

# **AFTER RIDD: CAN AUSTRALIAN UNIVERSITIES STILL REGULATE UNCIVIL BEHAVIOURS WITHIN THEIR INSTITUTIONS?**

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*This article provides guidance as to the extent to which Australian universities will need to reconsider behavioural standards previously imposed on staff and students to maintain a collegial and supportive learning and working environment in adopting the Model Code for the Protection of Free Speech and Academic Freedom ('Model Code') recommended by former High Court of Australia Chief Justice Robert French. Specifically, it considers the extent to which the Model Code allows universities to regulate staff or student speech where the manner of that speech may be considered to be 'offensive, shocking or insulting' as distinct from its content. This analysis involves consideration of the litigation involving Peter Ridd and James Cook University, culminating in the High Court's decision in *Ridd v James Cook University* [2021] HCA 32 and some reflections on the Model Code. The article recommends how the Model Code might be amended to provide Australian universities and their staff and students with greater certainty in relation to the extent to which universities can regulate disrespectful and discourteous behaviour within their institutions while still upholding freedom of speech and academic freedom in accordance with the principles of the Model Code.*

## I INTRODUCTION

In a previous article,<sup>1</sup> the current author analysed the consequences for Australian universities of the decision of Federal Circuit Court Judge Vasta in *Ridd v James Cook University* ('Ridd')<sup>2</sup> and the Model Code for the Protection of Free Speech and Academic Freedom ('Model Code') proposed by Robert French AC, former Chief Justice of the High Court of Australia ('High Court') in his *Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers* in March 2019 ('French Review').<sup>3</sup> The author concluded that a possible consequence of both *Ridd* and the Model Code was that their combined effect would render university codes of conduct effectively irrelevant and create difficulties for universities in responding to any uncivil behaviors on the part of their staff and students. The author empathized with the views of several Vice-Chancellors at Australian universities that the reduced effectiveness of codes of conduct might affect the ability of universities to, amongst other things, teach students to 'question respectfully', to 'disagree well' and to 'engage in vigorous debate without suspending courtesy'.<sup>4</sup> The author argued that, contrary to the position taken in *Ridd* and the apparent effect of the Model Code, 'academic freedom and free speech and the retention of dignity of academics and students is not a binary regime'<sup>5</sup> and that academic freedom should be 'distinct from personal

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<sup>1</sup> Pnina Levine and Rob Guthrie, 'The Ridd Case and the Model Code for the Protection of Free Speech and Academic Freedom: Wins for Academic Freedom or Losses for University Codes of Conduct and Respectful and Courteous Behaviour?' (2020) 47(2) *The University of Western Australia Law Review* 310.

<sup>2</sup> *Ridd v James Cook University* [2019] FCCA 997 ('Ridd').

<sup>3</sup> Robert S French AC, *Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers* (Final Report, March 2019) ('French Review') 230-236.

<sup>4</sup> Levine and Guthrie (n 1) 312, citing Michael Spence, 'True Free Speech Means Learning to Disagree Well', *The Daily Telegraph* (online at 19 June 2019)

<https://www.dailytelegraph.com.au/news/opinion/michael-spence-true-free-speech-means-learning-to-disagree-well/news-story/1b3a0a4899239ca97ee572f1a43311df> and Deborah Terry, 'Unis Shine in Ideas Contest', *The Australian* (online at 6 June 2019)

<<https://www.theaustralian.com.au/commentary/universities-shine-in-the-contest-of-ideas/news-story/1fc91a4519df2b3e695d83b758b0f8bc>>.

<sup>5</sup> *Ibid* 324.

attacks upon colleagues.<sup>6</sup> She opined that universities might need to consider the incorporation of behavioural standards into their enterprise agreements (EAs) in order to effectively circumvent the provision in the Model Code that allows for ‘offen[sive]...shock[ing] [and] insult[ing] conduct’ and hence, maintain an environment of civility within their institutions.<sup>7</sup>

Since the release of the Model Code and the decision of *Ridd* at first instance, there have been several developments in relation to the Model Code and freedom of speech and academic freedom in Australia. Following the publication of the *French Review* and the subsequent consultation between French and a working group of university chancellors, some minor amendments to the Model Code adopted by the University Chancellors Council (‘UCC’) were made.<sup>8</sup> In August 2020, with the Morrison Coalition Government still concerned about the university uptake of the Model Code, the then Minister of Education, the Honourable Dan Tehan engaged former Deakin University Vice-Chancellor Sally Walker to undertake a review into the extent to which Australian universities had adopted the Model Code (‘*Walker Review*’).<sup>9</sup> The *Walker Review*, released in

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<sup>6</sup> Ibid.

<sup>7</sup> As explained in the author’s previous article, the Model Code appears to ‘preserve the paramouncy of the workplace agreement at the expense of the application of the Model Code in that there does not appear to be any provision in the Model Code requiring Universities to draft, review, amend or interpret contracts or workplace agreements in accordance with the Principles of the Model Code’. The Model Code only provides that ‘Any power or discretion conferred on the university under any contract or workplace agreement shall be exercised, so far as it is consistent with the terms of that contract or workplace agreement, in accordance with the Principles of the Code’: Ibid 323.

<sup>8</sup> See ‘UCC version of the Model Code marked up to show how it varies from the Model Code’ in Sally Walker, *Review of the Adoption of the Model Code on Freedom of Speech and Academic Freedom* (Final Report, December 2020) (the ‘*Walker Review*’) <https://www.dese.gov.au/higher-education-reviews-and-consultations/resources/report-independent-review-adoption-model-code-freedom-speech-and-academic-freedom>, app B 48–54). This will be explained further below. References to the Model Code in this article are references to that Code and these subsequent amendments unless indicated otherwise.

<sup>9</sup> Walker (n 8); Dan Tehan, ‘Evaluating Progress on Free Speech’ (Media Release, Ministers’ Media Centre: Department of Education, Skills and Employment, 7 August 2020) <<https://ministers.dese.gov.au/tehan/evaluating-progress-free-speech>>; ‘Independent Review of Adoption of the Model Code on Freedom of Speech and Academic Freedom’, *Australian Government: Department of Education, Skills and Employment* (Web Page, 3 June 2021) <<https://www.dese.gov.au/higher-education-reviews-and-consultations/independent-review-adoption-model-code-freedom-speech-and-academic-freedom>>.

December 2020, found that a majority of Australian universities had, at that time, at least partially implemented the principles of the Model Code.<sup>10</sup> The *Walker Review* made five recommendations to the Morrison Coalition Government and seven suggestions to assist universities to strengthen their alignment with the Model Code.<sup>11</sup> The Morrison Coalition Government endorsed all of the recommendations set out in the *Walker Review*.<sup>12</sup> In accordance with one of these recommendations, the University Chancellors agreed, in October 2021, to their universities specifically and publicly reporting on how they are upholding academic freedom and freedom of speech on campus in their annual reports.<sup>13</sup> Legislative developments have also occurred: the *Higher Education Support Act 2003* (Cth) (*HES Act*) and the *Higher Education Framework (Threshold Standards) 2021* (formerly, the *Higher Education Framework (Threshold Standards) 2015*) (*HE Standards*) have been amended to align their statutory terms with the relevant provisions of the Model Code<sup>14</sup> and notably to include the Model

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<sup>10</sup> Walker (n 8) 27.

<sup>11</sup> Walker (n 8) 55-57.

<sup>12</sup> 'Review of the Adoption of the Model Code on Freedom of Speech and Academic Freedom in Higher Education: Australian Government Response', *Australian Government, Department of Education, Skills and Employment* (Web Page, 3 June 2021) <<https://www.dese.gov.au/higher-education-reviews-and-consultations/resources/australian-government-response-walker-review-model-code-implementation>>.

<sup>13</sup> See The Hon Alan Tudge MP (Minister for Education and Youth), 'Universities adopt free speech code' (Media Release, Ministers' Media Centre, Ministers of the Education, Skills and Employment Portfolio, 13 October 2021) <<https://ministers.dese.gov.au/tudge/universities-adopt-free-speech-code>>.

<sup>14</sup> Prior to the enactment of the Higher Education Support Amendment (Freedom of Speech) Bill 2020, s 19-115 of the *Higher Education Support Act 2003* (Cth) ('*HES Act*') required that a 'higher education provider that is a \*Table A provider or a \*Table B provider must have a policy that upholds free intellectual inquiry in relation to learning, teaching and research'. The term 'free intellectual inquiry' has now been replaced by 'freedom of speech and academic freedom'. Table A providers are listed in s 16-15 and include the majority of Australian universities; Table B providers are listed in s 16-20 and are Bond University, The University of Notre Dame Australia, University of Divinity, and Torrens University Australia. On 27 April 2021, the updated Higher Education Standards Framework (Threshold Standards) 2021 ('*HE Standards*') were published on the Federal Register of Legislation, having been revised in response to the review of the Provider Category Standards conducted in 2019. The updated Threshold Standards came into effect on 1 July 2021. Further amendments to the Threshold Standards were made on 1 December 2021 to reflect changes made to the *HES Act*. For example, standard 6.1.4 was amended to require higher education providers' governing bodies to 'take steps to develop and maintain an institutional environment in which freedom of speech and academic freedom are upheld and protected' with the definition of 'academic freedom' to have the same meaning as in the *HES Act*: 'Overview of changes – Higher Education Standards Framework (Threshold

Code's definition of 'academic freedom'.<sup>15</sup> In addition to the activity involving the Model Code, the decision of Vasta J in *Ridd* was appealed to the Full Federal Court ('*Ridd FFC Appeal*'),<sup>16</sup> and ultimately to the High Court ('*Ridd 2021 HCA Appeal*').<sup>17</sup> In October 2021, the High Court confirmed that the dismissal of Ridd by James Cook University (JCU) was lawful but significantly opined that, 'however desirable courtesy and respect might be, the purpose of intellectual freedom must permit of expression that departs from those civil norms.'<sup>18</sup>

These recent developments have made it evident that the author's earlier recommendation that universities should incorporate their codes of conduct into their EAs in order to be able to maintain civility is no longer appropriate. It is asserted that Australian Universities must now focus their attention on the interpretation and application of the principles of the Model Code to answer the question of the extent to which they can maintain a collegial and supportive learning and working environment consistent with the Model Code.

This article provides some guidance for universities in relation to this question by focussing on the requirement of the Model Code on Australian universities which prohibits them from regulating 'offensive, shocking or insulting' speech by staff and students, albeit allowing for the regulation of 'threatening or intimidating' and 'humiliating or intimidating' behaviour in certain circumstances. While the proscription seems clear on its face, it in fact poses a significant question: whether the Model Code allows for a university to regulate a staff member or a student's speech to the extent that the *manner* of their speech is considered to be 'offensive,

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Standards) 2021', *Australian Government, Tertiary Education Quality and Standards Agency* (Web Page) <<https://www.teqsa.gov.au/overview-changes>>.

<sup>15</sup> *HES Act* (n 14) sch 1 cl 1(1) (definition of 'academic freedom').

<sup>16</sup> *James Cook University v Ridd* [No 2] [2020] FCAFC 132 ('*Ridd FFC Appeal*').

<sup>17</sup> *Ridd v James Cook University* [2021] HCA 32 ('*Ridd 2021 HCA Appeal*').

<sup>18</sup> *Ibid* [33]. Notably, any distinction between 'intellectual freedom' and 'academic freedom' was considered to be irrelevant to the case by the High Court, although the Court did note that 'intellectual freedom' is '[s]ometimes ... 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 work': *Ibid* [29].

shocking or insulting’ as distinct from the content of the speech being so. This distinction is best explained using an example provided by Evans and Stone involving a ‘classroom debate on immigration policy.’ In their example –

One student argues vigorously for an open-border policy, saying that it will promote global social justice, antiracism and greater diversity in Australian culture. Another student argues against further immigration, saying that Australia has difficulty absorbing too much cultural diversity, that infrastructure is failing to keep up with population growth and that limiting immigration is the best way to protect the environment. Some members of the class (including the lecturer) may have strong feelings one way or the other on the debate, and some may even be hurt, angered or offended by one of the arguments.’<sup>19</sup>

According to Evans and Stone, ‘academic freedom [should] protect... the right of both students to make their case and neither should face disciplinary action or penalties...for doing so.’<sup>20</sup> Their view would seem to accord with the Model Code, with neither student’s speech being sufficient to ‘constitute misconduct nor attract any penalty or other adverse action’<sup>21</sup> by reason of its content being ‘offensive, shocking or insulting’ and there would be no difference if this scenario involved academic staff members as distinct from students.

However, in Evans and Stone’s view ‘academic freedom [should not] protect...[the making] of ‘personal attacks...or assertions with no intellectual value.’<sup>22</sup> In their view, if ‘the student in favour of closed borders were to use a [derogatory] slur against his opponent or if the speaker in favour of open borders were to call her opponent a ‘Nazi’’, disciplinary action would be appropriate.<sup>23</sup> Yet, whether in meaningfully applying the principles of the Model Code, a university would be justified in taking any disciplinary action against either student (or staff members in a similar situation) is not as clear. Neither is it clear whether a university could

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<sup>19</sup> Carolyn Evans and Adrienne Stone, *Open Minds: Academic Freedom and Freedom of Speech in Australia* (La Trobe University Press, 2021) 92.

<sup>20</sup> *Ibid.*

<sup>21</sup> Walker (n 8) app B, 52.

<sup>22</sup> Evans and Stone (n 19) 92.

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

take action if the student or staff member were to shout their arguments loudly and aggressively at their opponent. Specifically, it is not certain whether the university could lawfully take disciplinary action against either student (or staff member) on the basis that the *manner* in which they expressed their arguments was ‘offensive, shocking or insulting’ as distinct from taking any action in relation to the content of their arguments. Similar uncertainty exists in relation to how a university that respects and upholds the principles of the Model Code should respond if such derogatory slurs, personal attacks or loud and aggressive arguments are expressed in the university corridors, unrelated to any classroom or academic debate. Universities need more clarity around these questions so that they can meaningfully uphold academic freedom and freedom of speech on campus in accordance with the principles of the Model Code and provide accurate annual public reports on their application of the Model Code. At the same time, clarity would also assist to reduce the risk of staff and students self-censoring as a result of uncertainty in relation to the application of the Model Code.

The article firstly examines the objects of the Model Code, its definitions of ‘speech’ and ‘academic freedom’ and the limited restrictions that it places on free speech and academic freedom, highlighting the issues posed by the Model Code as noted above. Secondly, it provides some guidance in relation to these issues through an analysis of the Ridd litigation with particular reference to the High Court’s decision in the *Ridd 2021 HCA Appeal*. Finally, it makes recommendations as to how the Model Code might be amended in order to provide Australian universities and their staff and students with some specific guidance as to the extent to which universities may regulate uncivil behaviours within their institutions while still upholding freedom of speech and academic freedom in accordance with the principles of the Model Code.

## II THE REVIEW AND THE MODEL CODE

Arguably, the *French Review* and the Model Code constitute ‘the most significant recent development for academic freedom and the protection of freedom of speech

in Australia'.<sup>24</sup> The *French Review* was commissioned in November 2018 by the then Minister for Education the Honourable Dan Tehan MP, primarily in response to a number of high profile cases relating to protests against visiting speakers on Australian university campuses and attempts to 'de-platform' them.<sup>25</sup> Although French did not find there had been 'a systemic pattern of action by higher education providers... adverse to freedom of speech or intellectual inquiry in the higher education sector',<sup>26</sup> he considered that 'even a limited number of incidents ... may have an adverse impact on public perception of the higher education sector'.<sup>27</sup> He also expressed some concern as to the 'broad language' used in the higher education rules and policies that he reviewed as part of the *French Review* which he said was 'capable of impinging on freedom of expression'.<sup>28</sup> He noted that 'wide' terms such as 'lack of respect', 'prejudicial' and 'reprehensible' could be applied 'to a considerable range of expressive conduct' and that 'administrative application [of such language] may be more informed by more variable and less visible perspectives [than the Courts]'.<sup>29</sup> In French's view, '[t]he potential for overreach tending to erosion of important freedoms equate[d] to a non-trivial risk of that erosion.'<sup>30</sup> To reduce that risk, he recommended that universities and other higher education providers adopt 'umbrella principles' embodied within his proposed non-statutory Model Code.<sup>31</sup> He considered that the adoption of this Model Code would have the effect of 'restrain[ing] the exercise of overbroad powers to the extent that they would otherwise be applied adversely to freedom of speech and academic freedom without proper justification.'<sup>32</sup>

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<sup>24</sup> Pnina Levine and Haydn Rigby, 'To What Extent Should Academic Freedom Allow Academics to Criticise Their Universities?' (2022) 48(1) *Monash University Law Review* (forthcoming).

<sup>25</sup> French (n 3) 18-19.

<sup>26</sup> *Ibid* 217.

<sup>27</sup> *Ibid*.

<sup>28</sup> *Ibid*.

<sup>29</sup> *Ibid* 218.

<sup>30</sup> *Ibid*.

<sup>31</sup> *Ibid* 219.

<sup>32</sup> *Ibid*.



The Model Code has three objects that reflect the importance to universities, and to society generally, of ‘freedom of lawful speech’, ‘academic freedom’ and ‘institutional autonomy’.<sup>33</sup> Its objects are:

(1) To ensure that the freedom of lawful speech of staff and students of the university and visitors to the university is treated as a paramount value and therefore is not restricted nor its exercise unnecessarily burdened by restrictions or burdens other than those imposed by law and set out in the Principles of the Code.

(2) To ensure that academic freedom is treated as a defining value by the university and therefore not restricted nor its exercise unnecessarily burdened by restrictions or burdens other than those imposed by law and set out in the Principles of the Code.

(3) To affirm the importance of the university’s institutional autonomy under law in the regulation of its affairs, including in the protection of freedom of speech and academic freedom.<sup>34</sup>

The Model Code provides for the enjoyment of freedom of speech as ‘exercised on university land or in connection with the university’ by ‘every member of the staff and every student at the university’.<sup>35</sup> It further provides for the enjoyment of academic freedom by ‘every member of the *academic* staff and every student’.<sup>36</sup> ‘Speech’ is defined in the Model simply as ‘extend[ing] to all forms of expressive conduct including oral speech and written, artistic, musical and performing works and activity and communication using social media’ with the word ‘speak’ having ‘a corresponding meaning’.<sup>37</sup> However, the Model Code’s definition of ‘academic freedom’ is more complex. As part of the *French Review*, French extensively considered a definition of ‘academic freedom’ that could be applied consistently across Australian universities. This definitional question was made more challenging as the term ‘academic freedom’ did not appear in the Terms of Reference of the *French Review* because the *HES Act* and the *HE Standards*

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<sup>33</sup>Walker (n 8) app B 48–54.

<sup>34</sup>Ibid 48.

<sup>35</sup>Ibid 51.

<sup>36</sup>Ibid 52 (emphasis added).

<sup>37</sup>Ibid 50.

regulating the higher education sector at the time of the *French Review* used the term ‘free intellectual inquiry’.<sup>38</sup> French considered that ‘freedom of speech’ and ‘academic freedom’ could ‘sometimes be conflated’ under the term ‘free intellectual inquiry’ and so instead used the terms ‘freedom of speech’ and ‘academic freedom’ in his Model Code in order to ‘distinguish between freedom of speech as a common societal freedom and freedom of speech and intellectual inquiry as aspects of academic freedom’.<sup>39</sup> In French’s view, while any general definition of academic freedom must incorporate free intellectual inquiry, it must also go beyond it: academic freedom should also incorporate ‘relevant aspects of freedom of speech ...and institutional autonomy’.<sup>40</sup> For clarity, it is noted that that French appears to have distinguished the terms ‘free intellectual inquiry’ and ‘intellectual freedom’ in the *French Review*. His interpretation of ‘free intellectual inquiry’ appears consistent with the *HES Act* prior to the enactment of the Higher Education Support Amendment (Freedom of Speech) Bill 2020, as relating purely to learning, teaching and research.<sup>41</sup> Although he did not define ‘intellectual freedom’, it would appear from the way he used the terms in the *French Review* that he considered ‘intellectual freedom’ to be significantly similar to, if not synonymous with, ‘academic freedom’.<sup>42</sup>

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<sup>38</sup> French (n 3) 17-18.

<sup>39</sup> Ibid app 15 (Covering Letter sent to Higher Education Providers with First Draft Model Code) 293.

<sup>40</sup> Ibid 18.

<sup>41</sup> As referred to above, s 19-115 of the *HES Act* previously required that a ‘higher education provider that is a \*Table A provider or a \*Table B provider must have a policy that upholds free intellectual inquiry in relation to learning, teaching and research’.

<sup>42</sup> In this way, French may have viewed the terms ‘intellectual freedom’ and ‘academic freedom’ in a similar way to the High Court in the *Ridd 2021 HCA Appeal* with ‘intellectual freedom’ being ‘often referred to interchangeably with “academic freedom”’ but ‘[s]ometimes ... 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 work’: *Ridd 2021 HCA Appeal* (n 17) [29]. It is noted that in a previous article relating to the *French Review* and the Model Code co-authored by the author of this article, it was considered that French did not view ‘academic freedom’ and ‘intellectual freedom’ as synonymous: see Pnina Levine and Leigh Smith, ‘Protecting Academic Freedom in Australian Higher Education through the Imposition of Restrictions on Investigatory Suspension’ (2021) 47(1) *Monash University Law Review* 24, 31. However, on further examination, it appears that the distinction that French made was between ‘intellectual freedom’ and ‘free intellectual inquiry’, with any definition of academic freedom (or

As referred to above, since the *French Review*, French's definition of 'academic freedom' has undergone some minor amendments adopted by the University Chancellors Council ('UCC') as agreed to by French.<sup>43</sup> The definition in the Model Code now comprises the following:

- the freedom of academic staff to teach, discuss, and research and to disseminate and publish the results of their research;
- the freedom of academic staff and students to engage in intellectual inquiry, to express their opinions and beliefs, and to contribute to public debate, in relation to their subjects of study and research;
- the freedom of academic staff and students to express their opinions in relation to the higher education provider in which they work or are enrolled;
- the freedom of academic staff to participate in professional or representative academic bodies;
- the freedom of students to participate in student societies and associations.
- 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.<sup>44</sup>

French made it clear that this definition of 'academic freedom':

does not seek to import the general freedom of speech enjoyed by all as an element of academic freedom [as] [t]hat would be a conflation of two distinct concepts. Rather, it seeks to protect, from constraints that might otherwise exist in an employer/employee

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intellectual freedom) 'including relevant aspects of freedom of speech, freedom of intellectual inquiry and institutional autonomy': French (n 3) 18.

<sup>43</sup> As referred to above, subsequent to the publication of the Review and following consultation with a working group of university chancellors, French agreed to a revised version of the Model Code which was adopted by the UCC: see 'UCC version of the Model Code (marked up to show how it varies from the Model Code' in Professor (Emeritus) Sally Walker, Review of the Adoption of the Model Code on Freedom of Speech and Academic Freedom (December 2020), app B. It is this revised definition of 'academic freedom' that has been included in the *HES Act* subsequent to the enactment of the Higher Education Support Amendment (Freedom of Speech) Bill 2020, 62 with the term 'free intellectual inquiry' being replaced with 'freedom of speech and academic freedom' throughout the Act: 2 See *HES Act*, Schedule 1-Dictionary, s1.

<sup>44</sup> Walker (n 8) app B 48–49.

relationship, that freedom of expression which is the accepted incident of the academic role.<sup>45</sup>

As mentioned above, after the Model Code was released, and as recommended by French (and Walker), the Higher Education Support Amendment (Freedom of Speech) Bill 2020 was enacted on 22 March 2021 and amended the *HES Act* by replacing the term ‘free intellectual inquiry’ with the term ‘freedom of speech and academic freedom’ and inserting the Model Code’s definition of ‘academic freedom’ into the *HES Act*. The *HE Standards* were also subsequently amended to be consistent with the relevant provisions of the Model Code.

Notably, French did make provision for some limitations on the enjoyment of freedom of speech and academic freedom in the Model Code. These include, amongst others, those limits ‘imposed by law’; those ‘imposed by the reasonable and proportionate regulation necessary to the discharge of the university’s teaching and research activities’; and those ‘imposed by the reasonable and proportionate regulation necessary to enable the university to fulfil its *duty to foster the wellbeing of students and staff*’.<sup>46</sup>

In supporting ‘reasonable and proportionate regulation necessary to enable the university to fulfil its duty to foster the wellbeing of students and staff’, French made express provision for the existing duties imposed on universities under the *HE Standards* including the duties to accommodate student diversity, to promote and foster a safe environment and to foster the wellbeing of students and staff.<sup>47</sup>

In an attempt to avoid any ambiguity surrounding these duties (given the need for universities to balance them with the principles of the Model Code), French defined the ‘duty to foster the wellbeing of students and staff’ in the Model Code to include:

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<sup>45</sup> French (n 3) 214.

<sup>46</sup> Walker (n 8) app B 51-52 (emphasis added).

<sup>47</sup> See, for example *HE Standards* (n14) cl 2.2(1), 2.3(4) and 6.1(4).

the duty to ensure that no member of staff and no student suffers unfair disadvantage or unfair adverse discrimination on any basis recognised at law including race, gender, sexuality, religion and political belief;

and

the duty to ensure that no member of staff and no student is subject to threatening or intimidating behaviour by another person or persons on account of anything they have said or proposed to say in exercising their freedom of speech.

It is further defined to:

support[t] reasonable and proportionate measures to prevent any person from using lawful speech which a reasonable person would regard, in the circumstances, as likely to humiliate or intimidate other persons and which is intended to have either or both of those effects.<sup>48</sup>

However, this duty ‘does not extend to a duty to protect any person from feeling offended or shocked or insulted by the lawful speech of another’.<sup>49</sup>

Interestingly, the Model Code also allows for the enjoyment of freedom of speech of university staff and students as ‘exercised on university land or in connection with the university’ to be ‘restrain[ed] or burden[ed]’ by ‘the right and freedom of others to express themselves and to hear and receive information and opinions.’<sup>50</sup> However, it does not expressly allow the same restraint to be imposed by universities in relation to an exercise of academic freedom by their academic staff and students.

Subject to the specific restrictions on freedom of speech and academic freedom set out in the Code ‘a person’s lawful speech on the university’s land or in connection with a university activity shall not constitute misconduct nor attract any penalty or other adverse action *by reference only to its content*’ and ‘the exercise by a member of the academic staff or of a student of academic freedom

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<sup>48</sup> Walker (n 8) app B 50.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid 52.

... shall not constitute misconduct nor attract any penalty or other adverse action.’<sup>51</sup> The Model Code thus expressly permits speech that results in another ‘feeling offended or shocked or insulted’ (subjective). Although this is clearly distinct from speech which a reasonable person in the circumstances would regard as offensive, shocking or insulting (objective), it is implicit that speech which a reasonable person would regard as offensive, shocking or insulting would similarly be unable to ‘constitute misconduct or attract any penalty or other adverse action’, unless the speech fell within one of the specific restrictions on the enjoyment of freedom of speech and academic freedom set out in the Model Code. However, the extent to which Australian universities, in upholding the principles of the Model Code, might need to discard or modify certain behavioural standards relating to staff and students within their institutions is not clear. Specifically, questions arise as to the extent to which universities can regulate the *manner* of the speech of a university staff member or student, as distinct from its *content*, on the grounds that the *manner* of their speech is considered to be offensive, shocking or insulting.

The Model Code provides little guidance as to the extent that universities can regulate the *manner* of the speech of university staff or students, as distinct from its content, on the grounds that the *manner* of their speech is considered to be ‘offensive, shocking or insulting’. The Model Code expressly provides ‘a person’s lawful speech on the university’s land or in connection with a university activity shall not constitute misconduct nor attract any penalty or other adverse action *by reference only to its content*’. However, this reference to ‘content’ is absent from the equivalent provision relating to academic freedom, which provides only that the exercise of academic freedom by an academic staff member or student ‘shall not constitute misconduct nor attract any penalty or other adverse action.’

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<sup>51</sup> Ibid (emphasis added). For completeness, it is noted that the Model Code further provides that ‘the freedom of academic staff to make lawful public comment on any issue in their personal capacities [shall not] be subject to constraint imposed by reason of their employment by the university’: see Walker (n 8) app B, 52. A consideration of the effect of this provision is beyond the scope of this article.

Arguably, this choice of phrases suggests that subject to the limitations on the enjoyment of freedom of speech and academic freedom, the Model Code only prevents a university from regulating the *content* of speech on university land or in connection with a university activity. However, to the extent that such speech constitutes an exercise of academic freedom, the university is precluded from regulating both its content and the manner in which it is expressed. The discussion below explores whether this approach is correct. The decisions in the Ridd litigation (and particularly those in the *Ridd FFC Appeal* and the *Ridd 2021 HCA Appeal*) assist in providing guidance as discussed in the next part of this article.

### III THE RIDD LITIGATION

#### *A Background to the litigation between Professor Ridd and James Cook University and the decision of Vasta J at first instance*

Professor Ridd was the Head of Physics at JCU from 2009 until 2016 and managed the University's marine geophysical laboratory for 15 years. His concerns about the accuracy of the scientific research being published in relation to the degradation of the Great Barrier Reef resulted in his making various negative statements about the research being conducted and published by staff at JCU and its associated entities, such as the Australian Research Council-Centre of Excellence for Coral Reef Studies ('ARC-CoE') which is headquartered at JCU and its partners Great Barrier Reef Marine Park Authority and the Australian Institute of Marine Science. Relevantly, these statements included those made by Professor Ridd in an email sent by him to a journalist with News Limited in December 2015 and comments made by Professor Ridd on Sky News in August 2017 during the *Alan Jones Report* known as 'Jones and Co' (with Alan Jones and Peta Credlin) taking issue with the accuracy and objectivity of the research of JCU's staff and its associated entities.<sup>52</sup> Other comments made by Professor Ridd that JCU found to be objectionable included those made by him in an email to a

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<sup>52</sup> *Ridd* (n 2) [55], [81].

student in which he questioned the capability of the head of the ARC–CoE to be the keynote speaker at an Australian Meteorological and Oceanographic Society conference<sup>53</sup> as well as comments made by him in an email to the Dean in response to the actions being taken by the University against Professor Ridd, including telling the Dean that ‘it [was] not too late to do the right thing.’<sup>54</sup>

JCU asserted that in making these statements, Professor Ridd had breached the behavioural standards contained in JCU’s Code of Conduct, including those standards requiring its staff to treat others with collegiality, respect and courtesy, and hence, had engaged in misconduct. The University ultimately terminated Professor Ridd’s employment on 2 May 2018 on the basis he had engaged in ‘serious misconduct’ which was defined in JCU’s EA to relevantly include, ‘[a]ny serious breach of the James Cook University Code of Conduct’.<sup>55</sup> The decision by JCU to terminate his employment followed a variety of actions by Professor Ridd, including breaches of the University’s Code of Conduct, breaches of lawful and reasonable directions and breaches of confidentiality directions. However, of primary relevance to this article is Professor Ridd’s breach of the behavioural standards contained in JCU’s Code of Conduct in failing to act in a collegial, respectful and courteous manner and the Court’s determination as to the interaction between these behavioural standards and the University’s commitment to intellectual freedom (which was considered by each Court in the Ridd litigation to be significantly similar to, if not synonymous with academic freedom).<sup>56</sup>

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<sup>53</sup> Ibid [149]-[153].

<sup>54</sup> Ibid [226]-[228].

<sup>55</sup> *James Cook Enterprise Agreement 2013-2016* (JCU’s EA), s8.

<sup>56</sup> Notably, Vasta J equated the concept of intellectual freedom to academic freedom: *Ridd* (n 2) [6]. The High Court also considered ‘intellectual freedom’ to be ‘often referred to interchangeably with “academic freedom,”’ although the Court did note that ‘intellectual freedom’ is ‘[s]ometimes ... 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 work’: *Ridd 2021 HCA Appeal* [29]. Although the Judges in the Full Federal Court were less clear as to their view of the difference between ‘intellectual freedom’ and ‘academic freedom’, they also seemed to consider that a significant difference between ‘intellectual freedom’ and ‘academic freedom’ related to the former’s application to both academic and non-academic staff: *Ridd FFC Appeal* (n16) [68] (Griffiths and SC Derrington JJ) and [258] (Rangiah J).



Professor Ridd applied to the Federal Circuit Court after his dismissal asking the Court to make declarations that his termination by JCU constituted a breach of clause 14 of its EA, and therefore contravened s50 of the *Fair Work Act 2009* (Cth). In doing so, Professor Ridd did not dispute that he had engaged in conduct that was in contravention of JCU's Code of Conduct or that it constituted 'misconduct' or 'serious misconduct'.<sup>57</sup> Professor Ridd's position was that in engaging in the impugned conduct, he had been exercising his right to intellectual freedom as provided for by clause 14 of JCU's EA and that as none of his conduct contravened the restrictions in clause 14 in constituting harassment, vilification, bullying, or intimidation of those who disagreed with his views, he was entitled to protection under clause 14 of JCU's EA.<sup>58</sup>

Clause 14 of JCU's EA provided -

#### 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;

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<sup>57</sup> The Full Federal Court of Appeal labelled the failure of Dr Ridd to do these things as 'inexplicable': see *Ridd FFC Appeal* (n16) [23] (Griffiths and SC Derrington JJ) and [204] (Rangiah J); while the High Court described it as a 'curiosity.': *Ridd 2021 HCA Appeal* (n 17) [9].

<sup>58</sup> This was Professor Ridd's position as explained in the Full Federal Court of Appeal: see *Ridd FFC Appeal* (n16) [25] (Griffiths and SC Derrington JJ).

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

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According to Professor Ridd, JCU had contravened clause 14 of JCU's EA by applying its Code of Conduct to limit his right to intellectual freedom and to discipline him for his conduct. On the other hand, JCU maintained that the exercise of intellectual freedom by its staff was subject to the Code of Conduct and that as Professor Ridd had breached its Code of Conduct, he had engaged in misconduct or serious misconduct. In this regard, clause 13 of JCU's EA was also of critical significance to the case. It stated -

### 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 JCC.
- 13.2. JCU is committed to achieving and maintaining the highest standards of ethical conduct and through the Code of Conduct will ensure that staff:
- Seek excellence as a part of a learning community;
  - Act with integrity;
  - Behave with respect for others; and
  - Embrace sustainability and social responsibility.
- 13.3. The parties note that the Code of Conduct is not intended to detract from Clause 14, Intellectual Freedom.

At first instance, Vasta J found in favour of Professor Ridd, agreeing with Professor Ridd's position that clause 14.1 provided for JCU's commitment to the

protection and promotion of intellectual freedom and that the only limitations on the intellectual freedom of JCU's staff were to be found in clause 14.3 of its EA in that they did 'not have the right to harass, vilify, bully or intimidate those who disagree with their views'. In Vasta J's view, it would be incongruous to impose other limitations, such as anything provided for in the Code of Conduct as 'if the clause was truly meant to be subject to compliance with the Code of Conduct, such a limitation would have been spelt out in the clause itself'.<sup>59</sup> Vasta J found that Professor Ridd had been exercising his rights under clause 14.1 (and pursuant to clause 14.2) when he engaged in the impugned conduct and that as he had not engaged in conduct that 'harassed, vilified, bullied or intimidated' anyone who disagreed with his views, JCU's disciplinary actions against Professor Ridd were unlawful. His Honour ordered the University to pay Ridd \$1,094,214.47 in compensation as well as a pecuniary penalty of \$125,000.<sup>60</sup>

#### B *The Decision of the Full Federal Court on Appeal*

On appeal, the Full Court consisting of Justices Griffiths, SC Derrington and Rangiah considered that Vasta J's construction of clause 14 of JCU's EA was incorrect. The Court unanimously agreed that JCU's EA did not provide Professor Ridd (or his academic colleagues at JCU) with 'the untrammelled right (provided his conduct did not harass, vilify, bully or intimidate) to express his professional opinions in whatever manner he chose, unconstrained by the behavioural standards imposed by the Code of Conduct'.<sup>61</sup> Whilst the judges agreed Vasta J's construction of clauses 13-14 was incorrect, the judges differed on a key point: the extent to which they considered JCU's Code of Conduct to be in harmony with

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<sup>59</sup> *Ridd* (n 2) [256]. This was despite clause 14.1 of JCU's EA which provided 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*'. In Vasta J's view, this merely required JCU to commit itself to the Code of Conduct but did not require staff to do the same: Clause 14.1 of JCU's EA as cited in *Ridd* (n 2) [17] (emphasis added). Notably, clause 13.3 was not critical to Vasta J's findings.

<sup>60</sup> *Ridd v James Cook University (No.2)* ('*Ridd No 2*') [2019] FCCA 2489 (6 September 2019).

<sup>61</sup> *Ridd FFC Appeal* (n 16) [1] and [35] (Griffiths and SC Derrington JJ).

JCU's EA.<sup>62</sup> According to the majority of Griffiths and SC Derrington JJ, JCU's Code of Conduct was 'consistent and compatible' with JCU's EA, with 'the latter inform[ing] the content of the exercise of intellectual freedom; the former regulat[ing] the manner in which that freedom may be exercised within the framework of this particular Enterprise Agreement... and this particular Code of Conduct'.<sup>63</sup> Dissenting on this point, Rangiah J acknowledged that '[i]n some cases inconsistency may arise between JCU's commitment under cl 14.1 to act in a manner consistent with the protection and promotion of intellectual freedom and its commitment to enforce the Code of Conduct',<sup>64</sup> albeit that such 'inconsistency [was] not inevitable'.<sup>65</sup> For example, he explained that

Principle 1 of the Code of Conduct requires staff to, "criticise and challenge in the collegial and academic spirit of the search for knowledge, understanding and truth", while Principle 2 requires staff to, "behave in a way that upholds the... good reputation of the University", and Principle 3 requires staff to "treat fellow staff members...with...respect and courtesy". But it is difficult to see, for example, how an academic could make a genuine allegation that a colleague has engaged in

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<sup>62</sup> The difference in reasoning may be attributable to Rangiah J's willingness to consider the alternative construction of clause 14 that Professor Ridd advanced in the Full Federal Court. Professor Ridd's original and primary case against JCU was that clause 14 of JCU's EA had the effect of making the Code of Conduct redundant in any case where a staff member was engaged in an exercise of intellectual freedom. However, the alternative construction of clause 14 advanced by Ridd in the Full Federal Court did not consider clause 14 to mean that any exercise of intellectual freedom would displace the application of the Code of Conduct but instead that 'the application of the Code of Conduct is subject to the exercise of intellectual freedom, so that the latter prevails to the extent of any inconsistency': *Ridd FFC Appeal* (n 16) [234] (Rangiah J). Griffiths and SC Derrington J did not appear to consider it necessary to consider Ridd J's alternative construction, perhaps on the basis, as submitted by JCU, that as this alternative construction had not been argued by Professor Ridd before the primary judge, it was not open on appeal for the Court to adopt that construction: see *Ridd FFC Appeal* (n16) [219]. However, Rangiah J considered that Vasta J's role at first instance had not been 'to merely choose between the competing constructions contended for by the parties' but to 'decide the correct construction of the relevant terms of the Enterprise Agreement': *Ridd FFC Appeal* (n 16) [228] (Rangiah J). His Honour further considered it to be the role of the Full Court to decide on its correct construction: at [228]. It was Rangiah J's willingness to consider Dr Ridd's alternative construction of clause 14 (and to consider the correct construction of the clause) that resulted in Rangiah J finding that although JCU's appeal should be allowed, the proceedings should not be dismissed (as was ordered by the Majority) but should instead be remitted for a further hearing.

<sup>63</sup> *Ridd FFC Appeal* (n 16) [103] (Griffiths and SC Derrington JJ).

<sup>64</sup> *Ibid* [213] (Rangiah J). .

<sup>65</sup> *Ibid*.

academic fraud without being uncollegial, disrespectful and discourteous and adversely affecting JCU's good reputation.<sup>66</sup>

In view of the potential for a situation of inconsistency between JCU's 'twin commitments', Rangiah J went on to consider how such inconsistencies were to be resolved, noting clause 13.3 of JCU's EA, which indicated 'that cl 14 limit[ed] the scope, operation and effect of the Code of Conduct'.<sup>67</sup> Consequently, his Honour construed clause 14 as 'giving primacy to JCU's commitment to protect and promote intellectual freedom over its commitment to enforce the Code of Conduct [so that] where there is conflict, the former prevails to the extent of the inconsistency.'<sup>68</sup> The effect of such a conflict would be that JCU would be precluded from proceeding with disciplinary action based on a breach of its Code of Conduct (unless such breach fell within clauses 14.3 to 14.7 of JCU's EA).<sup>69</sup> However, notably, Rangiah J made it clear that any conflict would need to be a 'real conflict'.<sup>70</sup>

In construing the relevant clauses in JCU's EA in this way, Rangiah J helpfully set out a 'three-step process' that could be applied in determining whether JCU could proceed with disciplinary proceedings against a staff member based on a breach of its Code of Conduct in circumstances where the staff member had been engaging in intellectual freedom at the time of the breach. He explained this process as follows -

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

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<sup>66</sup> Ibid [264] (Rangiah J).

<sup>67</sup> Ibid [265] (Rangiah J).

<sup>68</sup> Ibid.

<sup>69</sup> Ibid [266] (Rangiah J).

<sup>70</sup> Ibid.

proceedings will be inconsistent with JCU's obligation to protect and promote intellectual freedom within the University.<sup>71</sup>

Rangiah J considered, contrary to the majority, that the matter should be remitted to the Federal Circuit Court for a new hearing<sup>72</sup> in which the primary judge would examine whether Professor Ridd had engaged in exercising intellectual freedom in respect of each allegation and then make a 'comparison between each particular exercise of intellectual freedom and each corresponding admitted breach of the Code of Conduct' and determine 'whether there was conflict which required JCU not to take disciplinary proceedings for Misconduct or Serious Misconduct'.<sup>73</sup> His Honour acknowledged that there would be 'a degree of subjectivity' involved in this process and that the broad description of intellectual freedom and the vaguely expressed requirements of the Code of Conduct meant that an evaluative judgment would be required.<sup>74</sup>

Despite the differences in their reasoning, the Full Federal Court unanimously recognised that a distinction could be drawn between 'the content of the exercise of intellectual freedom' and 'the manner in which that freedom may be exercised'.<sup>75</sup> In accordance with their decision, even if there is the possibility of an instance of 'genuine conflict' between the behavioural standards set out in university codes of conduct and the exercise of academic freedom (albeit that Justices Griffiths and SC Derrington did not acknowledge the potential for such a conflict), university codes of conduct should still be able to apply to staff (or students) who engage in academic freedom in the absence of such conflict. Rangiah J importantly noted that in instances where such conflict might seem apparent, it might not actually exist. He gave the example of 'where an academic who criticises the work of another academic is victimised or threatened in breach

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

<sup>72</sup> *Ibid* [294] (Rangiah J).

<sup>73</sup> *Ibid* [290] (Rangiah J).

<sup>74</sup> *Ibid* [266] (Rangiah J).

<sup>75</sup> *Ibid* [103] (Griffiths and SC Derrington JJ).

of the Code of Conduct by the second academic<sup>76</sup> noting that taking disciplinary proceedings against the second (for conduct constituting an exercise of intellectual freedom) would actually serve to protect the intellectual freedom of the first.<sup>77</sup>

It is interesting to ponder what the view of the Judges in the Full Federal Court might be on the question of whether the Model Code would allow for a university to take disciplinary action against an academic staff member or a student if the *manner* of their speech is considered to be ‘offensive, shocking or insulting’, as distinct from the content of the speech where such speech constitutes an exercise of academic freedom. In view of the Full Federal Court’s recognition of a distinction between the ‘content’ of an exercise of intellectual freedom and the ‘manner in which that freedom may be exercised’, it is considered that their Honours would find that at least in situations where statements made in the exercise of academic freedom are objectively ‘offensive, shocking or insulting’ and could be said in another way, they should be able to constitute misconduct. Their judgements suggest they would adopt the approach of Evans and Stone in relation to a student (or staff member) who used a derogatory ‘slur’ against their opponent or called them a ‘Nazi’ in any classroom or other academic debate. Like Evans and Stone, they would likely consider that a university would be completely justified in taking disciplinary action against the student (or academic staff member) in such a case. They would likely also hold the view that the university could take action if the student or staff member were to shout their arguments loudly and aggressively at their opponent in breach of the university’s Code of Conduct. However, as explained below, the High Court would seem to hold a different view.

### C *The Findings of the High Court in the Ridd 2021 HCA Appeal*

In the *Ridd 2021 HCA Appeal*, the High Court did not accept the reasons of the majority of the Full Court, finding unanimously that although clause 14 of the

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<sup>76</sup> Ibid [213] (Rangiah J)

<sup>77</sup> Ibid.

JCU's EA preserves intellectual freedom subject to some constraints contained in the Code of Conduct, these constraints were limited to those contained within clause 14 itself. However, the High Court disagreed with Vasta J, at first instance, that these constraints were limited to the express limits in clause 14.3 not to 'harass, vilify, bully or intimidate' those who disagree. In the High Court's view, in addition to these limits (and the requirement of honesty in clause 14.5), these constraints included those constraints in clause 14.3 'expressly requiring respect for the rights of others and implicitly requiring lawfulness.'<sup>78</sup> However, in the Court's view of the 'best interpretation' of clause 14, 'having regard to its text, context, and purpose',<sup>79</sup> these constraints did 'not require that the exercise of intellectual freedom be expressed respectfully or courteously' and would similarly not prevent intellectual freedom being expressed in a way that might lawfully damage the reputation of another.<sup>80</sup> The Court considered that this interpretation of clause 14, 'align[ed] with the long-standing core meaning of intellectual freedom',<sup>81</sup> acknowledging French's description of 'academic freedom' (which as explained above, was considered by the High Court to be significantly similar, if not synonymous with 'intellectual freedom') as a 'defining characteristic of universities and like institutions'.<sup>82</sup>

The High Court considered the justifications for intellectual freedom to be 'instrumental' and 'ethical'.<sup>83</sup> They explained the 'instrumental justification' as being the 'search for truth in the contested market place of ideas' and the 'ethical' justification as being 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"'.<sup>84</sup> While recognising that intellectual freedom has "always

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<sup>78</sup> *Ridd 2021 HCA Appeal* (n 17) [20] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

<sup>79</sup> *Ibid* [64].

<sup>80</sup> *Ibid* [5].

<sup>81</sup> *Ibid* [64].

<sup>82</sup> *Ibid* [30].

<sup>83</sup> *Ibid* [31].

<sup>84</sup> *Ibid* quoting Dworkin "We need a New Interpretation of Academic Freedom" (1996) 82(3) *Academic* 10 at 11 with respect to the ethical justification.



been delimited”<sup>85</sup>, they considered that these two justifications were “powerful reasons”<sup>86</sup> as to why intellectual freedom has traditionally not been, and should not be restricted by respect or courtesy.<sup>87</sup> In the High Court’s view “however desirable courtesy and respect might be, the purpose of intellectual freedom must permit of expression that departs from those civil norms”<sup>88</sup> as to disallow such departure would “subvert... the central ideals of the culture of independence and deny...the ethical individualism that that culture protects.”<sup>89</sup> Citing the work of Mill, the High Court explained that “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””.<sup>90</sup>

The Court also discussed the practical difficulties associated with drawing a clear line between what is said and the manner in which it is said, noting that “such a distinction may not exist”.<sup>91</sup> They went on to explain that-

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 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.<sup>92</sup>

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<sup>85</sup> Ibid [32] quoting Polishook, “Academic Freedom and Academic Contexts” (1994) 15 *Pace Law Review* 141 at 148.

<sup>86</sup> Ibid [33].

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid quoting Dworkin, “We Need a New Interpretation of Academic Freedom” (1996) 82(3) *Academe* 10 at 14.

<sup>90</sup> Ibid [64] quoting Mill, *On Liberty* (1859) at 60.

<sup>91</sup> Ibid [34].

<sup>92</sup> Ibid.

In finding this way, the High Court was not swayed by arguments made by Counsel for JCU, who asserted during the course of the proceedings that ‘there are manners and forms of exercising intellectual freedom which do not detract from it as a freedom ... permitting the freedom to be exercisable as widely as possible – not just by those with the loudest voices, but by everyone’, reducing the possibility of ‘the amenity of a workplace’ being ‘destroy[ed]’ in ‘advanc[ing] the search for truth’.<sup>93</sup> Neither did they appear to be influenced by the argument that the reference to the ‘rights of others’ in clause 14.3 of JCU’s EA included the rights of university employees to the protections provided by the Code of Conduct, arguably provided for in clause 13 of JCU’s EA.<sup>94</sup> Further, they were not persuaded by Counsel’s arguments in relation to the ‘self-regulating requirements’ imposed (for example) on both parliamentarians and the legal profession as to the manner in which freedom of speech can be exercised, albeit that freedom of expression and the need for disagreement is of great significance to both.<sup>95</sup> In this regard, Counsel for JCU took issue with Rangiah J that an honest allegation of academic fraud against a colleague is something that could never be done respectfully, asserting strongly that it could as follows -

Anyone who practises criminal law has in mind an indictment. It is utterly inappropriate discourse to say that an indictment which alleges terrible things against a person, that it is disrespectful, that it is discourteous, et cetera...it is not proper at all to posit that saying that someone has done something wrong or has done something that warrants their termination is something which by dint of that content makes the speaker disrespectful of the person or discourteous of the person, it is simply not true as a matter of ordinary experience in criminal courts and in disciplinary process.<sup>96</sup>

If the High Court decision in the *Ridd 2021 HCA Appeal* is applied broadly, and not confined to the agreement then under examination, a university would not be able to regulate the content *or* the manner of conduct engaged in by a person in

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<sup>93</sup> *Ridd v James Cook University* [2021] HCATrans 15 (23 June 2021).

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

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

the exercise of academic freedom on the grounds that it is discourteous or disrespectful as ‘the content of what is said often depends upon how it is said’.<sup>97</sup> If this extrapolation is correct, it is submitted that the Model Code must also be interpreted this way, namely that subject to the specific restrictions imposed by the Model Code, ‘the exercise by a member of the academic staff or of a student of academic freedom, shall not constitute misconduct nor attract any penalty or other adverse action’<sup>98</sup> *by reference to its content or manner*. Therefore, in adopting the Model Code and upholding freedom of speech and academic freedom, a university may not regulate the content *or manner* of lawful speech expressed by academic staff members or students in the exercise of academic freedom in order to protect any person from feeling offended, shocked or insulted by the lawful speech of another. Accordingly, it is submitted that contrary to the views of Evans and Stone, a university may not be able to take any disciplinary action against a student (or staff member) who uses a derogatory ‘slur’ or engages in any other personal attack or in loud and aggressive shouting against their opponent in any classroom or other academic debate provided that their speech is expressed legitimately for the purposes of that debate (and does not fall within one of the specific restrictions on the enjoyment of academic freedom set out in the Model Code).

However, the High Court in the *Ridd 2021 HCA Appeal* considered that ‘the intellectual freedom protected by clause 14 of the [JCU] Enterprise Agreement is not a general freedom of speech [and that] an expression of opinion about issues or ideas must be related to a field of competence’.<sup>99</sup> French seems to have similarly limited his definition of ‘academic freedom’ in the Model Code to include ‘the freedom of academic staff and students to engage in intellectual inquiry, to express their opinions and beliefs, and to contribute to public debate, [but only] *in relation*

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<sup>97</sup> *Ibid.*

<sup>98</sup> Walker (n 8) app B 52.

<sup>99</sup> *Ridd 2021 HCA Appeal* (n 17) [5]. It is noted clause 14.2 of JCU’s EA referred to ‘intellectual freedom’ as ‘including the rights of staff to...participate in public debate and express opinions about issues and ideas related to *their respective fields of competence*.’ (emphasis added).

to their subjects of study and research.<sup>100</sup> It is therefore submitted that to the extent that an academic staff member or student engages in speech on campus or in connection with the university that does not relate to ‘their subjects of study and research’, a university will not be limited in regulating the *manner* (as distinct from the content) of that speech on the grounds, for example, that it is discourteous or disrespectful or to use the expression contained in the Model Code, ‘*offensive, shocking or insulting*’. So, any derogatory slurs, personal attacks or loud and aggressive shouting by students and staff on campus or in relation to the university that are not expressed or conducted in the exercise of academic freedom can legitimately be the subject of disciplinary action.

#### IV CONCLUSION AND RECOMMENDATIONS

The author of this article suggests some guidance notes be added to the Model Code to provide further clarity and direction as to the circumstances in which the Model Code allows for a university to regulate a staff member or a student’s speech to the extent that the *manner* of their speech is considered to be ‘offensive, shocking or insulting’ as distinct from the content of the speech being so. As explained above, such clarity will assist universities to meaningfully uphold academic freedom and freedom of speech on campus in accordance with the principles of the Model Code and provide accurate public reports each year on how they are doing so. It should also assist to reduce the risk of staff and students self-censoring as a result of uncertainty as to whether their university might be able to regulate their conduct and penalise them for it.

As explained, the Model Code expressly provides that ‘a person’s lawful speech on the university’s land or in connection with a university activity shall not constitute misconduct nor attract any penalty or other adverse action *by reference only to its content*’.<sup>101</sup> However, this reference to ‘content’ is left off the equivalent

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<sup>100</sup> Walker (n 8) app B 49 (emphasis added).

<sup>101</sup> Ibid app B 52 (emphasis added).

provision relating to academic freedom, which provides only that the exercise of academic freedom by an academic staff member or student ‘shall not constitute misconduct nor attract any penalty or other adverse action.’ As discussed, although an inference might be drawn from this discrepancy in wording that, subject to its limitations on the enjoyment of freedom of speech and academic freedom, the Model Code only prevents a university from regulating the content (as distinct from the manner) of speech on university land or in connection with a university activity, this is not sufficiently clear. The Model Code further does not make it clear whether, to the extent that such speech constitutes an exercise of academic freedom, the university is precluded from regulating both its content and the manner in which it is expressed. The decisions in the *Ridd* litigation assist in providing clarity on how best to interpret these provisions in the Model Code and it is submitted that the Model Code should be interpreted with reference to these decisions, and in particular, to that of the High Court in the *Ridd 2021 HCA Appeal*. It is asserted that, consistent with the decision of the High Court in the *Ridd 2021 HCA Appeal*, a university that upholds the Model Code would not be able to regulate the content *or* the manner of conduct engaged in by a person in the exercise of academic freedom on the grounds that it is discourteous or disrespectful as ‘the content of what is said often depends upon how it is said’,<sup>102</sup> or on any other grounds not provided for in the Model Code. However, in accordance with the definition of ‘academic freedom’ in the Model Code and the views of the High Court in the *Ridd 2021 HCA Appeal*, to the extent that an academic staff member or student engages in speech on campus or in connection with a university activity that does not relate to ‘their subjects of study and research’,<sup>103</sup> a university may regulate the *manner* (as distinct from the content) of that speech, for example, on the grounds that the *manner* of such speech is ‘offensive, shocking or insulting’, while still upholding freedom of speech and academic freedom in accordance with the principles of the Model Code.

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<sup>102</sup> *Ridd 2021 HCA Appeal* (n 17) [5].

<sup>103</sup> Walker (n 8) app B 49.

In view of the discussion above, it is suggested that guidance notes be included in the Model Code as follows.

As referred to earlier in this article, Principle 2 of the Model Code expressly provides that—

Subject to reasonable and proportionate regulation of the kind referred to in the previous Principle, a person's lawful speech on the university's land or in connection with a university activity shall not constitute misconduct nor attract any penalty or other adverse action *by reference only to its content*'.<sup>104</sup>

The author suggests that in view of the above discussion, this paragraph should make reference to a guidance note which states –

To the extent that a person's speech on university land or in connection with a university activity does not constitute an exercise of academic freedom (as defined in this Model Code), the *manner* of that speech (as distinct from the content) can be regulated by the University. So, for example, if the manner of one's speech is such that a reasonable person in the circumstances would regard it as offensive, shocking or insulting, it may be able to constitute misconduct.

Principle 4 of the Model Code provides that -

The exercise by a member of the academic staff or of a student of academic freedom, subject to the above limitations, shall not constitute misconduct nor attract any penalty or other adverse action.<sup>105</sup>

The author suggests that this paragraph should make reference to a guidance note which states—

To the extent that the speech or conduct of an academic staff member or student is engaged in for the purposes of exercising their academic freedom (as defined in this Model Code), the *content and manner* of such speech or conduct cannot be regulated by the University in a way not provided for by the Model Code. So, for example, if the content or manner of one's speech is such that a reasonable person in the circumstances

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<sup>104</sup> Walker (n 8) app B 52 (emphasis added).

<sup>105</sup> Ibid.

would regard it as offensive, shocking or insulting, it will not be able to constitute misconduct for this reason alone, even if it contravenes the University's Code of Conduct.

These guidance notes make it clear that Australian universities can still regulate uncivil behaviour by their staff and students in certain circumstances, without rejecting the principles of freedom of speech and academic freedom as set out in the Model Code or the views of the High Court in the *Ridd 2021 HCA Appeal*.