

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON AND EDELMAN JJ

PETER VINCENT RIDD

APPELLANT

AND

JAMES COOK UNIVERSITY

RESPONDENT

Ridd v James Cook University
[2021] HCA 32
Date of Hearing: 23 June 2021
Date of Judgment: 13 October 2021
B12/2021

ORDER

Appeal dismissed.

On appeal from the Federal Court of Australia

Representation

S J Wood QC with B W Jellis and C Mintz for the appellant (instructed by Mahoneys)

B W Walker SC with Y Shariff SC and V Bulut for the respondent (instructed by Clayton Utz)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Ridd v James Cook University

Industrial law (Cth) – Industrial agreement – Interpretation of Enterprise Agreement – Where Enterprise Agreement and Code of Conduct each applied to all employees of respondent – Where intellectual freedom protected by Enterprise Agreement – Where Enterprise Agreement imposed confidentiality requirements concerning disciplinary processes – Where disciplinary action taken and employment terminated for misconduct and serious misconduct including for breaches of Code of Conduct – Whether disciplinary action taken for breaches of Code of Conduct contravened Enterprise Agreement – Whether exercise of intellectual freedom subject to constraints in Code of Conduct – Whether exercise of intellectual freedom subject to confidentiality obligations in Enterprise Agreement.

Words and phrases – "academic freedom", "censure", "Code of Conduct", "confidentiality", "critical and open debate and inquiry", "disciplinary processes", "Enterprise Agreement", "freedom of expression", "intellectual freedom", "lawful and reasonable direction", "obligations of confidentiality", "responsibility to respect the rights of others", "right to express unpopular or controversial views", "termination", "tone or manner of expression", "treat fellow staff members, students and members of the public with honesty, respect and courtesy".

Fair Work Act 2009 (Cth), s 50.

Introduction

- 1 Dr Ridd was employed by James Cook University ("JCU") for 27 years. For 15 years he managed the University's Marine Geophysics Laboratory. From 2009 until 2016 he was the head of physics at JCU. He had been ranked by ResearchGate within the top 5% of researchers globally. In 2015, Dr Ridd sent a lengthy email to a journalist, which concerned issues and ideas relating to his field of expertise. There was no suggestion that the remarks in his email were anything other than honestly held opinions. Nothing said in his email has ever been suggested to be unlawful or defamatory. It was not suggested that the remarks were wrong, or even unreasonable. But JCU concluded that these remarks had breached the JCU Code of Conduct for the failure by Dr Ridd to treat those who held different views with respect and courtesy.
- 2 From 2016, JCU took various actions against Dr Ridd based upon this and subsequent conduct by Dr Ridd: 17 findings were made by JCU that Dr Ridd had breached the JCU Code of Conduct; Dr Ridd was issued with two directions about impermissible speech, five directions about confidentiality, and a direction not to subject JCU to satire or parody; Dr Ridd was issued with two censures ("the 2016 Censure" and "the Final Censure"); and, on 2 May 2018, Dr Ridd's employment was terminated for serious misconduct under JCU's (now superseded) enterprise agreement ("the Enterprise Agreement"). The basis for the first of these censures, and part of the basis for the second, was a finding that Dr Ridd had contravened the Code of Conduct by failing to treat others "with respect and courtesy" in his public discussion of his research. But by the time that the termination decision was made by the Vice-Chancellor, that decision focused upon conduct by Dr Ridd that did not concern any matter within his academic expertise.
- 3 Dr Ridd commenced these proceedings claiming that each and every action taken by JCU was a contravention of s 50 of the *Fair Work Act 2009* (Cth), which provides that a person must not contravene a term of an enterprise agreement. Dr Ridd submitted that the application of the intellectual freedom protected by cl 14 of the Enterprise Agreement: (i) precluded any finding that he had breached the Code of Conduct; (ii) invalidated every direction and censure issued to him by JCU; and (iii) meant that his termination was unlawful.
- 4 In the Federal Circuit Court of Australia, the primary judge (Judge Vasta) accepted Dr Ridd's submissions and concluded that 13 actions taken by JCU were contrary to the Enterprise Agreement. The primary judge made a declaration of 13 contraventions of s 50 of the *Fair Work Act* and ordered that JCU pay to

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Dr Ridd compensation of \$1,094,214.47 and pecuniary penalties of \$125,000. On appeal to the Full Court of the Federal Court of Australia, a majority of the Court (Griffiths and S C Derrington JJ; Rangiah J dissenting) accepted none of Dr Ridd's submissions, concluding that none of JCU's actions was contrary to the Enterprise Agreement. If it had been necessary to determine, the majority would also have concluded that the primary judge had erred in overcalculating compensation and that pecuniary penalties would have been reduced to \$15,000. Neither of these matters was in dispute in this Court.

5 For the reasons below, neither the position of the primary judge nor the position of the majority of the Full Court can be entirely accepted. The legal position, in the circumstances of this case, is as follows. First, the intellectual freedom protected by cl 14 of the Enterprise Agreement is not a general freedom of speech: an expression of opinion about issues or ideas must be related to a field of competence and an expression of disagreement with JCU decisions or decision-making processes must be in accordance with applicable processes, giving reasonable opportunity for those processes to be followed. Secondly, the best interpretation of cl 14 is that it preserves intellectual freedom subject to some constraints contained in the Code of Conduct but, contrary to the conclusion of the majority of the Full Court, only those constraints that are adopted within cl 14 itself. Thirdly, the constraints contained in cl 14 do not require that the exercise of intellectual freedom be expressed respectfully or courteously but they do require that an expression of disagreement with JCU decisions follow the applicable processes, which includes adhering to obligations of confidentiality.

6 The first three paragraphs of the declaration made by the primary judge, concerning Dr Ridd's censure for his 2015 email, were correct¹. But, as the decisions of the primary judge and the Full Court illustrate, and as senior counsel for Dr Ridd frankly accepted in his oral reply, the cases for both of the parties were conducted on an all-or-nothing basis. From Dr Ridd's perspective, this forensic

1 *Ridd v James Cook University* (2019) 286 IR 389, and *Ridd v James Cook University [No 2]* [2019] FCCA 2489 where the primary judge declared that JCU contravened s 50 of the *Fair Work Act 2009* (Cth) by doing each of the following in contravention of cl 14 of the Enterprise Agreement: (a) making the findings the subject of the formal censure dated 29 April 2016 against Dr Ridd ("the 2016 Censure"); (b) issuing the 2016 Censure to Dr Ridd; and (c) in the 2016 Censure, directing Dr Ridd that "[i]n future it is expected that in maintaining your right to make public comment in a professional, expert or individual capacity in an academic field in which you are recognised, it must be in a collegial manner that upholds the University and individual respect".

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choice reflected the reality that, unless he was able to show that all, or almost all, of the actions by JCU were contraventions of cl 14, then the termination of his employment would have been justified and would have occurred in any event, leaving him with little benefit had he sought to uphold only a few of the instances of declared contraventions.

7 Given the manner in which his case was run, Dr Ridd did not make any submissions challenging the cogent conclusions of the majority of the Full Court that some of his conduct after the 2015 email, as to which the majority gave nine examples, could not be "characterised as an exercise of intellectual freedom in the sense described in cl 14, being no more than expressions of personal opinion and frustration (unrelated to issues or ideas related to his respective field of competence)"². Nor did Dr Ridd make any submissions about how any of his actions that were the subject of numerous findings of serious misconduct relied upon by the Deputy Vice-Chancellor and the Vice-Chancellor as justifying termination were within the intellectual freedom. In light of the manner in which Dr Ridd ran his appeal, and the constraints upon the intellectual freedom protected by cl 14, his appeal must be dismissed.

The issues and the decisions below

8 The actions of Dr Ridd that formed the basis for JCU's findings, directions, and censures, and ultimately its termination of Dr Ridd's employment, are considered in detail later in these reasons. Those actions can be broadly divided into four categories. First, there were comments relating to matters in the area of Dr Ridd's area of academic competence which criticised JCU or various institutions or unnamed "scientists" or particular people. Secondly, there were comments, which were not related to matters in the area of Dr Ridd's academic competence, that were critical of either particular institutions or particular people. Thirdly, there were comments which were critical of decisions or decision-making processes of JCU but which did not follow applicable processes for raising those concerns. Fourthly, there were comments made or information disclosed by Dr Ridd that was said by JCU to concern confidential matters. Dr Ridd did not seek to distinguish between these categories. On his all-or-nothing submission, the intellectual freedom protected by cl 14 of the Enterprise Agreement covered all of the above categories.

9 Dr Ridd did not dispute that each and every instance of his alleged actions had occurred. One curiosity about the manner in which his case has been presented

2 *James Cook University v Ridd* (2020) 278 FCR 566 at 595 [135].

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at first instance and on both appeals is that he also did not dispute that each and every instance of his actions was properly characterised by JCU as misconduct or as serious misconduct. It may be, for example, that some of the information revealed by Dr Ridd, and said to be confidential, was in the public domain and thus its disclosure by Dr Ridd could not have amounted to misconduct, still less serious misconduct. Nor was any issue raised about whether conduct of Dr Ridd was serious misconduct on the basis that, as the majority of the Full Court concluded, some instances "were undoubtedly trivial"³. The Full Court considered this stance of Dr Ridd to be "inexplicable"⁴. But Dr Ridd chose not to contest any of the findings of serious misconduct other than on the basis that he was protected by cl 14. The same stance was taken in this Court. It suffices to proceed on the same assumption, that each instance of alleged conduct by Dr Ridd would be misconduct or serious misconduct subject to Dr Ridd's submissions about the operation of cll 14 and 54.1.5 of the Enterprise Agreement.

10 At all stages of these proceedings, Dr Ridd's submission was that all of his actions were exercises of the intellectual freedom provided by cl 14 of the Enterprise Agreement and hence they could not be a serious breach of the Code of Conduct, nor could they have been subject to a valid contrary direction by JCU. This submission was accepted by the primary judge. By contrast, JCU's submission was that the intellectual freedom in cl 14 did not constrain the Code of Conduct from operating on any member of JCU staff. JCU's position, held at all stages of these proceedings, was most clearly stated in this Court: "[i]t is evident that through the Code of Conduct, the University abided by its commitment to protect and promote intellectual freedom". This submission was accepted by the majority of the Full Court, who concluded that none of JCU's actions was contrary to the Enterprise Agreement. In dissent in the Full Court, Rangiah J held that "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"⁵. His Honour would have remitted the matter to the primary judge for further factual findings.

3 *James Cook University v Ridd* (2020) 278 FCR 566 at 574 [23].

4 *James Cook University v Ridd* (2020) 278 FCR 566 at 573 [23], 609 [204].

5 *James Cook University v Ridd* (2020) 278 FCR 566 at 625-626 [289].

The Enterprise Agreement

11 In 2013, JCU entered into the Enterprise Agreement under Pt 2-4 of the *Fair Work Act* with five staff unions. The *Fair Work Act* gave statutory force to the terms of the Enterprise Agreement and applied those terms (as varied from time to time) to JCU and all of its employees⁶. Although the Enterprise Agreement is now superseded, at the time of the events that are the subject of these proceedings it applied to JCU and to Dr Ridd, as a member of staff⁷.

12 Clauses 54.3 to 54.6 of the Enterprise Agreement were concerned with the disciplinary procedure in cases of "Serious Misconduct", culminating in a "Final Determination" by the Vice-Chancellor of any penalty to be imposed under cl 54.5. The definitions clause of the Enterprise Agreement, cl 8, defined "Serious Misconduct" as having three alternative limbs: (i) "serious misconduct" as defined by the *Fair Work Regulations 2009* (Cth); (ii) "[a]ny serious breach of the James Cook University Code of Conduct"; and (iii) "Official Misconduct" as defined by the *Crime and Misconduct Act 2001* (Qld). It defined "Misconduct" as "conduct which is not Serious Misconduct but is nonetheless conduct which is improper or inconsistent with the staff member's duties or responsibilities". The definition also provided that "Misconduct may give rise to disciplinary action, but will not result in termination of the employment of the staff member".

13 Clauses 13 and 14, which are central to the findings against Dr Ridd of serious misconduct, and central to the issues on this appeal, provided 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.

13.1. The parties agree that the Code of Conduct will only be changed following consultation with the [Joint Consultative Committee].

6 See *Toyota Motor Corporation Australia Ltd v Marmara* (2014) 222 FCR 152 at 179-180 [89].

7 *Fair Work Act*, s 52; Enterprise Agreement, cl 4.1.

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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*.

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:

- 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.

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

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independent learning and thought where ideas may be put forward and opinion expressed freely.

- 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.
- 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 Code of Conduct

- 14 The *Public Sector Ethics Act 1994* (Qld)⁸ provides for codes of conduct to express standards of conduct for, relevantly, public sector entities. JCU is a public sector entity for the purposes of that Act⁹. The Code of Conduct adopted by JCU applied to all staff of JCU "while acting in their official capacity (including senior management, executive, visiting and adjunct staff)"¹⁰.

8 *Public Sector Ethics Act 1994* (Qld), s 10.

9 By *Public Sector Ethics Act*, Schedule, Dictionary, definition (c) of "public sector entity", and *James Cook University Act 1997* (Qld).

10 See Code of Conduct, Scope, read with Explanatory Statement to the Code of Conduct.

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15 JCU developed the Code of Conduct around four ethical principles, albeit principles which were not the same as the four principles described as fundamental to good public administration in the *Public Sector Ethics Act*¹¹: (1) seek excellence as part of a learning community; (2) act with integrity; (3) behave with respect for others; and (4) embrace sustainability and social responsibility. Within those four principles were numerous overlapping undertakings, signalled by the language of "we will" in the chapeau to the list of undertakings, including 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 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 responsibility for our mistakes, work to rectify problems as soon as possible, and ensure that those who have admitted mistakes are treated with fairness and dignity;
- comply with any lawful and reasonable direction given by someone who has authority to give that direction;
- make well-considered decisions, and provide reasons for these decisions where required, especially where they may have an adverse effect on people;
- act within the limits of our authority;
- disclose wrongdoing and protect those who make a disclosure;

11 *Public Sector Ethics Act*, s 4: integrity and impartiality; promoting the public good; commitment to the system of government; accountability and transparency.

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- 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;
- avoid and not accept behaviours which are unwelcome, discriminatory, intimidatory or abusive;
- refrain from, and not accept vilification, bullying, harassment or sexual harassment; and
- stand up for the rights of others.

16 The Explanatory Statement to the Code of Conduct provided further detail about many of the listed undertakings. In explaining the undertaking about "respect and courtesy", the Explanatory Statement provided that "[e]very individual has the right to be treated in a respectful and polite manner". And, in relation to "freedom of expression", the Explanatory Statement provided:

"All staff, regardless of involvement in academic duties, have the right to freedom of expression. However, this comes with a responsibility to respect the rights and reputations of others. Academic or constructive criticism is encouraged, but staff must not engage in hate speech as this conflicts directly with the universal value of respect for individuals."

Interpretation of cl 14 of the Enterprise Agreement

17 To the extent of any inconsistency, the Enterprise Agreement prevails over a law of a State or Territory¹², which includes the provisions of the *Public Sector Ethics Act* applying the Code of Conduct. But neither party asserted any such inconsistency at any stage in these proceedings. Both parties sought to resolve any tension between the Enterprise Agreement and the Code of Conduct by interpretation of the Enterprise Agreement itself, particularly cl 14. In that process of interpretation, an important matter of context is the industrial nature of the instrument. Industrial instruments are not always drafted carefully by lawyers or professional drafters, and hence the literal words of a provision might more readily

12 *Fair Work Act*, s 29.

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be understood to have a meaning other than their ordinary meaning if the context so suggests¹³.

18 Two issues of interpretation arose on this appeal. The first issue was the manner in which the Enterprise Agreement resolved conflicts between, on the one hand, the intellectual freedom of JCU staff members to debate, to criticise, and to express unpopular and controversial views protected by cl 14 and, on the other hand, the undertakings in the Code of Conduct, not replicated in cl 14, concerning treatment of others with respect and courtesy. The second issue was the manner in which the Enterprise Agreement resolved conflicts between, on the one hand, the intellectual freedom provided by cl 14 to express disagreement with decisions of JCU and to express disagreement with the processes used to make those decisions and, on the other hand, the confidentiality requirements concerning University disciplinary processes imposed by cl 54.1.5.

(1) Clause 14 and the Code of Conduct undertakings of respect and courtesy

19 On this appeal, the primary submission of senior counsel for Dr Ridd was that the only restrictions upon the intellectual freedom in cl 14 were the express limits in cl 14.3 not to harass, vilify, bully, or intimidate those who disagree, and the requirement of honesty in cl 14.5. As the majority of the Full Court observed, there was no suggestion in these proceedings that Dr Ridd had acted in a manner contrary to these restrictions¹⁴. Nor was there any suggestion that any of Dr Ridd's conduct was unlawful in any way, which includes the lack of any suggestion that Dr Ridd had committed any tort, such as defamation.

20 Although Dr Ridd's primary submission was accepted by the primary judge¹⁵, it was rightly rejected by all members of the Full Court¹⁶. The problem with his submission is that it treats the intellectual freedom as though it were a

13 See *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* (2006) 153 IR 426 at 440 [57].

14 *James Cook University v Ridd* (2020) 278 FCR 566 at 595 [133].

15 *Ridd v James Cook University* (2019) 286 IR 389 at 407 [80], 431 [253]-[255], 432 [264]-[265].

16 *James Cook University v Ridd* (2020) 278 FCR 566 at 582 [72], 611-612 [209]-[217].

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freedom of speech generally, and it ignores the constraint upon intellectual freedom in cl 14.3, which repeats an undertaking in the Code of Conduct, expressly requiring respect for the rights of others and implicitly requiring lawfulness. For instance, although defamatory speech or, for a more extreme example, hate speech¹⁷ is unlawful, Dr Ridd's primary submission would prevent such speech being the basis for any finding of serious misconduct under the second limb of that definition unless it were to harass, vilify, bully, or intimidate those holding a different view. It is hard to see why it could reasonably have been intended that the words of cl 14.3 should be read so narrowly to exclude unlawful conduct that does not respect the rights of others from the second limb of the definition of serious misconduct when conduct that was fraudulent or a criminal offence would fall, respectively, within the first and third limbs of the definition of serious misconduct in cl 8 of the Enterprise Agreement¹⁸.

21 Dr Ridd's alternative submission was that the only restrictions upon the intellectual freedom protected by cl 14 were those contained in that clause itself, although recognising the restrictions of legality expressly or impliedly contained in cl 14. By contrast, JCU's submission was that the cl 14 intellectual freedom existed alongside the Code of Conduct but that cl 14 was not a substantive constraint upon any undertaking in the Code of Conduct. The effect of this submission is that cl 14 serves no substantive purpose. It would merely be a statement of that which already exists: a liberty to communicate particular intellectual content provided that the communication is consistent with the Code of Conduct. If JCU's submission were accepted, cl 14 would, at most, only have a limited purpose of being a factor to consider in the application of the Code of Conduct so that open-ended concepts like "respect" or "courtesy" might be applied by taking into account norms of intellectual freedom.

22 Dr Ridd's alternative submission should be preferred for four reasons: (i) the terms of cl 14 reflect a textual choice to pick up, in identical or nearly identical terms, only those undertakings from the Code of Conduct to which the intellectual freedom was intended to be subject; (ii) it is the ordinary meaning of the provisions of the Enterprise Agreement that deal with both the cl 14 intellectual

17 See *Anti-Discrimination Act 1991* (Qld), s 131A; *Criminal Code* (Cth), ss 80.2A, 80.2B, 474.17.

18 See *Fair Work Regulations 2009* (Cth), reg 1.07 definition of "serious misconduct"; *Crime and Misconduct Act 2001* (Qld), s 15 definition of "official misconduct", which is now *Crime and Corruption Act 2001* (Qld), s 15 definition of "corrupt conduct", read with s 400.

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<i>Keane</i>	<i>J</i>
<i>Gordon</i>	<i>J</i>
<i>Edelman</i>	<i>J</i>

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freedom and the Code of Conduct; (iii) the meaning of the undefined term "intellectual freedom" in cl 14 is informed by its context and purpose, which strongly militate against an interpretation that would constrain the exercise of intellectual freedom to that which is respectful and courteous; and (iv) there are practical difficulties with JCU's interpretation, including the difficulty with drawing a clear line, or even a line at all, between the content of speech and the manner in which that content is delivered. Each of these four points is addressed below.

(i) Textual choices

23 Dr Ridd's alternative submission on the interpretation of cl 14 is supported by the textual choices made in the drafting of that clause. Many of the open-ended undertakings in the Code of Conduct will not conflict with the intellectual freedom embodied in cl 14 of the Enterprise Agreement. But in instances where conflict might arise, cl 14 was drafted specifically to preserve those undertakings to which the intellectual freedom was intended to be subject. Each of the qualifications upon the intellectual freedom in cl 14 is taken in identical or very similar terms from undertakings in the Code of Conduct to which the intellectual freedom was intended to be subject. Two notable omissions in the replication of various Code of Conduct undertakings reveal the policy adopted in the textual choices that were made.

24 The first notable omission is the duty to respect the "reputations" of others, found in the qualification upon freedom of expression in the Explanatory Statement to the Code of Conduct. The omission of the reference to "reputations" reflects a choice made in cl 14 to pick up only some of that qualification from the Code of Conduct – namely, the qualification that the "right to freedom of expression" comes with a responsibility to "respect[] the rights of others". The exercise of intellectual freedom to "express unpopular or controversial views" might damage the reputation of another. But provided that the exercise is lawful and respects the legal rights of others, the reputation of others is not protected. In other words, although cl 14 does not permit defamatory speech, the reputations of others are not protected from the exercise of intellectual freedom in relation to matters that are, for example, the subject of fair comment, qualified privilege, or truth¹⁹.

25 The second notable omission is that whilst the "right to express unpopular or controversial views" in cl 14.3 is expressly limited by the qualifications from

19 See, for example, *Defamation Act 2005* (Qld), Pt 4, Div 2.

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the Code of Conduct not to engage in harassment, vilification, bullying, or intimidation, it is not limited by any qualification in terms of the broad undertakings in the Code of Conduct to treat others, including staff members and members of the public, with respect and courtesy.

(ii) Provisions dealing with both cl 14 and the Code of Conduct

26 Dr Ridd's alternative submission does not merely give cl 14 substantive operation in a manner consistent with the textual choices about the Code of Conduct undertakings to which it is to be subject. It is also supported by the ordinary meaning of the provisions which expressly deal with both the intellectual freedom in cl 14 and the Code of Conduct. The first of those provisions is cl 13.3. Although expressed as a "note" of the "parties", the ordinary meaning of cl 13.3 is that cl 14 is not to be detracted from by undertakings in the Code of Conduct. It would not detract from cl 14 to give effect to undertakings that cl 14 itself recognises as qualifying the intellectual freedom. But it would detract from cl 14 to give effect to other undertakings in the Code of Conduct to qualify the intellectual freedom.

27 The second provision which deals with the intellectual freedom protected by cl 14 and also with the Code of Conduct is cl 14.1. The ordinary meaning of that clause is that it is a description of the remainder of cl 14 as embodying JCU's commitment to act in a manner which is consistent with both (i) protecting and promoting the intellectual freedom within JCU, and (ii) the Code of Conduct. The remainder of cl 14 reflects that commitment by qualifying the intellectual freedom²⁰, as perceived to be appropriate, by some of the undertakings from the Code of Conduct which would otherwise be inoperative to the extent that they detracted from the intellectual freedom.

(iii) Core meaning and the purpose of intellectual freedom

28 Dr Ridd's alternative submission is also reinforced by the purpose of the clause, in particular its concern with intellectual freedom. If cl 14 were to have no substantive effect then the intellectual freedom protected by cl 14 would be deprived of much, if not all, of the content that the concept has generally been understood to have, particularly in the environment of universities.

20 See [23]-[25] above.

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29 Although the expression "intellectual freedom" is not defined in cl 14, it is a concept with a long history, the core content of which has crystallised over the last century. "Intellectual freedom" is often referred to interchangeably with "academic freedom" and "intellectual academic freedom"²¹. Sometimes, however, intellectual freedom is said to be wider than "academic freedom", with the latter being confined to academic staff within universities or confined to those employed by a university or other institution of higher education, as opposed to anyone engaged in scholarly work²². But for present purposes nothing turns upon any distinction. On any view "intellectual freedom" includes academic freedom and both apply to Dr Ridd as an academic member of University staff.

30 In the independent review of freedom of speech in Australian higher education providers, which was relied upon by both parties to this appeal, the Hon Mr Robert French recognised that the "essential elements and history" of academic freedom "mark it as a defining characteristic of universities and like institutions"²³. Two essential elements of the developed concept of intellectual freedom are reflected in the examples described in cl 14.2. Underlying those examples, recognised by some as the essential elements of the concept of intellectual freedom²⁴, are two notions: (i) critical and open debate and inquiry including in public fora, namely the "spirit of free inquiry"²⁵; and (ii) participation and

21 See Lamont, *Freedom is as Freedom Does: Civil Liberties Today* (1956) at 237-240; Polishook, "Academic Freedom and Academic Contexts" (1994) 15 *Pace Law Review* 141 at 142, 143 fn 12; Baldwin, "The Academies, 'Hate Speech' and the Concept of Academic Intellectual Freedom" (1995) 7 *University of Florida Journal of Law and Public Policy* 41.

22 See Barendt, *Academic Freedom and the Law: A Comparative Study* (2010) at 35.

23 French, *Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers* (2019) at 114.

24 Post, "Discipline and Freedom in the Academy" (2012) 65 *Arkansas Law Review* 203 at 204-205; Evans and Stone, *Open Minds: Academic Freedom and Freedom of Speech in Australia* (2021) at 93-100.

25 *Sweezy v New Hampshire* (1957) 354 US 234 at 262, quoting T H Huxley's address at the opening of the Johns Hopkins University.

discussion in university governance. As early as 1900, E E Brown said of the first that²⁶:

"It is a part of the mission of educational institutions to take their place and play their part in the conflicts which are necessary to the life of the peoples; and when their part assumes the form of a struggle for the right to teach the truth as they find it, the conflict itself may prove their best means of persuading men that truth is worth fighting for."

31 One developed justification for intellectual freedom is instrumental. The instrumental justification is the search for truth in the contested marketplace of ideas, the social importance of which Frankfurter J spoke powerfully about in *Sweezy v New Hampshire*²⁷. Another justification is ethical rather than instrumental. Intellectual freedom plays "an important ethical role not just in the lives of the few people it protects, but in the life of the community more generally" to ensure the primacy of individual conviction: "not to profess what one believes to be false" and "a duty to speak out for what one believes to be true"²⁸.

32 The developed concept of intellectual freedom, exemplified by the examples in cl 14.2, has "always been delimited" by excluding, for instance, libel or efforts to incite violence²⁹. The intellectual freedom in cl 14 again reflects these recognised limits. For instance, the qualification in cl 14.3 recognises that "the right to express unpopular or controversial views" is subject to "a responsibility to respect the rights of others". Like the requirement in the Code of Conduct that speech is "lawful and respects the rights of others", the qualification in cl 14.3 includes the requirement that speech be lawful. Clause 14.3 also contains express qualifications upon the intellectual freedom, excluding speech that harasses, vilifies, bullies, or intimidates those who disagree with the view expressed. And

26 Brown, "Academic Freedom" (1900) 19 *Educational Review* 209 at 231.

27 (1957) 354 US 234 at 261-264.

28 Dworkin, "We Need a New Interpretation of Academic Freedom" (1996) 82(3) *Academe* 10 at 11.

29 Polishook, "Academic Freedom and Academic Contexts" (1994) 15 *Pace Law Review* 141 at 148.

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cl 14.5 reflects the qualification of intellectual honesty, namely truthfulness in scholarship, research, and professional practice.

33 Whilst different views might reasonably be taken about some additional restrictions upon intellectual freedom, the instrumental and ethical foundations for the developed concept of intellectual freedom are powerful reasons why it has rarely been restricted by any asserted "right" of others to respect or courtesy. It is not necessary to go as far as Said's assertion that "the whole point [of an intellectual] is to be embarrassing, contrary, even unpleasant"³⁰ to conclude that, however desirable courtesy and respect might be, the purpose of intellectual freedom must permit of expression that departs from those civil norms. As Dworkin wrote in an essay invoking Rabelais, Voltaire, Rushdie, Galileo, Darwin, Wilde, and Mencken³¹:

"The idea that people have that right [to protection from speech that might reasonably be thought to embarrass or lower others' esteem for them or their own self-respect] is absurd. Of course it would be good if everyone liked and respected everyone else who merited that response. But we cannot recognize a right to respect, or a right to be free from the effects of speech that makes respect less likely, without wholly subverting the central ideals of the culture of independence and denying the ethical individualism that that culture protects."

(iv) Practical application

34 Finally, JCU's submission that the Code of Conduct can operate consistently with cl 14 of the Enterprise Agreement encounters insurmountable obstacles in its practical operation. JCU's submission depends upon drawing a distinction between what is said and how it is said. But such a distinction may not exist. The content of what is said often depends upon how it is said. This is particularly so when the impugned speech concerns the expression of an opinion. The content of speech that expresses an opinion will often be inseparable from the strength of conviction with which the opinion is held, which is tied to the manner of expression. The message conveyed by a statement, expressed tentatively, "It may be that it was an error for Professor Jones to claim that the earth is flat" expresses a proposition only of possibility. It cannot be divorced from the tentative

30 Said, *Representations of the Intellectual: The 1993 Reith Lectures* (1994) at 10.

31 Dworkin, "We Need a New Interpretation of Academic Freedom" (1996) 82(3) *Academe* 10 at 14.

manner in which it was expressed. By contrast, "No reasonable person could ever claim that the earth is flat" expresses a proposition of certainty, all the more so if it is expressed in an emphatic manner.

35 For these reasons, Dr Ridd's alternative submission is the better interpretation of cl 14. But, as explained above, the developed concept of intellectual freedom protected by cl 14 remains subject to important limits. These limits include requirements of confidentiality, such as the requirements in cl 54.1.5.

(2) The interpretation of cl 14 together with cl 54.1.5

36 Two of the undertakings in the Code of Conduct that Dr Ridd submitted could conflict with the intellectual freedom in cl 14 were the undertaking to "maintain appropriate confidentiality regarding University business" and, so far as it concerned confidentiality, the undertaking to "comply with any lawful and reasonable direction given by someone who has authority to give that direction". Dr Ridd submitted that these undertakings could not detract from the intellectual freedom, focusing particularly upon the example of the intellectual freedom in cl 14.2 to "[e]xpress opinions about the operations of JCU" and in cl 14.4 "to express disagreement with University decisions and with the processes used to make those decisions".

37 The difficulty with Dr Ridd's submission is that there is no conflict between the two different subject matters of the intellectual freedom in cl 14 and the confidentiality of JCU's disciplinary processes. The intellectual freedom in cl 14.4 is qualified by a requirement which provides that, when staff express disagreement with University decisions, they "should seek to raise their concerns through applicable processes and give reasonable opportunity for such processes to be followed". The applicable process for handling allegations of misconduct or serious misconduct is set out in cl 54 of the Enterprise Agreement. As to confidentiality, cl 54.1.5 provides:

"The confidentiality of all parties involved in the management of Misconduct and Serious Misconduct processes will be respected and all information gathered and recorded will remain confidential, subject to JCU's obligations:

- a) to discharge its responsibilities under an Act or University policy;
- b) for a proceeding in a court or tribunal; or

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- c) unless the person to whom the confidential information relates, consents in writing to the disclosure of the information or record; or if no consent is obtainable and such disclosure is unlikely to harm the interests of the person affected; or
- d) unless the information is already in the public domain."

38 As both the majority and minority of the Full Court observed, there are numerous difficulties with the drafting of cl 54.1.5³². But only one aspect of the interpretation of cl 54.1.5 relevantly arises. Contrary to the approach of the primary judge³³, but consistently with the majority of the Full Court³⁴, the concern of cl 54.1.5 is not merely with the interests of the person subject to the disciplinary proceeding, here Dr Ridd. For instance, in para (c), the person to whom the confidential information relates might be a complainant. The University also has an interest in the maintenance of the confidentiality of its private procedures. Of course, as para (b) provides, the information would not be confidential for the purposes of a proceeding in a court or tribunal, which would include proceedings such as these under s 50 of the *Fair Work Act*. Nor, as para (d) provides, would the information remain confidential once it had been read or expressed in open court. At no point has Dr Ridd suggested that cl 54.1.5 did not apply to him because there had been a reasonable opportunity for JCU processes to be followed.

39 Subject to these limitations, the confidentiality provisions serve the legitimate interests of all parties to JCU's dispute resolution processes, and of JCU itself in maintaining the integrity and efficacy of those processes. Those processes are not inconsistent with cll 13 and 14 of the Enterprise Agreement. Observance of the confidentiality provisions ensures that a member of staff with a just grievance against another member of staff is not intimidated or reduced to silent resignation by the willingness of a colleague to ignore or disrupt the dispute resolution processes of JCU. Conduct of that kind on the part of a staff member

32 *James Cook University v Ridd* (2020) 278 FCR 566 at 590-591 [106]-[112], 623 [277].

33 *Ridd v James Cook University* (2019) 286 IR 389 at 433 [269], [274], [276].

34 *James Cook University v Ridd* (2020) 278 FCR 566 at 591 [115].

may, in some circumstances, be regarded as inconsistent with the maintenance of the relationship of employment under the Enterprise Agreement.

40 In summary, contrary to Dr Ridd's submission, cl 14 cannot provide any protection against breaches of the Code of Conduct which involve disagreement with JCU decisions or JCU processes where the expression of disagreement involves a failure to respect the confidentiality of the parties involved, or the confidential information gathered, in breach of the obligation imposed by cl 54.1.5.

The decisions of JCU disciplining Dr Ridd

41 Although the primary judge and the Full Court properly focused upon each of the actions of JCU that Dr Ridd alleged to have contravened the Enterprise Agreement, the focus of submissions on this appeal was at the higher level of principle concerning the matters of interpretation addressed above. When descending to the facts, Dr Ridd focused only upon the three decisions by which Dr Ridd was disciplined, namely, (i) the 2016 Censure, (ii) the Final Censure, and (iii) the termination decision.

The 2016 Censure

42 The first censure of Dr Ridd arose from an email that Dr Ridd sent to a journalist on 16 December 2015. Dr Ridd sent the email in his capacity as a Professor and head of physics at JCU and as a member of the Marine Geophysics Laboratory. Dr Ridd said to the journalist that work "we have done recently" indicates that the Great Barrier Reef Marine Park Authority ("the GBRMPA") "is grossly misusing some scientific 'data' to make the case that the Great [B]arrier Reef is greatly damaged". He attached documents showing photos of the Great Barrier Reef from around 1890 and from around 1994 which he said were "very famous" and "plastered across the internet". He then provided several pages of comment about those photographs of the Great Barrier Reef, saying that they are "actually a dramatic example of how scientific organisations are quite happy to spin a story for their own purposes, in this case to demonstrate that there is massive damage to the [Great Barrier Reef]".

43 Towards the conclusion of his lengthy email, Dr Ridd said that "GBRMPA, and the [Australian Research Council Centre of Excellence for Coral Reef Studies ('the ARC Centre of Excellence')] should check their facts before they spin their story" and that "[m]y 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

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they will smell a trap". These phrases were the basis for the first finding of misconduct against Dr Ridd and the 2016 Censure.

44 On 29 April 2016, following a complaint by the head of the ARC Centre of Excellence and an investigation, JCU concluded that Dr Ridd had engaged in misconduct as defined in the Enterprise Agreement. JCU found that Dr Ridd had breached Principles 1 and 2 of the Code of Conduct respectively by: (i) not acting collegially, not respecting the rights of others, not upholding professional standards, and "not displaying responsibility in respecting the reputations of other colleagues"; and (ii) not "uphold[ing] the integrity and good reputation of the University". Dr Ridd was formally censured and directed that in making future public comments in his academic field he must do so "in a collegial manner that upholds the University and individuals['] respect".

45 Nowhere in JCU's findings, and at no stage in these proceedings, did JCU deny that Dr Ridd's remarks about the GBRMPA and the ARC Centre of Excellence in his 16 December 2015 email were views that Dr Ridd honestly held. The primary judge held, in a finding that was not challenged on appeal, that Dr Ridd's honest expression of these views was an expression of opinion "about issues and ideas related to his field of competence"³⁵. JCU did not submit that Dr Ridd's remarks were unlawful or contrary to the legal rights, including rights to reputation, of any person.

46 The majority of the Full Court correctly reasoned that the opinions expressed by Dr Ridd in his 16 December 2015 email fell, *prima facie*, within the scope of cl 14.3 of the Enterprise Agreement. The majority reasoned that Dr Ridd would therefore have had a defence to any charges of misconduct or serious misconduct for the expression of his opinions. But the majority held that Dr Ridd had not been disciplined for the expression of his opinions but instead was disciplined having regard to the "correlative duty ... owed to his colleagues" under the Code of Conduct³⁶. For the reasons explained above, the best interpretation of cl 14.3 of the Enterprise Agreement is that where the expression of opinion falls within the intellectual freedom protected by cl 14 then it cannot amount to misconduct or serious misconduct for violating the Code of Conduct.

47 JCU's submission that Dr Ridd could violate the Code of Conduct by the tone or manner of his expression of honestly held views based on his academic

35 *Ridd v James Cook University* (2019) 286 IR 389 at 406 [67].

36 *James Cook University v Ridd* (2020) 278 FCR 566 at 595 [133].

expertise irrespective of whether those views were expressed lawfully and consistently with the legal rights of others is not consistent with the proper interpretation of cll 13 and 14 of the Enterprise Agreement. Dr Ridd should not have been given the 2016 Censure.

The Final Censure

48 The "Final Censure" of Dr Ridd by JCU was the result of a number of comments by Dr Ridd in different fora. The first of these was made on 1 August 2017 in an interview with Mr Alan Jones and Ms Peta Credlin on the television show "Jones and Co", which was broadcast on Sky News ("the Sky Interview"). In the course of that interview, Dr Ridd affirmed remarks that he had made in a book chapter which argued that the Great Barrier Reef "[q]uietly grows and waits for the beginning of the next cycle of death and regrowth". Dr Ridd added that after the reef "crashes", the "scientists ... then do the same stories and push it all around the world again". He said that "this has been going on for close to 50 years, how many more years will it take for us to cotton-on to the fact that you can no longer trust this stuff, unfortunately". Earlier in the Sky Interview he had said that:

"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.

...

I think that most of the scientists who are pushing out this stuff, they genuinely believe that there are problems with the reef. I just don't think that they are very objective about the science they do. I think [they're] emotionally attached to their subject, and ...

You know you can't blame them, the reef is a beautiful thing."

49 On 21 November 2017, following a prima facie finding by JCU of serious misconduct in this interview and the exchange of considerable correspondence between Dr Ridd and JCU, the Senior Deputy Vice-Chancellor of JCU wrote to Dr Ridd setting out JCU's finding that Dr Ridd had engaged in serious misconduct by violation of the Code of Conduct in relation to this interview and other matters. Dr Ridd was disciplined with the Final Censure.

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50 One basis for the Final Censure, which relied upon the extracts above from the Sky Interview, was that Dr Ridd's intellectual freedom did not justify the "criticism of key stakeholders of the University" in a manner which was not "in the collegial and academic spirit of the search for knowledge, understanding and truth" or "respectful and courteous". Dr Ridd was also told that his conduct "had and has the capacity to damage the reputation of [the Australian Institute of Marine Science] and ARC Centre [of Excellence] and therefore the relationship of the University with these bodies and by association the reputation of the University". In the 21 November 2017 letter, the Senior Deputy Vice-Chancellor also directed Dr Ridd not to discuss or to disclose any matters relating to the disciplinary process to any person including the media or in any public forum but excluding his immediate family or solicitors. Dr Ridd was also told that it was JCU's "expectation[]" that he "will not make any comments or engage in any conduct that directly or indirectly trivialises, satirises or parodies the University taking disciplinary action against [him]".

51 For the same reasons expressed above in relation to the 2016 Censure, that part of the reasoning of the Senior Deputy Vice-Chancellor in the 21 November 2017 letter concerning the manner in which Dr Ridd had expressed his criticisms was inconsistent with the proper interpretation of cl 14.3 of the Enterprise Agreement. In the absence of any assertion that his remarks amounted to harassment, vilification, bullying, or intimidation, or that they were defamatory or not honestly held, the remarks were protected by the intellectual freedom in cl 14.

52 The Final Censure did not, however, rely exclusively upon the remarks made by Dr Ridd in the Sky Interview. Rather, it also relied upon six other findings, described in the courts below as the third to eighth findings, which together with the remarks made by Dr Ridd in the Sky Interview were found to be serious misconduct for the purposes of cl 54.3.6 of the Enterprise Agreement. Five of these six findings concerned remarks in emails sent by Dr Ridd from his JCU email account to external recipients expressing his views that he had offended "powerful organisations" and "some sensitive but powerful and ruthless egos", and that "our whole university system pretends to value free debate, but in fact it crushes it". These were not expressions of opinion within an area of Dr Ridd's academic competence. And Dr Ridd made no submissions that could have justified these remarks otherwise falling within the intellectual freedom protected by cl 14.

53 The remaining finding of the six additional findings upon which the Final Censure rested was, however, the subject of submissions by Dr Ridd. That was the finding that he had repeatedly failed to comply with his obligations with respect to confidentiality. The failure to comply with confidentiality obligations arose despite

letters from JCU to Dr Ridd on 24 and 27 August 2017 in which JCU notified Dr Ridd that it considered the Sky Interview to be a prima facie case of serious misconduct and repeatedly emphasised the confidentiality of the disciplinary process for all parties. Dr Ridd's attention was also directed by the 24 August 2017 letter to cl 54.1.5 of the Enterprise Agreement.

54 On 28 August 2017, Dr Ridd replied to a group email, which had more than 30 group members, in which a member of the group had attached an article from *The Australian* newspaper that mentioned that Dr Ridd was facing disciplinary proceedings and the member had asked "Is there anything we can do to help Peter?". Dr Ridd responded, with comments that included, "Actually if anything a letter to my VC would be the most useful".

55 One of the curiosities of the manner in which Dr Ridd's case was conducted was that he accepted that, subject to the intellectual freedom in cl 14, this comment involved serious misconduct, which must have been on the basis that the comment contravened Dr Ridd's obligations of confidentiality under the Code of Conduct. He made no submission that the exception in cl 54.1.5 was engaged because the information was "already in the public domain". Nor did he make any submission that his response suggesting that letters be sent to the Vice-Chancellor did not impair the confidentiality of any of the parties involved in the management of the disciplinary process or reveal any confidential information gathered or recorded. His sole submission – accepted by the primary judge, but rejected by the majority of the Full Court – was that confidentiality could not be infringed, and directions concerning confidentiality could not be given by JCU, if the confidential matters, or the directions, fell within the scope of the intellectual freedom. That submission should not be accepted for the reasons expressed in the section of these reasons concerned with the interpretation of cl 54.1.5.

56 The consequence of this reasoning is that, given the manner in which Dr Ridd's case has been presented, one part only, not all, of the basis for the Final Censure was unjustified. Consistently with the all-or-nothing presentation of his case, it was not submitted by Dr Ridd that an irrelevant consideration as to only one part of the Final Censure would have the effect that the whole of the Final Censure was a contravention of the Enterprise Agreement.

The termination decision

57 At about the same time as, or subsequent to, the Final Censure, Dr Ridd engaged in further conduct which was the basis for findings made by the Deputy Vice-Chancellor of JCU. It was alleged that in 20 respects Dr Ridd had engaged in serious misconduct. Those 20 respects were divided into nine head allegations,

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many of which contained sub-allegations, including: deliberate disclosure by Dr Ridd of confidential information to *The Australian* newspaper in around November 2017, being correspondence contained in his affidavit filed in the proceeding in the Federal Circuit Court; publishing confidential documents relating to the 2016 and 2017 disciplinary processes, which had led to the 2016 Censure and the Final Censure; "deliberately and repeatedly" breaching confidentiality directions given to him by JCU, including disclosing information to journalists; damaging JCU's reputation by making comments without proper basis and in deliberate disregard of his obligations to JCU; communicating to a student in a manner that directly or indirectly trivialised, satirised, or parodied JCU's disciplinary action against him; publishing comments about the disciplinary process that were said to be untrue, misleading, or not full or frank; communicating with another staff member in a manner that was threatening, insubordinate, or disrespectful; and preferring his own interests and those of the Institute of Public Affairs above the interests of JCU in breach of his obligations to avoid conflicts of interest.

58 Apart from Dr Ridd's submission about his confidentiality obligations being subject to the cl 14 intellectual freedom, which should not be accepted for the reasons already given, none of these findings of serious misconduct was challenged. It appears to have been assumed throughout these proceedings that all of the information subject to these breach of confidentiality allegations (i) concerned the parties involved or concerned information that had been gathered and recorded as part of the disciplinary process and (ii) was not already in the public domain, including not in any open court hearings in the proceedings commenced in the Federal Circuit Court on 20 November 2017.

59 On 13 April 2018, the Deputy Vice-Chancellor of JCU made a preliminary determination under cl 54.3.6 of the Enterprise Agreement that Dr Ridd had engaged in serious misconduct as alleged in relation to 18 of the 20 respects. Only two sub-allegations were found to be unsubstantiated. That is, the Deputy Vice-Chancellor made 18 findings of serious misconduct against Dr Ridd. The Deputy Vice-Chancellor's conclusion was that the appropriate disciplinary penalty was termination of Dr Ridd's employment. The Deputy Vice-Chancellor concluded that Dr Ridd's "behaviour in regards to each allegation, individually and collectively, is serious and destructive of the necessary trust and confidence for the continuation of the employment relationship" and that "[i]ndividually, and collectively, the allegations demonstrate a pattern of deliberate Serious Misconduct". None of these findings was in respect of expressions of opinions or ideas within Dr Ridd's academic expertise. And Dr Ridd did not suggest that any of these findings were in respect of criticism of JCU's decisions or its processes "through applicable processes".

60 Following the preliminary decision of the Deputy Vice-Chancellor, Dr Ridd, through his solicitors, made a final submission to the Vice-Chancellor under cl 54.4 of the Enterprise Agreement. On 2 May 2018, the Vice-Chancellor made a final determination under cl 54.5 of the Enterprise Agreement. The Vice-Chancellor was satisfied that it was open to the Deputy Vice-Chancellor to make her 18 findings of serious misconduct and that it was within the power of the Deputy Vice-Chancellor to do so. The Vice-Chancellor determined that Dr Ridd's employment should be terminated. Much of the Vice-Chancellor's reasoning was concerned with the 18 findings of serious misconduct by the Deputy Vice-Chancellor, individually and collectively, as being destructive of the necessary trust and confidence for the continuation of the employment relationship.

61 Unlike the decision of the Deputy Vice-Chancellor, the Vice-Chancellor also considered the 2016 Censure and the Final Censure. She did so in the course of reasoning to the conclusion that "alternative sanctions would not be appropriate". However, the reliance by the Vice-Chancellor upon the 2016 Censure and the Final Censure focused upon the extent to which those censures concerned conduct the same as or similar to that which the Deputy Vice-Chancellor had found to be serious misconduct. The Vice-Chancellor said that Dr Ridd had been "twice censured for similar conduct" to the instances of serious misconduct found by the Deputy Vice-Chancellor and that Dr Ridd had repeated "the same conduct for which [he had] previously been censured". And for the reasons already given, the actions of Dr Ridd which were the subject of the 18 findings of serious misconduct by the Deputy Vice-Chancellor were not protected by cl 14.

62 Other than to submit generally that the findings by the Deputy Vice-Chancellor were contrary to Dr Ridd's intellectual freedom protected by cl 14, Dr Ridd did not dispute that the Vice-Chancellor's termination decision could be supported by the 18 findings made by the Deputy Vice-Chancellor. Indeed, the contest between the parties concerned only the validity of the conclusions of the Deputy Vice-Chancellor.

Conclusion

63 This appeal was conducted by both parties on an all-or-nothing basis. JCU's position was that all of the findings against Dr Ridd were justified. Dr Ridd's position was that none of the findings made against him was justified. Dr Ridd sought to reinstate all of the orders made by the Federal Circuit Court with adjustments for compensation and pecuniary penalties to reflect errors identified by the Full Court which he conceded had been made. No submissions were made

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by Dr Ridd to justify an alternative ground of relief that the matter be remitted to the Federal Circuit Court.

64 At the high level of principle at which this appeal was argued, the essential question is whether, in the interpretation of cl 14 of the Enterprise Agreement, the intellectual freedom should be qualified (i) by a requirement to afford respect and courtesy to others in the expression of issues and ideas in one's field of competence and (ii) by obligations of confidentiality in relation to JCU's disciplinary processes. The best interpretation of cl 14, having regard to its text, context, and purpose, is that the intellectual freedom is not qualified by a requirement to afford respect and courtesy in the manner of its exercise. That interpretation aligns with the long-standing core meaning of intellectual freedom. Whilst a prohibition upon disrespectful and discourteous conduct in intellectual expression might be a "convenient plan for having peace in the intellectual world", the "price paid for this sort of intellectual pacification, is the sacrifice of the entire moral courage of the human mind"³⁷. The 2016 Censure given to Dr Ridd was, therefore, not justified.

65 That conclusion does not affect the outcome of this appeal. The only conduct that falls within the intellectual freedom in cl 14 is the expression of opinion within an area of academic expertise and the criticism of JCU decisions and processes through applicable processes which include obligations of confidentiality. This litigation concerned conduct by Dr Ridd far beyond that of the 2016 Censure, almost none of which was protected by the intellectual freedom in cl 14. That conduct culminated in the termination decision, a decision which itself was justified by 18 grounds of serious misconduct, none of which involved the exercise of intellectual freedom. Since this appeal was run on an all-or-nothing basis, the appeal should be dismissed. There should be no order as to costs.

37 Mill, *On Liberty* (1859) at 60.

