

# Before the High Court

## The Meaning of Academic Freedom: The Significance of *Ridd v James Cook University*

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### Abstract

The case of *Ridd v James Cook University* raises important questions as to the content and scope of the principle of academic freedom, and its application to public criticism of academic research and university governance. It presents a rare opportunity for the High Court of Australia to consider the legal content of the principle of academic freedom, and the outcome of the case will likely be very significant for Australian universities. This article provides a principled foundation to suggest that James Cook University's termination of Professor Ridd contravened critical and widely accepted aspects of the principle of academic freedom. It takes issue with the majority decision of the Full Federal Court of Australia under appeal on two bases. First, it suggests that the majority paid insufficient regard to the principle of academic freedom, which should properly have informed the interpretation of the provisions of the relevant university enterprise agreement relating to 'intellectual freedom'. Second, given the requirements of the principle of academic freedom and the principle's centrality to the purposes of a university, the particular provision that protects 'intellectual freedom' should have been understood, in some circumstances, to take priority over the code of conduct that Ridd was found to have breached.

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## I Introduction

For some years, public debate about universities has been at an unusually high pitch.<sup>1</sup> Much of the focus has been on freedom of speech in universities,<sup>2</sup> leading, in 2018, to the Independent Review of Freedom of Speech in the Australian Higher Education Sector, headed by the Hon Robert French AC.<sup>3</sup> Some disputes related to controversial speakers on university campuses and student reactions to them,<sup>4</sup> leading to allegations of a culture of intolerance among students.<sup>5</sup>

One of the most high-profile disputes, however, arose in a somewhat different context. In 2018, James Cook University ('JCU') terminated the employment of Professor Ridd, who had been an employee for 27 years, for 'serious misconduct'.<sup>6</sup> The termination and subsequent legal action arose from Ridd's trenchant public criticism of certain academic colleagues and their research, and so raised questions as to the right of an academic to engage in such public criticism. In other words, it raised questions as to academic freedom — a concept specific to the university context — rather than the more general concept of freedom of speech.

Ridd successfully challenged his termination at first instance in the Federal Circuit Court of Australia.<sup>7</sup> However, the Full Federal Court of Australia, by majority, upheld an appeal by JCU. At both stages, the case turned on the interaction between the JCU Enterprise Agreement ('EA'), cl 14 of which contained a commitment to 'intellectual freedom', and the JCU Code of Conduct, which contained obligations of 'courtesy', 'respect' and upholding the University's reputation. Notwithstanding the guarantee of intellectual freedom in the EA, the University found that Ridd had breached his obligations under the Code of Conduct, setting in train a process that led to his termination.

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<sup>1</sup> But debates of this kind are also very old: see Carolyn Evans and Adrienne Stone, *Open Minds: Academic Freedom and Freedom of Speech in Australia* (La Trobe University Press, 2021) ch 1.

<sup>2</sup> Katharine Gelber 'Is There a "Free Speech Crisis" in Australian Universities?', *ABC Religion & Ethics* (Opinion Post, 15 July 2020) <<https://www.abc.net.au/religion/katharine-gelber-free-speech-crisis-in-australian-universities/12459718>>.

<sup>3</sup> Robert S French, *Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers* (March 2019) ('*French Report*').

<sup>4</sup> See, eg, Gavin Fernando, 'Riot Squad Called to Sydney University over Protests to Sex Therapist Bettina Arndt', *News.com.au* (Website, 12 September 2018) <<https://www.news.com.au/lifestyle/real-life/news-life/riot-squad-called-to-sydneyuniversity-over-protests-to-sex-therapist-bettina-arndt/news-story/0698b147e38b44f2b13fc3766664385c>>; Chris Smith, 'Psychologist Slams Hypocritical Mob of "Abusive" Protesters for Bullying', *2GB* (online, 24 September 2018) <<https://www.2gb.com/psychologist-slams-hypocritical-mob-of-abusive-protesters-for-bullying/>>.

<sup>5</sup> Evans and Stone (n 1) 111.

<sup>6</sup> *James Cook University v Ridd* (2020) 278 FCR 566 ('*Ridd Appeal*'). The facts are set out at 569–73 [2]–[22] (Griffiths and SC Derrington JJ).

<sup>7</sup> *Ridd v James Cook University* (2019) 286 IR 389 ('*Ridd First Instance*'). See also *Ridd v James Cook University (No 2)* [2019] FCCA 2489 (Judge Vasta) on the assessment of compensation and pecuniary penalties.

The case, now on appeal to the High Court of Australia,<sup>8</sup> presents a rare opportunity for consideration of the legal meaning of academic freedom.<sup>9</sup> The High Court's decision may therefore be highly significant for the rights of academics to discuss research and express academic opinions. As I will later discuss, the issues and employment instruments at issue in the *Ridd* case are hardly unique to JCU. Moreover, the case illuminates a long-running public debate about the role of universities in society and the risks posed when academics are censured for discussing research or university governance.<sup>10</sup>

In this column, I take issue with the majority judgment in the Full Federal Court on two bases. First, the majority paid insufficient regard to the concept of academic freedom, which is based on well-understood principles that should properly have informed the interpretation of the JCU EA provisions relating to 'intellectual freedom'. Second, given the requirements of academic freedom and its centrality to the purposes of a university, the EA provision that protects 'intellectual freedom' should have been understood, in some circumstances, to circumscribe the operation of the Code of Conduct.

Leaving aside technical questions as to the construction of the JCU EA and the JCU Code of Conduct, these arguments provide a principled foundation to suggest that Ridd's termination contravened critical and widely accepted principles of academic freedom. Beyond this particular case, it seems that, unless the decision is overturned on appeal, similar university codes of conduct are, or may become, significant threats to academic freedom.

## II Background

JCU's decision to terminate Ridd's employment followed two formal censures of his conduct in 2016 and 2017. These censures arose from findings by the University that Ridd had engaged in misconduct contrary to the JCU Code of Conduct and that this misconduct formed part of a wider pattern of conduct destructive of the University's reputation and of the trust and confidence necessary to the continuation of his employment.

The origins of the dispute lay in an academic disagreement about climate change and its effects on the Great Barrier Reef. Beginning in 2015, Ridd made several public statements to journalists expressing his disagreement with colleagues

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<sup>8</sup> *Ridd v James Cook University* (High Court of Australia, Case No B12/2021) ('*Ridd*'). The High Court of Australia granted special leave to appeal on 11 February 2021: see Transcript of Proceedings, *Ridd v James Cook University* [2021] HCATrans 15 (Gageler, Gordon and Edelman JJ).

<sup>9</sup> There is no Australian case providing a clear statement of the meaning of academic freedom. However, there are cases that have considered the principle or related ideas. This is often for the purpose of determining the status of academics in the context of employment disputes. See, eg, *Burns v Australian National University*, where Ellicott J stated that '[i]t is vital to the fulfilment of the University's functions as an independent educational institution committed to the search for truth that the tenure of its professorial staff be free from arbitrary attack. I can think of no principle more basic to the existence of a university in a free society.': *Burns v Australian National University* (1982) 61 FLR 76, 88.

<sup>10</sup> Evans and Stone (n 1) 111.

at the Australian Research Council Centre of Excellence in Coral Reef Studies ('Centre of Excellence') at JCU and at the Great Barrier Reef Marine Park Authority ('the Authority'), a federal government authority. For instance, in 2015 Ridd emailed a journalist questioning the reliability of reports produced by those bodies. In it, he stated that the bodies should 'check their facts before they spin their story'.<sup>11</sup> He predicted that, if pressed, the bodies would 'wobble and squirm because they actually know that these pictures are likely to be telling a misleading story — and they will smell a trap'.<sup>12</sup> In 2017, Ridd appeared on a television program on Sky News Australia with well-known conservative commentators Alan Jones and Peta Credlin. In that interview, he suggested that research from the Centre of Excellence and the Authority was flawed and could not be trusted.<sup>13</sup>

As the dispute between Ridd and JCU escalated and disciplinary processes commenced, Ridd was directed to maintain confidentiality in respect of those processes. Such directions are commonly given to the subjects of disciplinary processes.<sup>14</sup> Later, he was also directed not to do anything that 'directly or indirectly trivialises, satirises or parodies the University taking disciplinary action against [him]'.<sup>15</sup> Ridd did not comply with these directions. For example, he published confidential documents relating to the disciplinary process on a website, engaged in further commentary about his colleagues, and set up a *Go Fund Me* campaign to raise funds to assist in his dispute with the University.<sup>16</sup> An article in *The Australian* newspaper detailed the application Ridd had filed in the Federal Circuit Court. Ridd emailed the article to a student at the University with the subject line 'For your amusement'.<sup>17</sup> Following two censures and his non-compliance with the various directions, JCU terminated Ridd's employment. Ridd successfully challenged the termination in the Federal Circuit Court.<sup>18</sup> JCU appealed to the Full Federal Court.

### III The Decision of the Full Federal Court of Australia

The essential question before the Full Federal Court was whether Ridd's conduct was protected by the JCU EA. As a legal matter, the case therefore turned on the relationship between the JCU EA and the JCU Code of Conduct, which are therefore explained in some detail below.

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<sup>11</sup> *Ridd Appeal* (n 6) 570 [4].

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid* 570 [5].

<sup>14</sup> The legality of the confidentiality provisions is not canvassed in this column.

<sup>15</sup> *Ridd Appeal* (n 6) 572 [13]; *Ridd First Instance* (n 7) 423 [168].

<sup>16</sup> *Ridd Appeal* (n 6) 572 [14].

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ridd First Instance* (n 7).

## A *The JCU Enterprise Agreement*

For present purposes, the central clause of the JCU EA<sup>19</sup> is cl 14, entitled ‘Intellectual Freedom’.<sup>20</sup> Clause 14.1 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.’<sup>21</sup> Intellectual freedom is defined in cl 14.2 as including the rights of staff to:

- 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.<sup>22</sup>

Clause 14.3 expressly provides:

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.<sup>23</sup>

As may be seen, cl 14 of the EA makes reference to the Code of Conduct. The provisions of the EA prevail over inconsistent guidelines and policies. Clause 6 of the EA relevantly provides:

- 6.3 If there is any inconsistency between the guidelines and policies and the express terms of this Agreement, this Agreement will apply.<sup>24</sup>

## B *The JCU Code of Conduct*

The Code of Conduct is an instrument approved by the Council of the University pursuant to JCU’s governing legislation.<sup>25</sup> Compliance with the Code is a

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<sup>19</sup> An enterprise agreement is a collective agreement made between employers and employees under (and subject to conditions set down by) the *Fair Work Act 2009* (Cth) and given statutory force by that Act: *Ridd Appeal* (n 6) 576 [42], citing *Toyota Motor Corporation Australia Ltd v Marmara* (2014) 222 FCR 152, 179–80 [89]–[90].

<sup>20</sup> *Ridd Appeal* (n 6) 577–8 [46]–[47].

<sup>21</sup> *Ibid* 577–8 [47].

<sup>22</sup> *Ibid*.

<sup>23</sup> *Ibid*.

<sup>24</sup> *Ibid* 582–3 [75].

<sup>25</sup> James Cook University (‘JCU’) is established by the *James Cook University Act 1997* (Qld). JCU is therefore a ‘public sector entity’ pursuant to the *Public Sector Ethics Act 1994* (Qld) sch - Dictionary

requirement, imposed by statute, on all JCU staff.<sup>26</sup> The Code of Conduct confers rights and imposes obligations on JCU employees, including, relevantly, to:

- value academic freedom, and enquire, examine, criticise, and challenge in the collegial and academic spirit of the search for knowledge, understanding and truth;
- behave with intellectual honesty;
- have the right to make public comment in a professional, expert or individual capacity, provided that we do not represent our opinions as those of the University unless authorised to do so;
- have the right to freedom of expression, provided that our speech is lawful and respects the rights of others;
- maintain appropriate confidentiality regarding University business;
- behave in a way that upholds the integrity and good reputation of the University;
- take reasonable steps to avoid, or disclose and manage, any conflict of interest (actual, potential or perceived) in the course of employment;
- comply with any lawful and reasonable direction given by someone who has authority to give that direction;
- treat fellow staff members, students and members of the public with honesty, respect and courtesy, and have regard for the dignity and needs of others; and
- refrain from and not accept vilification, bullying, harassment or sexual harassment.<sup>27</sup>

### C *Ridd's Argument*

Both at trial and on appeal to the Full Federal Court, Ridd did not dispute that he had engaged in the conduct that formed the basis for JCU's findings of misconduct and the termination of his employment. Nor did he dispute that some of his conduct amounted, as the University found, to 'misconduct' or 'serious misconduct'.<sup>28</sup> The Full Federal Court was sceptical about these concessions. Describing them as 'inexplicable',<sup>29</sup> the Court was evidently of the view that some of the University's findings about and characterisations of Ridd's conduct were unjustified. Nevertheless, the concessions by Ridd narrowed the issues in dispute.<sup>30</sup>

Ridd's primary argument was that the 'intellectual freedom' guaranteed by cl 14 of the JCU EA meant that he was entitled to express his academic opinions unconstrained by the JCU Code of Conduct. Clause 14 offered him protection provided that, in exercising his intellectual freedom, he did not harass, vilify, bully

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(definition of 'public sector entity') ('PSEA'). Accordingly JCU is subject to the requirement under that Act that it have a code of conduct: *PSEA* ss 10(1). See also *PSEA* ss 13–27.

<sup>26</sup> *PSEA* s 18.

<sup>27</sup> *Ridd Appeal* (n 6) 584–5 [85] quoting parts of Principles 1 to 3 of the Code of Conduct.

<sup>28</sup> *Ridd Appeal* (n 6) 573–4 [23] (Griffiths and SC Derrington JJ); 609 [204] (Rangiah J).

<sup>29</sup> *Ibid* 609 [204] (Rangiah J). See also 573–4 [23] (Griffiths and SC Derrington JJ).

<sup>30</sup> *Ibid* 575 [35] (Griffiths and SC Derrington JJ), 609 [204] (Rangiah J).

or intimidate those who disagreed with his views (which the University conceded his conduct did not do).<sup>31</sup> Accordingly, he argued the University had no basis to discipline him for any of his conduct and had contravened the EA in doing so.<sup>32</sup>

At first instance, the primary judge accepted this argument, finding that the Code of Conduct was subordinate to the intellectual freedom guaranteed by cl 14 of the EA.<sup>33</sup> As the impugned conduct was protected by the primary ‘intellectual freedom’ guarantee, the censures, directions, and termination in respect of that conduct were unlawful.<sup>34</sup>

## D *The Majority Decision in the Full Federal Court*

In the Full Federal Court, Griffith and SC Derrington JJ delivered the majority judgment, rejecting the primary judge’s interpretation and upholding JCU’s appeal.

### 1 *The Meaning of Intellectual Freedom*

An important step in the majority’s argument was to insist on a distinction between the related concepts of ‘intellectual freedom’ (as defined in the JCU EA) and ‘academic freedom’.<sup>35</sup> In determining the meaning of ‘intellectual freedom’, the majority explicitly put to one side any substantive consideration of the principle of ‘academic freedom’.<sup>36</sup> While the majority referred to the ‘ancient’ origins of the principle,<sup>37</sup> its connection to the growth of the secular university and its role in tenure, their Honours concluded that: ‘There 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’.<sup>38</sup>

The reason for this rejection lay partly in change in practices in universities over time. Tenure, once considered a central feature of academic appointments, has been replaced with ‘continuing appointments’.<sup>39</sup> Moreover, practices in universities and the relevant obligations found in university enterprise agreements vary. By way of example, the majority pointed (without identifying it) to the University of Melbourne’s Enterprise Agreement, which incorporates an academic freedom of expression policy expressed in strong terms.<sup>40</sup> Their Honours contrasted that policy

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<sup>31</sup> Ibid 576 [25].

<sup>32</sup> Ibid.

<sup>33</sup> *Ridd First Instance* (n 7) 435–6 [299]–[301].

<sup>34</sup> Ibid 436–7 [303].

<sup>35</sup> *Ridd Appeal* (n 6) 585–6 [90]: ‘It is important ... that the terms “intellectual freedom” and “academic freedom” not be conflated’.

<sup>36</sup> Ibid 587–8 [94]–[97]. In addition (and somewhat puzzlingly) their Honours point to the transformation of communication in the modern digital economy as a reason to put traditional understandings of academic freedom to one side: at 587 [94]–[95].

<sup>37</sup> Ibid 585 [88].

<sup>38</sup> Ibid 587 [94].

<sup>39</sup> Ibid 586 [92].

<sup>40</sup> Ibid 587 [95]. As their Honours summarise it:

That Policy describes a core value of the university being ‘to preserve, defend and promote the traditional principles of academic freedom ... so that all scholars at the University are free to

with a provision of another university's enterprise agreement that is somewhat more qualified.<sup>41</sup> The majority concluded:

These two examples, from amongst the 44 referred to in the French Review... illustrate that *there is no common understanding across the university sector as to the content of any principle of academic freedom or of intellectual freedom, nor any unanimity as to where the bounds of any such freedoms should be set.*<sup>42</sup>

In addition, the majority pointed to 'contemporary circumstances ... including the internet, social media and trolling',<sup>43</sup> which were said to render less relevant 'historical concepts and definitions of academic freedom'.<sup>44</sup> As neither the history of academic freedom, nor the practice in Australia, was sufficiently relevant or uniform to inform the meaning of 'intellectual freedom', the majority then turned to a conventional textual analysis of the JCU EA and the JCU Code of Conduct.

## 2 *The Relationship between the JCU Enterprise Agreement and the JCU Code of Conduct*

A second important step in the Full Federal Court majority's reasoning was its finding that, as a matter of construction, the protection of 'intellectual freedom' in the JCU EA was more limited than the first instance judge had accepted. Their Honours did not accept, as the first instance judge had, that the 'intellectual freedom' guarantee in the EA allowed Ridd to make public comments subject only to those provisions of the Code of Conduct that prohibit harassment, bullying or intimidation.<sup>45</sup>

In reaching this conclusion, their Honours emphasised that cl 14 of the EA contains explicit textual limits exceeding the narrow limitation for which Ridd contended.<sup>46</sup> For example, cls 14.5–14.7 respectively require that staff 'must adhere to the highest standards of propriety and truthfulness in scholarship, research and professional practice'; 'must not represent their opinions as those of JCU'; and,

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engage in critical enquiry, scholarly endeavour and public discourse without fear or favour'. The Policy expressly recognises that scholars are entitled to express their ideas and opinions even when doing so may cause offence. The right to exercise academic freedom of expression is subject to two principles: that all discourse must be undertaken reasonably and in good faith; and all discourse should accord with principles of academic and research ethics.

See University of Melbourne, *Academic Freedom of Expression Policy (MPF1224)* <<https://policy.unimelb.edu.au/MPF1224>>.

<sup>41</sup> That enterprise agreement, which appears to be Murdoch University's 2018 agreement, provides:

Without derogating from or limiting the employment and other legal obligations of Academic Employees, including the obligations to comply with reasonable and lawful directions and requests, the parties to the Agreement are committed to the principles of promoting and protecting academic freedom.

'Those principles are said to include the rights of all Academic Employees to, inter alia, "express unpopular or controversial views, but this does not mean the right to harass, bully, vilify, defame or intimidate": see *Ridd Appeal* (n 6) 587–8 [96]. See also *Murdoch University Enterprise Agreement* [2018] FWCA 4557, cl 14.3.

<sup>42</sup> *Ridd Appeal* (n 6) 588 [97] (emphasis added).

<sup>43</sup> *Ibid* 587 [94].

<sup>44</sup> *Ibid*.

<sup>45</sup> *Ibid* 582 [72].

<sup>46</sup> *Ibid* 589 [102].



where contributing to public debate as individuals, ‘must not intentionally identify themselves in association with their University appointment’.<sup>47</sup>

Similarly, their Honours did not accept that the Code of Conduct was subordinate to the ‘intellectual freedom’ guarantee in cl 14 of the EA. Rather, the two instruments were to be read harmoniously. Far from subordinating the Code of Conduct, the EA required compliance with it.<sup>48</sup> For instance, cl 14.1 required the University 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’.<sup>49</sup> Further, cl 13.1 provided that the ‘[p]arties to this agreement support the Code of Conduct’.<sup>50</sup>

For these reasons, their Honours concluded that the Code of Conduct and cl 14 of the EA were consistent and compatible: specifically, cl 14 supplied the content of the ‘intellectual freedom’ guarantee, whereas the Code of Conduct prescribed the *manner* in which that ‘intellectual freedom’ is to be exercised.<sup>51</sup> Absent any conflict between the EA and the Code, the application of the Code to Ridd’s conduct was lawful and in accordance with the University’s obligations under the EA.<sup>52</sup>

## **E     *The Dissent in the Full Federal Court***

Rangiah J dissented, taking a different view of the relationship between the JCU EA and the Code of Conduct. Like the majority, his Honour rejected Ridd’s submission that cl 14 of the EA entitled him to express his academic opinions unconstrained by the Code.<sup>53</sup> Similarly, Rangiah J accepted that cl 14 (and other relevant clauses) ‘are intended to be interpreted and applied in light of the Code of Conduct’.<sup>54</sup>

But, unlike the majority, his Honour recognised that there may be occasions where action taken under the Code of Conduct is inconsistent with cl 14.<sup>55</sup> The two instruments were therefore not, in all cases, consistent and compatible. His Honour emphasised that cl 13 provided that nothing in the Code was ‘to detract from’ cl 14, meaning that the Code ‘is not intended to undermine the scope, operation and effect of cl 14’.<sup>56</sup> Other sub-clauses of cl 14 explicitly recognised the possibility of conflict between the intellectual freedom guarantee and the Code obligations.<sup>57</sup> Thus, there may be circumstances where an academic who exercises the right to intellectual freedom protected by cl 14 simultaneously breaches the standards set out in the Code of Conduct. His Honour illustrated the point as follows:

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<sup>47</sup> Ibid 582 [71].

<sup>48</sup> Ibid 584 [82], 585 [87].

<sup>49</sup> Ibid 584 [81] (emphasis in original).

<sup>50</sup> Ibid 581 [66].

<sup>51</sup> Ibid 589 [103].

<sup>52</sup> Ibid 589 [104].

<sup>53</sup> Ibid 611 [209].

<sup>54</sup> Ibid 618 [250].

<sup>55</sup> Ibid 619 [257].

<sup>56</sup> Ibid 618 [252].

<sup>57</sup> Ibid 619 [257].

[I]t is difficult to see, for example, how an academic could make a genuine allegation that a colleague has engaged in academic fraud without being uncollegial, disrespectful and discourteous and adversely affecting JCU's good reputation.<sup>58</sup>

In such circumstances, Rangiah J considered that the following inquiry must ensue:

First, it must be determined whether the staff member was genuinely engaged in an exercise of intellectual freedom, which will require identification of how that freedom is said to have been exercised. Second, it must be determined whether the staff member may have breached the Code of Conduct, and in what manner. Third, it must be determined whether there is a conflict between the particular exercise of intellectual freedom identified and the particular requirement of the Code of Conduct that is alleged to have been breached, such that prosecuting the disciplinary proceedings will be inconsistent with JCU's obligation to protect and promote intellectual freedom within the University.<sup>59</sup>

If the third stage of the analysis is reached, and inconsistency identified, Rangiah J continued, then the guarantee of the genuine exercise of intellectual freedom prevails to the extent of the inconsistency.<sup>60</sup>

Rangiah J's position, therefore, is a more subtle reading of the relationship between the JCU EA and the JCU Code of Conduct. His Honour rejected both Ridd's submission that the cl 14 guarantee trumps the Code of Conduct; and the majority position that the Code of Conduct supplies content to, and is therefore always fully consistent with, cl 14. Rather than being an all-or-nothing proposition, inconsistency, on his Honour's view, may arise on the facts of a particular case. In such cases, 'where there is 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'.<sup>61</sup>

A final relevant point of contrast with the majority's approach was that Rangiah J's approach was informed by some consideration of the principle of academic freedom. His Honour considered that the principle of 'intellectual freedom' protected by cl 14 was evidently derived from or otherwise related to the principle of academic freedom. The principle of academic freedom, despite variances in definition and application, was not 'devoid of meaning',<sup>62</sup> and necessarily provides 'important contextual background for the construction of cl 14'.<sup>63</sup>

Ultimately, Rangiah J would have remitted the matter to the Federal Circuit Court for a new hearing on the same evidence.<sup>64</sup>

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<sup>58</sup> Ibid 620 [264].

<sup>59</sup> Ibid 621 [266].

<sup>60</sup> Ibid 621 [265].

<sup>61</sup> Ibid 625–6 [289]. See also 620–1 [265]–[266].

<sup>62</sup> Ibid 620 [260].

<sup>63</sup> Ibid 619 [258]. See also 619–21 [259]–[261].

<sup>64</sup> Ibid 626 [294].

## IV Commentary and Critique

There are a number of aspects of this case that seem unsatisfactory. Some lie in the way that the arguments were put for Ridd. As mentioned above in Part III, the Full Federal Court considered Ridd's failure to contest the University's findings that his conduct was in breach of the code 'inexplicable'.<sup>65</sup> Had Ridd done so, the Court may have concluded that some of his conduct amounted to trivial, rather than serious, breaches.<sup>66</sup> Equally, Ridd's submission that he had 'the untrammelled right (provided his conduct did not harass, vilify, bully or intimidate) to express his professional opinions in whatever manner he chose'<sup>67</sup> may have been an unfortunate framing of the issue. The rejection of such an unqualified proposition appears to have opened the way for the equally unqualified conclusion that the JCU Code of Conduct was fully consistent with the JCU EA in all circumstances. The case also points to the difficulty of the use of the term 'intellectual freedom' in the EA, a term apt to confuse, rather than the better understood term 'academic freedom'.

The focus of my comments, however, is on the majority's findings that: academic freedom and intellectual freedom are to be distinguished; and, relatedly, 'academic freedom' has no settled meaning that could have assisted the Court in the interpretation of the phrase 'intellectual freedom' in the EA. In my view, both conclusions are questionable.

Contrary to the majority's view, 'intellectual freedom' and 'academic freedom' should be understood largely to overlap. The concept of academic freedom, moreover, has a long history from which clear principles emerge. This does not mean that the principle and its requirements can be mapped with the precision of a statute. Nor does it mean that the principle is static. However, it means that there were a richer set of resources from which the Court could, but did not, draw. Indeed, given the well-accepted understandings of the principle of academic freedom, university instruments, such as enterprise agreements and codes of conduct, arguably should be *subject to* and *informed by* the requirements of academic freedom, rather than treated as charting the boundaries of those requirements.

In making these points, I note the principles governing the interpretation of enterprise agreements set out by the majority.<sup>68</sup> Rightly, the majority counsels an approach that pays attention to purpose, and also to context including the 'ideas that gave rise to an expression in a document from which it has been taken' and the history of a particular clause.<sup>69</sup> It is to the idea of academic freedom that I now turn.

### A *Academic Freedom: Three Core Principles*

Academic freedom is a long-established commitment of universities the world over. The roots of the idea of academic freedom lie deep in the Enlightenment and even

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<sup>65</sup> See above n 29 and accompanying text.

<sup>66</sup> *Ridd Appeal* (n 6) 573–4 [23], 602 [169].

<sup>67</sup> *Ibid* 566 [1]. Thanks to Joo-Cheong Tham for this point.

<sup>68</sup> *Ibid* 580–1 [65].

<sup>69</sup> *Ibid* quoting *Short v FW Hercus Pty Ltd* (1993) 40 FCR 511, 518 (Burchett J).

in ancient thought. But as an articulated principle, it is usually traced to the German academic tradition of the late 18<sup>th</sup> century. The German conception depended on an ideal of the university engaged in the search for truth to be realised through freedom of teaching (*lehrfreiheit*) and of learning (*lernfreiheit*).<sup>70</sup>

Academic freedom is also a longstanding tradition within the academic traditions with more direct influence in Australia. At the Universities of Oxford and Cambridge, for instance, academic freedom (although less a fully articulated principle than a deeply held implicit assumption) was realised through a strong tradition of academic self-government.<sup>71</sup> In the United States ('US'), academic freedom principles have long been authoritatively expounded by the American Association of University Professors ('AAUP'), which has issued two highly influential declarations of these principles.<sup>72</sup> These declarations recognise the professional freedom of professors to research and teach and to speak freely, particularly about university affairs. At an international level, academic freedom is directly recognised in, for example, the United Nations Educational, Scientific and Cultural Organisation's 1997 *Recommendation Concerning the Status of Higher-Education Teaching Personnel*.<sup>73</sup>

Taken together, these various traditions of academic freedom provide a remarkably consistent statement of the central principles. The first and foremost principle of academic freedom is the freedom of research and teaching. That much follows from the very purpose of a university. Modern universities are complex institutions that serve many purposes, but the most important and distinctive function of universities is that they contribute to the public good by producing and disseminating knowledge through research and teaching.<sup>74</sup>

The AAUP's *1915 Declaration*, for instance, identifies 'freedom of inquiry and research' and 'freedom of teaching within the university or college' as central elements of this first principle of academic freedom.<sup>75</sup> Equally, its *1940 Statement* places these two elements at the centre of the idea of academic freedom, stating:

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<sup>70</sup> Rosalind MO Pritchard, 'Academic Freedom and Autonomy in the United Kingdom and Germany' (1998) 36(2) *Minerva* 101, 105.

<sup>71</sup> *Ibid* 102.

<sup>72</sup> 'Academic Freedom and Tenure: Statements of Principles' (1946) 32(1) *Bulletin of the American Association of University Professors* 149 reproducing the American Association of University Professors' ('AAUP') and the Association of American Colleges' *1940 Statement of Principles on Academic Freedom and Tenure* ('1940 Statement') and the American Council on Education's *1925 Conference Statement on Academic Freedom and Tenure*. See also, 'AAUP's 1915 Declaration of Principles', AAUP (Web Page) <[http://www.aaup-ui.org/Documents/Principles/Gen\\_Dec\\_Princ.pdf](http://www.aaup-ui.org/Documents/Principles/Gen_Dec_Princ.pdf)> ('1915 Declaration').

<sup>73</sup> Paul M Taylor, 'Thinking Allowed in the Academy: International Human Rights Law and the Regulation of Free Speech and Academic Freedom under the "Model Code"' (2020) 39(1) *University of Queensland Law Journal* 117, 119, discussing United Nations Educational, Scientific and Cultural Organization ('UNESCO'), *Recommendation Concerning the Status of Higher-Education Teaching Personnel*, UNESCO General Conference, 29<sup>th</sup> sess (adopted 11 November 1997).

<sup>74</sup> Frank M Turner (ed), *The Idea of a University: John Henry Newman* (Yale University Press, 1<sup>st</sup> ed, 1996) 117; Michael Oakshott, 'The Idea of a University 1950' in Timothy Fuller (ed), *The Voice of Liberal Learning: Michael Oakshott on Education* (Yale University Press, 1989) 95.

<sup>75</sup> *1915 Declaration* (n 72).

- (a) The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of [their] other academic duties; ...
- (b) The teacher is entitled to freedom in the classroom in discussing [their] subject ...<sup>76</sup>

A second principle necessarily follows. For the same reasons that academics require the freedom to research and teach, universities need appropriate institutional autonomy. Free academic inquiry requires that universities are not beholden to the political agenda of governments or to the interests of wealthy individuals or corporations. Viewed globally, there is some variation in the way in which this institutional autonomy is recognised, but a strong consensus as to the importance of the principle. It is reflected in case law in some countries,<sup>77</sup> and in legislation in others, including the *Higher Education and Research Act 2017* (UK) in the United Kingdom ('UK').<sup>78</sup> It has also been recognised in numerous expert reports including: in Australia, in the *French Report*;<sup>79</sup> in sector-wide statements of academic freedom;<sup>80</sup> and in international recommendations.<sup>81</sup>

It follows from the first two principles that the third core principle is that academics must play a role in the governance of universities. Academic judgment, informed by expertise in research and teaching, is necessary to ensure universities provide conditions in which those activities prosper.<sup>82</sup> Early conceptions of the university took this idea so seriously that, in some places, universities were self-governing institutions. That is, governance was the collective task of academics, rather than a dedicated class of university leaders. This idea was a marked feature of the German institutions of the 19<sup>th</sup> century<sup>83</sup> and the 'Oxbridge' tradition where, in practice, academic freedom was secured through a faculty governance structure and, at least until 1988, a system of academic tenure.<sup>84</sup>

<sup>76</sup> 1940 *Statement* (n 72) 152.

<sup>77</sup> A classic statement is found in the US case of *Sweezy v New Hampshire*, 354 US 234, 263 (1957) (Frankfurter J).

<sup>78</sup> *Higher Education and Research Act 2017* (UK) s 36; *Education Act 1989* (NZ) ss 160–61.

<sup>79</sup> The Model Code proposed by the *French Report* includes in its definition of 'academic freedom' the 'autonomy of the higher education provider in relation to the choice of academic courses and offerings, the ways in which they are taught and the choices of research activities and the ways in which they are conducted': *French Report* (n 3) 230–31. See also National Committee of Inquiry into Higher Education (UK), *Higher Education in the Learning Society* (Final Report, 1997) 228 [15.4].

<sup>80</sup> The Association of American Universities, Australian 'Group of Eight' Universities, the League of European Research Universities ('LERU') and the Chinese 'C9' Universities League, 'Hefei Statement on the Ten Characteristics of Contemporary Research Universities' (Joint Statement, LERU, 10 October 2013) <<https://www.leru.org/files/Hefei-Statement-Full-paper.pdf>>; Universities Canada, 'Statement on Academic Freedom', (Media Release, 25 October 2011) <<https://www.univcan.ca/media-room/media-releases/statement-on-academic-freedom/>>.

<sup>81</sup> UNESCO, *Recommendation Concerning the Status of Higher-Education Teaching Personnel* (n 73) para 22.

<sup>82</sup> Matthew W Finkin and Robert C Post, *For the Common Good: Principles of American Academic Freedom* (Yale University Press, 2009) ch 5.

<sup>83</sup> *Ibid* 23.

<sup>84</sup> On the changed landscape for academic freedom in the UK since 1988, see Eric Barendt, *Academic Freedom and the Law: A Comparative Study* (Hart Publishing, 2010) ch 4.

The practice of collective academic governance has not been realised in Australia.<sup>85</sup> But in its place is a principle that protects the freedom to criticise university governance. This principle, known in the US (where academic self-governance is also less common) as the freedom of ‘intra-mural’ criticism, preserves the crucial role of academic expertise with respect to research and teaching. It is a position that lies between the ideal of full academic self-governance and the dangerous position where university governance is detached from academic judgment and scholarly values.<sup>86</sup>

## **B Principles of Academic Freedom in Practice**

Principles of academic freedom leave some room for variation in their realisation. Just as forms of self-government differ, so do mechanisms for ensuring the independence of individual academics. In some university systems — notably the US and Germany — strong academic tenure rights guard against arbitrary interference with the academic freedom of individual researchers. In other systems, such as Australia and the UK, academic job security is no longer subject to special rules, and is governed by general employment law. The level of academic job security is therefore dependent on the complex interplay of this law and university governance.<sup>87</sup> There are important differences, as well, between public and private universities. It is to be expected that public universities, by virtue of the fact that they are funded by the public, may be subject to forms of control that are not appropriate for private institutions.<sup>88</sup>

But these variations in how the principles are implemented should not be mistaken for evidence that the principles have been abandoned or are meaningless. In the Australian context, they are reaffirmed in many ways. For instance, although Australian universities are creatures of statute governed by an appointed body under legislation, the statutes establishing universities typically recognise and protect academic freedom values. For instance, s 5 of the *James Cook University Act 1997* (Qld) defines the University’s functions as including:

- (a) to provide education at university standard; and
- (b) to provide facilities for study and research generally and, in particular, in subjects of special importance to the people of the tropics; and
- (c) to encourage study and research generally and, in particular, in subjects of special importance to the people of the tropics; and
- (d) to provide courses of study or instruction (at the levels of achievement the council considers appropriate) to meet the needs of the community; and
- (e) to confer higher education awards; and
- (ea) to disseminate knowledge and promote scholarship.

<sup>85</sup> Glyn Davis, *The Australian Idea of a University* (Melbourne University Press, 2017) 34–42.

<sup>86</sup> *Ibid.*

<sup>87</sup> On tenure in UK universities, see Barendt (n 84). See also Michael Otsuka, ‘Is There Academic Tenure in the UK’, *Medium* (Blog Post, 5 August 2019) <<https://mikeotsuka.medium.com/is-there-academic-tenure-in-the-uk-93aacc388616>>.

<sup>88</sup> Barendt (n 84) 30–1.

It is not surprising that these principles — freedom of research and teaching, and institutional autonomy — were also recognised by the *French Report* as principles that govern Australian institutions.<sup>89</sup> Exactly how these values might inform the employment relationship between Ridd and JCU is another question. But it is not an entirely separate question: there is no reason to exclude consideration of the principles of academic freedom on the grounds that those principles are so outdated or so varied as to be meaningless. They are not.

### C *Intellectual Freedom and Academic Freedom*

This analysis brings into question the distinction between academic freedom and intellectual freedom drawn by the majority of the Full Federal Court. Given the centrality of the principle of academic freedom to the very concept of a university and the principle's long history — both of which are acknowledged by the joint reasons — it is most improbable that a university enterprise agreement would have been intended to limit academic freedom by guaranteeing only some elements of it.

The terms of the JCU EA do not indicate an intention to distinguish between academic freedom and intellectual freedom. The EA's definition of 'intellectual freedom', set out in Part III(A) above, includes five rights.<sup>90</sup> The first three rights are recognisable elements of the principle of academic freedom discussed above. The next two rights (eligibility to participate in decision making; and participation in representative bodies) are particular instances of the right of academic self-government.

To the extent that the rights of 'intellectual freedom' defined in the EA differ from academic freedom per se, it is not a difference in the content of the rights, but of their subjects: the rights of 'intellectual freedom' are conferred on all 'staff', including non-academic staff.<sup>91</sup> Rather than reflecting a different or narrower idea than 'academic freedom', 'intellectual freedom' is better understood as a more *expansive* idea that applies more widely, and includes academic freedom and also some additional rights, such as general employment rights to participate in professional organisations and collective bargaining.

### D *Academic Freedom and the JCU Code of Conduct*

With this understanding of 'intellectual freedom', how should the relationship between the 'intellectual freedom' guaranteed in the JCU EA and the obligations in the JCU Code of Conduct be understood? The position of the Full Federal Court majority judgment is that the recognition of the Code of Conduct in the EA indicates that the two are to be read consistently; specifically, with the Code of Conduct understood as narrowing the content of intellectual freedom. If 'intellectual

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<sup>89</sup> *French Report* (n 3) 119.

<sup>90</sup> See above n 22 and accompanying text.

<sup>91</sup> See above nn 22–3 and accompanying text. Academic freedom is ordinarily conceived as a freedom principally of academics. Though, as a matter of first principle, there is a strong argument that it should be understood as attaching to the activities of teaching, research and public commentary rather than to particular individuals: see Evans and Stone (n 1) 89–90.

freedom' were a term of entirely uncertain meaning, that interpretation may have been more open. But if intellectual freedom incorporates and expands on the centrally important principles of academic freedom, the protection of intellectual freedom may be better understood as the primary commitment that constrains the interpretation of the Code.

As Rangiah J shows in his dissent, moreover, there is textual support for this interpretation. Clause 13.3 of the EA records that the Code of Conduct is not intended to 'detract from' cl 14. As Rangiah J explains:

[T]he use of the phrase 'detract from' means that the Code of Conduct is not intended to undermine the scope, operation and effect of cl 14. It suggests, to the contrary, that cl 14 is intended to undermine the Code of Conduct.<sup>92</sup>

...

In my opinion JCU's commitment must be to *enforce* the Code of Conduct while at the same time complying with its conjunctive commitment to act to protect and promote intellectual freedom within JCU.<sup>93</sup>

The advantage of this interpretation, in addition to consistency with the text of the instruments, is that it gives priority to the core purposes of a university — purposes reflected in JCU's own enabling legislation.<sup>94</sup> The interpretation is therefore both faithful to the legal scheme established by the instruments considered here and also operates to protect the enormous public benefit that universities produce through teaching and research.

## E *University Codes of Conduct*

The consequences of the Full Federal Court majority's interpretation for academic freedom more generally are potentially significant. The obligations contained in the JCU Code of Conduct that Ridd was found to have breached are not unusual. While they appear unexceptional at first glance, requirements that staff treat others with 'respect and courtesy'<sup>95</sup> and that they 'behave in a way that upholds the integrity and good reputation of the University'<sup>96</sup> may pose a real threat to academic freedom.

Part of the problem is recognised explicitly by Rangiah J: some actions that are important expressions of academic freedom are necessarily discourteous and may harm reputations.<sup>97</sup> The same could be said of instances in which academics, acting within their rights to academic freedom, criticise university governance or point to deficiencies in the maintenance of academic standards in admissions, appointments, promotions or other activities.

A second dimension of the problem was recognised in the *French Report*:

<sup>92</sup> *Ridd Appeal* (n 6) 618 [252].

<sup>93</sup> *Ibid* 618–19 [254] (emphasis in original).

<sup>94</sup> *James Cook University Act 1997* (Qld) (n 25) s 5.

<sup>95</sup> See above n 27 and accompanying text.

<sup>96</sup> *Ibid*.

<sup>97</sup> See above n 58 and accompanying text.



The freedom of expression which is an aspect of academic freedom should not be restricted by broadly drawn staff conduct policies such as those which would sanction expressions of opinion or comment said to create a risk of harm to the university's 'reputation' or 'prestige'. The creation of any such rule or policy goes hand-in-hand with the creation of a power on the part of some decision-maker or decision-makers to enforce it — the more broadly drawn the policy, the greater the power.<sup>98</sup>

Thus, the distinction the majority draws between the manner of the exercise of intellectual freedom (governed by the JCU Code of Conduct) and its content (governed by the JCU EA) is not stable. The regulation of 'manner' can easily slip into the regulation of 'content' and in doing so undermine academic freedom.

These dangers would be greatly reduced by a provision in a university enterprise agreement that requires respect for academic freedom and is explicit that academic freedom values cannot be unduly restricted by codes of conduct (or other university policies). More generally, the case sounds a warning that enterprise agreements, codes of conduct and other relevant instruments must be explicit in the protection of academic freedom, as opposed to some cognate phrase such as 'intellectual freedom', to prevent courts sidestepping, as in this case, the academic freedom principles at stake.

## V Conclusion

Ridd's conduct involved the exercise of two important elements of academic freedom: the expression of his opinion on scientific matters and criticism of university governance. Of course, academic freedom is not an absolute or untrammelled right. Moreover, though clear in its outline, there is room for disagreement as to precisely where the limits ought properly to lie. However, as a matter of principle, limits on academic freedom should be rare and carefully confined. The priority given to intellectual freedom in the JCU EA, properly understood, recognises that position.

With those values in mind, the burden on JCU of justifying the application of its Code of Conduct to censure, constrain and terminate an academic because of a dispute about research ought to have been very significant indeed. The manner of Ridd's criticism of colleagues may have been unconventional, unpleasant and personal. But the dispute was a dispute between scientists about research. Given the importance of academic freedom, there should be some serious and clearly identifiable cost justifying restricting that freedom beyond inconvenience, irritation and angry disputation among colleagues. Even the possibility that his conduct might damage the University's relationship with the Authority was an insufficient justification: if institutional autonomy is to be maintained, university partners also need to understand the norms of academic discourse.

Further, the way confidentiality directions were relied upon to escalate this dispute is of concern. If a university action against a researcher is contrary to

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<sup>98</sup> *French Report* (n 3) 214–15.

academic freedom, then academic freedom itself requires that researchers are free to point this out.

As mentioned, Rangiah J would have remitted the matter for further hearing according to the construction of the EA that his Honour adopted. The benefit of this course of action, and, more generally, the approach adopted by Rangiah J and argued for in this article, is that it better brings to the fore what is really at stake in the interaction between the interlocking employment instruments: the capacity of universities to freely pursue and disseminate knowledge. With those values in mind, the burden of justifying termination of an academic because of a dispute about research should be very heavy indeed.

ADVANCE