



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

BETWEEN:

**PETER VINCENT RIDD**

Appellant

and

**JAMES COOK UNIVERSITY**

Respondent

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**APPELLANT'S OUTLINE OF ORAL SUBMISSIONS**

## Part I: Certification

1. This outline of oral submissions is in a form suitable for publication on the internet.

## Part II: Propositions to be advanced in oral argument

2. The issue on this appeal is: how does the EA resolve a conflict between the general obligations imposed by the Code of Conduct and the specific protection of intellectual freedom in clause 14?
3. Dr Ridd contends that the intellectual freedom right is not subject to or qualified by the Code; it is not misconduct or serious misconduct under the EA to exercise a right recognised by the EA.

### 10 A. Construction

4. **First**, the intellectual freedom right must be construed in light of its history and purpose:
  - (a) intellectual freedom furthers the purpose of both the university **and** its employees. It allows for the pursuit of truth by the robust clash of ideas, within broad limits: AS, [36]-[38];
  - (b) intellectual freedom is an ancient principle foundational to a university: see FCAFC, [88] (**CAB 161**). The freedom was significant to the makers of the EA, as shown by its inclusion in the statutory agreement: AS, [36], [57];
  - (c) history and purpose cannot be put to one side: cf FCAFC, [94] (**CAB 163**). The right should not be read as if unimportant to the enterprise and its employees;
  - 20 (d) the right is not unlimited. Clause 14 draws a balance.
5. **Second**, the Code and the intellectual freedom right conflict with each other:
  - (a) the Code of Conduct is a **prohibition**. It prohibits employees from doing certain things and is a gateway to disciplinary action by the university: ASR, [2], [8]-[9];
  - (b) intellectual freedom is a **permission**. It is a right conferred upon employees that is a protection from the university: AS, [33]; ASR, [10].
6. **Third**, the Code detracts from clause 14:
  - (a) JCU disciplined Dr Ridd on the basis that the clause 14 right was “subject to” the Code, *ipso facto*, a detraction: FCAFC, [201] (**CAB 191-192**).
  - (b) The Code prohibits conduct otherwise permissible and protected by clause 14:

- (i) Rangiah J in dissent at FCAFC, [264] (**CAB 207**);
- (ii) the primary judge at [296] (**CAB 77-78**), which the majority in the Full Court quoted at FCAFC, [89] (**CAB 161**);
- (iii) less certain standards: FCAFC, [86] (**CAB 160**);
- (iv) the TV interview: LJ, [81] (**CAB 32-39**);
- (v) the email to journalist: LJ, [55] (**CAB 21-27**);
- (vi) the 12<sup>th</sup> finding: LJ, [183]-[198] (**CAB 60-62**).

(c) The majority in the Full Court erred at FCAFC, [78] (**CAB 158**).

7. **Third**, the makers of the EA resolved the conflict by clause 13.3. The majority in the Full Court erred at FCAFC, [82] (**CAB 159**) and [78] (**CAB 158**).
8. **Fourth**, Dr Ridd’s contention is **not** that clause 14 allows for intellectual freedom free of all constraint (RS, [37], [39]; cf ASR, [12]). The Full Court erred in so characterising his case: FCAFC, [1] (**CAB 140**).
9. **Fifth**, the reference to the Code of Conduct in clause 14.1 does not address the issue in the case, which is what is to occur if the two commitments are inconsistent with one another: see Rangiah J at FCAFC, [264] (**CAB 207**).
10. Incorporating the Code into clause 14 undoes the detail of the clause and frustrates its purpose. An enterprise agreement is “not to be interpreted in a vacuum divorced from industrial realities ... industrial agreements are made for various industries in the light of the customs and working conditions of each ... frequently couched in terms intelligible to the parties but without the careful attention to form and draftsmanship that one expects to find in an Act of Parliament...”: *Workpac Pty Ltd v Skene* (2018) 264 FCR 536, 580 [197] (**JBA vol 4, Pt D, no 15**).
11. **Sixth**, the examples in clause 14.3 of the “rights of others” is exhaustive. Clause 14.3 does not pick up the Code of Conduct: AS, [65]; ASR, [13].

JCU applied the Code of Conduct contrary to clause 14

12. The right to **express criticism** of JCU and to disagree with disciplinary decisions and processes was converted into an obligation to uphold the reputation of the university: see 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> findings. It was converted into an obligation not to be satirical, untruthful or disrespectful: see 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup> findings. The right to **express a**

**professional scientific opinion** was qualified by an obligation to protect reputations, be respectful and courteous: see 1<sup>st</sup>, 2<sup>nd</sup> 8<sup>th</sup> findings.

## **B. Consequences of the construction**

### Confidentiality directions

13. Dr Ridd was directed to keep confidential the disciplinary action taken against him, including: the charges against him, the outcome of the charges, and the speech directions imposed on him: see, eg, LJ, [160] (**CAB 56**), LJ, [166]-[167] (**CAB 57**). It would have prevented him from protesting and disagreeing with the infringement of his intellectual freedom right.
- 10 14. The majority in the Full Court upheld those directions. But that was in the context of its holding that JCU’s disciplinary action was lawful and did not contravene the clause 14 right. If the majority’s construction was wrong, that disciplinary action was unlawful. A direction to prevent the disclosure of unlawfulness cannot be lawful or reasonable: AS, [69]; ASR, [19], cf FCAFC, [121]-[122] (**CAB 171**).
15. Further, each disciplinary decision was cumulative: see FCAFC, [293] (**CAB 214**). No decision by JCU was unaffected by its unlawful action.
16. Finally, the Confidentiality Directions cannot detract from the clause 14 right to express disagreement and express opinions about JCU: see AS, [68].

### “Alternative” ground

- 20 17. The “alternative” ground is affected by the misconstruction: FCAFC, [130], [133], [134], [135], [136] (**CAB 173-175**).
18. It is incomplete and wrong: (i) “some of the elements”: FCAFC, [135] (**CAB 174**); (ii) findings as to emails misstated: FCAFC, [135] (**CAB 174**); (iii) conduct after Final Censure incorrectly dealt with: FCAFC, [136] (**CAB 175**); (iv) other findings of primary judge unchallenged: see the 17<sup>th</sup> finding (LJ, [235]-[239] (**CAB 69**), “honesty and integrity” 15<sup>th</sup> finding at LJ, [212]-[215] (**CAB 65**).

**Dated:** 23 June 2021



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