conduct on the part of an applicant for admission to the legal profession. At the last Admissions Sitting, the Court indicated a strengthening of its response to situations like this on the basis adequate warning had been given ... Legal practitioners must exhibit a degree of integrity which engenders in the Court and in clients unquestioning confidence in the completely honest discharge of their professional commitments.'

27 Corbin and Carter, above n 26, 54.

28 Which is one of the main concerns of their article and one by which they urge superior courts, exercising inherent jurisdiction over admissions to practice, to take a 'hard-line' on plagiarism cases regardless of what findings universities make: Corbin and Carter, above n 25, 54.

29 [2006] NSWSC 550, [79].

30 Bills, above n 8, 112: 'An intent to deceive the evaluation process may characterize the worst form of plagiary, but it is not essential for the wrong to exist.' LeClerq, above n 21, 245: 'The most important choice in creating a definition [of plagiarism] is whether or not to define plagiarism as an intentional act — whether a student can be guilty of "accidental" or "good faith" plagiarism. If the law school does not require intent as a factor, then any student who is found to have used another literary property without attribution for academic credit is automatically guilty of plagiarism.'

31 *Carleton v ABC* [2002] ACTSC 127.

32 *Ibid* [110].

33 Billings, above n 8.

34 See, eg, Victorian Ombudsman, *Investigation of an Allegation of Improper Conduct within RMIT's School of Engineering (TAFE) — Aerospace* (2010), [16]-[17], where it was held by the Ombudsman that cheating by students, leading to incompetent or poorly trained graduates subsequently employed in the airline industry, could pose a risk to the general public, specifically in respect of the 'travelling public using aeroplanes'. Whether or not the Ombudsman was correct in his findings, the general principle as to the possible 'flow-on' of damage in academic misconduct from institutional integrity to the circumstances of the practical application of academic knowledge and skill is pertinent.

35 (1987) VR 447.

36 *Re La Trobe University; ex parte Wild* (1987) VR 447, 455.

37 *Ibid* 458.

38 *Carleton v ABC* [2002] ACTSC 127, [112]-[113].

39 Cited in *ibid* [122]-[123].

40 The same, or a similar, point is perhaps made in a less direct, more circumspect fashion by the Queensland Court of Appeal in both *Re AJG* [2004] QCA 88, where the Chief Justice remarks that '[c] heating in the academic course which leads to the qualification central to practice and *at a time so close to the application for admission* must preclude our presently being satisfied of this applicant's fitness' (emphasis added), and *Re Liveri* [2006] QCA 152 at [21] where the Court stated: 'The findings against the respondent involve serious plagiarism, committed more than once. At the relevant times, she was a person of mature years — 25 and 27 years old...'

41 Compare *Wrongs Act 1958* (Vic), ss 58-59.

42 See also the valuable critique of plagiarism and Australian international education by Helen Song-Turner, 'Plagiarism: Academic Dishonesty or "Blind Spot" of Multicultural Education?' (2008) 50 *Australian Universities Review* 2 39. Song-Turner, at 46, argues that resort to misappropriation by

international students, arising from social and cultural dislocation (as well as academic and linguistic difficulties) as distinguishable from misconduct properly speaking: ‘This comment and many other like it attest to a certain lack of confidence on the part of students. Lost in a sea of a new environment, language issues, cross cultural misunderstandings, and other problems, sometimes copying from a written text seemed to be not so much an issue of improper behaviour, as, rather, a safe and viable course of action in what often seemed to be a time of confusion and uncertainty.’

- 43 *Napolitano v Trustees of Princeton University* 453 A 2d 263, N J Super Ct App Div (1982), 569
- 44 See, eg, Phillip Candy, Gay Crebert and Jane O’Leary, *Developing Lifelong Learners through Undergraduate Education: Commissioned Report 28* (National Board of Employment, Education and Training, 1994), 47–51: ‘It would seem, then, that undergraduate education fits broadly into the “formation” stage of educational provision...’.
- 45 Ann Johns, *Text, Role and Context: Developing Academic Literacies* (Cambridge University Press, 1997).
- 46 Candy, Crebert & O’Leary, above n 44.
- 47 Melanie Walker, *Higher Education Pedagogies: A Capabilities Approach* (Society For Research Into Higher Education and Open University Press, 2006), especially Chapter 4.
- 48 The concept of ‘formation’ owes strong association to the pedagogical and cultural concept of *Bildung*. Space prohibits an extended discussion of the theory of *Bildung* here and, in particular, its contemporary significance and/or relevance. The Enlightenment origins of the term, most notably associated (in its educational sense) with the Wilhelm von Humboldt and the founding of the University of Berlin, advert to the Idealist ‘cultivation’ of the self, especially in the image of (and striving for) an ideal national and/or rationalist figure: the model of the ‘educated Man’ (see, eg, Sven Erik Nordenbro, ‘*Bildung* and the Thinking of *Bildung*’ (2002) 36 *Journal of Philosophy of Education* 3 341). This pedagogical foundation is reproduced across other theories and contexts of liberal education: see Lars Lovlie and Paul Standish, ‘Introduction: *Bildung* and the Idea of a Liberal Education’ (2002) 36 *Journal of Philosophy of Education* 3 317. Jean-Francois Lyotard refers to the eclipse of *Bildung* in *The Postmodern Condition: A Report on Knowledge* (University of Minnesota Press, 1984), 4, 47–53, coextensive with an ‘exteriorisation’ and ‘performativity’ of knowledge. Lyotard’s approach presumes the crisis of a pedagogical condition autonomous of commodity-forms (ie models of economic value and supply chains). Lyotard’s reference is presumably to a ‘classical’ *Bildung* identified in particular with Humboldt’s ‘neo-humanism’ and an individualistic ‘self-transformation.’ The content of this *Bildung* — with its teleological figure of egoistic (and ‘interior’) freedom — has, arguably, been displaced by a new content, characterised by the accumulator of pragmatic (ie operative and ‘exterior’) knowledge, including ‘generic’ knowledge, and where the (trans)formative experience of education is not teleological, or revelatory, but mutable and always provisional. I would argue it is possible to retain the skeletal concept of *Bildung*/formation while recognising that it has been ‘hollowed out’ (‘ruined’, to use Bill Readings’ metaphor: Bill Readings, *The University in Ruins* (Harvard University Press, 1996)), and its humanist narrative of maturation/freedom replaced by the technocratic one of competence.
- 49 Graham Little, *The University Experience: An Australian Study* (Melbourne University Press, 1970), 171.
- 50 Craig McInnis, Richard James and Robyn Hartley *Trends in the First Year Experience in Australian Universities* (Department of Education Training and Youth Affairs, 2000).
- 51 McInnis, James and Hartley, above n 50, xi; see also 14–18.
- 52 See also Ursula Wingate, ‘A Framework for Transition: Supporting “Learning To Learn” in Higher Education’ (2007) 61 *Higher Education Quarterly* 3 391; Kerri-Lee Krause and Hamish Coates, ‘Students’ Engagement in First-Year University’ (2008) 33 *Assessment and Evaluation in Higher Education* 5 493; Jennifer Case, ‘Alienation and Engagement: Development of an Alternative Theoretical Framework for Understanding Student Learning’ (2008) 55 *Higher Education* 3 321; David Watkins, ‘Factors Influencing the Study Methods of Australian Tertiary Students’ (1982) 11 *Higher Education* 4 369.

- 53 Paul Richardson, 'Introductory Textbooks and Plagiarism in Higher Education: A Case Study from Economics' (Paper presented to the Annual Meeting of the American Educational Research Association, New Orleans, LA, April 1–5 2002), 3, eric.ed.gov (accessed 5 September 2007).
- 54 Richardson, above n 53, 17.
- 55 Ibid 10.
- 56 Karen Ellery, 'Undergraduate Plagiarism: A Pedagogical Perspective' (2008) 33 *Assessment and Evaluation in Higher Education* 5, 514.
- 57 Song-Turner, above n 42.
- 58 University of Queensland, *Policy 3.40.12 — Academic Integrity and Plagiarism* <http://www.uq.edu.au/hupp/?page=25128> (accessed 3 January 2011). A similar 'educative' approach appears to be taken by the University of Western Australia, where instances of 'minor' breaches of academic misconduct rules are treated primarily as an educational problem and in the case of 'trivial' instances by first-year students are outside of the scope of misconduct altogether: see University of Western Australia *Academic Misconduct — Guidelines for Faculties and Other Teaching and Supervision Sections at UWA: Ethical Scholarship, Academic Literacy and Academic Misconduct*, <http://www.teachingandlearning.uwa.edu.au/staff/policies/?a=451666> (accessed 21 December 2010), [3.1].
- 59 See generally, J D Heydon, *Cross on Evidence* (Butterworths, 2004), [1050]–[1070].
- 60 Forbes includes university tribunals under the rubric of 'hybrid' tribunals: see generally JRS Forbes, *Justice in Tribunals* (Federation Press, 2002), [2.16]–[2.18], possessing both 'domestic' and statutory features. It has long been recognised that Australian universities are of an 'administrative character' in the scheme of public or governmental power: see *Burns v Australian National University* (1982) 40 ALR 707, 714, and that internal student disciplinary bodies are 'quasi-judicial' in nature: *University of Ceylon v Fernando* (1960) 1 All ER 631.
- 61 *Briginshaw v Briginshaw* (1938) 60 CLR 336.
- 62 *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362.
- 63 Graduates and alumni commonly retain a status as 'members' of the university under university legislation in Australia.
- 64 Such a power may be expressly incorporated into sanctions available to disciplinary bodies, although in any case, universities possess an inherent power to do so: *R v the Chancellor, Masters and Scholars of the University of Cambridge; ex parte Bentley* [1723] 93 ER 698; *Re La Trobe University; ex parte Hazan* [1993] 1 VR 7.
- 65 John Basten and Paul Redmond, 'Character Review of Intending Lawyers' (1980) 3 *University of New South Wales Law Journal* 117.
- 66 On the 'two-step' procedure, see generally, Francesca Bartlett, 'Student Misconduct and Admission to Legal Practice — New Judicial Approaches' (2008) 34 *Monash University Law Review* 2 309.
- 67 *Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279.
- 68 *New South Wales Bar Association v Evatt* (1968) 117 CLR 177.
- 69 Eg *Re Legal Profession Act 2004; Re OG, A Lawyer* [2007] VSC 520; compare *Re: Humzy-Hancock* [2007] QSC 34.
- 70 *Law Society of Tasmania v Richardson* [2003] TASSC 9; *Re Liveri* [2006] QCA 152; *Re AJG* [2004] QCA 88.
- 71 *Re Legal Profession Act 2004; Re OG, A Lawyer* [2007] VSC 520.
- 72 [2007] VSC 520, [99].
- 73 See *Re Liveri* [2006] QCA 152, [13], [19], [21].
- 74 Eg *Legal Profession (Admission) Rules 2008* (Vic), r 5.02(c)(v); *Rules of Legal Practitioners Education and Admission Council 2004* (SA), r 7.6(b).
- 75 See, eg. *Re Del Castillo* [1998] ACTSC 131, [18]: 'where a question arises as to fitness to practise, the Court is required to exercise its own independent judgment on this further requirement for admission under [*Legal Practitioners Act 1970* (ACT)] s 16B(1) for the Court to be satisfied that an applicant is of good fame and character'.
- 76 See *Re AJG* [2004] QCA 88; compare *Re Liveri* [2006] QCA 152.
- 77 As in, eg. *Re Humzy-Hancock* [2007] QSC 34.

- 78 Courts have repeatedly emphasised the seriousness and ‘gravity’ of such allegations and/or findings: see *Flanagan v University College Dublin* (1988) IR 724; *Re Liveri* [2006] QCA 152; *Re AJG* [2004] QCA 88.
- 79 See eg *Re AJG* [2004] QCA 88: ‘Over the last couple of years, the Court has, in strong terms, emphasised the unacceptability of this conduct on the part of an applicant for admission to the legal profession. At the last Admissions Sitting, the Court indicated a strengthening of its response to situations like this on the basis adequate warning had been given.’.
- 80 *National Code*, Standard 13.2(b).
- 81 *Migration Regulations 1994* (Cth), Schedule 8, subs 2.05(1) and (2), Condition 8202 (3).
- 82 *Education Services for Overseas Students Act 2000* (Cth) s 9(1)(d).
- 83 *Education Services for Overseas Students Act 2000* (Cth) s 19(2). A breach may also occur where a student’s course attendance is unsatisfactory, a situation that may be imposed on him/her by, for example, a restriction of his/her enrolment resulting from disciplinary action.
- 84 *Migration Act 1958* (Cth), s 137J. It is a requirement under s 20 of the *ESOS Act* that a provider send a notice to the student regarding an alleged breach, allowing them to respond to the allegation. The student has 28 days to respond to the notice. The Minister is required to cancel a visa, including a student visa, if the Minister is satisfied the student has not complied with visa conditions: see *Migration Regulations 1994* (Cth), subs 2.43(2)(b), made pursuant to *Migration Act 1958* (Cth), s 116.
- 85 *Migration Act 1958* (Cth), s 15.
- 86 *Migration Act 1958* (Cth), s 198.
- 87 It is unlikely that the ‘exceptional circumstances’ provisions relevant to the cancellation powers of the Minister (*Migration Regulations 1994* (Cth), s 2.43(2)(b)) would have effect in these circumstances. Temporary suspension of the student’s enrolment for ‘misbehaviour’ is a distinct category of discretion available to education providers under the *National Code*, and in any case, the ‘exceptional circumstance’ provisions apply expressly to circumstances ‘beyond the [student’s] control’: *Migration Regulations 1994* (Cth), s 2.43(2)(b)(ii)(B). Misbehaviour is *mutatis mutandis* inherently not beyond the student’s control: see, for example, discussion of the term in student visa cases in *Wang v Minister for Immigration* [2005] FMCA 918, [24]–[36].
- 88 *Tarasovski v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 570, 572-573; see also *Singh v Minister of Immigration and Ethnic Affairs* [1994] FCA 1534, [16].
- 89 071 497 780 [2007] MRTA 637, [38]–[43]. At [42], Member Ellis remarks (emphasis added):
- The Tribunal is aware of the distinction which was drawn between the cancellation powers set out in s 116 of the Act and those more rigorous provisions in Part 2, Division 3 Subdivision C of the Act which were drawn by Smith FM in *SZEEM v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FMCA 27, however the Tribunal considers that the same principle applies; *the serious consequences of a visa cancellation require that the Tribunal should be satisfied to a high degree that the information upon which the visa was cancelled was correct.*

