



## HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

BETWEEN:

**PETER VINCENT RIDD**

Appellant

and

**JAMES COOK UNIVERSITY**

Respondent

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### **APPELLANT'S SUBMISSIONS**

#### **Part I: Certification**

1. These submissions are in a form suitable for publication on the internet.

#### **Part II: The Issue**

2. Clause 14 of the *James Cook University Enterprise Agreement 2013-2016 (EA)* affords to employees at James Cook University (JCU) a right to “intellectual freedom”. The freedom is defined to include the right of an employee to “[p]articipate in public debate and express opinions about issues and ideas related to their respective fields of competence”, “[e]xpress opinions about the operations of JCU”, and “express unpopular or controversial views”. The right is expressly limited, *inter alia*, to exclude any right to harass, vilify, bully or intimidate those who disagree with the employee’s views.
3. Separately, the EA provides that an employee may be disciplined, and indeed have their employment terminated, for any serious breach of the JCU Code of Conduct (**Code**). By clause 13.3 of the EA the “parties note that the Code of Conduct is not intended to detract from Clause 14”. The issue that arises is this: can an employee who exercises the right to intellectual freedom, conformably with the terms of clause 14, nevertheless be disciplined for a breach of the Code?

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#### **Part III: Section 78B of the *Judiciary Act 1903* (Cth)**

4. It is not necessary to give notice under s 78B of the *Judiciary Act 1903* (Cth).

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#### Part IV: Judgments Below

5. The judgments of the Full Court of the Federal Court of Australia (Griffiths, Rangiah and SC Derrington JJ) are *James Cook University v Ridd* (2020) 382 ALR 8; [2020] FCAFC 123 (FCAFC) and *James Cook University v Ridd (No 2)* [2020] FCAFC 132.
6. The judgments of the Federal Circuit Court of Australia are *Ridd v James Cook University* (2019) 286 IR 389; [2019] FCCA 997 (judgment on liability) (LJ) and *Ridd v James Cook University (No 2)* [2019] FCCA 2489 (judgment on penalty) (PJ).

#### Part V: Facts

##### The parties

- 10 7. The appellant (**Dr Ridd**) was employed by JCU for 27 years [FCAFC, [2] (CAB 140)]. He managed JCU’s marine geophysical laboratory for 15 years and, from 2009 to 2016, he was the head of physics, in recognition that he had “sustained outstanding achievement and leadership across the broad spectrum of academic activities” [LJ, [26] (CAB 17); PJ, [114] (CAB 110-111)]. Dr Ridd had been ranked within the top 5% of researchers globally, had published at least 83 articles in international journals, and had received a number of awards for his teaching [PJ, [109]-[112] (CAB 110)]. His academic interests included a concern about the quality of the scientific research that had been published about the state of health of the Great Barrier Reef [LJ, [29] (CAB 18)].
- 20 8. JCU is a university located in Townsville, close to the Great Barrier Reef. It has significant ongoing relationships with the Great Barrier Reef Marine Park Authority (GBRMPA) and the Australian Research Council Centre of Excellence for Coral Reef Studies (ARC Centre) [LJ, [16] (CAB 10)].

##### The EA

9. The EA came into effect in 2013.<sup>1</sup> At all relevant times, it applied to Dr Ridd.
10. The EA provides a process for disciplinary action against an employee.<sup>2</sup> Under the EA, “Serious Misconduct” is defined to mean, *inter alia*, any serious breach of the Code.<sup>3</sup>

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<sup>1</sup> See EA at AFM 5-159.

<sup>2</sup> EA, clause 54 (Misconduct / Serious Misconduct).

<sup>3</sup> EA, clause 8 (Definitions – “Serious Misconduct”).

Termination of employment is available as disciplinary action by JCU against an employee only in the event of proven unsatisfactory performance or serious misconduct.<sup>4</sup>

### The Code

11. The Code is not a part of the EA. But it is referred to in clause 13 of the EA as follows:

#### **13. CODE OF CONDUCT**

The parties to this Agreement support the Code of Conduct as it establishes the standard by which staff and volunteers conduct themselves towards others and perform their professional duties on behalf of JCU.

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13.1. The parties agree that the Code of Conduct will only be changed following consultation with the JCC.

13.2. JCU is committed to achieving and maintaining the highest standards of ethical conduct and through the Code of Conduct will ensure that staff:

- Seek excellence as a part of a learning community;
- Act with integrity;
- Behave with respect for others; and
- Embrace sustainability and social responsibility.

13.3. The parties note that the Code of Conduct is not intended to detract from Clause 14, *Intellectual Freedom*.

20 12. The Code itself contains about 50 items. It imposes general obligations on employees such as to “enquire, examine, criticise and challenge in the collegial and academic spirit of the search for knowledge, understanding and truth”, “behave in a way that upholds the integrity and good reputation of the University”, treat others with “honesty, respect and courtesy”, and “maintain appropriate confidentiality”.

13. The Code provides that it “must be read in conjunction with the Explanatory Statement for the Code of Conduct which provides further detail regarding the required standards

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<sup>4</sup> EA, clause 8 (Definitions – “Disciplinary Action”).

of conduct”.<sup>5</sup> The Explanatory Statement refers to, among other things, a responsibility to “respect the rights and reputations of others”.<sup>6</sup>

#### Clause 14

14. Clause 14 of the EA gives employees the right to intellectual freedom:

#### **14. INTELLECTUAL FREEDOM**

14.1. JCU is committed to act in a manner consistent with the protection and promotion of intellectual freedom within the University and in accordance with JCU’s Code of Conduct.

14.2. Intellectual freedom includes the rights of staff to:

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- Pursue critical and open inquiry;
- Participate in public debate and express opinions about issues and ideas related to their respective fields of competence;
- Express opinions about the operations of JCU and higher education policy more generally;
- Be eligible to participate in established decision making structures and processes within JCU, subject to established selection procedures and criteria;
- Participate in professional and representative bodies, including unions and other representative bodies.

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14.3. All staff have the right to express unpopular or controversial views. However, this comes with a responsibility to respect the rights of others and they do not have the right to harass, vilify, bully or intimidate those who disagree with their views. These rights are linked to the responsibilities of staff to support JCU as a place of independent learning and thought where ideas may be put forward and opinion expressed freely.

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<sup>5</sup> Code, “Intent”, p 1.

<sup>6</sup> The Code can be found at **AFM 160-166**. The Explanatory Statement can be found at **AFM 167-178**.

- 14.4. JCU acknowledges the rights of staff to express disagreement with University decisions and with the processes used to make those decisions. Staff should seek to raise their concerns through applicable processes and give reasonable opportunity for such processes to be followed.
- 14.5. Staff, as leaders and role models to students and the wider community, must adhere to the highest standards of propriety and truthfulness in scholarship, research and professional practice.
- 10 14.6. Staff members commenting publicly in a professional or expert capacity may identify themselves using their University appointment or qualifications, but must not represent their opinions as those of JCU. The University expects that staff will maintain professional standards when they intentionally associate themselves with its name in public statements and/or forums.
- 14.7. Staff who contribute to public debate as individuals and not in a professional or expert capacity, must not intentionally identify themselves in association with their University appointment.

#### The disciplinary decisions

15. Between 2015 and 2018, JCU made three disciplinary decisions in respect of Dr Ridd. They are conveniently described as the First Censure, the Final Censure and the Termination Decision.<sup>7</sup>
- 20 16. In making these decisions, JCU did not allege, nor find, that Dr Ridd had contravened any of the limits in clause 14. It is common ground that Dr Ridd did not harass, bully, vilify or intimidate anyone. He was disciplined by JCU on the basis that he had contravened the Code.

#### *First Censure*

17. On 16 December 2015, Dr Ridd emailed a journalist to express his opinion that scientific research promoted by the GBRMPA and the ARC Centre — stakeholders of JCU — was

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<sup>7</sup> See First Censure at **AFM 179-181**, Final Censure at **AFM 182-189**, and Termination Decision at **AFM 210-224**. See also JCU's Notice of Termination (which itself is referred to in the Termination Decision) at **AFM 190-209**.

unreliable. Dr Ridd explained his opinion to the journalist. He said that he had undertaken field work in respect of the accuracy of photographs that had been used to suggest damage to an inshore reef. He sought to illustrate how the use of the photographs had been misleading. He included a lengthy document that “explains how these pictures have been misused and that there is a wider issue of lack of quality assurance of much of this ‘public good’ science”. He said that “GBRMPA, and the ARC Centre of Excellence should check their facts before they spin their story” and suggested that the journalist pursue the matter with the two institutions, saying: “My guess is that they will both wiggle and squirm because they actually know that these pictures are likely to be telling a misleading story — and they will smell a trap” [LJ, [55] (**CAB 21-27**); FCAFC, [4] (**CAB 141**)].

18. JCU became aware of the email. It investigated the matter under the Code [LJ, [34] (**CAB 18**)]. It alleged that by sending the email Dr Ridd had breached the Code. In his response to the allegation, Dr Ridd said to JCU:

My view is that all of this is based upon science with very poor quality assurance systems. I have published a number of papers highlighting flaws in some of this science. What am I supposed to do? Remain silent? It is hard to say that a whole lot of science is questionable and poorly quality assured without people getting upset.

19. On 29 April 2016, JCU found that Dr Ridd had breached the Code and engaged in misconduct (**First Finding**). It issued him with a formal censure (**First Censure**). JCU’s findings, contained in the First Censure, included that Dr Ridd had failed to act in a “collegial” manner and failed to “uphold the integrity and good reputation of the University”. JCU also directed Dr Ridd to make public comment only, “in a collegial manner that upholds the University and individuals [sic] respect” (**First Speech Direction**) [LJ, [58] (**CAB 28-29**); FCAFC, [4] (**CAB 141**)].

#### *Final Censure*

20. On 1 August 2017, Dr Ridd was interviewed on Sky News. In the course of the interview he said:

...the basic problem is that we can no longer trust the scientific organisations like the Australian Institute of Marine Science even things like the ARC Centre of Excellence for Coral Reef Studies.

A lot of this stuff is coming out, the science is coming not properly checked, tested or replicated and this is a great shame because we really need to be able to trust our scientific institutions.

And the fact is, I do not think we can anymore.

21. He also said that the scientists concerned “genuinely believe that there are problems with the reef”, but they were not “very objective about the science they do” and were “emotionally attached to their subject”, adding: “You can’t blame them, the reef is a beautiful thing” [LJ, [81] (**CAB 32-39**); FCAFC, [5] (**CAB 141**)].
- 10 22. On 21 November 2017, JCU issued Dr Ridd with the Final Censure. In it, it made seven findings that he had breached the Code (the **Second to Eighth Findings**). Those findings included that the statements in the Sky News interview, referred to above, breached the Code. JCU found Dr Ridd had violated the Code on the basis that he had damaged JCU’s reputation, and denigrated and damaged the reputations of its stakeholders. It said that “[t]he University does not accept that academic freedom justifies your criticism of key stakeholders of the University”. It said that it was entitled to take disciplinary action for what he had said in the Sky News interview “irrespective of whether you believe these comments to be true or made these comments in a calm manner” [LJ, [82] (**CAB 40-41**); FCAFC, [11] (**CAB 142-143**)].
- 20 23. On various occasions throughout the disciplinary process it conducted, JCU purported to direct Dr Ridd to keep the disciplinary action against him confidential [FCAFC, [6]-[8], [12], [15] (**CAB 141-144**)] (these were the **First to Fifth Confidentiality Directions**).<sup>8</sup> But Dr Ridd did not adhere to those directions. He was critical of the disciplinary action against him. For example, in an email exchange with a student, Dr Ridd complained that JCU’s conduct was “Orwellian” because, in his view, “our whole university system pretends to value free debate, but in fact it crushes it whenever the ‘wrong’ ideas are spoken” [LJ, [143] (**CAB 53**); FCAFC, [11] (**CAB 143**)]. As part of the Final Censure, JCU found that this speech breached the Code.

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<sup>8</sup> The First to Third Confidentiality Directions were made before the Final Censure. The Fourth Confidentiality Direction was made in the Final Censure, and the Fifth Confidentiality Direction was made thereafter.



24. Also as part of the Final Censure, JCU purported to direct Dr Ridd to refrain from criticism that was not “collegial” or in the “academic spirit of the search for knowledge, understanding and truth” (**Second Speech Direction**), and not to “make any comments or engage in any conduct that directly or indirectly trivialises, satirises, or parodies the University taking disciplinary action against you” (**No Satire Direction**) [LJ, [165], [168] (**CAB 57-58**); FCAFC, [13] (**CAB 143**)].

#### *Termination Decision*

25. Subsequently, JCU made a further nine findings of breaches of the Code against Dr Ridd. These included that he had breached the directions JCU had issued to him, and breached the Code [FCAFC, [14]-[21] (**CAB 144-145**)].
26. On 2 May 2018, JCU terminated Dr Ridd’s employment [LJ, [50] (**CAB 20**); FCAFC, [22] (**CAB 145**)].

#### The proceedings

27. By proceedings commenced in the Federal Circuit Court, Dr Ridd alleged that the disciplinary action taken against him was unlawful because it contravened the EA and thereby s 50 of the *Fair Work Act 2009* (Cth) [LJ, [4] (**CAB 8**); FCAFC, [10] (**CAB 142**)].
28. Dr Ridd succeeded before the primary judge. His Honour found that conduct that is an exercise of intellectual freedom, within the meaning of clause 14, is protected [LJ, [300] (**CAB 78**)] and “the Code of Conduct cannot detract from cl. 14” [LJ, [265] (**CAB 73**)]. His Honour found that, in each case, Dr Ridd had expressed his honestly-held opinion (a finding not challenged by JCU on appeal). He also found that JCU could not direct Dr Ridd about the exercise of the intellectual freedom right or issue directions designed to limit the exercise of the freedom [LJ, [287]-[292] (**CAB 76-77**)]. His Honour found that JCU’s seventeen findings, two censures, five confidentiality directions, two speech directions, and no satire direction, and its termination of Dr Ridd’s employment, were all unlawful [LJ, [303] (**CAB 79-81**)].
29. JCU appealed. By majority, the Full Court of the Federal Court allowed the appeal, and overturned all of the primary judge’s findings. The majority, in substance, preferred JCU’s construction of the EA that the clause 14 right must be exercised in accordance

with the obligations in the Code [FCAFC, [104] (**CAB 166**)]. JCU also relied on an “alternative” ground of appeal that none of Dr Ridd’s conduct was protected by clause 14 in any event. The majority only partly addressed this ground [FCAFC, [135] (**CAB 174**)]; insofar as it did so, its reasons do not explain which parts of Dr Ridd’s conduct are unable to be characterised as an exercise of intellectual freedom, it wrongly characterised that conduct as something other than an exercise of intellectual freedom, and its conclusions were otherwise a function of its erroneous construction of the scope of the clause 14 right [FCAFC, [130]-[134] (**CAB 173-174**)].<sup>9</sup>

- 10 30. The dissenting justice agreed in substance with the point of construction relied on by Dr Ridd. His Honour found that “where there is a conflict between a genuine exercise of intellectual freedom and a requirement of the Code of Conduct, the former prevails to the extent of the inconsistency” [FCAFC, [289] (**CAB 213**)]. His Honour would have remitted the matter to the primary judge for further factual findings [FCAFC, [293]-[294] (**CAB 214-215**)].<sup>10</sup>

## Part VI: Argument

31. On the proper construction of the EA, where an employee exercises the right in clause 14 — and does not contravene its internal limits — that employee cannot lawfully be disciplined by JCU for that conduct.

32. This construction is supported by the text, context and purpose of the right.

### 20 Text, context and purpose

33. The starting point is that, by the text of clause 14, the makers of the EA intended to confer upon employees a right to intellectual freedom, and by the text of clause 13.3, intended for the Code not to detract from that right.

34. The EA is the product of bargaining between employer and employees. The inclusion of the right in the EA — which had statutory force [FCAFC, [42] (**CAB 149**)], [222]

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<sup>9</sup> So too were its conclusions as to confidentiality [FCAFC, [122] (**CAB 171**)], which assumed that which was, and is, in issue: that JCU was attempting to keep confidential a lawful, rather than unlawful, disciplinary process.

<sup>10</sup> With respect, a remitter is unnecessary. The inconsistency between the Code and the clause 14 right, in this case, is demonstrated by disciplinary action being taken against conduct within clause 14. Once JCU’s conduct is held to be unlawful, the appeal must be allowed and the relevant orders of the primary judge reinstated.

(**CAB 197**)] — reflected the significance of intellectual freedom to the enterprise and its employees [LJ, [247] (**CAB 71**)].

35. The principle of intellectual freedom pre-dates, and exists separately to, this particular enterprise agreement. Intellectual freedom is “derived from, or a variant of, the principle of academic freedom” [FCAFC, [258] (**CAB 205**)].
36. The right to academic freedom is of critical importance to the tertiary sector. Universities pursue knowledge for the public good and the freedom safeguards their capacity to do so.<sup>11</sup> Academic freedom is foundational to a university, being “the very principle upon which the University is founded”.<sup>12</sup> It lies at the heart of a university’s mission by allowing employees to engage in intellectual pursuits without fear of censorship or retaliation.<sup>13</sup> It recognises that human knowledge is fallible and that “time has upset many fighting faiths”.<sup>14</sup> It furthers the robust contest of ideas — what John Henry Newman described, in his classic text ‘The Idea of a University’ as “the collision of mind with mind, and knowledge with knowledge” — that is essential for the advancement of human knowledge.
37. Intellectual freedom includes the right to criticise the university itself. Universities “are not commercial institutions, nor are they instruments of government. They are special communities dedicated to teaching and research”.<sup>15</sup> Accordingly, “requirements to refrain from criticising your employer — common in other workplaces — cannot be indiscriminately imported into universities”; in this sense, academic university employees have a degree of freedom to criticise their employers not shared by those in other employment relationships.<sup>16</sup>

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<sup>11</sup> Carolyn Evans and Adrienne Stone, *Open Minds* (La Trobe University Press, 2021) (**Open Minds**) 83.

<sup>12</sup> *Burns v Australian National University* (1982) 40 ALR 707, 718 (Ellicot J).

<sup>13</sup> See John Dewey, ‘Academic Freedom’ (1902) 23 *Educational Review* 1, 3.

<sup>14</sup> *Abrams v United States* 250 US 616 (1919), 630 (Holmes J, dissenting).

<sup>15</sup> *Open Minds*, 9.

<sup>16</sup> *Open Minds*, 97; see, also, The Hon Robert French AC, ‘Free Speech and the Law on Campus — Do We Need a Charter of Rights for Universities?’ (8th Austin Asche Oration in Law and Governance, 17 September 2018, Darwin) 19.

38. The terms of clause 14 reflect the essential features of the concept of intellectual freedom, including the right to pursue critical and open inquiry, publicly express opinions, express “unpopular or controversial views”, and disagree with JCU processes and decisions.
39. The drafting of clause 14 recognises that the right to intellectual freedom is not absolute. It includes specific limits, such as the obligation not to harass, vilify, bully or intimidate (clause 14.3) and restricting the circumstances in which employees may identify themselves by their JCU appointment, when publicly expressing opinions (clauses 14.6 and 14.7).
- 10 40. The right is intramural to the relationship between the employer and its employees. As a term of the EA it does not purport to, and could not, confer any right upon an employee outside of the employment relationship. This focuses attention on the protection that the right is intended to afford, within that relationship.<sup>17</sup>
41. In light of these considerations, the majority’s construction was erroneous. That is so for the following reasons.
42. **First**, the majority’s construction collides with the express words of clause 13.3, which provides that “[t]he parties note that the Code of Conduct is not intended to detract from Clause 14, *Intellectual Freedom*”.
- 20 43. Clause 13.3 is addressed to a particular mischief, being the interaction between the Code and the clause 14 right. Clause 14 confers a specific right, addressed to a particular subject matter, being the exercise of intellectual freedom. By contrast, the Code confers broad obligations, addressed generally to JCU employees. As a general proposition, one would not ordinarily read a specific right as limited by general obligations contained in the same instrument.<sup>18</sup> This is made plain by the text of clause 13.3, which addresses in terms whether the exercise of the right in clause 14 is subject to the obligations in the Code.

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<sup>17</sup> See, further, Mark Davies, *The Law of Professional Immunities* (Oxford University Press, 2014) [3.34].

<sup>18</sup> That proposition is reflective of, and similar to, two principles of construction: *generalia specialibus non derogant* (“the specific overrides the general”) and *expressum facit cessare tacitum* (“that which is expressed excludes that which is unspoken”). See, eg, *Anthony Hordern & Sons Ltd v Amalgamated Clothing & Allied Trades Union of Australia* (1932) 47 CLR 1, 7 (Gavan Duffy CJ and Dixon J); *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672, 678-679 (Mason J) (Barwick CJ and Aickin J agreeing at 674 and 680); *John v Commissioner of Taxation* (1989) 166 CLR 417, 434 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ); *Smith v The Queen* (1994) 181 CLR 338, 348 (Mason CJ, Dawson, Gaudron and McHugh JJ).

44. A natural reading of clause 13.3 is that the Code cannot be allowed to detract from — *viz.*, diminish, weaken, lessen, takeaway or subtract from — the right that an employee otherwise has by operation of clause 14. Any construction that results in the Code detracting from the right to intellectual freedom in clause 14 is a construction not intended by the makers of the EA, and one that would be contrary to the express language of clause 13.3.
45. The Code’s prohibitions significantly burden the exercise of the clause 14 right and limit its scope. The Code imposes limits on the conduct of staff not otherwise found in clause 14 of the EA. The Code also imposes limits on the conduct of staff that not only incorporate the express limits of clause 14 but go much further by imposing far wider-reaching restrictions. And the Code further imposes limits that are simply inconsistent with the exercise of intellectual freedom. As the dissenting justice observed [FCAFC, [264] (CAB 207)], “it is difficult to see, for example, how an academic could make a genuine allegation that a colleague has engaged in academic fraud” — which is permitted by clause 14 — “without being uncollegial, disrespectful and discourteous and adversely affecting JCU’s good reputation” — which would contravene the Code.
46. There is, therefore, a conflict when “a staff member exercises intellectual freedom and, at the same time, is alleged to have breached the standards set out in the Code of Conduct” [FCAFC, [264] (CAB 207)].
47. The present case illustrates that conflict. Put simply, if the Code applies so that an employee can be disciplined by JCU for conduct that is an exercise of his or her clause 14 right, then the Code has detracted from that right. Clause 13.3 confirms that this is not the proper construction.
48. The majority addressed clause 13.3 as follows [FCAFC, [78] (CAB 158)]:
- Clause 13.3 is no more than a statement of intent by JCU not to diminish its commitment to promote and protect intellectual freedom by means of the Code of Conduct. The Code of Conduct does not do so. If the Code of Conduct were to proscribe any of the matters listed in cl 14.2 (for example the right of staff to pursue critical and open inquiry or to participate in public debate and express opinions about issues and ideas related to their respective fields of competence), those provisions would indeed detract

from cl 14.

49. This was the decisive error made by the majority. The majority ought to have concluded that the Code does detract from the right in the manner described above, and as correctly identified by the dissenting justice.
50. **Second**, the majority’s construction disturbs the detail of the text in clause 14. There, the right is expressed as being subject to specified obligations, but is not expressed as being subject to obligations in the Code.
51. By contrast, the obligations in the Code reflect its more general focus and application. They are “legal categories of indeterminate reference” that permit “a wide range for variable judgment in interpretation and application”.<sup>19</sup> As the majority correctly observed of the Code, “many of these standards are couched in vague and imprecise language” and “do not readily provide clear guidance to staff as to whether particular conduct might breach the obligations outlined in the Code of Conduct”. The majority described this as “an unfortunate consequence of the drafting, particularly given the very serious consequences that may flow from a decision by JCU that conduct has breached the standards” [FCAFC, [86] (**CAB 160**)].
52. Yet the majority failed to see that this “unfortunate consequence of the drafting” arose only on its own construction: whereby the clause 14 right was also subject to the Code. It also failed to appreciate that this “unfortunate consequence” of its construction detracted from the right.
53. **Third**, the majority failed to construe the right with regard to its history and purpose. It acknowledged that “[t]he historical context in which the ideal of academic freedom developed is important” [FCAFC, [91] (**CAB 162**)]. But the majority went on to conclude that “[t]here is little to be gained in resorting to historical concepts and definitions of academic freedom. Whatever the concept once meant, it has evolved to take into account contemporary circumstances which present a challenge to it, including the internet, social media and trolling, none of which informed the view of persons such as JS Mill, John

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<sup>19</sup> See The Hon Robert S French AC, *Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers* (2019) 218, quoting Julius Stone, *Legal System and Lawyers’ Reasoning* (Maitland Publications, 1968) 263-264.

Locke, Isaiah Berlin and others who have written on the topic” [FCAFC, [94] (CAB 163)].

54. This was a significant misstep. As the dissenting justice said: “[w]hile academic freedom has no settled definition, it is not devoid of meaning” [FCAFC, [260] (CAB 206)]. Nor is the right to be construed as if it has no history or discernible purpose.
55. The principle of academic freedom is one of considerable history dating back to Socrates’ defence in Plato’s *Apology* [FCAFC, [91] (CAB 162)]. As has been explained, it lies at the heart of a university’s mission by allowing employees to engage in intellectual pursuits — thereby pursuing the search for truth — without fear of reprisals.
- 10 56. In fact, the importance of the freedom is reflected in its recognition around the world. In some jurisdictions, the right to academic freedom is afforded constitutional protection.<sup>20</sup> In others, it is protected by legislation.<sup>21</sup> In Australia, academic freedom is recognised in the *Higher Education Support Act 2003* (Cth).<sup>22</sup> The Supreme Court of the United States has said that academic freedom is a something of “transcendent value to all of us”.<sup>23</sup> The Supreme Court of Canada has said that “[a]cademic freedom and excellence is necessary to our continuance as a lively democracy”.<sup>24</sup>
- 20 57. The history and purpose of the right is significant because it illuminates the importance of the right to the enterprise and its employees. It also explains why the makers of the agreement both decided to incorporate the right into the EA, and also took pains to confirm that the right was not to be detracted from by the Code.

### Other textual matters

<sup>20</sup> See, eg, *Constitution of the Republic of South Africa*, s 16(1)(d); *Constitution of the Republic of the Philippines*, art XIV, s 5(2). See also *Charter of Fundamental Rights of the European Union*, art 13.

<sup>21</sup> See, eg, *Education and Training Act 2020* (NZ), s 267 (and, earlier, *Education Act 1989* (NZ), s 161); *Universities Act 1997* (Ireland), s 14.

<sup>22</sup> The objects of the present *Higher Education Support Act* include that it “promotes and protects freedom of speech and academic freedom” (s 2–1(a)(iv)). The earlier version of the Act, which applied at the time of Dr Ridd’s dismissal, included as one of the Act’s objects that it “promotes and protects free intellectual inquiry in learning, teaching and research” (s 2–1(a)(iv)). See also Subdivision 19-G.

<sup>23</sup> *Keyishian v Board of Regents*, 385 US 589 (1967), 603. See also *Regents of Univ. of California v Bakke*, 438 US 265 (1978), 312.

<sup>24</sup> *McKinney v University of Guelph* [1990] 3 SCR 229, 286-287 (La Forest J).

58. In support of its construction, the majority relied upon clause 14.1, which provides that “JCU is committed to act in a manner consistent with the protection and promotion of intellectual freedom within the University and in accordance with JCU’s Code of Conduct”. It reasoned that “[p]art of that commitment is an implicit commitment on the part of the University to require all staff to comply with the Code of Conduct as part of their employment relationship” [FCAFC, [81] (**CAB 159**)]. On this basis, it concluded that the clause 14 right must be read as subject to the Code [FCAFC [82] (**CAB 159**)].
59. There are three reasons why that is not so.
60. **First**, this is not a natural reading of the words. To make the right subject to the obligations in the Code is to significantly change the scope of the right as otherwise described in clauses 14.2-14.7. There are no clear or direct words in clause 14.1 that would require this result.
61. The important context and purpose considerations above are not undone by what is, at its highest, awkward drafting. An enterprise agreement is a practical document. While the language used by the parties to the EA, read in context, is paramount,<sup>25</sup> courts should not make too much of infelicitous expression in the drafting of industrial instruments. Apparent inconsistencies may be met by a generous and liberal approach to construction.<sup>26</sup>
62. **Second**, an important feature of the drafting of clause 14 — when read as a whole — is that where the clause refers to employees (either to confer a right, or to impose an obligation), it directly addresses “staff” (see clauses 14-2-14.7). By contrast, the subject of clause 14.1 is not “staff” but “JCU”.
63. **Third**, even assuming, as the majority did, that clause 14.1 recognises an “an implicit commitment on the part of the University to require all staff to comply with the Code of Conduct as part of their employment relationship”, it does not follow that employees are

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<sup>25</sup> *Amcor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241, [2] (Gleeson CJ and McHugh J), [30] (Gummow, Hayne and Heydon JJ).

<sup>26</sup> *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* (2006) 153 IR 426, [57] (French J). See also *Hail Creek Coal Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union* (2018) 265 FCR 505, [1] (Reeves J), [6] (Bromberg J), [76]-[78] (O’Callaghan J).



required to comply with the Code where it detracts from the clause 14 right. As the dissenting justice concluded [FCAFC, [265] (**CAB 207**)]:

The issue is how the Enterprise Agreement resolves conflicts between JCU's commitment under cl 14.1 to enforce the Code of Conduct and its conjunctive commitment to protect and promote intellectual freedom. The answer is found in cl 13.3, which indicates that cl 14 limits the scope, operation and effect of the Code of Conduct.

- 10 64. On that approach, properly understood, clause 14.1 confirms Dr Ridd's construction. That is, where an employee purports to exercise the right to intellectual freedom, but does not do so within the limits provided for in clauses 14.2-14.7 (for example, by vilification), then he or she will not be protected by the clause 14 right. In that event, the Code will not detract from the right and would be engaged such that disciplinary action may be taken. By contrast, where clause 14 applies, the Code is not permitted to detract from it. This is a coherent construction that gives all the words in clause 14 meaning and effect.
65. Finally, the majority also suggested that the phrase "rights of others", that precedes the obligation not to harass, vilify, bully or intimidate, should be read as if it too picks up all of the obligations in the Code [FCAFC, [72] (**CAB 157**)]. For the reasons already given, it does not. That phrase is descriptive of the particular obligations listed in clause 14.3.

#### Disposition

- 20 66. JCU's three disciplinary decisions were cumulative upon one another [FCAFC, [293] (**CAB 214**)]. Each depended upon JCU's misconstruction of the clause 14 right. The primary judge found that each of the three disciplinary decisions by JCU was unlawful.
67. The Full Court overturned all of the primary judge's findings. If Dr Ridd is correct on the construction of clause 14, the Full Court's orders must be set aside and the primary judge's orders (in respect of liability) restored.
68. This includes his Honour's specific findings as to the alleged contraventions by Dr Ridd of confidentiality obligations, whereby Dr Ridd was directed to, but did not, keep confidential the disciplinary action against him. His conduct, in that regard, was protected by the intellectual freedom right in clauses 14.2 and 14.4, properly construed.

69. The majority concluded that JCU’s confidentiality directions were both reasonable and lawful. But if Dr Ridd succeeds on his construction, that conclusion must fall away because it cannot be a lawful and reasonable direction to prohibit the disclosure of an unlawful disciplinary process. In this regard, as the dissenting justice described it, the majority’s approach led to “a Kafkaesque scenario of a person secretly accused and secretly found guilty of a disciplinary offence but unable to reveal, under threat of further secret charges being brought, that he or she had ever been charged and found guilty” [FCAFC, [276] (CAB 210)].

**Part VII: Orders sought**

10 70. The appellant seeks orders conformably with his Notice of Appeal.

**Part VIII: Time estimate**

71. It is estimated that 1.5 hours will be required for the presentation of the oral argument of the appellant.

**Dated:** 15 April 2021



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## ANNEXURE

**List of the particular constitutional provisions, statutes and statutory instruments  
referred to in the submissions**

<b>Title</b>	<b>Provisions\sections</b>	<b>Date</b>
<i>Higher Education Support Act 2003 (Cth)</i>	Section 2–1 and Subdivision 19-G	Current
<i>Constitution of the Republic of South Africa</i>	Section 16(1)(d)	Current
<i>Constitution of the Republic of the Philippines</i>	Article XIV, section 5(2)	Current
<i>Charter of Fundamental Rights of the European Union</i>	Article 13	Current
<i>Education and Training Act 2020 (NZ)</i>	Section 267	Current
<i>Education Act 1989 (NZ)</i>	Section 161	Repealed
<i>Universities Act 1997 (Ireland)</i>	Section 14	Current