FEDERAL COURT OF AUSTRALIA

James Cook University v Ridd [2020] FCAFC 123

Appeal from:	*Ridd v James Cook University* [2019] FCCA 997 *Ridd v James Cook University (No 2)* [2019] FCCA 2489
File number:	QUD 567 of 2019
Judges:	**GRIFFITHS, RANGIAH AND SC DERRINGTON JJ**
Date of judgment:	22 July 2020
Catchwords:	**INDUSTRIAL LAW –** interpretation of Enterprise Agreement – whether Code of Conduct incorporated **–** whether disciplinary action taken for breaches of Code of Conduct contravened Enterprise Agreement – meaning and effect of cl 14 of Enterprise Agreement relating to Intellectual Freedom – relationship between cl 14 and Code of Conduct **INDUSTRIAL LAW –** interpretation of Enterprise Agreement **–** extent of obligations of confidentiality on parties involved in disciplinary processes **–** whether directions given pursuant to Enterprise Agreement and/or employer's common law right breached Enterprise Agreement **INDUSTRIAL LAW –** appeal from penalty judgment **–** *Fair Work Act 2009* (Cth) s 557 **–** whether primary judge erred in rejecting contention there was a single course of conduct **DAMAGES –** assessment of general damages **–** whether error shown in trial judge's assessment **–** whether compensation order under s 545(2) can include component for shock, distress, hurt or humiliation **PRACTICE AND PROCEDURE –** whether proceedings should be remitted to Federal Circuit Court for new hearing – where issue not in dispute at trial **–** where party bound by way matter conducted at trial **PRACTICE AND PROCEDURE –** interveners – whether leave should be granted

Legislation:	*Constitution* s 109
	Acts Interpretation Act 1901 (Cth) s 46AA
	Australian National University Act 1946 (Cth)
	Australian National University Act 1991 (Cth)
	Fair Work Act 2009 (Cth) ss 3(e), 12, 29, 50, 51, 52, 53, 54, 172(1), 172(2), 186, 257, 340, 346, 392(4), 545(1)-(2), 557
	Federal Court of Australia Act 1976 (Cth) ss 24(1)(d), 28(1)
	Legislation Act 2003 (Cth) s 8
	Fair Work Regulations 2009 (Cth) reg 1.07
	Federal Court Rules 2011 (Cth) rr 36.32, 36.57
	Crime and Misconduct Act 2001 (Qld) ss 15, 38
	James Cook University Act 1997 (Qld) ss 4, 5, 7, 8
	Public Sector Ethics Act 1994 (Qld) ss 10, 15, 16, 17, 18, 24(c)
Cases cited:	*Accident Towing & Advisory Committee v Combined Motor Industries Pty Ltd* [1987] VR 529
	Ah Toy v Registrar of Companies (1985) 10 FCR 280
	Aldi Foods Pty Ltd v Morrocanoil Israel Ltd [2018] FCAFC 93; 261 FCR 301
	Allesch v Maunz [2000] HCA 40; 203 CLR 172
	Amcor Limited v Construction, Forestry, Mining and Energy Union [2005] HCA 10; 222 CLR 241
	Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2018] HCA 3; 262 CLR 157
	Australian Industry Group v Fair Work Australia [2012] FCAFC 108; 205 FCR 339
	Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd [2011] FCA 333; 193 FCR 526
	Australian Municipal, Administrative, Clerical and Services Union v Treasurer of the Commonwealth of Australia [1998] FCA 249; 82 FCR 175
	Australian National University v Burns (1982) 64 FLR 166
	Australian Rail, Tram & Bus Industry Union v KDR Victoria Pty Ltd t/a Yarra Trams [2014] FCAFC 24
	Bailey v Nominal Defendant [2004] QCA 344
	Banque Commercial SA v Akhil Holdings Ltd [1990] HCA 11; 169 CLR 279
	Burns v Australian National University (1982) 61 FCR 76
	Byrne v Australian Airlines Ltd [1995] HCA 24; 185 CLR

City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union [2006] FCA 813; 153 IR 426

City of Wanneroo v Holmes [1989] FCA 553; 30 IR 362

Coleman v Power [2004] HCA 39; 220 CLR 1

Commissioner of Taxation v Scone Race Club Ltd [2019] FCAFC 225; 374 ALR 189

Construction, Forestry, Mining and Energy Union v Cahill [2010] FCAFC 39; 269 ALR 1

Construction, Forestry, Maritime, Mining and Energy Union v Hay Point Services Pty Ltd [2018] FCAFC 182

Coulton v Holcombe [1986] HCA 33; 162 CLR 1

D'Orta-Ekenaike v Victoria Legal Aid [2005] HCA 12; 223 CLR 1

Director of Prosecutions (Nauru) v Fowler [1984] HCA 48; 154 CLR 627

Dynamic Hearing Pty Ltd v Polaris Communications Pty Ltd [2010] FCAFC 135; 273 ALR 696

Ex parte McLean [1930] HCA 12; 43 CLR 472

Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union (the Hutchison Ports Appeal) [2019] FCAFC 69

Geo A Bond and Co Ltd (in liq) v McKenzie [1929] AR 499

George A Bond & Co Ltd (in liq) v McKenzie [1929] AR(NSW) 498

Hancock Prospecting Pty Ltd v Reinhart [2017] FCAFC 170; 257 FCR 442

Harmer v Oracle Corporation Australia Pty Limited [2013] FCAFC 63; 299 ALR 236

Holdway v Arcuri Lawyers (A Firm) [2008] QCA 218; [2009] 2 Qd R 18

House v The King [1936] HCA 40; 55 CLR 499

Jemena Asset Management (3) Pty Ltd v Coinvest Ltd [2011] HCA 3; 244 CLR 508

Kucks v CSR Limited [1996] 66 IR 182

Kuru v State of New South Wales [2008] HCA 26; 236 CLR 1

National Tertiary Education Union v La Trobe University [2015] FCAFC 142; 254 IR 238

O'Brien v Komesaroff [1982] HCA 33; 150 CLR 310

Optical 88 Ltd v Optical 88 Pty Ltd [2011] FCAFC 130; 197 FCR 67

Parker v Australian Building and Construction Commissioner [2019] FCAFC 56; 270 FCR 39

	Patrick Stevedores Holdings Pty Ltd v Construction, Forestry, Maritime and Energy Union [2019] FCA 1647 *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 *R v The Darling Island Stevedoring and Lighterage Co Ltd; Ex parte Halliday; Ex parte Sullivan* [1938] HCA 44; 60 CLR 601 *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82; 223 FCR 334 *Ridd v James Cook University (No 2)* [2019] FCCA 2489 *Ridd v James Cook University* [2019] FCCA 997 *Roadshow Films Pty Ltd v iiNet Ltd* [2011] HCA 54; 248 CLR 37 *Robinson Helicopter Company Inc v McDermott* [2016] HCA 22; 331 ALR 550 *Sharma v Minister for Immigration and Border Protection* [2017] FCAFC 227; 256 FCR 1 *Shop Distributive and Allied Employees' Association v Woolworths SA Pty Ltd* [2011] FCAFC 67 *Short v FW Hercus Pty Ltd* [1993] FCA 51; 40 FCR 511 *Soliman v University of Technology, Sydney* [2009] FCAFC 159 *Stewart v Biodiesel Producers Limited* [2008] FCAFC 66 *SZRPT v Minister for Immigration and Border Protection* [2014] FCA 24 *Toyota Motor Corporation Australia Ltd v Marmara* [2014] FCAFC 84; 222 FCR 152 *Transport Workers' Union of Australia, New South Wales Branch v No Fuss Liquid Waste Pty Ltd* [2011] FCA 982 *University of Wollongong v Metwally (No 2)* [1985] HCA 28; 59 ALJR 481 *Wentworth v Woollahra Municipal Council (No 2)* [1982] HCA 41; 149 CLR 672 *WorkPac Pty Ltd v Skene* [2018] FCAFC 131; 264 FCR 536
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Registry:	Queensland
Division:	Fair Work Division
National Practice Area:	Employment & Industrial Relations
Category:	Catchwords

Number of paragraphs:	294
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Counsel for the Intervener:	Ms S Kelly
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ORDERS

QUD 567 of 2019

BETWEEN:	**JAMES COOK UNIVERSITY** Appellant
AND:	**PETER VINCENT RIDD** Respondent
JUDGES:	**GRIFFITHS, RANGIAH AND SC DERRINGTON JJ**
DATE OF ORDER:	**22 JULY 2020**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders made by the Federal Circuit Court of Australia on 6 September 2019 be set aside.
3. In lieu thereof the second further amended application dated 3 August 2018 be dismissed.
4. The appellant should within 7 days hereof file and serve any further amended notice of appeal seeking to set aside order 1 of the orders made by the Federal Circuit Court of Australia on 16 April 2019.
5. If the respondent opposes any such amendment, he should within 14 days hereof file and serve a brief outline of submissions, not exceeding 3 pages in length.
6. The appellant should within 21 days hereof file and serve a brief outline of submissions in response, not exceeding 3 pages in length.
7. If necessary, the issue concerning order 1 of the orders dated 16 April 2019 will be determined on the papers and without an oral hearing.
8. There be no order as to costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

GRIFFITHS AND SC DERRINGTON JJ:

1 This is an appeal from a decision of the Federal Circuit Court declaring that James Cook University (**JCU**) contravened s 50 of the *Fair Work Act 2009 (Cth)* (**FWA**) by making 17 findings against Professor Ridd of breach of the JCU Code of Conduct (**Code of Conduct**), and by giving him two speech directions, five confidentiality directions, a 'no satire' direction, two censures, and terminating his employment in contravention of cl 14 of the JCU Enterprise Agreement 2013-2016 (**Enterprise Agreement**). The question for decision is whether, as the primary judge held, properly construed, the Enterprise Agreement provided Professor Ridd 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. For the reasons that follow, it did not, and the termination of Professor Ridd's employment with JCU did not contravene s 50 of the FWA.

THE FACTS

2 Professor Ridd was employed by JCU for a period of twenty-seven years. Curiously, no copy of any written contract of employment between JCU and Professor Ridd was included in the Appeal Books and it is unclear whether any such copy was put before the primary judge.

3 On 2 May 2018, JCU terminated Professor Ridd's employment for serious misconduct. The termination followed two prior censures, one on 29 April 2016, and one, described as the ***Final Censure***, on 21 November 2017. The censures related to findings by JCU that Professor Ridd had engaged in misconduct contrary to the Code of Conduct in that he had not expressed a professional opinion in a manner consistent with his obligations under the Code of Conduct. This included by failing to act "in the collegial and academic spirit" but had denigrated a colleague (including by failing to treat a fellow staff member "with respect and courtesy"), the ARC Centre of Excellence in Coral Reef Studies (**ARC Centre of Excellence**), and the Great Barrier Reef Marine Park Authority (**GBRMPA**), that he had denigrated the University in a manner inconsistent with his obligations under the Code of Conduct, and that he had breached directions to maintain confidentiality. JCU considered that Professor Ridd's conduct subsequent to the Final Censure amounted to serious misconduct, demonstrating a pattern of conduct intentionally designed to damage the University's

reputation and destructive of the necessary trust and confidence for the continuation of the employment relationship.

4 The pattern of conduct to which JCU referred in its decision to terminate Professor Ridd's employment commenced on 16 December 2015 when Professor Ridd sent an email to a journalist suggesting that reports produced by GBRMPA and the ARC Centre of Excellence were unreliable. Professor Ridd stated in the email that those two organisations should "check their facts before they spin their story" and that if the organisations were asked about the issue, his "guess is that they will both wiggle and squirm because they actually know that these pictures are likely to be telling a misleading story – and they will smell a trap". JCU found that, in using the language he did in the relevant email, Professor Ridd's conduct amounted to "Misconduct" as defined in the Enterprise Agreement in that he did not act in a collegial way, did not respect the right of others, did not display responsibility in respecting his colleagues' reputations, in breach of the Code of Conduct (the ***First Finding***). On 29 April 2016, Professor Ridd was issued with a formal censure (the ***2016 Censure***) and was told that, "In future it is an expectation that in maintaining your right to make public comment in a professional capacity in an academic field in which you are recognised, it must be in a collegial manner that upholds the University and individuals (sic) respect" (the ***First Speech Direction***).

5 Following the publication of an essay in a book entitled *Climate Change – The Facts 2017*, Professor Ridd was invited to appear on the television show "Jones & Co" to participate in an interview with Alan Jones and Peta Credlin (the **Sky Interview**). This he did on 1 August 2017. Following the Sky Interview, a complaint was made by another professor at JCU to the effect that Professor Ridd was "trashing JCU's relationship with ARC, GBRMPA and AIMS again", those organisations being the ones mentioned in the email the subject of the *First Finding* and referred to in the Sky Interview (the reference to "AIMS" is a reference to the Australian Institute of Marine Science).

6 On 24 August 2017, Professor Ridd was notified by JCU that it considered the Sky Interview to be a *prima facie* case of serious misconduct and wrote, "[a]s per clause 54.1.5 the confidentiality for all parties in the management of this process is highly important, and I trust that you will consider your obligations professionally" (the ***First Confidentiality Direction***).

7 On 27 August 2017, JCU again wrote to Professor Ridd, after he had sought clarification of the *First Confidentiality Direction* in the following terms: "[y]ou should not discuss any aspect of the serious misconduct process whilst it is ongoing – except with an appropriate representative" and "you are expected to maintain your confidentiality obligations to the University" (the ***Second Confidentiality Direction***).

8 On 19 September 2017, JCU wrote to Professor Ridd informing him that it had made a *prima facie* finding of misconduct in relation to the Sky Interview. The letter directed Professor Ridd to keep the details of the allegations, and all matters relating thereto (including the fact of the 2016 Censure) strictly confidential. He was instructed not to disclose or discuss the matter with the media or in in any other public forum, including social media. He was told that he was permitted to discuss the matter with his immediate family, a support person, his union, professional advisors or JCU's Employee Assistance Provider – provided he could assure himself that they would maintain the same confidentiality (the ***Third Confidentiality Direction***).

9 After an internal search of Professor Ridd's University email account, JCU wrote to Professor Ridd on 23 October 2017 requesting a response to allegations that he had breached the Code of Conduct by denigrating JCU and a particular colleague, being insubordinate, interfering in the disciplinary process in relation to the *First Finding*, and breaching the *First* and *Second Confidentiality Directions*.

10 Professor Ridd commenced the proceedings in the Federal Circuit Court on 20 November 2017.

11 On 21 November 2017, Professor Ridd was informed by letter that JCU considered that he had engaged in serious misconduct and that the appropriate disciplinary action was the *Final Censure*. The conduct found to amount to serious breach of the Code of Conduct and therefore serious misconduct was:

- failing to act "in the collegial and academic spirit of the search for knowledge, understanding and truth" and failing to "treat fellow staff members, students and members of the public with honesty, respect and courtesy" when commenting during the Sky Interview to the effect that we can "no longer trust" scientific research published by AIMS or the ARC Centre of Excellence, and implying or insinuating

that scientists who work for those organisations are "emotionally attached" to the reef and their scientific research is "not objective" (the ***Second Finding***);

- failing to "behave in a way that upholds the integrity and good reputation of the University" and in breaching the Information Communication Technology Acceptable Use Policy of the University when expressing views in emails from his University email account to external recipients, including recipients at other universities, that:
  - (i) "I am not sure I have any influence on the outcome", being whether he was likely to be terminated (the ***Third Finding***);
  - (ii) "As usual, I have offended some powerful organisations who don't like being challenged, and rather than debate the case, they just resort to threats and complaints" (the ***Fourth Finding***);
  - (iii) "Needless to say I have certainly offended some sensitive but powerful and ruthless egos" (the ***Sixth Finding***); and
  - (iv) "In my view our whole university system pretends to value free debate, but in fact it crushes it whenever the "wrong" ideas are spoken. They are truly an (sic) Orwellian in nature" (the ***Seventh Finding***).
- failing to treat a colleague "with respect and courtesy" by denigrating that colleague and communicating about him in a disrespectful manner when responding to a student by email about that colleague's participation in a conference as a keynote speaker in terms, "You wonder why he is there. It is not like he has any clue about the weather. He will give the normal doom science about the GBR" (the ***Eighth Finding***); and
- engaging in conduct designed to interfere with the disciplinary process and in breach of the *Second* and *Third Confidentiality Directions* by soliciting a letter of support to the Vice Chancellor through a group email to more than 30 people (the ***Fifth Finding***).

12 That letter also expressed the "expectation" that the disciplinary process and all matters relating thereto (including the *Final Censure*) would remain strictly confidential and directed Professor Ridd not to discuss or disclose the matter with or to any person, including the media or in any public forum, with the same exceptions identified in previous directions as to confidentiality (the ***Fourth Confidentiality Direction***).

13 The letter of 21 November 2017 contained two further directions. The first was that Professor Ridd would refrain "from criticising other persons or organisations in a manner that is inconsistent with the collegial and academic spirit of the search for knowledge, understanding and truth" (the ***Second Speech Direction***). The second directed him to "not make any comment or engage in any conduct that directly or indirectly trivialises, satirises or parodies the University taking disciplinary action against you" (the ***No Satire Direction***).

14 On 22 November 2017, an article was published in *The Australian* newspaper detailing the application that had been filed in the Federal Circuit Court by Professor Ridd. Subsequently, Professor Ridd published a suite of confidential documents relating to the two disciplinary processes on a *WordPress* website which included republication of the comments found to be denigrating of his colleague. He also set up a *Go Fund Me* website. On 23 November 2017, Professor Ridd sent a copy of the article in *The Australian* to a student with the subject line "For your amusement". JCU held this to be a breach of the *No Satire Direction* (the ***Fourteenth Finding***).

15 On 8 February 2018, JCU wrote to Professor Ridd to express concerns about the apparent breaches of confidentiality directions evidenced by the media article, the websites and a flyer that had been distributed on the JCU campus. JCU directed Professor Ridd to maintain strict confidentiality in relation to all matters relating to the disciplinary process, drawing his attention to cl 54.1.5 of the Enterprise Agreement (the ***Fifth Confidentiality Direction***).

16 On 13 April 2018, JCU informed Professor Ridd that it had determined that he had engaged in serious misconduct, including serious breaches of the Code of Conduct and behaviour that was contrary to the interests of the University. JCU found that in making a series of comments to *The Australian*, and on the *WordPress* and *Go Fund Me* websites, and in a flyer distributed on campus, Professor Ridd promoted discussion and perpetrated the view, within and external to the University, that the University took disciplinary action against him because he had a different scientific view to the University or its stakeholders. It found that, contrary to the Code of Conduct, there was no proper basis for the comments, the comments were likely to have damaged, and had the potential to further damage, the reputation of the University, and his actions were in deliberate disregard of his obligations to the University (the ***Twelfth Finding***). The disclosure of documents to *The Australian* and the publication of the documents on the *WordPress* website were found to be in breach of the four previous

Confidentiality Directions and, in relation to the latter, republication of the denigrating comments about his colleague (the ***Ninth*** and ***Tenth Findings***).

17 Further, JCU found that Professor Ridd had no proper basis for making comments to the effect that he was denied procedural fairness and the comments had damaged the reputation of the University and were in deliberate disregard of the obligations owed to the University (the ***Thirteenth Finding***).

18 JCU found further that Professor Ridd had published comments regarding the disciplinary process that were untrue, misleading, and/or not full and frank and in so doing, failed to act with honesty and integrity in breach of the Code of Conduct. Professor Ridd had made the comment that he had been instructed not to talk anybody about the allegations, even to his wife. The statement was true, in that he had been refused permission to mention the allegations to his wife in an email dated 27 August 2017. He was, however, subsequently given permission to do so on 19 September 2017. This was not mentioned in the published comments (the ***Fifteenth Finding***).

19 Professor Ridd was also found to have breached to Code of Conduct by failing to "treat fellow staff members… with honesty, respect and courtesy" when replying to an email from his Dean in a manner that was said to be "threatening, insubordinate, and disrespectful". The email included comments that, "I think you should consider your actions in all this and which side you want to be remembered as being part of. So far it does not look encouraging but I live in hope" and described the Dean's email as "offensive" and as "[not living] up to public expectations of decent behaviour" (the ***Sixteenth Finding***).

20 Professor Ridd was also found to have breached the Code of Conduct by preferring his own interests and those of the Institute of Public Affairs (**IPA**) above the interest of the University in failing to disclose that the IPA had paid for various travel expenses and was providing assistance with his legal costs to challenge the 2017 disciplinary processes in circumstances where the IPA endorses, and has promoted, Professor Ridd's comments (the ***Seventeenth Finding***).

21 Professor Ridd was also found to have deliberately and repeatedly breached *Confidentiality Directions* by: providing a folder of confidential documents to another Professor (who did not look at them); disclosing information to the author of an article in the *Cairns News*; and causing a flyer to be distributed on JCU's campus which disclosed the outcome of the 2017

disciplinary process and said, *inter alia*, that he had "no intention of accepting the final censure or complying with the order to remain silent and would rather be fired than accept the situation" (the ***Eleventh Finding***).

22 On 2 May 2018, Professor Ridd's employment with JCU was terminated.

THE CASE AT TRIAL

23 Somewhat inexplicably, Professor Ridd did not dispute that he had engaged in any of the conduct that formed the basis of the findings by JCU that related to breach of the behavioural standards prescribed by the Code of Conduct (being the *First – Fourth, Sixth – Eighth, Twelfth, Thirteenth,* and *Fifteenth – Seventeenth Findings*). Nor did he dispute that his conduct should not be characterised as breaching those standards of behaviour such that it could fairly be characterised as misconduct or serious misconduct — some instances of the conduct charged were undoubtedly trivial. In particular, Professor Ridd did not ask the Court below to review JCU's findings as to whether or not his conduct in fact breached the standards of behaviour prescribed by the Code of Conduct. Senior counsel for Professor Ridd said explicitly, "…we haven't run a case that [JCU] contravened the code of conduct, that the findings aren't supported by the evidence, that it doesn't constitute misconduct. We haven't run any of those – that case" [Transcript, 26.03.19, P-65].

24 Professor Ridd also did not dispute that he had discussed or disclosed information contrary to directions he was given and which formed the basis of the *Fifth* and *Ninth – Eleventh Findings*. Nor did he dispute sending the email the subject of the *Fourteenth Finding*.

25 Professor Ridd pleaded below, and maintained the position in this Court, that in respect of each of the findings of misconduct and serious misconduct, he was exercising his right to intellectual freedom in accordance with cl 14 of the Enterprise Agreement and, that as none of his conduct harassed, vilified, bullied, or intimidated those who disagreed with his views (which was conceded by JCU), his conduct was protected by cl 14. It was therefore a contravention of the Enterprise Agreement by JCU to discipline him for any of the conduct that formed the basis of those findings.

26 The primary judge agreed and held that *First – Fourth, Sixth – Eighth, Twelfth, Thirteenth,* and *Fifteenth – Seventeenth Findings* were unlawful because they breached the rights that Professor Ridd had pursuant to cl 14.

27 In respect of the findings of breach of the *Confidentiality Directions*, Professor Ridd pleaded that, in so far as they were made in purported reliance on cl 54.1.5 of the Enterprise Agreement, that clause imposed no obligation of confidence on Professor Ridd and so no direction could be made pursuant to that clause. Alternatively, it was pleaded that Professor Ridd had consented to the disclosure, was not prohibited from disclosing the information, any disclosure was not of information "collected or recorded" by JCU and, in any event, was not serious misconduct within the definition of that expression in the Enterprise Agreement.

28 Professor Ridd also pleaded that cl 54.1.5 is subject to cl 14 of the Enterprise Agreement. Thus, as the *Confidentiality Directions* had the effect of prohibiting or limiting the future exercise of his right to intellectual freedom under cl 14 of the Enterprise Agreement, by giving those directions, JCU had contravened the Enterprise Agreement and so the directions were neither reasonable nor lawful.

29 Consequently, on either basis, the *Fifth* and *Ninth – Eleventh Findings* could not lawfully have been made.

30 The primary judge agreed and held that none of the *Confidentiality Directions* was lawful because JCU had no power to give the directions, and even if it did have the power, any such direction contravened the rights Professor Ridd had pursuant to cl 14. The *Fifth* and *Ninth – Eleventh Findings* were therefore unlawful because they each related to the breach of a direction which was of itself unlawful.

31 Professor Ridd pleaded similarly that the *First* and *Second Speech Directions*, and the *No Satire Direction*, had the effect of prohibiting or limiting his future exercise of his right to intellectual freedom under cl 14 of the Enterprise Agreement. By giving those directions, JCU had contravened the Enterprise Agreement and so the directions were neither reasonable nor lawful. Consequently, the *Fourteenth Finding*, which related to the *No Satire Direction*, could not lawfully have been made.

32 The primary judge agreed. His Honour held that each of the *Speech Directions* and the *No Satire Direction* sought to interfere with the rights that Professor Ridd had pursuant to cl 14. The *Fourteenth Finding* was therefore unlawful because it related to the breach of a direction which was of itself unlawful.

33 The primary judge reasoned that it followed that the censures were also in contravention of cl 14 and were therefore unlawful, as was the termination of Professor Ridd's employment, because it punished him for conduct that was protected by cl 14 of the Enterprise Agreement.

34 The primary judge held that JCU has assumed that the Code of Conduct takes precedence over cl 14 and, in making that assumption, made a "fundamental error" (*Ridd v James Cook University* [2019] FCCA 997 [294]-[295]). He found that the Code of Conduct is subordinate to cl 14 of the Enterprise Agreement *(Ridd v James Cook University* [2019] FCCA 997 [299]) and that it is "only when behaviour is not covered by cl.14 that the Code of Conduct can apply. Clause 14 means that it is the right of Professor Ridd to say what he has said in any manner he likes so long as he does not contravene the sanctions embedded in cl.14" (*Ridd v James Cook University* [2019] FCCA 997 [301]).

35 As a consequence of the approach taken by Professor Ridd in his claim against JCU, the primary outcome of this appeal is limited solely to the question of whether, properly construed, the Enterprise Agreement provided Professor Ridd with the untrammelled right (provided only that he did not harass, vilify, bully or intimidate) to express his opinions in whatever manner he chose, unconstrained by the behavioural standards imposed by the Code of Conduct, with which he was bound to comply.

36 Professor Ridd submitted that the Court should view the video recording of the Sky Interview, the written transcript of which was in evidence before the primary judge (but not the video recording itself). No application pursuant to r 36.57 of the *Federal Court Rules 2011* (Cth) to receive further evidence on appeal had been filed or foreshadowed. The Court declined to view the video recording in the course of the appeal. Even if an application had been made in the proper form, the limited compass of the appeal made it unnecessary to receive the further evidence. There was no challenge to any finding of fact relating to the Sky Interview, nor was there any relevant issue of credibility.

37 The National Tertiary Education Union (**NTEU**) sought leave to intervene, pursuant to r 36.32 of the *Federal Court Rules 2011* (Cth), on the question of the proper construction of the Enterprise Agreement and it filed draft written submissions. The NTEU was permitted to make oral submissions at the hearing of the appeal, contingent upon whether the Court granted it leave to intervene (which the Court said it would determine in its reasons for judgment).

38 Having regard to the principles relevant to an application to intervene as set out in *Roadshow Films Pty Ltd v iiNet Ltd* [2011] HCA 54; 248 CLR 37 and in *Hancock Prospecting Pty Ltd v Reinhart* [2017] FCAFC 170; 257 FCR 442, the Court has concluded that leave should be refused. First, the construction of JCU's Enterprise Agreement does not involve consideration of matters of general relevance to the members of the NTEU; the Enterprise Agreement is peculiar to one university only, JCU. Secondly, there was no suggestion that the parties to the proceedings may not present fully the submissions on a particular issue, being submissions which the Court should have to assist it to reach a correct determination. Thirdly, the submissions of the NTEU largely involved repetition of the submissions made on behalf of Professor Ridd and so were unnecessary.

39 No question of liability for costs arises within the Fair Work jurisdiction.

JAMES COOK UNIVERSITY

40 JCU is a university established by the *James Cook University Act 1997* (Qld). Section 4 establishes the University as a body corporate. Section 5 prescribes the University's functions to be:

(a) to provide education at university standard; and

(b) to provide facilities for study and research generally and, in particular, in subjects of special importance to the people of the tropics; and

(c) to encourage study and research generally and, in particular, in subjects of special importance to the people of the tropics; and

(d) to provide courses of study or instruction (at the levels of achievement the council considers appropriate) to meet the needs of the community; and

(e) to confer higher education awards; and

(ea) to disseminate knowledge and promote scholarship;

(eb) to provide facilities and resources for the wellbeing of the university's staff, students and other persons undertaking courses at the university; and

(f) to exploit commercially, for the university's benefit, a facility or resource of the university, including for example, study, research or knowledge, belonging to the university, whether alone or with someone else; and

(g) to perform other functions given to the university under this or another Act.

41 Section 7 establishes the Council of the University which, by virtue of s 8, is the governing body of the University.

THE ENTERPRISE AGREEMENT

42 An enterprise agreement is a statutory artefact made by persons specifically empowered in that regard, and under conditions specifically set down by the FWA (*Toyota Motor Corporation Australia Ltd v Marmara* [2014] FCAFC 84; 222 FCR 152 [90]). The Full Court explained the effect of an enterprise agreement made under the FWA at [89]:

> [T]he Act does more than merely impose conditions upon, and give additional legal effect to, an agreement made between private parties. The effect of the legislation is to empower the employer and the relevant majority of its employees to specify terms which will apply to the employment of all employees in the area of work concerned. The legal efficacy of those terms will arise under statute, not contract, and … will be felt also by those who did not agree to them. Someone such as an employee subsequently taken on, who had nothing to do with the choice of the terms or the making of the agreement, will be exposed to penal consequences under s 50 if he or she should happen to contravene one of the terms. When viewed in this way, it is not difficult to share in the perception that an enterprise agreement approved under the FW Act has a legislative character.

43 The relevant Enterprise Agreement came into effect in 2013. It is expressed to "cover James Cook University and its staff" (cl 4.1). It therefore applies to JCU and Professor Ridd (FWA ss 52 and 53), although the FWA does not identify the employer, nor any employee, as a "party" to an enterprise agreement.

44 Clause 8 of the Enterprise Agreement defines the "Parties to the Agreement" to be "James Cook University and those staff unions listed at Clause 4, *Coverage*, of this Agreement". Those staff unions as listed in cl 4 are: National Tertiary Education Union; United Voice; Together Queensland, Industrial Union of Employees; Australian Municipal, Administration, Clerical and Services Union; and Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia.

45 Part B of the Enterprise Agreement is headed "University Commitments". The terms "JCU" and "the University" are used variously throughout Part B and indeed throughout the Enterprise Agreement. The drafting obscures the intent of the document. Part B describes "the University['s]" commitments in relation to the employment of Australian Aboriginal and/or Torres Strait Islander People, "JCU and its staff['s]" responsibility in respect of workplace health and safety, "JCU['s]" recognition of the need for staff support and representation, "JCU['s]" commitment to maintaining a Joint Consultative Committee (**JCC**),

the agreement of "[t]he parties to this Agreement" to supporting the Code of Conduct, "JCU['s]" commitment to intellectual freedom, and "the University['s]" commitment to providing support to staff who experience domestic violence. It is not clear whether, throughout the Enterprise Agreement, either term is to be read to mean the body corporate as established by the *James Cook University Act 1997* (Qld), or whether either term is used collectively, as referring to its constituent elements, including its staff.

46 Clause 13 relates to the Code of Conduct. It provides:

> 13. 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*.** (emphasis added)

47 Clause 14 of the Enterprise Agreement provides:

> 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 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.

48 The term "intellectual freedom" is not otherwise defined in the Enterprise Agreement.

49 Clause 8 of the Enterprise Agreement defines "serious misconduct" to be:

> - Serious misconduct as defined by the Fair Work Regulations 2009 (Cth); as amended from time to time; or
> - ***Any serious breach of the James Cook University Code of Conduct***; (emphasis added) or
> - Official Misconduct as defined by the Crime and Misconduct Act 2001, as amended form time to time.

50 The principles and procedures for dealing with misconduct and serious misconduct are detailed in Part G of the Enterprise Agreement, in particular cl 54.

THE CODE OF CONDUCT

51 As a university established by the *James Cook University Act 1997* (Qld), JCU is a "public sector entity" within the definition contained in the Schedule to the *Public Sector Ethics Act 1994* (Qld) (**PSEA**) and is subject to the relevant provisions of that Act.

52 If there is any inconsistency between the provisions of the Enterprise Agreement and the PSEA, the Enterprise Agreement prevails to the extent of any inconsistency (FWA s 29). The parties did not contend that there was any relevant inconsistency.

53 Section 10 of the PSEA provides:

> (1) In recognition of the ethics principles and values for public service agencies, public sector entities and public officials, codes of conduct are to apply to those agencies, entities and officials in performing their function.
>
> (2) The purpose of the code is to provide standards of conduct for public service agencies, public sector entities and public officials consistent with the ethics principles and values.

54 A "public official", for the purposes of a public sector entity means, *inter alia*, an employee of the entity. There was no dispute that Professor Ridd was a "public official" for the purposes of the PSEA.

55 Subdivision 1 of Division 3 of Part 4 of the PSEA provides for the content of codes of conduct for a public sector entity. Section 15 requires the chief executive officer to ensure that a code of conduct is prepared for the entity and, relevantly, s 16 provides that reasonable steps must be taken to consult about the code with the public officials to whom the code is to apply, industrial organisations representing the interests of any of the officials, and any other appropriate entities representing any of the officials.

56 Section 17 provides that the responsible authority for a public sector entity may approve a code of conduct prepared under s 15. The responsible authority for a university established under an Act is the council of the university (PSEA, Schedule).

57 There was no dispute that the Code of Conduct was promulgated after consultation with the JCC, as referred to in cl 13 of the Enterprise Agreement, nor that the Code of Conduct was validly approved by the Council of the University on 12 April 2012 and was implemented from 10 May 2012.

58 The Code of Conduct describes the standards of behaviour expected of all staff of JCU in respect of four fundamental ethical principles "to guide the actions" of staff when acting in their official capacity. Those principles are to: seek excellence as part of a learning community; to act with integrity; to behave with respect for others; and to embrace sustainability and social responsibility.

59 The Code of Conduct states that it "must be read in conjunction with the Explanatory Statement for the Code of Conduct which provides further detail regarding the required standards of conduct". There was also no dispute that the Explanatory Statement was validly approved by the Council of the University on 12 April 2012 and was implemented from 10 May 2012.

60 The Code of Conduct provides that failure to comply with it "may lead to disciplinary action, and in serious cases, may lead to termination of employment and/or criminal prosecution".

61 Quite apart from that statement in the Code of Conduct, s 18 of the PSEA provides that a public official of a public service entity must comply with the standards of conduct stated in the entity's code of conduct that apply to the official. Section 24(c) provides that if the public official is not a public service officer or a local government employee, but there are disciplinary processes applying to the official, action for a contravention of an approved code of conduct should be dealt with under those disciplinary processes applying to the official.

62 In this case, the disciplinary processes that applied to Professor Ridd are those set out in Part G of the Enterprise Agreement.

THE INTERACTION BETWEEN THE ENTERPRISE AGREEMENT AND THE CODE OF CONDUCT

63 The primary judge held that the Code of Conduct is not part of the Enterprise Agreement. He acknowledged, however, that the Enterprise Agreement envisages that there will be a Code of Conduct (*Ridd v James Cook University* [2019] FCCA 997 [21]).

64 The gravamen of the findings of the primary judge is that the Code of Conduct is subordinate to cl 14 of the Enterprise Agreement. Consequently, according to the primary judge, "If the whole of what is said objectively is an exercise of intellectual freedom, then the protections of cl.14 apply … It is only when behaviour is not covered by cl.14, that the Code of Conduct can apply" (*Ridd v James Cook University* [2019] FCCA 997 [299]-[301]).

65 The relevant principles applicable to the interpretation of an enterprise agreement may be stated as follows:

(i) The starting point is the ordinary meaning of the words, read as a whole and in context (*City of Wanneroo v Holmes* [1989] FCA 553; 30 IR 362, 378; *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813; 153 IR 426 [53]; *WorkPac Pty Ltd v Skene* [2018] FCAFC 131; 264 FCR 536 [197]).

(ii) A purposive approach is preferred to a narrow or pedantic approach — the framers of such documents were likely to be of a "practical bent of mind" (*Kucks v CSR Limited* [1996] 66 IR 182, 184; *Shop Distributive and Allied Employees' Association v Woolworths SA Pty Ltd* [2011] FCAFC 67 [16]; *WorkPac Pty Ltd v Skene* [2018]

FCAFC 131; 264 FCR 536 [197]). The interpretation "turns upon the language of the particular agreement, understood in the light of its industrial context and purpose" (*Amcor Limited v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; 222 CLR 241 [2]).

(iii) Context is not confined to the words of the instrument surrounding the expression to be construed (*City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813; 153 IR 426 [53]). It may extend to "… the entire document of which it is a part, or to other documents with which there is an association" (*Short v FW Hercus Pty Ltd* [1993] FCA 51; 40 FCR 511, 518; *Australian Municipal, Administrative, Clerical and Services Union v Treasurer of the Commonwealth of Australia* [1998] FCA 249; 82 FCR 175, 178).

(iv) Context may include "… ideas that gave rise to an expression in a document from which it has been taken" (*Short v FW Hercus Pty Ltd* [1993] FCA 51; 40 FCR 511, 518).

(v) Recourse may be had to the history of a particular clause "Where the circumstances allow the court to conclude that a clause in an award is the product of a history, out of which it grew to be adopted in its present form…" (*Short v FW Hercus Pty Ltd* [1993] FCA 51; 40 FCR 511, 518).

(vi) A generous construction is preferred over a strictly literal approach (*Geo A Bond and Co Ltd (in liq) v McKenzie* [1929] AR 499, 503-4; *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813; 153 IR 426 [57]), but "Awards, whether made by consent or otherwise, should make sense according to the basic conventions of the English language. They bind the parties on pain of pecuniary penalties" (*City of Wanneroo v Holmes* [1989] FCA 553; 30 IR 362, 380).

(vii) Words are not to be interpreted in a vacuum divorced from industrial realities but in the light of the customs and working conditions of the particular industry (*City of Wanneroo v Holmes* [1989] FCA 553; 30 IR 362, 378-9; *WorkPac Pty Ltd v Skene* [2018] FCAFC 131; 264 FCR 536 [197]).

66 Turning first then to the language of the Enterprise Agreement and cognizant of the overarching purpose of an enterprise agreement — to empower the employer and the relevant majority of its employees to specify terms which will apply to the employment of all

employees. As has been described above, cl 14.1 contains an expression of the University's commitment "to act in a manner consistent with the protection and promotion of intellectual freedom within the University and in accordance with JCU's Code of Conduct". It is pertinent to note that the Code is described as "JCU's Code of Conduct", not the "University's Code of Conduct" recalling that it is explicitly stated in cl 13.1 that "The parties to this Agreement support the Code of Conduct". That necessarily suggests that the Code of Conduct is not simply an artefact of the body corporate but rather of all those persons whose interests were represented in the making of the Enterprise Agreement.

67 As described in cl 14.1, JCU's commitment is not one simply to act consistently with the protection and promotion of intellectual freedom; the use of the conjunctive in that provision requires also that JCU act in accordance with the Code of Conduct. Employees therefore have the right to expect that JCU will honour that commitment both as between JCU and an employee, and as between employees. The mechanism for so doing is the Code of Conduct.

68 As has also been observed above, the Enterprise Agreement does not provide a definition of "intellectual freedom". Clause 14.2 does, however, provide an inclusive list of rights that are said to be embodied within the concept of intellectual freedom and which one might expect to be exercised within a university context. The first two, to "[p]ursue critical and open inquiry" and to "express opinions about issues and ideas related to their respective fields of competence", relate most directly to activities that would be expected to be undertaken by academic members of staff and which are embodied in the broadly understood concept of "academic freedom"— referred to in the Code of Conduct but not in the Enterprise Agreement. The remaining three relate to activities that could be undertaken both by academic and non-academic staff within a university. It does not, and could not, seek to give full expression to the concept of intellectual freedom and the myriad circumstances in which the right to intellectual freedom might be exercised, either intra or extramurally.

69 The scope of the definitional examples of the exercise of intellectual freedom in cl 14.2 is explained in the subsequent sub-clauses. Clause 14.3 acknowledges that the views that might be expressed by staff in the exercise of intellectual freedom might be unpopular or controversial and that all staff have the right to express such views. This right is, however, necessarily constrained by the correlative responsibility to respect the rights of others and the proscribing of the harassment, vilification, bullying or intimidation of those who disagree with such views. Once more, the use of the conjunctive constrains the exercise of the right to

express unpopular or controversial views both by reference to respect for the rights of others and by the proscription of harassment, vilification, bullying or intimidation.

70 Similarly, cl 14.4 constrains the acknowledged right, encompassed within the exercise intellectual freedom, to express negative opinions about the operations of JCU and higher education policy generally, by stipulating an expectation that staff should raise their concerns through applicable processes.

71 Clauses 14.5-14.7 articulate obligations attaching to staff, and thereby place some parameters around the rights of staff in pursuing critical and open inquiry, and in participating in public debate and expressing opinions. Staff "must adhere to the highest standards of propriety and truthfulness in scholarship, research and professional practice"; "must not represent their opinions as those of JCU"; and, where contributing to public debate as individuals, "must not intentionally identify themselves in association with their University appointment".

72 Professor Ridd urged a construction of cl 14 whereby the only constraint on the exercise by staff of whatever can be properly described as an exercise of intellectual freedom is the proscription of harassment, vilification, bullying or intimidation. Such a construction does not flow naturally from a plain reading of cl 14 in its entirety. First, it would leave the words "this comes with a responsibility to respect the rights of others" in cl 14.3 without any work to do. One has a right not to be defamed. If the only prohibition is, however, harassment, vilification, bullying or intimidation, defamatory statements concerning other staff would be protected. Secondly, it ignores the express constraints in cll 14.4-14.7. Thirdly, it ignores the express reference to the Code of Conduct in cl 14.1.

73 The question then is whether the Code of Conduct is incorporated into the Enterprise Agreement. Section 257 of the FWA provides that, despite s 46AA of the *Acts Interpretation Act 1901* (Cth), an enterprise agreement may incorporate material contained in an instrument or other writing. An example of incorporation of a document by reference is cl 23 of the Yarra Trams Enterprise Bargaining Agreement 2009, considered in *Australian Rail, Tram & Bus Industry Union v KDR Victoria Pty Ltd t/a Yarra Trams* [2014] FCAFC 24, which provided (see [5]):

> Staff discipline will continue to be conducted in accordance with the Yarra Trams Disciplinary Counselling Policy and Procedures, as contained in MSM document c400im0001.

74 In considering the question of whether the policy was incorporated into the Yarra Trams Enterprise Bargaining Agreement, the Full Court held at [9] that it "is unnecessary to rely on custom and practice to perceive that the clause required, in terms, that staff discipline be conducted in accordance with a clearly identified document, the disciplinary policy".

75 Clauses 6.2 and 6.3 of the Enterprise Agreement are relied upon by Professor Ridd in support of the contention that an instrument such as the Code of Conduct cannot detract from the terms of the Enterprise Agreement. It is asserted that the Code of Conduct falls within the ambit of "all other policies, procedures and guidelines" within the meaning of those sub-clauses. Clause 6 provides:

> 6.1 The parties agree that the Supported Wage System for People with Disabilities Policy will form part of this agreement.
>
> 6.2 All other policies, procedures and guidelines which support the operation of this Agreement or provide staff benefits, conditions of employment or entitlements are not incorporated into nor form part of this Agreement and may be made or varied from time to time, following consultation with the Joint Consultative Committee (JCC).
>
> 6.3 If there is any inconsistency between the guidelines and policies and the express terms of this Agreement, this Agreement will apply.

76 It is to be noted that the clause refers to "policies, procedures and guidelines" and it expressly incorporates one particular policy. Numerous other references to various policies are made throughout the Enterprise Agreement, including to the Human Resources Policy and Procedures, the Recruitment, Selection and Appointment Policy, the Special Studies Program policy, and the Grievance Resolution Policy and Procedure. Similarly, there is reference throughout the Enterprise Agreement to various guidelines, including to the Travel Guidelines, guidelines for Marketing and Casual staff, and the Special Studies Program guidelines. The Code of Conduct is not referred to anywhere in the Enterprise Agreement in terms that suggest it is a mere policy, procedure or guideline. Quite the contrary. It is expressly referred to in cl 13 as one of JCU's commitments under the Enterprise Agreement.

77 Clause 6 does not operate to preclude the incorporation by reference of the Code of Conduct into the Enterprise Agreement.

78 The commitment in cl 14.1 to act *in accordance with* the Code of Conduct is consistent with the statement in cl 13.3 that the Code of Conduct is "not intended to detract from Clause 14". In this context it is accepted that the word "detract" should be given its ordinary grammatical meaning and usage. Clause 13.3 is no more than a statement of intent by JCU not to diminish

its commitment to promote and protect intellectual freedom by means of the Code of Conduct. The Code of Conduct does not do so. If the Code of Conduct were to proscribe any of the matters listed in cl 14.2 (for example the right of staff to pursue critical and open inquiry or to participate in public debate and express opinions about issues and ideas related to their respective fields of competence), those provisions of the Code of Conduct would indeed detract from cl 14.

79 In the appeal, Professor Ridd placed considerable emphasis on the terms of cl 13.3. He submitted that this provision made clear that cl 14 is the primary provision and that cl 13 is subordinate to it. There are several reasons why that submission should be rejected. First, it is important to note that cl 13 reflects and records various statements by the **parties** to the Enterprise Agreement (being JCU and the specified unions, as opposed to JCU staff). Those statements include the statement in the chapeau to cl 13 of the parties' mutual support for the Code of Conduct as establishing the standards by which staff and volunteers conduct themselves towards others and perform their professional duties on behalf of JCU. There are no "parties" as such to the Code of Conduct. Rather, it is an instrument which is made by the CEO and approved by the Council of the University, as required by the PSEA. Compliance with the Code of Conduct is, however, part of the terms and conditions of employment of all JCU staff (both academic and non-academic) as well as volunteers and contractors.

80 Secondly, the statement in cl 13.3 to the "parties" noting that the Code is not intended to detract from cl 14, *Intellectual Freedom*, records a note to that effect by the parties to the Enterprise Agreement. As the University pointed out in argument, cl 13.3 is an interpretive provision which assists in the proper construction of cl 14.

81 Thirdly, it is critical to note that cl 14.1 records the commitment of JCU to act in a manner consistent with the protection and promotion of intellectual freedom within the University **and** in accordance with the Code of Conduct. Part of that commitment is an implicit commitment on the part of the University to require all staff to comply with the Code of Conduct as part of their employment relationship. That is confirmed by the terms of both the Code of Conduct and the Explanatory Statement, which state that the Code applies to **all** staff of JCU while acting in their official capacity.

82 Fourthly, having regard to the explicit statement in cl 14.1 concerning acting "in accordance with the Code Conduct", cl 13.3 should not be construed so as to produce a construction of cl 14 which has the effect of carving out from the content of that clause the standards

imposed by the Code of Conduct. Clause 13.3 and cl 14 should be read together harmoniously. Having regard to their terms, there is no inconsistency between the two provisions which warrants one being characterised as primary and the other as subordinate. They should be read together.

83 Nor is the Code of Conduct "an attempt to rewrite the Intellectual Freedom clause", as was held by the primary judge (*Ridd v James Cook University* [2019] FCCA 997 [244]). Rather, the function of the Code of Conduct is to set the standards of behaviour for the exercise of the range of activities in which staff bound by the Code of Conduct might engage in their official capacity. This includes the expectations as to standards of behaviour in undertaking basic research, in teaching and supervising students, in the use of resources, in decision-making, and in general human interactions.

84 The Code of Conduct describes the expectations as to how the rights of staff, as outlined in the Enterprise Agreement, are to be exercised commensurately with the ethical principles prescribed in the PSEA and enshrined in the approved Code of Conduct.

85 By being bound by the Code of Conduct, including through their contract of employment, the following rights and duties of staff arise to, relevantly (drawing on parts of Principles 1 to 3 of the Code):

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

- refrain from and not accept vilification, bullying, harassment or sexual harassment.

86 It may be observed that many of these standards are couched in vague and imprecise language. They do not readily provide clear guidance to staff as to whether particular conduct might breach the obligations outlined in the Code of Conduct so as to amount to misconduct, or indeed serious misconduct. Reasonable minds may differ about whether particular conduct in fact breaches the obligations on any given occasion. This is an unfortunate consequence of the drafting, particularly given the very serious consequences that may flow from a decision by JCU that conduct has breached the standards. However, as has already been emphasised, Professor Ridd did not challenge the conclusions reached by JCU that his conduct breached the standards of behaviour required by the Code of Conduct.

87 The obligation of staff, including Professor Ridd, to comply with the Code of Conduct is enshrined in the Enterprise Agreement (and in his employment relationship with JCU, as contemplated by the PSEA) and the consequences of breach are prescribed by the Enterprise Agreement.

88 Professor Ridd pressed the consideration of a number of contextual factors which were said to support the proposition that cl 14 alone sets out the rights of employees with respect to the exercise of intellectual freedom, constrained only by the limits in cl 14 itself. The most significant contextual element that is said to inform the proper construction of the Enterprise Agreement is the fact that it is concerned with a university and that the concept of academic freedom is an ancient principle foundational to a university context (*Burns v Australian National University* (1982) 61 FCR 76, 88).

89 The primary judge considered that "the University has not understood the whole concept of intellectual freedom". He held that, "In the search for truth, it is an unfortunate consequence that some people may feel denigrated, offended, hurt or upset. It may not always be possible to act collegiately (sic) when diametrically opposed views clash in the search for truth" (*Ridd v James Cook University* [2019] FCCA 997 [296]).

90 It is important, however, that the terms "intellectual freedom" and "academic freedom" not be conflated. As has already been observed, the former is used in the Enterprise Agreement, the latter in the Code of Conduct, together also with the terms "intellectual honesty" and "freedom of expression". The former Chief Justice of the High Court of Australia, the Hon

Robert S French AC observed in his *Independent Review of Freedom of Speech in Australian Higher Education Providers* (March 2019) (**French Review**) p 18 (emphasis added):

> '[F]ree intellectual inquiry'…appears in the HE [Higher Education] standards. It is a term of uncertain meaning but seems to cover some elements of academic freedom. Freedom of speech is an aspect of academic freedom although used in a sense which is not congruent with the general freedom of expression applicable on and off campus. It is a freedom which, in this context, reflects the distinctive relationship of academic staff and universities, a relationship not able to be defined by reference to the ordinary law of employer and employee relationships. Academic freedom has a complex history and apparently no settled definition. It is nevertheless seen as a defining characteristic of universities and similar institutions.
>
> …
>
> Institutional autonomy is a further dimension of academic freedom. It is the capacity of the institution to discharge, in the way it thinks fit, its mission of transmitting and generating human knowledge and conferring on students the skills and abilities which the community is entitled to expect. It covers **autonomy in the formulation and application of domestic rules and policies relating to the conduct of students and staff** and visitors to the institutions. The extent and limits of such autonomy is ultimately a matter of public policy informed by the history, tradition and purposes of higher education as well as by contemporary needs.

91 The historical context in which the ideal of academic freedom developed is important. As Mr French notes, it can be traced back to Socrates' defence in Plato's Apology. Even then though, his teaching was constrained by, and served, his belief in God (French Review p 114). As university education became increasingly secular, recognition of the principle that "[s]cience and its teachings shall be free" became common throughout Europe (French Review p 114-115). Mr French refers to the writings of American scholar, E E Brown, at the end of the 19th century in which he rejected the proposition that academic freedom stood for "mere independence of all constraint" (French Review p 115).

92 In time, academic freedom provided the foundation for the concept of tenure for professorial staff (see Jim Jackson, "Express Rights to Academic Freedom in Australian Public University Employment" (2005) 9 *Southern Cross University Law Review* 107). From the establishment of the first university in Australia in 1850, the University of Sydney, a professor could expect to be offered tenure of office during good behaviour, subject only to becoming incapacitated for performing the duties of his office, attaining the age of 60, or misconduct. Lecturers had no such tenure and their positions were terminable on six months' notice. The first award covering all universities was the *Australian Universities Academic Staff (Conditions of Employment) Award 1988*. It defined academic duties, including obligations to teach and research, introduced a standardised dismissal procedure, and defined misconduct. There was

no reference to "academic freedom" and, perhaps more significantly, the word "tenure" was not used. Rather, academics of all levels were to be offered "continuing appointments" subject to probationary periods. Gradually, specific references to the appointment of professorial staff disappeared from university statutes.

93 The observations in *Burns v Australian National University* (1982) 61 FCR 76 are therefore of little more than historical interest. The statute governing the Australian National University in force at the time of Professor Burns' appointment had certain rights conferred on him under that Act. The Act entitled a professor to be a member of the Professorial Board which advised the University Council on matters relating to education. A professor was eligible for election to the Council and entitled to vote for the election to the Council of a professor in the Institute of Advanced Studies. It was in that context Ellicott J observed that, "The notion that in the involuntary termination of a professor's appointment it is merely acting under the terms of appointment and not under its basic statute as well, in my view, debases the very principle upon which the University is founded – academic freedom" ((1982) 61 FCR 76, 88). The *Australian National University Act 1991* (Cth) differs from its predecessor. The appointment of the professoriate is no longer a matter of specific provision in the Act and there is no special entitlement for professors to be elected to the Council; all members of the academic staff are eligible. In any event, it was held on appeal that the rights and duties of the parties to the contract of engagement arose from that contract and not from the *Australian National University Act 1946* (Cth) (*Australian National University v Burns* (1982) 64 FLR 166).

94 There is little to be gained in resorting to historical concepts and definitions of academic freedom. Whatever the concept once meant, it has evolved to take into account contemporary circumstances which present a challenge to it, including the internet, social media and trolling, none of which informed the view of persons such as J S Mill, John Locke, Isaiah Berlin and others who have written on the topic. As noted by Professor Jennifer Lackey in the introduction to her book, *Academic Freedom* (Oxford University Press, 2018, 11), although "the protection provided by academic freedom is at least primarily from institutional censorship or retaliation, particularly that of the State and the administration", a big question today "is whether this protection is sufficient, especially against the background of the underlying rationale of academic freedom and the ever-changing challenges posed by online activity". Professor Lackey says further (at 19):

> Academic freedom plays an indispensable role in fulfilling the mission of the university. Many of the issues facing institutions of higher learning are familiar and timeless ones, such as how to understand the rationale for academic freedom and whether its aims are compatible with campus protests and no platforming. **But a host of new challenges have arisen in recent years in response to the changing norms and expectations of the university. With the increasing role of the Internet in research, the rise of social media in both professional and extramural exchanges, and student demands for accommodations such as content warnings and safe spaces, the parameters of, and challenges to, academic freedom often leave us in unchartered territory.** (emphasis added)

95 In considering the industrial realities of the modern university system and, in the light of the customs and working conditions of this particular industry (*City of Wanneroo v Holmes* [1989] FCA 553; 30 IR 362, 378-9; *WorkPac Pty Ltd v Skene* [2018] FCAFC 131; 264 FCR 536 [197]), it must be understood that all public Australian universities now have enterprise agreements which, to a greater or lesser degree, contain clauses referring to intellectual freedom or to academic freedom (French Review, Ch 21). A survey of these clauses reveals that greater or lesser degrees of freedom are to be found across the university sector, no doubt as a consequence of the relative weight the parties have given to such freedom in the course of the industrial bargaining process. One university's enterprise agreement states that, "The University promotes and protects Academic Freedom of Expression, as set out separately in University Policy". That Policy describes a core value of the university being "to preserve, defend and promote the traditional principles of academic freedom … so that all scholars at the University are free to engage in critical enquiry, scholarly endeavour and public discourse without fear or favour". The Policy expressly recognises that scholars are entitled to express their ideas and opinions even when doing so may cause offence. The right to exercise academic freedom of expression is subject to two principles: that all discourse must be undertaken reasonably and in good faith; and all discourse should accord with principles of academic and research ethics.

96 A quite different approach is taken by another university whose enterprise agreement provides, "Without derogating from or limiting the employment and other legal obligations of Academic Employees, including the obligations to comply with reasonable and lawful directions and requests, the parties to the Agreement are committed to the principles of promoting and protecting academic freedom". Those principles are said to include the rights of all Academic Employees to, *inter alia*, "express unpopular or controversial views, but this does not mean the right to harass, bully, vilify, defame or intimidate". The definition of both misconduct and serious misconduct within this particular enterprise agreement includes the refusal to carry out a lawful and reasonable instruction.

97 These two examples, from amongst the 44 referred to in the French Review (Appendix 8), illustrate that there is no common understanding across the university sector as to the content of any principle of academic freedom or of intellectual freedom, nor any unanimity as to where the bounds of any such freedoms should be set.

98 It is also important to recognise that the provisions of the Enterprise Agreement and the Code of Conduct apply to *all* staff of the University, not simply to academic staff. That may explain why the phrase "intellectual freedom", rather than "academic freedom" is used in cl 14. The phrase "academic freedom" is used in the Code of Conduct. The Explanatory Statement says in relation to "academic freedom" that "Staff are free within their respective fields of competence to pursue academic endeavour in accord with appropriate standards of scholarly inquiry. Staff have an implicit right to inquire, to examine, to criticise and to challenge in the collegial and academic spirit of the search for knowledge and understanding". The notion of academic freedom is applicable only to members of the academic staff. This follows from the distinction drawn in the Code of Conduct between "academic freedom" and "freedom of expression". The latter expression is also elucidated in the Explanatory Statement: "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".

99 The commitment of JCU in cl 14.1 of the Enterprise Agreement – to promote intellectual freedom in accordance with the Code of Conduct – finds scope and substance in the Code, which is consistent with the promise. The scope and substance of the commitment is necessarily different as between academic staff members and non-academic members of staff. Academic staff members have the particular rights described in the Enterprise Agreement and which are given additional content in the Code of Conduct. The standards by which these rights are to be exercised are prescribed in the Code of Conduct.

100 The construction of the Enterprise Agreement for which Professor Ridd contends would elide any distinction between intellectual freedom and academic freedom. If cl 14 provides for the right of all staff to express their views in any manner they so choose, subject only to the constraint directed at harassment, vilification, bullying or intimidation, there would be no distinction between academic freedom and intellectual freedom. In the context of a

university, it cannot be supposed that such a consequence would have been intended by the drafters and that the particular privileges and obligations that attend academic discourse would be irrelevant.

101 It is also necessary to construe the Enterprise Agreement as a whole. The interaction between cll 13 and 14 and the provisions relating to misconduct and serious misconduct in cl 54 are significant. Clause 54 provides the mechanism, to which the parties to the Enterprise Agreement have agreed, for JCU to discipline staff for misconduct and serious misconduct. The Enterprise Agreement is the sole source of the grounds for the termination of employment. The Enterprise Agreement provides that "Termination of employment can only be used in the event of proven unsatisfactory performance or Serious Misconduct" (cl 8). There is no power in cl 54 for JCU to take disciplinary action against an employee for serious misconduct unless that conduct falls within the definition in cl 8 — being any serious breach of the Code of Conduct (or as defined by the *Fair Work Regulations 2009* (Cth) or the *Crime and Misconduct Act 2001* (Qld)).

102 Clause 14 purports to place explicit prohibitions on particular conduct, including harassment, vilification, bullying or intimidation of others, failing to adhere to the highest standards of propriety and truthfulness in scholarship research and professional practice, representing opinions as those of JCU, and intentionally identifying themselves in association with their university appointment when contributing to public debate in their individual capacity. The Enterprise Agreement does not provide a mechanism for JCU to discipline a staff member for serious misconduct in breach of any of the prohibitions of cl 14. That is because the definition of "serious misconduct", which triggers the disciplinary processes in cl 54.3, does not include a breach of the Enterprise Agreement. The fact that cl 14 commits JCU to act "in accordance with" the Code of Conduct is consistent with the overall framework of the Enterprise Agreement which provides for JCU's commitment to protect and promote intellectual freedom, appropriately for different categories of staff within the University, and in a manner consistent with the ethical principles which guide the actions of staff as articulated in the Code of Conduct.

103 Clause 13 and the Code of Conduct are consistent and compatible with the Enterprise Agreement. The latter informs the content of the exercise of intellectual freedom; the former regulates the manner in which that freedom may be exercised within the framework of this

particular Enterprise Agreement (which, it should be noted, has now been superseded by an enterprise agreement in different terms) and this particular Code of Conduct.

104 JCU did not contravene cl 14 of the Enterprise Agreement in taking disciplinary action against Professor Ridd on the basis of the breaches by him of the Code of Conduct, which were not contested in the Court below, nor in requiring him to comply with the standards of behaviour prescribed in the Code of Conduct. Contrary to the conclusion reached by the primary judge, none of the *First – Fourth, Sixth – Eighth, Twelfth – Seventeenth Findings*, the *First* and *Second Speech Direction*, nor the *No Satire Direction* was unlawful.

THE CONSTRUCTION OF CL 54.1.5

105 Clause 54.1 sets out the general principles relating to misconduct and serious misconduct. Clause 54.1.5 was relied on by JCU as one source of its power to direct Professor Ridd to keep the disciplinary processes confidential. Importantly, however, JCU also relied on a separate source of power to give such directions, namely that arising under the common law relating to an employee's legal obligation to obey any reasonable and lawful direction given to the employee by the employer.

106 The drafting of cl 54.1.5 suffers from the same difficulties that attend the Enterprise Agreement as a whole. Its drafting confounds a straightforward construction. Clause 54.1.5 (which appears in Part G of the Enterprise Agreement, "Conduct and Disputes") provides:

> 54.1 General principles
>
> …
>
> 54.1.5 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
>
> (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 information is already in the public domain.

107 Clauses 54.2 and 54.3 describe the procedures and processes applying to concerns that a staff member has engaged in misconduct or serious misconduct. The processes contemplate the possible involvement of a broad range of persons in any such process, not limited to the

person who is the subject of concern or any complainant. As will shortly emerge, the range of persons extends from the staff member's line manager up to the Vice-Chancellor.

108 The primary judge held that the purpose of the cl 54.1.5 is to benefit and protect the employee (*Ridd v James Cook University* [2019] FCCA 997 [269]). He said that, "If it were the case that a staff member had confidentiality obligations, the clause would have been written to reflect that, which reinforces the conclusion that cl 54.1.5 did not mandate confidentiality obligations on a staff member" (*Ridd v James Cook University* [2019] FCCA 997 [277]).

109 The language used in cl 54.5.1 does not, in its express terms, impose an obligation on Professor Ridd to maintain confidentiality. On one view, the language used might be considered to denote the expression of an aspiration that something will occur, namely that the confidentiality of all parties will be respected. Alternatively, the use of the passive voice might be considered to bind all parties to a regime set out in the Enterprise Agreement. The context is critical. What matters (in accordance with the principles referred to in [65] above) is what the language used means in the context of the Enterprise Agreement as a whole.

110 Clause 54.1.5 is clumsily drafted, as is evident from the following matters. The chapeau deals with two arguably separate but related matters, namely the confidentiality of all parties involved in the management of misconduct and serious misconduct processes (whose confidentiality will be respected) **and** a commitment that all information gathered and recorded will remain confidential, both matters which are then subject to JCU's obligations. The reference to the "confidentiality of all parties involved *in the management of* Misconduct and Serious Misconduct *processes*" (emphasis added) does not simply refer to the confidentiality of all parties *to* the misconduct and serious misconduct processes. If the latter wording had been employed, it might more readily have been discerned that the clause was directed to protecting the confidentiality of, for example, the complainant and the staff member the subject of the disciplinary process. The parties involved *in the management of* misconduct and serious misconduct *processes* include a range of parties in addition to JCU and the relevant staff member. Those parties, as referred to in the procedures detailed in cll 54.2 and 54.3, potentially include a line manager, a supervisor, the Director of Human Resources Management, an Investigator, the Senior Deputy Vice-Chancellor and the Vice-Chancellor. On one view, if attention is focussed only on the first part of the chapeau, cl 54 seems directed to respecting the confidentiality of those parties.

111 As noted above, however, the second part of the chapeau to cl 54.1.5 also refers to "all information gathered and recorded will remain confidential". This appears to go beyond respecting the confidentiality of all parties involved in the management of the processes, which is the subject of the first part of the chapeau. The second part of the chapeau is sufficiently wide to include information relating *inter alia* to any complainant and the staff member who is the subject of the disciplinary processes. Such a construction is consistent with the evident purpose of the clause, which is to cast a cloak of confidentiality over the entirety of the disciplinary process, subject to some express exceptions listed therein. It is unlikely that the parties to the Enterprise Agreement were concerned only to protect the confidentiality of managers involved in administering the relevant processes and not also any complainant and the staff member who is subject to those processes. This broader construction of cl 54.1.5 sits more comfortably with the evident purpose of the provision than the construction adopted by the primary judge.

112 In our respectful view, the primary judge gave too much emphasis in the chapeau to cl 54.1.5 to the phrase "subject to JCU's obligations", which is then followed by four sub-paragraphs. This further highlights the clumsiness of the drafting of the clause. Although there are four separate sub-paragraphs which one would reasonably expect identify the obligations of JCU, in fact only sub-paragraph (a) squarely fits that description. The syntax of sub-paragraph (b) (i.e. starting with "**for** a proceeding…") does not flow naturally from the term "obligations".

113 Moreover, it is notable that the disjunctive "or" does not appear at the end of sub-paragraph (a), yet it does appear at the end of both sub-paragraphs (b) and (c). Further, sub-paragraphs (c) and (d) do not truly identify the JCU's obligations. Rather, they create exceptions, as is reflected in the use of the term "unless" at the beginning of each sub-paragraph.

114 Finally, we consider that the matters referred to in sub-paragraphs (c) and (d) provide some limited support for the broader construction of cl 54.1.5 which we favour. The drafting of both those provisions is sufficiently broad to encompass confidential information relating not only to persons involved in managing the disciplinary process, but also any complainant or staff member who is involved in the process (i.e. being persons "to whom the confidential information relates" or who give consent). Additionally, where the relevant confidential information is already in the public domain, it would not make sense to impose a

confidentiality obligation in respect of that information on any person, including in this case, Professor Ridd.

115 Clause 54.1.5 is properly construed as imposing an obligation on all parties involved in the management of the disciplinary processes, as well as any complainant or relevant staff member and the University itself, to respect the confidentiality of all persons involved and to keep information gathered and recorded confidential. The clause then provides specifically for two sets of circumstances in which the confidentiality does not enure. First, the clause provides that JCU can be relieved of its obligation of confidentiality if it is required to discharge its responsibilities under an Act or University policy (for example, in compliance with its duty to notify of a complaint that does or may involve official misconduct pursuant to s 38 of the *Crime and Misconduct Act 2001* (Qld)) (cl 54.1.5 (a)), or for (sic) a proceeding in a court or tribunal (54.5.1(b)). Secondly, as indicated by the use of the disjunctive "or" after sub-cl (b), there is no obligation of confidentiality on any party involved in the management of misconduct or serious misconduct processes, in circumstances consistent with the principles of the duty of confidence at law and in equity. Thus, an exception exists when 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 (cl 54.5.1(c)), and when the information is already in the public domain (cl 54.5.1(d)).

116 When construing the Enterprise Agreement as a whole, it would be a surprising result if the parties to the Agreement had intended that any staff member, who was the subject of any allegation of misconduct or serious misconduct, could disclose at will any information about those proceedings, including information about the complainant and the parties involved in managing the proceedings.

117 The primary judge's conclusion that cl 54.1.5 did not impose confidentiality obligations on a staff member was erroneous.

THE ALTERNATIVE SOURCE OF POWER TO GIVE THE CONFIDENTIALITY DIRECTIONS

118 At trial and in the appeal, JCU relied not only on cl 54.1.5 as a source of power to give the *Confidentiality Directions*, but also on its powers at common law as an employer to give a lawful and reasonable direction to an employee. Even if we are wrong in our construction of

cl 54.1.5, we consider that this alternative source of power is available to sustain the lawfulness of the *Confidentiality Directions*.

119 The primary judge found (*Ridd v James Cook University* [2019] FCCA 997 at [286] and see also [289]) that JCU did not rely on its common law rights as employer. That is plainly wrong. The University expressly relied on that alternative source of power in its written submissions below (at [140]-[143]) which it reaffirmed in the course of oral address below. Moreover, it was made clear to Professor Ridd in two letters he received from the University that it relied separately on those common law powers (see the letters dated 6 October 2017 and 17 October 2017).

120 In this Court, JCU continued to rely on its common law powers in the alternative to its submissions on cl 54. In the appeal, Professor Ridd submitted that in the Court below he challenged the *Confidentiality Directions* on the ground that they were unreasonable and unlawful, but he then added that this was "beside the point because the confidentiality obligations infringed on the intellectual freedom ground" [Ridd submissions [46]]. Professor Ridd did not contend that the alternative source of power argument was not pressed below.

121 Whether the *Confidentiality Directions* were given in reliance on a term in the Enterprise Agreement, or pursuant to the common law right of an employer to give reasonable and lawful directions, none of the directions impinged upon the respondent's right to intellectual freedom as provided for in cl 14. Clause 14 does not confer on a member of staff the freedom to disregard an obligation imposed on that staff member by virtue of a term of the Enterprise Agreement, breach of which could have penal consequences pursuant to s 50 of the FWA, or alternatively by virtue of an employer's common law right to give a reasonable and lawful direction.

122 All five directions were justified by reference to cl 54.1.5 of the Enterprise Agreement (and/or, if necessary, JCU's common law right to give reasonable and lawful directions, having regard to Professor Ridd's limited response to this aspect of JCU's case below as we explain later at [172] to [180]), including directions with respect to confidentiality, in its capacity as employer. JCU did not breach cl 14 of the Enterprise Agreement in giving such directions, nor in making the *Fifth* and *Ninth – Eleventh Findings*, and did not contravene s 50 of the FWA.

123 It follows that, contrary to the conclusion of the primary judge, neither of the censures nor the termination of Professor Ridd's employment contravened cl 14 of the Enterprise Agreement. The declaration that JCU contravened s 50 of the FWA must be set aside.

124 That is sufficient to dispose of the appeal. Nevertheless, an alternative ground of appeal was agitated and JCU also challenged the amount of compensation and imposition of the pecuniary penalty. These matters arise only if we are wrong in our construction of cl 14 of the Enterprise Agreement. Noting, however, the observations of the High Court in *Kuru v State of New South Wales* [2008] HCA 26; 236 CLR 1 at [12] regarding the importance of intermediate courts of appeal considering whether to deal with all grounds of appeal and not just the decisive ground, we will now address those other matters.

THE ALTERNATIVE GROUND OF APPEAL

125 JCU submitted that, if it were wrong about the proper construction of the Enterprise Agreement and its interaction with the Code of Conduct, the primary judge nevertheless erred in characterising each act engaged in by Professor Ridd as an exercise of "intellectual freedom", such that each decision taken and each direction issued by JCU infringed that right. The primary judge concluded that JCU breached the rights that Professor Ridd had under cl 14 by pursuing allegations of misconduct and by giving directions to keep matters confidential. In so doing, it is said that JCU itself breached cl 14. Professor Ridd submitted that, if each circumstance of conduct charged against him falls within the scope of conducted permitted by cl 14, the primary judge was right to hold that JCU acted in contravention of cl 14, and therefore contravened s 50 of the FWA.

126 Such a construction is not without difficulty. On a plain reading, cl 14.1 does not impose an obligation on JCU, a breach of which could be considered a contravention of the Enterprise Agreement. Rather, it is an expression of a commitment to act in a particular way and, significantly, in accordance with the Code of Conduct. Although there was no attempt to articulate what was meant by the phrase "protection and promotion", it is not insignificant in the context of an enterprise agreement that the phrase appears to have been picked up from its use in the context of the definition of "industrial association" in s 12 of the FWA, and its predecessor, where the purpose of such an association is defined variously according to the type of association as "the protection and promotion of their [employees', independent contractors', or employers'] interests" in matters concerning employment". Within that statutory definition, there is some recognition of reciprocity in the need for the interests of

both employees and employers to be protected and promoted. Similar reciprocity is evidenced in cl 14.1 where JCU's commitment is to the protection and promotion of intellectual freedom *within the University*, an entity that is concerned with the interests of staff, both academic and non-academic, JCU as an employer, students, and "work units", which includes Institutes and Centres (such as AIMS and the ARC Centre of Excellence). JCU's commitment must be viewed in the context of the whole of cl 14, from which it can be seen that the obligation to protect and promote must be tempered by the expectations and boundaries it sets in relation to respecting the rights of others, proscribing harassment, vilification, bullying and intimidation, supporting JCU as a place of independent learning and thought, and the maintenance by staff of professional standards. It is a multi-dimensional commitment to the protection and promotion of intellectual freedom.

127 The language of "commitment" is also used in cl 12.1, which expresses JCU's commitment to "communicating and consulting with staff on workplace matters" and in cl 9.1, which expresses the University's commitment "to achieving the long term goal of at least 7.4% of JCU staff" being Aboriginal or Torres Strait Islander peoples. None of these clauses is couched in such sufficiently clear language as to suggest the possibility of penal consequences flowing from an alleged breach.

128 The primary judge found that, in respect of each element of conduct the subject of findings made by JCU, Professor Ridd had been exercising his rights to intellectual freedom: in relation to the *First Finding* under cll 14.2 and 14.3; the *Second Finding* and *Seventeenth Finding* under cl 14; the *Third, Fourth, Sixth, Seventh, Twelfth, Thirteenth, Fifteenth, Sixteenth Findings* under cll 14.2 and 14.4; and the *Eighth Finding* under cl 14.2.

129 The primary judge held further that JCU had breached cl 14 in giving the *Confidentiality Directions* and in making the *Fifth, Ninth, Tenth* and *Eleventh Findings* with respect to their breach, the two *Speech Directions*, the *No Satire Direction* and in making the *Fourteenth Finding* in respect of the breach of the latter, because each of the directions contravened Professor Ridd's rights pursuant to cl 14.

130 The primary judge erred in holding that, in each case the subject of the findings by JCU, Professor Ridd had been exercising a right under cl 14, which right could be breached by JCU in bringing disciplinary proceedings or issuing directions.

131 As has already been observed, the rights listed in cl 14.2 are descriptive (or definitional) of the rights that are encompassed within the concept of "intellectual freedom". The scope of the definitional examples of the exercise of intellectual freedom in cl 14.2 is explained in the subsequent sub-clauses. Specifically, intellectual freedom includes the rights of staff to:

- express unpopular or controversial views — subject to the responsibility to respect the rights of others and the prohibition on harassment, vilification, bullying or intimidation (14.3);
- express disagreement with University decisions and with the processes used to make those decisions — subject to the requirement that staff should seek to raise their concerns through applicable processes (14.4).

132 Professor Ridd submitted that cl 14 was a shield, not a sword. If each element of the conduct the subject of the findings could properly be said to be the expression of unpopular or controversial views (that nevertheless respected the rights of others) or the expression of disagreement with University decisions and the processes used to make those decisions, then a decision to discipline Professor Ridd for that conduct would be inconsistent with JCU's commitment to act in a manner consistent with the protection and promotion of intellectual freedom within the University. Such a matter should then have been raised as a defence to the disciplinary proceedings.

133 It is clear that some of the elements of Professor Ridd's conduct, particularly in expressing his opinions to the journalist in the email of 16 December 2015 and in the Sky Interview (the subjects of the *First* and *Second Findings*) did, *prima facie*, fall within the scope of the acknowledged right in 14.3. If JCU had disciplined Professor Ridd simply for expressing those opinions, JCU's apparent failure to act in a manner consistent with the protection and promotion of intellectual freedom might have been used as a defence to the charges of misconduct and serious misconduct — but would not of itself amount to breach of a term of the Enterprise Agreement by JCU. In any event, JCU did not discipline him on that basis. It was concerned about the correlative duty Professor Ridd owed to his colleagues, and also to those academics associated with the institutions he criticised. There was no suggestion that he harassed, vilified, bullied or intimidated those who disagreed with his view.

134 Clause 14.3 imposes the additional constraint that a staff member has a responsibility to respect the rights of others. Those rights are not limited to the right not to be harassed, vilified, bullied or intimidated but include such other rights as may be encroached on by the

expression of unpopular or controversial views, such as the right not to be defamed. The issue of whether Professor Hughes was in fact defamed by Professor Ridd was not in issue at the trial of the action, no doubt because Professor Ridd was not disciplined by JCU for breach of cl 14.3 of the Enterprise Agreement — it is neither misconduct nor serious misconduct to breach cl 14 of the Enterprise Agreement. Similarly, the Enterprise Agreement does not ground a claim against JCU for breach of cl 14 in circumstances where it does not create an obligation or a duty on the part of JCU.

135 It is also clear that some of the elements of Professor Ridd's conduct are unable to 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), and general criticism of JCU or the university sector more broadly (not particular disagreement with University decisions or processes). Examples include the emails to students the subject of the *Third, Fourth, Sixth, Seventh*, *Eighth, Twelfth, Thirteenth, Fifteenth* and *Sixteenth Findings*. These are examples of what the primary judge seemed to have had in mind when he said, "If a person were exercising "intellectual freedom" which went beyond what was permitted in cl.14, then *ipso facto*, they would not be exercising intellectual freedom under cl 14" (*Ridd v James Cook University* [2019] FCCA 997 [264]). The primary judge erred in mischaracterising these elements of Professor Ridd's conduct as an exercise of intellectual freedom within cl 14.

136 Professor Ridd's conduct subsequent to the *Final Censure*, and on which his termination was grounded, had nothing to do with the exercise of intellectual freedom pursuant to cl 14. Subsequent to his *Final Censure*, Professor Ridd was found to have deliberately disclosed confidential information about the 2017 disciplinary process to *The Australian*, to another person, on a website, and by causing or allowing a flyer to be distributed on campus disclosing the outcome of the disciplinary proceedings and stating that he had no intention of complying with the *Final Censure*. JCU considered that such breaches demonstrated a willingness to disobey lawful and reasonable directions given to him by his employer and were destructive of the necessary trust and confidence for the continuance of the employment relationship. The primary judge held that the termination was unlawful because it punished Professor Ridd for conduct that was protected by cl 14. The primary judge reasoned that JCU was unable to rely on the *Final Censure* because JCU had no power to make the five *Confidentiality Directions* given to Professor Ridd.

137 The primary judge erred in holding that each of the *Confidentiality Directions* issued by JCU was an infringement of Professor's Ridd future exercise of intellectual freedom properly so characterised and so contravened cl 14 of the Enterprise Agreement. If necessary, the alternative ground of appeal would also have been upheld.

THE PENALTY JUDGMENT

138 Grounds 4 and 5 of the Amended Notice of Appeal only arise if, contrary to the conclusions reached above, the appeal were otherwise dismissed. If the appeal had otherwise been dismissed, grounds 4 and 5 would have been allowed in part. The primary judge awarded Professor Ridd the sum of $1,094,214.47 by way of compensation for the contraventions of cl 14 of the Enterprise Agreement and the sum of $125,000 by way of pecuniary penalty (*Ridd v James Cook University (No 2)* [2019] FCCA 2489).

139 Subsequent to the delivery of the judgment on liability, but prior to the hearing on the financial consequences of that judgment, the Vice Chancellor of JCU, Professor Sandra Harding, issued a statement by group email to all persons on the JCU mailing list, which email was reproduced in a media release (the **Email**). There was also a link to the statement on the JCU Twitter feed. The Email was highly critical of the decision of the primary judge. It was also critical of Professor Ridd. The primary judge said of this Email, "I have been at pains to ensure that the Court does not "punish" JCU for publishing the statement. Any issue of repercussions on JCU by a Court or other authority, because of this publication, are not issues that have arisen in the assessment of this matter. However … the email, the press release and tweet are not insignificant matters when the assessment of compensation and pecuniary penalties are considered" (*Ridd v James Cook University (No 2)* [2019] FCCA 2489 [14]).

140 Ground 4 challenges the award of $1,094,214.47 by way of compensation for the loss suffered by Professor Ridd on four bases:

a. an error as to the date on which Professor Ridd had pleaded that he would have continued to work which increased the sum awarded;

b. an erroneous finding that JCU had failed to prove that Professor Ridd had not mitigated his losses;

c. erroneously finding that the compensation for future economic loss should be discounted at a rate of 5%; and

d. an error in finding that Professor Ridd was entitled to compensation for general damages of $90,000 in circumstances where Professor Ridd suffered no psychiatric or diagnosed medical condition.

141 It was uncontroversial that the Court's power to award compensation derives from ss 545(1) and (2) of the FWA, which include:

> **Orders that can be made by particular courts**
>
> *Federal Court and Federal Circuit Court*
>
> (1) The Federal Court or the Federal Circuit Court may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision.
>
> …
>
> (2) Without limiting subsection (1), orders the Federal Court or the Federal Circuit Court may make include the following:
>
> (a) an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention;
>
> (b) an order awarding compensation for loss that a person has suffered because of the contravention;
>
> (c) an order for reinstatement of a person.

142 There was also no dispute about the relevant principles to be applied by an appellate court when reviewing a primary judge's conclusions which are evaluative in nature: *Robinson Helicopter Company Inc v McDermott* [2016] HCA 22; 331 ALR 550 [43]; *Aldi Foods Pty Ltd v Morrocanoil Israel Ltd* [2018] FCAFC 93; 261 FCR 301 [6]-[7]; *Optical 88 Ltd v Optical 88 Pty Ltd* [2011] FCAFC 130; 197 FCR 67 [33]. As Griffiths J stated in *Commissioner of Taxation v Scone Race Club Ltd* [2019] FCAFC 225; 374 ALR 189 [50] (in dissent and noting that an application for special leave to appeal has been filed in the High Court):

> …the relevant question is not whether [the appellate court] disagrees with those conclusions but is rather whether it detects error. Where error is found this indicates not merely that the appellate court has a different view from the primary judge, but that the primary judge's view is wrong even having regard to the advantages enjoyed by the primary judge and even taking into account the subject matter. The extent of the perceived advantages of the primary judge in any particular case is relevant to how extensive the difference of opinion must be to warrant appellate court intervention.

143 The primary judge found Professor Ridd "to be scrupulously honest" (*Ridd v James Cook University (No 2)* [2019] FCCA 2489 [143]).

144 Professor Ridd pleaded that he would have continued to work on a full time basis until the age of 60 and on a part time basis until the age of 63. The tables in the pleading which set out the calculation of loss and damage for economic loss calculated Professor Ridd's loss of full time income until the age of 61 and his loss of part time income until the age of 64.

145 Professor Ridd gave evidence at trial that he intended to work until the age of 65. JCU's counsel objected to this evidence and said expressly "I'm going to hold my friend to his pleaded case" [Transcript, 19.07.19, P-107]. The primary judge accepted that Professor Ridd was being truthful when he gave his evidence but that he "is estopped from claiming any period other than that which he has specifically pleaded" (*Ridd v James Cook University (No 2)* [2019] FCCA 2489 [33]).

146 This is not a case where "the parties have chosen some issue different from that disclosed in the pleadings as the basis for the determination of their respective rights and liabilities" (cf *Banque Commercial SA v Akhil Holdings Ltd* [1990] HCA 11; 169 CLR 279 [18]), nor was there any admission from which one party sought to resile (cf *Holdway v Arcuri Lawyers (A Firm)* [2008] QCA 218; [2009] 2 Qd R 18). It is evident from the transcript of the hearing that counsel for both Professor Ridd and for JCU, and also the primary judge, were agreed that damages for economic loss were to be calculated until he turned 63 on Christmas Day 2023.

147 The primary judge erred in awarding Professor Ridd damages on the basis that he would have continued to work full time until the age of 61 and part time until the age of 64. Damages should have been calculated on the basis that Professor Ridd would have continued to work full time until the age of 60 and part time until the age of 63.

148 As to the issue of mitigation, JCU adduced no evidence as to possible sources of alternative employment that might be available to Professor Ridd. The primary judge accepted Professor Ridd's evidence that he was seen as "damaged goods" and would find it difficult to obtain alternative employment in the field (*Ridd v James Cook University (No 2)* [2019] FCCA 2489 [83]-[84]). The primary judge also rejected the proposition that Professor Ridd had failed to mitigate his loss in failing to enter into reasonable undertakings with JCU. Those undertakings would have permitted Professor Ridd to continue to work at JCU but would have required him to maintain confidentiality about the disciplinary proceedings, which in turn would have prevented him from continuing to raise funds for his legal proceedings. The primary judge reasoned that as he had held the *Confidentiality Directions* to be unlawful, it

was not unreasonable for Professor Ridd to refuse to give the requested undertakings ([98]). The primary judge also accepted Professor Ridd's unchallenged evidence that he did not trust JCU to "keep up its end of the bargain" and held that such misgivings "were certainly not misplaced or over-stated" in light of the Email ([99]).

149 No appealable error has been established in relation to the primary judge's finding that JCU failed to prove that Professor Ridd had not mitigated his loss.

150 The primary judge found that the compensation for future economic loss (which was for a period of approximately 5 years and 7 months) ought be discounted at a rate of 5% on the basis of the vicissitudes of life or human contingencies. JCU submitted that the primary judge failed to take into account the possibility and probability of changes in Professor Ridd's planned retirement dates, including due to illness, death or resignation and additionally, failed to have regard to the possibility that Professor Ridd's employment may have been terminated by JCU for other reasons, including for misleading JCU regarding the provision of documents and materials to *The Australian*, a matter which emerged during cross-examination. JCU submitted that this failure amounted to error within the first limb of *House v The King* [1936] HCA 40; 55 CLR 499 and contended that a discount of 20-25% was more appropriate.

151 As to the possibility of termination of employment on other grounds, Professor Ridd's evidence in cross-examination contradicted a letter that had been written by his solicitors to the solicitors for JCU. The primary judge rejected that any inference could be drawn that Professor Ridd had instructed his solicitors to lie. No such suggestion was put to Professor Ridd. As to the general vicissitudes, the primary judge accepted as truthful Professor Ridd's evidence that, had there been no disciplinary processes, he would have worked until the age of 65; he refuted any suggestion that he planned to retire at 60. There was no evidence to suggest that Professor Ridd suffered from any medical condition that might shorten his working life (*Ridd v James Cook University (No 2)* [2019] FCCA 2489 [63]-[73]).

152 No appealable error has been established in relation to the primary judge's finding that a 5% discount for the vicissitudes of life was appropriate.

153 The primary judge awarded $90,000 for general damages. The primary judge accepted Professor Ridd's evidence that the actions of JCU caused him stress, anxiety and humiliation. The primary judge acknowledged, however, that "Professor Ridd has no psychiatric injury or

any lasting or significant medical condition that can be attributed to the actions of JCU" (*Ridd v James Cook University (No 2)* [2019] FCCA 2489 [150]).

154 No interference with an award of general damages made by the primary judge can be made unless the Court considers "either that the trial judge acted on an error of principle, misapprehended the facts, allowed extraneous matters to affect the assessment, failed to take account of a material consideration or that the judge has made a wholly erroneous estimate of the damages" (*Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82; 223 FCR 334 [76]). JCU contends that, given this acknowledgement, the primary judge erred in awarding general damages. It submitted that an award of general damages is, in the main, referable to pain and suffering and loss of enjoyment of life. JCU also submitted that, in referring to s 3(e) of the FWA, which sets out as an object of the Act "protecting against unfair treatment", the primary judge applied an incorrect principle of law.

155 The express terms of s 545(1) of the FWA permit the Court to make orders which it considers to be "appropriate" in the circumstances where it is satisfied that a person has contravened or proposes to contravene a civil remedy provision. It is not, however, boundless. The terms of s 545(2), by its opening words "[w]ithout limiting subsection (1)", go no further than to ensure that s 545(1) is not read down in light of the specific orders set out in s 545(2) as examples of what orders may be made under s 545(1) (*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3; 262 CLR 157 [23]-[25]). The section should not be read down so as to prevent an award for general damages, unconnected to personal injury, to include an amount representing "hurt and humiliation" suffered by reason of the contravention. In *Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* [2011] FCA 333; 193 FCR 526 [441]-[442], Barker J said:

> The question arises, however, whether the court may order compensation, that is to say, the payment of a pecuniary sum on account of hurt and humiliation found to be a direct consequence of contravention of ss 340 and 346 of the FW Act. There is no direct authority under the FW Act concerning this question. However, approaching the question as a matter of first principle, it is plain that s 545(1) is intended to provide the court with a very broad power to make appropriate orders where contravention is established. In this s 545(2) provides confirmation that certain types of orders – for example, an order awarding compensation for the loss a person has suffered because of a contravention – may be made. But s 545(2), in this regard, expressly states that is has effect "without limiting subs (1)".
>
> As a matter of principle it is difficult to see why a compensatory financial order cannot be made in respect of hurt and humiliation … shown to be a direct consequence of the contravention.

156 This reasoning was relied on by Flick J in *Transport Workers' Union of Australia, New South Wales Branch v No Fuss Liquid Waste Pty Ltd* [2011] FCA 982 in making an award for compensation with an amount representing "hurt and humiliation" for contraventions of the proscriptions concerning freedom of association in ss 340 and 346 of the FWA.

157 There is no obvious policy consideration that militates against a conclusion that a compensation order under s 545(2) for contravention of s 50 of the FWA should not include a component for shock, distress, hurt or humiliation. Indeed, the express exclusion of such a component in respect of a claim for unfair dismissal in s 392(4) suggests a contrary conclusion (*Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* [2011] FCA 333; 193 FCR 526 [444]).

158 The primary judge accepted that the actions of JCU caused Professor Ridd stress, anxiety and humiliation and that he suffered shock and embarrassment. This evidence was not challenged. The extent to which the primary judge took account of the Email when assessing general damages is not clear from his Honour's reasons, although it is clear that it had some effect on his reasoning. The Email was not causative of the loss for which the primary judge was required to assess compensation under s 545(2). It could, however, be considered to have exacerbated the loss that had been directly caused by the contraventions.

159 In all the circumstances, we are not persuaded that any error of principle has been shown by the primary judge to warrant interference with the assessment of general damages.

160 In respect of the imposition of the pecuniary penalty, JCU contends that the primary judge erred in failing to identify that either under s 557 of the FWA and/or at common law, the course of conduct principle required that JCU not be punished twice for the same culpability where there is an interrelationship between legal and factual elements of two or more contraventions. The approach of an appellate court to a trial judge's characterisation and assessment of the contraventions in the course of assessing a pecuniary penalty is subject to the principles in *House v The King* [1936] HCA 40; 55 CLR 499, 504-505 (*Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union (the Hutchison Ports Appeal)* [2019] FCAFC 69 at [118]-[119] per Flick, Ross and Rangiah JJ). It is therefore necessary that some error of principle be shown, not just that the appellate court would have imposed a different penalty.

161 Section 557(1) provides:

> For the purposes of this Part, 2 or more contraventions of a civil remedy provision referred to in subsection 2 [which includes the contravention of enterprise agreements, s 50] are, subject to subsection (3), taken to constitute a single contravention if:
>
> (a) the contraventions are committed by the same person; and
>
> (b) the contraventions arose out of a course of conduct by the person.

162 JCU submitted that the primary judge failed to have regard to the incontrovertible fact that all the findings and declarations made related to a single breach of cl 14 such that, upon the correct application of the legal principle, the primary judge should have found that there was a single course of conduct reflecting the common legal and factual element that JCU relied on the Code of Conduct in a way it considered compatible with cl 14.

163 As was observed in *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; 269 ALR 1 [39] and reiterated in *Parker v Australian Building and Construction Commissioner* [2019] FCAFC 56; 270 FCR 39 [268] (emphasis in original):

> …a "course of conduct" or the "one transaction principle" is not a concept peculiar to the industrial context. It is a concept which arises in the criminal context generally and one which may be relevant to the proper exercise of the sentencing discretion. The principle recognises that where there is an interrelationship between the *legal and factual elements of two or more offences* for which an offender has been charged, care must be taken to ensure that the offender is not punished twice for what is essentially the same criminality. That requires careful identification of what is "the same criminality" and that is necessarily a factually specific enquiry. Bare identity of motive for the commission of separate offences will seldom suffice to establish the same criminality in separate and distinct offending acts or omissions.

164 The primary judge held that a course of conduct is not founded upon the underlying reason for the conduct, but upon the behaviour that constitutes the conduct (*Ridd v James Cook University (No 2)* [2019] FCCA 2489 [156]). He identified that behaviour as: first, the behaviour that stems from the making of the first censure; secondly, the behaviour that stems from the making of the second censure; thirdly, the behaviour that stems from the making of the confidentiality and other similar directions; fourthly, the behaviour that stems from the termination of Professor Ridd's employment. In this respect, the primary judge has misconceived the test for ascertaining whether there was a single course of conduct and has not considered the interrelationship between the common legal and factual elements.

165 All of the contraventions involved the common legal and factual element that JCU understood that the Code of Conduct applied to Professor Ridd's actions such that it was entitled, at law, to make the various confidentiality and similar directions, to censure

Professor Ridd and, ultimately, to terminate his employment. All of the contraventions were held by the primary judge to be of a single term in the Enterprise Agreement, cl 14.

166 The primary judge erred in finding there were four courses of conduct. It is therefore appropriate for the discretion to be re-exercised in circumstances where the Court is in as good a position as the primary judge to determine the appropriate pecuniary penalty. His Honour should have found that there was only a single course of conduct which reflected the common legal and factual element that the University relied upon the Code of Conduct in a way that it considered was compatible with cl 14.

167 Many of the principles to be applied in imposing a pecuniary penalty were set out by Flick J in *Patrick Stevedores Holdings Pty Ltd v Construction, Forestry, Maritime and Energy Union* [2019] FCA 1647 [29]-[30] (citations abridged):

> First, a primary purpose in imposing penalties is deterrence: *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46, 258 CLR 482 [55]. See also: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113, 254 FCR 68 [98]-[99].
>
> Second, the process of quantifying an appropriate penalty is not an "*exact science*" but rather a process of "*instinctive synthesis*": *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8, 165 FCR 560 *[27]-[28], [55] and [78]*. It nevertheless remains a process guided by a consideration of a number of well-accepted factors. In *Kelly v Fitzpatrick* [2007] FCA 1080, 166 IR 14 [14], Tracey J was called upon to quantify penalties for admitted contraventions of the Transport Workers Award 1998 and in doing so adopted the following as a "*non-exhaustive range of considerations*" to be taken into account:
>
> - the nature and extent of the conduct which led to the breaches;
> - the circumstances in which that conduct took place;
> - the nature and extent of any loss or damage sustained as a result of the breaches;
> - whether there had been similar previous conduct by the respondent;
> - whether the breaches were properly distinct or arose out of the one course of conduct;
> - the size of the business enterprise involved;
> - whether or not the breaches were deliberate;
> - whether senior management was involved in the breaches;
> - whether the party committing the breach had exhibited contrition;
> - whether the party committing the breach had taken corrective action;
> - whether the party committing the breach had cooperated with the enforcement authorities;

- the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and
- the need for specific and general deterrence.

168 The following matters are significant in the present case. The contraventions took place over a period of almost two and a half years but arose from the one course of action embarked upon by Professor Ridd in December 2015 from which all subsequent matters flowed. JCU considered that Professor Ridd had breached the Code of Conduct, and that he continued to do so in a variety of ways over the next two years. The parties had competing legal advice as to whether the Code of Conduct or the Enterprise Agreement prevailed. The lawfulness, or otherwise, of JCU's contraventions could not be predicted with certainty. There was no suggestion that the contraventions were deliberate. Indeed, JCU did not believe them to be contraventions, nor that similar contraventions had previously occurred. JCU did not act in contumelious disregard of its obligations under the FWA. In the circumstances, this is not a case where the need for specific or general deterrence is a significant factor. It is to be presumed that a university, and its legal advisors, would take heed of the construction of its Enterprise Agreement by a court.

169 Nevertheless, the contraventions that were found to have occurred took place within a university and against the background of JCU having committed, through the Enterprise Agreement, to achieve and maintain the highest standards of ethical conduct (cl 13.2). Its maintenance of disciplinary action in several instances of what can only be regarded as trivial breaches of the Code of Conduct did not reflect the highest standards of ethical conduct. Nor did JCU's conduct in searching Professor Ridd's email account in order to uncover additional breaches of the Code of Conduct. The unethical approach to the matter was compounded by the direction to Professor Ridd that he was not to speak to his wife about the disciplinary matter, albeit that the direction was revoked almost one month later. When found to have contravened the Enterprise Agreement, JCU did not exhibit contrition. As the Email demonstrated, its attitude, and that of senior management, was quite to the contrary.

170 The maximum penalty for a single contravention is $63,000. Having regard to all the circumstances, if it had been necessary to determine a pecuniary penalty it would have been in the amount of $15,000. There was no challenge to the order that the pecuniary penalty should be paid to Professor Ridd and that component of the order would not have been disturbed.

SHOULD PROFESSOR RIDD'S PROCEEDING NOW BE DISMISSED?

171 We have had the opportunity to review Rangiah J's draft reasons for judgment. We shall now explain why we respectfully disagree with his Honour's conclusion that the proceeding should not be dismissed but instead should be remitted to the Federal Circuit Court for a new hearing upon the same evidence with particular reference to the issue whether JCU's common law right as an employer to give lawful and reasonable directions to an employee concerning confidentiality provided an alternative basis to cl 54.1 for the *Confidentiality Directions*.

172 Significantly, nowhere in either the second further amended application or the further amended statement of claim did Professor Ridd raise the reasonableness or lawfulness of any of the *Confidentiality Directions* other than in respect of his central claim that they were not reasonable and/or lawful because they had the effect of prohibiting or limiting the future exercise of his Intellectual Freedom Rights and, therefore, contravened cl 14 of the Enterprise Agreement (see [23A] of the further amended statement of claim and contrast [24] of the amended statement of claim which was deleted by Professor Ridd and replaced by [23A]).

173 In the further amended defence, JCU denied [23A] of the FASOC and claimed that the *First*, *Second* and *Third Confidentiality Directions* did not breach cl 14 because, *inter alia*, the "confidentiality directions were lawful and reasonable, and valid and effective".

174 Although Professor Ridd filed a reply to the further amended defence, he was content to join issue with many of the paragraphs therein, including JCU's defence to [23A].

175 It is also evident from the outlines of written submissions filed below that Professor Ridd did not challenge the reasonableness of the *Confidentiality Directions* at common law. His submissions may be summarised as follows. At [120] of his outline of written submissions below, in challenging JCU's determination that Professor Ridd had breached "his obligations with respect of confidentiality" (when making what he described as the "Second Decision"), Professor Ridd submitted at [120] that "JCU appears to have **principally** relied on cl 54.1 of the Enterprise Agreement" in making that determination (emphasis added). Professor Ridd's written submissions then focussed principally upon the proper construction of cl 54.1 of the EA. Nowhere in his outline of written submissions did Professor Ridd question the reasonableness at common law of JCU's directions regarding confidentiality. The closest he came to that subject was in [135] where, in the alternative to his contentions regarding the proper construction of cl 54.1, he submitted that "in the circumstances of this case a **lawful**

confidentiality obligation could not arise in any event" (emphasis added). This was because he claimed that the disciplinary processes against him (and the related decisions) "were unlawful because JCU did not comply with the Code of Conduct and contravened his Intellectual Freedom Right". This is a different issue to JCU's power at common law to give a reasonable and lawful direction to an employee concerning confidentiality.

176 It is abundantly clear from JCU's outline of written submissions below that it relied upon an employer's right to issue lawful and reasonable directions at common law regarding the confidentiality of information gathered and recorded during disciplinary processes as an alternative source of power to give the *Confidentiality Directions* (see [140]-[143] of that outline).

177 Nowhere in his outline of written submissions in reply did Professor Ridd respond to JCU's alternative reliance upon its common law rights as an employer. Instead, Professor Ridd effectively confined his response to the separate question of the proper construction of cl 54.1 of the Enterprise Agreement, with reference to cl 14.4 (see [66]-[75]).

178 The transcript of the hearing below confirms that the University made plain to the trial judge that it relied upon that aspect of its outline of written submissions concerning the right of an employer at common law to issue a direction to an employee in respect of confidentiality (see T 126-127). There is no record in the transcript below of any oral response by Professor Ridd on that subject.

179 Moreover, as has been emphasised, Senior Counsel for Professor Ridd explicitly stated below that Professor Ridd did not dispute that his conduct (which must have included his conduct in respect of the *Confidentiality Directions*) should not be characterised as breaching the standards in the Code of Conduct (see [23] above).

180 In the light of these matters, JCU's submission in the appeal that Professor Ridd **did not** challenge the University's claims regarding its common law rights as an employer to issue the *Confidentiality Directions* must be accepted. Professor Ridd's challenge to the *Confidentiality Directions* was confined to his claims that they infringed his right to intellectual freedom under cl 14 and that cl 54.1.5 of the EA did not bind him to confidentiality (see [32] of the University's submissions in the appeal).

181 In these circumstances, we see no basis for remitting for a new hearing the issue of whether the *Confidentiality Directions* were "reasonable" at common law. That particular issue was

never contested below by Professor Ridd. It is well settled that a party is bound by the way in which the party conducts its case at trial. As the High Court stated in *University of Wollongong v Metwally (No 2)* [1985] HCA 28; 59 ALJR 481 at 483, with respect to the related question whether a party should be permitted to raise a point on appeal which was not run below:

> Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he fails to put during the hearing when he had an opportunity to do so.

182 Essentially the same general principle was described by Mason J in *O'Brien v Komesaroff* [1982] HCA 33; 150 CLR 310 at [21] and [22] (emphasis added):

> 21. In some cases when a question of law is raised for the first time in an ultimate court of appeal, as for example upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is expedient in the interests of justice that the question should be argued and decided (*Connecticut Fire Insurance Co. v. Kavanagh* (1892) AC 473, at p 480; *Suttor v. Gundowda Pty. Ltd*. (1950) 81 CLR 418, at p 438; *Green v. Sommerville* (1979) 141 CLR 594, at pp 607-608). However, this is not such a case. The facts are not admitted nor are they beyond controversy.
>
> 22. The consequence is that the appellants' case fails at the threshold. **They cannot argue this point on appeal**; **it was not pleaded by them nor was it made an issue by the conduct of the parties at the trial**.

(See also *Coulton v Holcombe* [1986] HCA 33; 162 CLR 1 at [9] per Gibbs CJ, Wilson, Brennan and Dawson JJ; *Bailey v Nominal Defendant* [2004] QCA 344 at [29]) per Chesterman J; *Stewart v Biodiesel Producers Limited* [2008] FCAFC 66 at [21]-[22] per Ryan, Moore and Tamberlin JJ and *Soliman v University of Technology, Sydney* [2009] FCAFC 159 at [5] per Graham, Logan and Flick JJ).

183 Although the circumstances of the present case do not fit squarely within the observations referred to at [181] and [182] above, we consider that the general principles relating to the finality of litigation which underlie those observations and the cases referred to immediately above apply to the issue in the present matter as to whether or not the issue of the reasonableness at common law of the *Confidentiality Directions* should be remitted. As was stated in *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; 223 CLR 1 at [34] per Gleeson CJ, Gummow, Hayne and Heydon JJ (footnotes omitted):

> A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances. That tenet finds reflection in the restriction upon the reopening of final orders after entry and in the rules concerning the bringing of an action to set aside a final

> judgment on the ground that it was procured by fraud. The tenet also finds reflection in the doctrines of res judicata and issue estoppel. Those doctrines prevent a party to a proceeding raising, in a new proceeding against a party to the original proceeding, a cause of action or issue that was finally decided in the original proceeding. It is a tenet that underpins the extension of principles of preclusion to some circumstances where the issues raised in the later proceeding could have been raised in an earlier proceeding.

184 As we have emphasised, JCU's alternative reliance upon its power at common law to give a reasonable and lawful direction to an employee was not contested by Professor Ridd save for the limited manner set out above.

185 Accordingly, independently of the primary judge's error in stating that the issue was not pressed by the University, it would be inconsistent with the way the case was conducted below to now require this issue to be heard and determined at a fresh trial. Furthermore, it is notable that Professor Ridd did not make any submission in the appeal that any aspect of the matter should be remitted.

186 It is appropriate that Professor Ridd's proceeding be dismissed, together with the other orders set out below.

THE ORDERS BELOW DATED 16 APRIL 2019

187 It is noted that on 16 April 2019, the following orders were made in the Court below:

> (1) The Court rules that the 17 findings made by the University, the two speech directions, the five confidentiality directions, the no satire direction, the censure and the final censure given by the University and the termination of employment of Professor Ridd by the University were all unlawful.
>
> (2) The issue of the making of declarations and penalty are adjourned to a date to be fixed.

188 In its amended notice of appeal, JCU did not challenge order 1 made on 16 April 2019 (see the definition of "Orders" in the amended notice of appeal, which is confined to the orders dated 6 September 2019). The legal status of order 1 made on 16 April 2019 is not entirely clear having regard to its terms, but JCU presumably wishes to have it also set aside. If so, it should within 7 days hereof file and serve a further amended notice of appeal seeking that additional relief. If Professor Ridd opposes any such amendment he should within 14 days hereof file and serve a brief outline of submissions, not exceeding 3 pages in length. JCU should within 21 days hereof file and serve a brief outline of submissions in response, not exceeding 3 pages in length. The issue will then be determined on the papers and without a further oral hearing.

CONCLUSION

189 For all these reasons, the following orders are appropriate:

1. The appeal be allowed.

2. The orders made by the Federal Circuit Court of Australia on 6 September 2019 be set aside.

3. In lieu thereof the second further amended application dated 3 August 2018 be dismissed.

4. The appellant should within 7 days hereof file and serve any further amended notice of appeal seeking to set aside order 1 of the orders made by the Federal Circuit Court of Australia on 16 April 2019.

5. If the respondent opposes any such amendment, he should within 14 days hereof file and serve a brief outline of submissions, not exceeding 3 pages in length.

6. The appellant should within 21 days hereof file and serve a brief outline of submissions in response, not exceeding 3 pages in length.

7. If necessary, the issue concerning order 1 of the orders dated 16 April 2019 will be determined on the papers and without an oral hearing.

8. There be no order as to costs.

I certify that the preceding one hundred and eighty nine (189) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Griffiths and SC Derrington.

Associate:

Dated: 22 July 2020

REASONS FOR JUDGMENT

RANGIAH J:

190 I have had the benefit of reading the judgment of Griffiths and SC Derrington JJ in draft. I respectfully dissent.

191 While I agree that the reasons of the primary judge contained material errors and the appeal should be allowed, I consider that the proceeding should not be dismissed but should be remitted for a further hearing.

192 The disposition of the appeal begins, but does not end, with the question of whether the primary judge erred in the construction of the Enterprise Agreement. Section 24(1)(d) of the *Federal Court of Australia Act 1976* (Cth) (the **FCA Act**) confers jurisdiction on the Federal Court to hear and determine an appeal from a judgment of the Federal Circuit Court. Such an appeal is by way of rehearing: *Sharma v Minister for Immigration and Border Protection* [2017] FCAFC 227; 256 FCR 1 at [26]; *SZRPT v Minister for Immigration and Border Protection* [2014] FCA 24 at [21]. In an appeal by way of rehearing, the powers of the appellate court are only exercisable where the appellant demonstrates that the judgment is the result of error: *Allesch v Maunz* [2000] HCA 40; 203 CLR 172 at [23]. The "judgment" is a formal order by which the court disposes of the matter before it: see, for example, *Ah Toy v Registrar of Companies* (1985) 10 FCR 280 at 285-286; *Harmer v Oracle Corporation Australia Pty Limited* [2013] FCAFC 63; 299 ALR 236 at [21]-[22] and [33]. Where an error in the primary judge's reasons is not shown to have affected the orders made, the appeal is dismissed. Where the appeal is allowed, it is necessary for the appellate court to consider what further orders are, under s 28(1) of the FCA Act, appropriate to make. In *Dynamic Hearing Pty Ltd v Polaris Communications Pty Ltd* [2010] FCAFC 135; 273 ALR 696, Besanko J observed at [74] that, "The powers of the Court include the power to affirm, reverse or vary the judgment appealed from and to give such judgment, or make such order, as, in all the circumstances, it thinks fit, or refuse to make an order". Where the judgment of the primary judge is set aside, it is necessary to consider how the proceeding in the court below should be dealt with, including whether there should be a further hearing, or whether the proceeding should be dismissed.

193 It is necessary to consider each of these issues in the present appeal. In particular, it is necessary to decide:

(1) Whether the primary judge erred in construing the relevant clauses of the Enterprise Agreement.

(2) If so, how the Enterprise Agreement should correctly be construed.

(3) Having regard to the correct construction:

(a) whether the orders of the primary judge should be set aside; and

(b) whether the proceeding commenced in the Federal Circuit Court should be dismissed, or whether there should be a further hearing.

194 There is controversy between the parties as to whether an argument adopted by Professor Ridd in the appeal was run before the primary judge, and, consequently, there is a dispute about whether the second and third issues may or should be considered. To demonstrate why it is necessary and appropriate to decide these issues, consideration must be given to the facts of the case, the relevant terms of the Enterprise Agreement and the issues the primary judge was asked to determine by the parties.

THE FACTS AND ISSUES BEFORE THE PRIMARY JUDGE

195 The majority judges have described the relevant facts and the primary judge's findings in some detail, and I respectfully adopt that description. I will merely highlight some matters of particular relevance. I will adopt their Honours' abbreviations.

196 On 29 April 2016, the Senior Deputy Vice-Chancellor found that Professor Ridd had engaged in conduct which breached JCU's Code of Conduct in various ways, which amounted to "Misconduct" as defined in the Enterprise Agreement. Those findings, and the consequent decision to issue Professor Ridd with a formal censure, were made under the power vested in the Senior Deputy Vice-Chancellor under cl 54.2.2.5 of the Enterprise Agreement.

197 On 21 November 2017, the Senior Deputy Vice-Chancellor found that Professor Ridd had engaged in serious breaches of the Code of Conduct in various ways, including failing to comply with confidentiality directions, which amounted to "Serious Misconduct" as defined in the Enterprise Agreement. Those findings, and the consequent decision to issue Professor Ridd with a final censure, were made under powers vested in the Senior Deputy Vice-Chancellor under cl 54.3.6 of the Enterprise Agreement.

198 On 13 April 2018, a delegate of the Senior Deputy Vice-Chancellor made findings that Professor Ridd had, inter alia, failed to comply with lawful and reasonable directions, including confidentiality directions, made misleading and untrue comments about the disciplinary process, and failed to manage or avoid a conflict of interest. The delegate found that this conduct amounted to Serious Misconduct and decided that Professor Ridd's employment should be terminated. The findings and the decision were made under powers vested in the Senior Deputy Vice-Chancellor under cl 54.3.6 of the Enterprise Agreement. On 2 May 2018, the Vice-Chancellor made a final determination that Professor Ridd's employment would be terminated. That determination was made under cl 54.5 of the Enterprise Agreement.

199 Before the Federal Circuit Court, Professor Ridd challenged each of the three sets of findings of Misconduct and Serious Misconduct and the disciplinary actions taken against him. In his Further Amended Statement of Claim (**FASOC**), he alleged expressly that his conduct did not constitute "Misconduct" or "Serious Misconduct" within the meaning of that term in the Enterprise Agreement.

200 In his FASOC, Professor Ridd alleged, inter alia:

> 8AB On the proper construction of the EA, the effect of clause 6 and/or clause 13.3 and/or clause 14.1 is that conduct by JCU staff that would otherwise be permissible as an exercise of the Intellectual Freedom Right conferred by clause 14:
>
> d. is subject to clause 14, not the Code of Conduct;
>
> e. is not prohibited or limited (to any extent) by the Code of Conduct;
>
> f. cannot constitute a breach of the Code of Conduct for the purpose of a disciplinary process by JCU under clause 54;
>
> g. cannot constitute misconduct or serious misconduct within the meaning of s 8 of the EA;
>
> h. cannot constitute misconduct or serious misconduct for the purpose of a disciplinary process by JCU under clause 54
>
> i. cannot lawfully be prohibited or limited (to any extent) at the direction of JCU.

201 In response, JCU pleaded in its Further Amended Defence that:

> 8AB. The Respondent denies paragraph 8AB of the Further Amended Statement of Claim, on the basis that the rights and obligations under the EA and the Code of Conduct are contained in the terms of each of those instruments, and further says:

a. in response to paragraphs 8AB(d), (e) and (f), on the proper construction of clauses 14.1 and 13 of the EA, the exercise of intellectual freedom is subject to the Code of Conduct and can only be exercised in a manner that is consistent with the Code of Conduct;

b. in response to paragraphs 8AB (g) and (h), on a proper construction of the EA, a breach of the Code of Conduct when purporting to exercise intellectual freedom is capable of constituting misconduct or serious misconduct, having regard to:

i. clause 8 of the EA which defines misconduct to be "*conduct that is not serious misconduct but is nonetheless conduct which is improper or inconsistent with the staff member's duties or responsibilities*";

ii. clause 8 of the EA which defines serious misconduct to be, amongst other things, serious misconduct as defined in the Fair Work Regulations 2009 as well as serious breaches of the Code of Conduct;

iii. clause 54.2 of the EA, which prescribes the steps to be taken by the University to address allegations of misconduct;

iv. clause 54.3, which prescribes the steps to be taken by the University to address allegations of serious misconduct.

202 In relation to the findings and decision made on 29 April 2016, the FASOC alleged:

8OC In the premises, in making the First Decision and First Censure JCU contravened cl 14 of the EA (as construed in paragraphs 8AA, 8AB and 8AC above) because JCU:

a. applied the Code of Conduct to the conduct instead of clause 14;

b. applied the Code of Conduct in a manner that limited or prohibited conduct in the exercise of the Intellectual Freedom Right;

c. determined that the conduct was misconduct, even though it was protected by clause 14.

203 Paragraph 8OC was denied in the Further Amended Defence. There were similar pleadings in relation to the findings and decisions of 21 November 2017 and 13 April 2018.

204 In the course of the hearing before the primary judge, senior counsel for Professor Ridd expressly limited the extent and nature of the case being pressed, saying, "…we haven't run a case that [JCU] contravened the Code of Conduct, that the findings aren't supported by the evidence, that it doesn't constitute misconduct". Senior counsel must be understood as having conceded that it was not any part of Professor Ridd's case that he had not breached the Code of Conduct, nor was it any part of his case that those breaches of the Code of Conduct did not fall factually within the definitions of "Misconduct" or "Serious

Misconduct" under the Enterprise Agreement. As the majority judges have commented, the making of these concessions has not been explained, and appears inexplicable.

205 However, it is apparent that Professor Ridd did not resile from his pleaded case that it was impermissible for JCU to apply the Code of Conduct to limit his right to intellectual freedom under cl 14 of the Enterprise Agreement. Professor Ridd maintained that JCU's findings of Misconduct and Serious Misconduct, and the consequent disciplinary actions, were in contravention of cl 14 of the Enterprise Agreement and s 50 of the FWA. On the other hand, JCU contended that the exercise of intellectual freedom was subject to the Code of Conduct and that a breach of the Code of Conduct was capable of constituting Misconduct and Serious Misconduct. The issues before the Federal Circuit Court were defined by those competing positions.

THE PRIMARY JUDGE'S REASONS FOR FINDING THAT CLAUSE 14 OF THE ENTERPRISE AGREEMENT HAD BEEN CONTRAVENED

206 The primary judge's construction of cll 13.3 and 14 of the Enterprise Agreement was encapsulated in the following passages of his Honour's reasons for judgment:

> 265. However, if a person were objectively to breach the Code of Conduct but the action was one that was done in the proper exercise of the rights under cl.14, then there could be no breach of the Code of Conduct. That is because the Code of Conduct cannot detract from cl.14.
>
> …
>
> 301. It is only when behaviour is not covered by cl.14, that the Code of Conduct can apply. Clause 14 means that it is the right of Professor Ridd to say what he has said in any manner that he likes so long as he does not contravene the sanctions embedded in cl.14. That is at the heart of intellectual freedom.

207 His Honour had said earlier:

> 249. The University submits that the right to exercise intellectual freedom provided by cl.14 is subject to the other terms of the EA, which must be read together with cl.14, as part of the context of the clause. This includes cl.13 (which talks of the Code of Conduct), cl.8 (which defines misconduct and serious misconduct) and cl.54 (which prescribes the steps to be taken by the University to address allegations of misconduct or serious misconduct).
>
> 250. To do requires one to limit the concept of intellectual freedom and make it subservient to clauses that relate to behaviour.

> 251. The wording of cl.14 does not show that there is any such limitation on its power or applicability.
>
> 252. Whilst cl.14.1 speaks of the commitment of JCU to act in accordance with the Code of Conduct, it does not, in that clause, bind anyone other than the university itself with the Code of Conduct.
>
> 253. The clause puts its own limitations on intellectual freedom. The clause speaks of a "*responsibility to respect the rights of others*". As referred to earlier in these reasons, there is no right to harass, vilify, bully or intimidate those who disagree with the views espoused.
>
> 254. The clause links the rights to intellectual freedom to the responsibilities of staff to support the University as a place of independent learning and thought where ideas may be put forward an opinion expressed freely. The clause speaks of what staff should do and what they must do.
>
> 255. When the clause already has sufficient limitations on the right to intellectual freedom, it seems incongruous to then impose other limitations that have not been expressly identified.
>
> 256. If the clause is truly meant to be subject to compliance with the Code of Conduct, such a limitation would have been spelt out in the clause itself.
>
> …
>
> (Emphasis in original.)

208 It is apparent that the primary judge accepted a submission made on behalf of Professor Ridd that cl 14 of the Enterprise Agreement protects the exercise of intellectual freedom, subject only to the constraints upon its exercise found within cl 14 itself, and that the Code of Conduct cannot be applied to restrict the exercise of that freedom. His Honour did not expressly state, but must have reasoned, that where intellectual freedom is exercised, JCU cannot take disciplinary proceedings for Misconduct or Serious Misconduct based upon a breach of the Code of Conduct. His Honour rejected JCU's submission that the exercise of intellectual freedom is subject to, and can only be exercised in a manner consistent with, the Code of Conduct.

WHETHER THE PRIMARY JUDGE ERRED IN CONSTRUING CLAUSE 14 OF THE ENTERPRISE AGREEMENT

209 I concur with the majority judges that the primary judge erred in construing cl 14 of the Enterprise Agreement such that where a staff member is engaged in an exercise of intellectual freedom, the Code of Conduct has no application, and that they can say what they like as long as they do not contravene the restrictions embedded in cl 14 itself. My reasons for so concluding are, to some extent, different from those of the majority. I place particular emphasis on the following aspects of the language, context and purpose of cl 14.

210 Firstly, his Honour's construction ignores the express reference to the Code of Conduct in cl 14.1 of the Enterprise Agreement. The clause provides:

> 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.

211 Clause 14.1 indicates that JCU's commitment is not merely to act in a manner consistent with the protection of intellectual freedom, but also, "to act…in accordance with JCU's Code of Conduct". To construe cl 14 as meaning that the Code of Conduct can have no application where a staff member exercises intellectual freedom, pays no attention to JCU's express commitment to act also in accordance with the Code of Conduct.

212 As I will discuss later in these reasons, JCU's commitment to, "act…in accordance with the Code of Conduct", must be a commitment to enforce the Code of Conduct. JCU's enforcement of the Code of Conduct occurs through the disciplinary processes for Misconduct and Serious Misconduct provided under the Enterprise Agreement.

213 In 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. However, inconsistency is not inevitable. In some cases, taking disciplinary proceedings against one staff member may protect the intellectual freedom of another. So, for example, where an academic who criticises the work of another academic is victimised or threatened in breach of the Code of Conduct by the second academic, the taking of disciplinary proceedings against the second may protect the intellectual freedom of the first. In that case, there may be no conflict between JCU's commitment to act in a manner that protects and promotes intellectual freedom and at the same time to act in accordance with the Code of Conduct.

214 JCU's express commitment to "act…in accordance with the Code of Conduct" is given no content under the construction given to cl 14 by the primary judge. That construction should not be accepted.

215 Secondly, under the primary judge's construction, when a staff member exercises intellectual freedom, disciplinary action is precluded, except where, relevantly, the conduct comes within cl 14.3, which states that staff, "do not have the right to harass, vilify, bully or intimidate those who disagree with their views". The expression "Serious Misconduct" is defined in cl 8 of the Enterprise Agreement to mean, not only a serious breach of the Code of Conduct,

but also "serious misconduct" as defined by the *Fair Work Regulations 2009* (Cth) (the **FWR**) and "official misconduct" as defined by the *Crime and Misconduct Act 2001* (Qld) (the **CMA**). Under reg 1.07 of the FWR, "serious misconduct" includes fraud, assault and intoxication at work. Under s 15 of the CMA, "official misconduct" includes a criminal offence. Under the primary judge's construction, JCU could not take disciplinary action in such circumstances. The foothold found by his Honour for the exclusion of the Code of Conduct where there is an exercise of intellectual freedom is cl 13.3, which provides that, "the Code of Conduct is not intended to detract from Clause 14, *Intellectual Freedom*". However, there is no clause which suggests that intellectual freedom trumps the other two integers of "Serious Misconduct". Clause 14 cannot be construed to mean that disciplinary action may not be taken against a staff member who engages in "official misconduct" contrary to the CMA, or "serious misconduct" contrary to the FWR, merely because he or she is engaged in an exercise of intellectual freedom.

216 Thirdly, the consequences of construing cl 14 as completely excluding the Code of Conduct when a staff member is engaged in an exercise of intellectual freedom make such a construction improbable. It cannot be supposed that it was intended that a staff member should be free, for example, to make improper use of IT systems or engage in sexual harassment, merely because they are at the same time exercising intellectual freedom by, for example, participating in a professional or representative body.

217 Fourthly, in the next section of these reasons I will indicate what I consider to be the correct construction of cll 13 and 14. There can only be one correct construction. As the construction I favour is different to that of the primary judge, I respectfully consider his Honour's construction to be wrong.

WHETHER CLAUSES 13 AND 14 OF THE ENTERPRISE AGREEMENT MAY BE CONSTRUED IN A MANNER DIFFERENT TO THE WAY CONTENDED FOR BY PROFESSOR RIDD AT FIRST INSTANCE

218 The primary judge construed cl 14 of the Enterprise Agreement in the manner urged by Professor Ridd's lawyers, namely that where a staff member is engaged in an exercise of intellectual freedom, the Code of Conduct has no application and the only restrictions upon that exercise are those contained in cl 14 itself. In the appeal, Professor Ridd, while primarily contending that the construction adopted by the primary judge was correct, also advanced, or at least adopted, an alternative construction to the effect that where there is

inconsistency between the exercise of intellectual freedom and the Code of Conduct, the former prevails, such that there can be no finding of Misconduct or Serious Misconduct.

219 JCU submits that as the alternative argument was not argued before the primary judge by Professor Ridd, it is not open on appeal for the Court to adopt that construction. Professor Ridd asserts that he did. JCU asserts that he did not. Neither side descended to the detail of the arguments run before the primary judge. I am left uncertain as to the parameters of the submissions made at first instance. In the end, I do not think that it matters.

220 JCU's submission that it is not open to construe the relevant clauses in a manner different from that argued below implies that the primary judge's role was not necessarily to decide the correct construction of the relevant terms of the Enterprise Agreement, but to merely choose between the competing constructions contended for by the parties. I do not accept that to be so. To explain why, it is necessary to consider the nature and legal status of enterprise agreements.

221 Sections 172(1) and (2) of the FWA provide that an enterprise agreement may be made between an employer and its employees about, inter alia, matters that pertain to their relationship. Section 186 provides for enterprise agreements to be approved by the Fair Work Commission. The effect of s 50, taken together with ss 51, 53 and 54, is that an employer, employee or employee organisation covered by an approved enterprise agreement that is in operation is bound to comply with its terms.

222 Enterprise agreements are not contracts: cf *Byrne v Australian Airlines Ltd* [1995] HCA 24; 185 CLR 410 at 421–422, 452–453. Neither are enterprise agreements legislative instruments within s 8 of the *Legislation Act 2003* (Cth). Although enterprise agreements have been described as having a "legislative character" and "statutory force" and as being "a creature of statute", they are not laws.

223 In *Toyota Motor Corporation Australia Ltd v Marmara* [2014] FCAFC 84; 222 FCR 152, the Full Court observed at [89]:

> In his reasons, the primary judge said that "Toyota contended and it was not disputed, that an enterprise agreement made under the FW Act is a form of delegated legislation". It appears that that contention was made in the context of Toyota's submission based on s 46 of the [Acts Interpretation] Act to which we have referred. However, although the FW Act provides that an enterprise agreement is "made" otherwise than by the Commission, the Act does more than merely impose conditions upon, and give additional legal effect to, an agreement made between private parties. The effect of the legislation is to empower the employer and the relevant majority of

> its employees to specify terms which will apply to the employment of all employees in the area of work concerned. The legal efficacy of those terms will arise under statute, not contract, and, as mentioned above, will be felt also by those who did not agree to them. Someone, such as an employee subsequently taken on, who had nothing to do with the choice of the terms or the making of the agreement, will be exposed to penal consequences under s 50 if he or she should happen to contravene one of the terms. When viewed in this way, it is not difficult to share in the perception that an enterprise agreement approved under the FW Act has a legislative character.

It may be noted that the Full Court, while accepting that an enterprise agreement may be perceived as having "a legislative character", was careful to refrain from suggesting that it is a law.

224 In *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108; 205 FCR 339, the Full Court held at [72]:

> The Agreement has statutory force. It is neither a contract, arrangement or understanding within the meaning of the [Competition and Consumer] Act, but a creature of statute.

Although the Full Court described an enterprise agreement as having "statutory force" and as "a creature of statute", it did not hold that an enterprise agreement is itself a law.

In *Ex parte McLean* [1930] HCA 12; CLR 472, Isaacs CJ and Starke J considered the nature of awards at 479:

> It is to be noted *in limine* that not only the obligation to *make* the agreement, but the obligation to *observe* it, is prescribed by the award. The award itself is, of course, not law, it is a *factum* merely. But once it is completely made, its provisions are by the terms of the Act itself brought into force as part of the law of the Commonwealth. In effect, the statute enacts by the prescribed constitutional method the provisions contained in the award.

225 In *Byrne v Australian Airlines*, Brennan CJ, Dawson and Toohey JJ observed at 425 that, "an award is not a statute", but is enforceable under statute. In the same case, McHugh and Gummow JJ held at 455, "Of itself, the Award could not answer the description of a law of the Commonwealth" and, "the Award is made part of the law, not by its own force but by force of its adoption by the statute".

226 Similarly, in *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813; 153 IR 426, French J (as his Honour was then) held at [51]:

> An award made under the Act is not a law but, when made, its provisions are given the force of a law of the Commonwealth

227 Just as an award made by the Fair Work Commission is not a law, an enterprise agreement approved by the Commission is not a law. However, as the Full Court observed in *Marmara*

and in *Australian Industry Group*, s 50 of the FWA operates to give an approved enterprise agreement the force of a law.

228 The question of whether a person has contravened s 50 of the FWA depends on whether a term of an enterprise agreement has been contravened; and whether a term has been contravened depends on its construction. The meaning attributed by a court to a clause of an enterprise agreement has consequences, not only for the legal rights and obligations of the parties to the litigation, but also for the legal rights and obligations of others covered by the enterprise agreement who have had no opportunity to contend for any different meaning. In that way, the interpretation of an enterprise agreement by a court is analogous to the interpretation of a statute.

229 In addition, s 29(1) of the FWA provides that an enterprise agreement prevails over a law of a State or Territory to the extent of any inconsistency. Under s 18 of the PSEA, a public official of a public sector entity must comply with relevant standards of conduct stated in the entity's code of conduct. An issue in the present case is whether, on the correct interpretation of the Enterprise Agreement, Professor Ridd could be required to comply with the Code of Conduct when engaged in the exercise of intellectual freedom. Accordingly, the interpretation of the Enterprise Agreement may affect the operation of a statutory provision, there being an obvious public interest in enforcement of the provision.

230 The role of a court in interpreting a statute was described by Brennan CJ in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355, at [13]:

> However, the interests of persons concerned in the litigation and the assumptions made in the rival submissions cannot divert the Court from its duty to construe the statute. "Judges are more than mere selectors between rival views", said Lord Wilberforce in *Saif Ali v Sydney Mitchell & Co*, "they are entitled to and do think for themselves".

231 In *Coleman v Power* [2004] HCA 39; 220 CLR 1, Kirby J observed at [243]:

> Subject to considerations of procedural fairness, this Court may adopt a construction of legislation that has not been argued by the parties, and a fortiori it is not restricted to the interpretive principles argued by their representatives.

232 In *Accident Towing & Advisory Committee v Combined Motor Industries Pty Ltd* [1987] VR 529, McGarvie J held at 548:

> Having reached a firm conclusion that the common assumption on which the parties proceeded is wrong in law, I consider I should not decide the appeal on the basis of that erroneous assumption: cf. *Lavin v Albert* [1982] AC 546, at p. 547.

> The questions of construction arising in these appeals are not of importance only to the present parties or in the present disputes. The decision of this Court will in a number of respects establish the legal effect of provisions of the legislation which will apply in future to the Authority, tow truck owners and the public.

233 The primary judge was called upon to construe the Enterprise Agreement. It is not a law. Yet it has the force of a law. The question of its interpretation is inextricable from the question of whether s 50 of the FWA had been contravened. An incorrect interpretation of the Enterprise Agreement would affect not only the legal rights and obligations of the parties, but those of the employees of JCU who were not parties to the litigation. In my opinion, by analogy with the interpretation of a statute, his Honour was required to determine the correct construction, not merely which of the rival constructions advanced by the parties was preferable.

234 The alternative construction adopted in the appeal by Professor Ridd is 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. In the appeal, JCU had the opportunity to advance substantive argument against this alternative construction, but did not take that opportunity, submitting that it is not open to the Court to consider a construction that was not argued before the primary judge. I disagree. The task of the appellate court is also to construe the Enterprise Agreement for itself in the course of considering the appropriate orders to make, including whether the proceeding should be dismissed or whether there should be a further hearing.

235 I should add that even if the precise argument now adopted on behalf of Professor Ridd was not made before the primary judge, an argument something like it was made. The premise of Professor Ridd's case was always that under cl 14 of the Enterprise Agreement, it was impermissible for JCU to apply the Code of Conduct in a manner that limited his right to intellectual freedom. He consistently argued that the Code of Conduct was subordinate to intellectual freedom. The alternative argument now adopted expresses the same idea, but construes cl 14 as operating in a somewhat different way to that originally contended for. The difference may be described as a matter of nuance, rather than a wholly different argument.

HOW CLAUSES 13 AND 14 OF THE ENTERPRISE AGREEMENT SHOULD BE CONSTRUED

236 The ultimate issue raised in the proceeding before the Federal Circuit Court was whether JCU contravened s 50 of the FWA by contravening the Enterprise Agreement. In *WorkPac*

Pty Ltd v Skene [2018] FCAFC 131; 264 FCR 536 at [197], the Full Court described the principles relevant to the interpretation of an enterprise agreement as follows:

> The starting point for interpretation of an enterprise agreement is the ordinary meaning of the words, read as a whole and in context. The interpretation "turns on the language of the particular agreement, understood in the light of its industrial context and purpose". The words are not to be interpreted in a vacuum divorced from industrial realities; rather, industrial agreements are made for various industries in the light of the customs and working conditions of each, and they are 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. To similar effect, it has been said that the framers of such documents were likely of a "practical bent of mind" and may well have been more concerned with expressing an intention in a way likely to be understood in the relevant industry rather than with legal niceties and jargon, so that a purposive approach to interpretation is appropriate and a narrow or pedantic approach is misplaced.
>
> (Citations omitted.)

237 At issue is how the Code of Conduct interacts with the clauses dealing with the exercise of intellectual freedom and disciplinary proceedings for Misconduct and Serious Misconduct under the Enterprise Agreement.

238 JCU's Code of Conduct was prepared under s 15 of the PSEA and approved under s 17(1). Section 18 of the PSEA requires public officials to comply with relevant standards of conduct stated in an applicable code of conduct. Section 24(c) of the PSEA provides that any disciplinary action for a contravention of a code of conduct should be dealt with under the disciplinary processes applying to the relevant public official.

239 The first direct reference in the Enterprise Agreement to the Code of Conduct is in cl 8, which provides, relevantly, that, "Serious Misconduct is…[a]ny serious breach of the James Cook University Code of Conduct". There is also an implicit reference to the Code of Conduct in the definition of "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".

240 The Code of Conduct is then dealt with expressly in cl 13. The chapeau commences, "The parties to this agreement support the Code of Conduct…". The reference to the "parties" is to JCU and the five staff unions named in cl 4. It is unsurprising that the parties would support the Code of Conduct, given that s 16(2)(b) of the PSEA required consultation with relevant industrial organisations before the Code of Conduct could be approved.

241 Clause 13.3 of the Enterprise Agreement then provides:

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

242 The Code of Conduct is referred to again in cl 14.1. It is convenient to reproduce cl 14 in full at this stage:

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 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 an expert or professional capacity, must not intentionally identify themselves in association with their University appointment.

243 Clause 54 has the heading, "Misconduct/Serious Misconduct". Clause 54.1 sets out, "General Principles".

244 Clause 54.2 deals with allegations of Misconduct. Clause 54.2.2 provides for formal investigation and resolution of allegations of Misconduct which cannot be informally resolved. Under cl 54.2.2.5, the Senior Deputy Vice-Chancellor will make a decision as to whether there has been any Misconduct and any disciplinary measures.

245 Clause 54.3 deals with allegations of Serious Misconduct. Under cl 54.3.6, the Senior Deputy Vice-Chancellor will notify the staff member of his or her determination as to whether there has been any Serious Misconduct and any disciplinary action, which may include termination of employment. Under cl 54.5, the Vice-Chancellor will make a final determination.

246 The findings of Misconduct and Serious Misconduct against Professor Ridd were made on the basis that he had breached the Code of Conduct. He did not dispute that he breached the Code of Conduct as alleged. Instead the issue was whether cll 13.3 and 14 operated to preclude JCU from taking proceedings for Misconduct or Serious Misconduct based on breach of the Code of Conduct in circumstances where he alleged he was exercising his entitlement to intellectual freedom.

247 I will deal first with the competing submissions as to whether the Code of Conduct is part of, or incorporated into, the Enterprise Agreement. JCU submits that it is. Professor Ridd submits it is not.

248 Professor Ridd relies on cl 6. Clause 6.1 refers to one of the policies specifically mentioned in the Enterprise Agreement and states that it will form part of the Enterprise Agreement. Clause 6.2 then provides that, "All other policies, procedures and guidelines which support the operation of this Agreement or provide staff benefits, conditions of employment or entitlements are not incorporated into nor form part of this Agreement…".

249 The purpose, or at least a purpose, of cl 6.2 appears to be to ensure or clarify that, apart from the single specific exception, a breach of a policy, procedure or guideline referred to in the Enterprise Agreement will not itself amount to a breach of the Enterprise Agreement. I consider the Code of Conduct to be a policy or guideline which, "support[s] the operation of the Agreement". The Code of Conduct "supports" the Enterprise Agreement in the sense that the operation of various clauses is founded upon its existence. Further, the Code of Conduct "provide[s]…conditions of employment", since failure to comply with it can lead to disciplinary action under cl 54, which may result in termination of employment. I accept that

the effect of cl 6.2 is that the Code of Conduct is not incorporated into, and does not form part of, the Enterprise Agreement.

250 However, I consider that cl 6.2 makes no difference to the interpretation of the relevant clauses. That is because cll 13, 14 and 54 acknowledge and operate upon the existence of the Code of Conduct. They are intended to be interpreted and applied in light of the Code of Conduct. This view is consistent with *Australian Rail, Tram & Bus Industry Union v KDR Victoria Pty Ltd (t/as Yarra Trams)* [2014] FCAFC 24, where it was held at [9] that a term of an enterprise agreement which provided that, "discipline will continue to be conducted in accordance with [a named policy]", meant that if a staff member were disciplined otherwise than in accordance with that policy, there would be a contravention of the term, even though the policy did not form part of the agreement.

251 Further, cl 6.3, which provides that the express terms of the Enterprise Agreement apply where there is inconsistency with the guidelines and policies, does not affect the issues, given that cll 13 and 14 expressly deal with their interaction with the Code of Conduct.

252 That brings me to the interaction of the relevant clauses. Clause 13 commences by stating that the parties, "support the Code of Conduct", but, under cl 13.3, the parties note that the Code of Conduct is not intended to "detract from" cl 14. Accordingly, cl 13.3 provides a limitation upon the support the parties express for the Code of Conduct. The phrase "detract from", is used in the context of interaction of a clause and another instrument which may be contradictory in their operation. The context in which the phrase is used has some analogy with s 109 of the *Constitution*. Under s 109, a test of validity of a State law is whether it would "alter, impair or detract from" the Commonwealth law; and each of these elements refers to the "undermining" of a Commonwealth law: *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* [2011] HCA 33; 244 CLR 508 at [41]. In this case, the use of the phrase "detract from" means that the Code of Conduct is not intended to undermine the scope, operation and effect of cl 14. It suggests, to the contrary, that cl 14 is intended to undermine the Code of Conduct. Clause 13.3 is expressed in the negative, but could equally have been expressed as, "Clause 14 is intended to detract from the Code of Conduct".

253 Clause 14 has the heading, "Intellectual Freedom". Clause 14.1 provides that, "JCU is committed to act in a manner consistent with the protection and promotion of intellectual freedom within the University and in accordance with JCU's Code of Conduct". The

commitment is given by JCU, not its staff. JCU's commitment is in relation to its own actions.

254 JCU's commitment is that its own actions will be consistent with the protection and promotion of intellectual freedom within JCU and that its own actions will be in accordance with the Code of Conduct. However, the Code of Conduct applies only to the conduct of "staff of James Cook University", not JCU itself. The only obligation of JCU under the Code of Conduct is to provide staff with access to education and training about the Code of Conduct, which seems most unlikely to have been intended to provide the sole content of JCU's commitment to, "act…in accordance with JCU's Code of Conduct". The question is what, then, is meant by JCU's commitment to act "in accordance with JCU's Code of Conduct"? In my opinion, JCU's commitment must be to *enforce* the Code of Conduct, while at the same time complying with its conjunctive commitment to act to protect and promote intellectual freedom within JCU.

255 In *National Tertiary Education Union v La Trobe University* [2015] FCAFC 142; 254 IR 238, the Full Court considered a clause of an enterprise agreement which commenced, "The University is committed to job security. Wherever possible redundancies are to be avoided and compulsory retrenchment used as a last resort". The majority held that the clause imposed a binding obligation upon the employer. Justice White observed at [108]:

> Although it may be a statement of the obvious, it is appropriate to keep in mind that the document which the Court is asked to construe is an enterprise agreement made pursuant to the regime in Pt 2-4 of the *Fair Work Act 2009* (Cth) (the FW Act). It is in the very nature of these agreements that they are intended to establish binding obligations. The manner of making such agreements is subject to detailed prescription and their operation is contingent upon approval by the Fair Work Commission, the obtaining of which is itself a matter of detailed prescription. In my opinion, it is natural to suppose that parties engaging in this detailed process intend that the result should be a binding and enforceable agreement. To my mind, that is an important matter of context when approaching the construction of [the clause].

256 In my opinion the use of the phrase "is committed to act" in the Enterprise Agreement indicates that cl 14.1 is intended to impose a binding and enforceable obligation upon JCU.

257 As I have explained, in some cases, there may be no inconsistency between JCU's twin commitments under cl 14.1, such as where disciplinary proceedings are taken for Misconduct or Serious Misconduct against one staff member in order to protect the intellectual freedom of another. However, cll 14.2 to 14.7 recognise that conflict may arise between JCU's

commitment to the protection and promotion of intellectual freedom and its commitment to enforce the Code of Conduct.

258 Clause 14.2 defines "intellectual freedom" inclusively. The five matters it specifically includes are described as "rights". The concept of intellectual freedom appears to be derived from, or to be a variant of, the principle of academic freedom. The concept is adapted so as to take into account that the Enterprise Agreement covers, under cl 4.1, not only academic staff, but all staff of JCU other than catering staff. However, given that JCU's functions under s 5 of the *James Cook University Act 1997* (Qld) include providing education at university standard, encouraging study and research, and disseminating knowledge and promoting scholarship, the principle of academic freedom cannot be ignored and, in fact, provides important contextual background for the construction of cl 14.

259 In the *Independent Review of Freedom of Speech in Australian Higher Education Providers* (March 2019) (the **French Review**), the Hon Robert French AC observed at p 18:

> Academic freedom has a complex history and apparently no settled definition. It is nevertheless seen as a defining characteristic of universities and similar institutions.

260 While academic freedom has no settled definition, it is not devoid of meaning. One definition of "academic freedom", contained in a 1997 UNESCO report, was considered and described in the French Review at p 119 as follows:

> The elements of academic freedom thus defined, have been summarised as freedom of teaching, freedom of research, freedom of intra-mural expression and freedom of extra-mural expression.

261 The French Review also described ongoing debate about the limits and protection of academic freedom. It is against the background of such debate that cl 14 must be understood. In my opinion, each of the five matters set out as examples of intellectual freedom in cl 14.2 is capable of being described as an aspect of academic freedom, although the last three also extend to non-academic staff.

262 The specific inclusion of cl 14 in the Enterprise Agreement recognises the importance of intellectual freedom, including academic freedom, to the fabric of JCU as a university and to the work of its staff. That is why JCU committed under cl 14.1 to acting in a manner consistent with protecting and promoting intellectual freedom. At the same time, cl 14 recognises that intellectual freedom is not absolute, and there must be a balance between the

exercise of that freedom and the standards of conduct required under the Code of Conduct. Accordingly, cll 14.3 to 14.7 describe limits upon the exercise of intellectual freedom.

263 However, the limits in cll 14.3 to 14.7 have no force of themselves. Those limits tend to be expressed as expectations, rather than obligations which may found a breach of the Enterprise Agreement by staff members. For example, the language used includes, "responsibility to respect the rights of others", "should seek to raise their concerns", "must adhere to the highest standards of propriety and truthfulness", and "expects that staff will maintain professional standards". The Enterprise Agreement envisages that limits of the kinds described in cll 14.3 to 14.7 will be enforced through disciplinary action taken under cl 54 for Misconduct or Serious Misconduct. In order to constitute Misconduct or Serious Misconduct, conduct will usually, although not inevitably, require a breach of the Code of Conduct. Such an approach is consistent with JCU's commitment under cl 14.1 to enforce the Code of Conduct.

264 There will be a conflict between JCU's twin commitments under cl 14.1 where a staff member exercises intellectual freedom and, at the same time, is alleged to have breached the standards set out in the Code of Conduct. In some circumstances this may be inevitable. 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 academic fraud without being uncollegial, disrespectful and discourteous and adversely affecting JCU's good reputation.

265 The issue is how the Enterprise Agreement resolves conflicts between JCU's commitment under cl 14.1 to enforce the Code of Conduct and its conjunctive commitment to protect and promote intellectual freedom. The answer is found in cl 13.3, which indicates that cl 14 limits the scope, operation and effect of the Code of Conduct. Clause 14 does so by giving primacy to JCU's commitment to protect and promote intellectual freedom over its commitment to enforce the Code of Conduct. Where there is conflict, the former prevails to the extent of the inconsistency. In such a case, JCU cannot proceed with disciplinary proceedings for Misconduct or Serious Misconduct based on a breach of the Code of Conduct.

266 Under this construction, where a staff member claims that he or she is protected under cl 14, it is necessary for the JCU decision-maker, or a court, considering an allegation of Misconduct or Serious Misconduct based on a breach of the Code of Conduct to engage in a three-step process. First, it must be determined whether the staff member was genuinely engaged in an exercise of intellectual freedom, which will require identification of how that freedom is said to have been exercised. Second, it must be determined whether the staff member may have breached the Code of Conduct, and in what manner. Third, it must be determined whether there is a conflict between the particular exercise of intellectual freedom identified and the particular requirement of the Code of Conduct that is alleged to have been breached, such that prosecuting the disciplinary proceedings will be inconsistent with JCU's obligation to protect and promote intellectual freedom within the University. The conflict must be a "real conflict": cf *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* at [41]–[42]. If it is, the exercise of intellectual freedom prevails and JCU cannot complete disciplinary proceedings for Misconduct or Serious Misconduct. In the absence of such conflict, the staff member may be proceeded against for Misconduct or Serious Misconduct. Seen in this way, cll 14.3 to 14.7 provide examples of breaches of the Code of Conduct which might result in a staff member being guilty of Misconduct or Serious Misconduct despite the exercise of intellectual freedom, or at least describe expectations of appropriate behaviour. It may be acknowledged that there will be a degree of subjectivity involved in the assessment, but the broad description of intellectual freedom and the vaguely expressed requirements of the Code of Conduct mean that an evaluative judgment will often be required.

267 It may be noted that under this construction, the exercise of intellectual freedom does not stand in the way of disciplinary action for Serious Misconduct constituted by "official misconduct" within s 15 of the CMA, or "serious misconduct" within reg 1.07 of the FWR.

268 I will later consider the consequences for the appeal of the construction that I accept to be the correct construction of cll 13, 14 and 54.

THE PRIMARY JUDGE'S REASONS FOR FINDING THAT CLAUSE 54.1.5 OF THE ENTERPRISE AGREEMENT DID NOT IMPOSE AN OBLIGATION OF CONFIDENTIALITY ON PROFESSOR RIDD

269 Clause 54 describes the procedural and substantive steps for investigating and dealing with allegations of Misconduct and Serious Misconduct. Clause 54.1.5 deals with confidentiality in the management of allegations of Misconduct and Serious Misconduct in the following terms:

> 54.1.5 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
>
> (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 information is already in the public domain.

270 JCU issued Professor Ridd with a number of directions requiring him to maintain the confidentiality of the disciplinary processes. For example, by letter dated 8 February 2018, Professor Ridd was directed to keep, "all matters relating to this disciplinary process strictly confidential, including the existence of the disciplinary process, details of the allegations, this letter, your response and any further correspondence between yourself and the University in relation to this matter". The letter asserted that the source of the power to give such directions was cl 54.1.5 of the Enterprise Agreement.

271 The findings of Serious Misconduct made against Professor Ridd included that he had breached the Code of Conduct by failing to comply with lawful and reasonable directions to keep information relating to the disciplinary processes confidential.

272 The primary judge held that cl 54.1.5 of the Enterprise Agreement did not give JCU power to issue the confidentiality directions. His Honour decided, firstly, that the clause exists solely for the protection of the staff member against whom the allegations of Misconduct or Serious Misconduct are made. Secondly, his Honour considered that the requirement is only that the confidentiality of all parties, "will be respected", and that does not create any obligation of confidentiality. Thirdly, his Honour held that any obligation of confidentiality is limited to "all information gathered and recorded", whereas the confidentiality directions went further by requiring the disciplinary process itself to be confidential. Further, his Honour held that taking disciplinary action for non-compliance with the directions contravened the protection of intellectual freedom requirement under cl 14.

273 I will first consider the primary judge's construction of cl 54.1.5. I think it is well understood that confidentiality obligations in respect of disciplinary processes generally exist to protect, not only the person against whom the allegation is made, but also others involved in the process. Such persons include complainants and witnesses who might otherwise be exposed

to embarrassment or opprobrium by others. That may readily be understood, for example, in the context of sexual or other harassment. Unless the confidentiality of such persons is protected, they may be discouraged from coming forward or cooperating. It is in the interests of any organisation that misconduct be exposed and dealt with.

274 Clause 54.1.5 expressly provides that, "confidentiality of *all parties* involved in the management of Misconduct and Serious Misconduct processes will be respected" (emphasis added). That indicates that the clause applies not only to the staff member against whom the allegation is made, but also to other people involved, including the complainant and witnesses. Therefore, I do not agree with the primary judge's characterisation of the clause as existing only for the protection of the staff member who is the subject of the allegation.

275 It is true, as the primary judge noted, that the language used at the commencement of the chapeau to cl 54.1.5 is that, "confidentiality…will be respected", and does not expressly impose an obligation to maintain confidentiality. However, the next part of the chapeau reads, "all information gathered and recorded will remain confidential", which clearly imposes an obligation of confidentiality. It would be inconsistent for there to be an obligation of confidentiality in respect of "information gathered and recorded", but otherwise no obligation, and only an expectation, in respect of the "confidentiality of all parties". The chapeau should be understood as having a consistent meaning, such that there is also an obligation to maintain the confidentiality of all parties involved.

276 However, I agree with the primary judge that the obligation of confidentiality under cl 54.1.5 does not extend to a requirement for the person who is the subject of the disciplinary process to not disclose the fact or existence of the process. The clause is expressly directed to the confidentiality of "all parties" and "all information gathered and recorded". It cannot be understood as imposing an obligation on the person accused of Misconduct or Serious Misconduct to "respect" his or her own entitlement to confidentiality. In my opinion, the clause does not prevent the person accused from disclosing the existence of the process, so long as he or she does not disclose any matter that would allow, for example, the identity of the complainant to reasonably be ascertained. To construe the clause otherwise would reveal a Kafkaesque scenario of a person secretly accused and secretly found guilty of a disciplinary offence but unable to reveal, under threat of further secret charges being brought, that he or she had ever been charged and found guilty.

277 The majority judges have observed that cl 54.1.5, particularly the words and syntax commencing with the words "subject to JCU's obligations", is clumsy. It is arguable that the drafting is not merely clumsy, but contains an obvious and unintended typographical and syntactical error.

278 As the majority judges observe, although the clause reads as if paras (a) to (d) should each identify an obligation imposed upon JCU, only para (a) does so squarely. The clause may have been intended to read as follows:

> 54.1.5 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) JCU's obligations to discharge its responsibilities under an Act or University policy;
>
> (b) for a proceeding in a court or tribunal; or
>
> (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 information is already in the public domain.

279 In *Construction, Forestry, Maritime, Mining and Energy Union v Hay Point Services Pty Ltd* [2018] FCAFC 182, the Full Court held at [20], "It ought also be presumed that [the relevant clause] was intended to be effective and produce a sensible industrial outcome". A reading of cl 54.1.5 in the manner suggested would operate to produce a sensible industrial outcome, although perhaps a less grammatical one, whereas there does not appear to be any sensible reason for the existing drafting of the clause. This construction would mean that the exceptions to the requirement of confidentiality in paras (b), (c) and (d) would not merely apply to JCU, but also to the person the subject of disciplinary proceedings. Otherwise, for example, where a person to whom the confidential information relates consents to disclosure of information, or the information is in the public domain, JCU is entitled to disclose it, but a staff member who discloses the same information would breach the Enterprise Agreement and may also be found to have engaged in Serious Misconduct. It seems unlikely that the clause could have been intended to operate in such an unbalanced manner.

280 This construction would require rewriting of the clause. However, that may not be fatal if it is clear that the original drafting was the product of a typographical or syntactical error. Even in a statute, that may sometimes be permitted: see *Director of Prosecutions (Nauru) v Fowler*

[1984] HCA 48; 154 CLR 627 at 630. It may be more readily done in an enterprise agreement. In *George A Bond & Co Ltd (in liq) v McKenzie* [1929] AR(NSW) 498, Street J held at 503:

> …it must be remembered that awards are made for the various industries in the light of the customs and working conditions of each industry, and they frequently result…from an agreement between the parties, couched in terms intelligible to themselves but often framed without that careful attention to form and draughtsmanship which one expects to find in an Act of Parliament. I think, therefore in construing an award, one must always be careful to avoid a too literal adherence to the strict technical meaning of words, and must view the matter broadly, and after giving consideration and weight to every part of the award, endeavour to give it a meaning consistent with the general intention of the parties to be gathered from the whole award.

[cited in *City of Wanneroo v Holmes* (1989) 30 IR 362 at 378-379].

281 Further, in *Kucks v CSR Ltd* (1996) 66 IR 182, Madgwick J observed at 184:

> It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand.
>
> But the task remains one of interpreting a document produced by another or others. A court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into the award. Deciding what an existing award means is a process quite different from deciding, as an arbitral body does, what might fairly be put into an award. So, for example, ordinary or well-understood words are in general to be accorded their ordinary or usual meaning.

282 I recognise that this possible construction of cl 54.1.5 was not argued by the parties, nor did they have an opportunity to address that construction. Therefore, I will not decide whether or not it is the correct construction. This approach does not affect the orders I propose, since the validity of disciplinary action taken for a breach of the Code of Conduct by failing to comply with the confidentiality directions depends upon the application of cl 14 under its proper construction, and that matter should, in any event, be remitted.

283 JCU raised an argument before the primary judge that it was entitled to give Professor Ridd the confidentiality directions under the common law right of an employer to give lawful and

reasonable directions to an employee. The primary judge stated that the argument was not pressed and decided that, in any event, the common law right was overridden by cl 14 of the Enterprise Agreement on the proper construction of that clause. His Honour's construction of cl 14 has not been upheld in the appeal, and it is apparent JCU had in fact continued to rely upon its common law entitlement.

284 The common law obligation of an employee to comply with a direction given by his or her employer depends upon the reasonableness of the direction. In *R v The Darling Island Stevedoring and Lighterage Co Ltd; Ex parte Halliday; Ex parte Sullivan* [1938] HCA 44; 60 CLR 601, Dixon J (as his Honour was then) said at 621–2:

> Naturally enough the award adopted the standard or test by which the common law determines the lawfulness of a command or direction given by a master to a servant. If a command relates to the subject matter of the employment and involves no illegality, the obligation of the servant to obey it depends at common law upon its being reasonable. In other words, the lawful commands of an employer which an employee must obey are those which fall within the scope of the contract of service and are reasonable.
>
> …
>
> But what is reasonable is not to be determined, so to speak, *in vacuo*. The nature of the employment, the established usages affecting it, the common practices which exist and the general provisions of the instrument, in this case an award, governing the relationship, supply considerations by which the determination of what is reasonable must be controlled

285 The primary judge did not determine whether the confidentiality directions given were reasonable, even though that was an issue in dispute on the pleadings. Further, the question of what is reasonable must be determined in light of the requirements of the Enterprise Agreement, including cll 14 and 54.1.5, properly construed. These are issues that require full argument, which was not provided in the appeal.

286 In addition, there is a question of whether the common law obligation was modified by the provisions of the Enterprise Agreement, including cll 14 and 54.1.5, upon their proper construction.

OTHER MATTERS

287 I agree with the reasons of the majority judges concerning damages.

288 As to penalty, I agree with the majority judges that the primary judge erred in imposing a penalty of $125,000. However, upon the assumption of JCU's conduct involving the unlawful termination of the employment of a long-standing employee because he was exercising

intellectual freedom of the very type which JCU had agreed to protect, I do not agree that $15,000 would be adequate to reflect the seriousness of the conduct.

THE APPROPRIATE ORDERS

289 I have accepted that the primary judge wrongly construed cll 13 and 14 of the Enterprise Agreement. His Honour ought to have instead construed the clauses to mean 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. This means that where disciplinary action for breach of the Code of Conduct is inconsistent with JCU's obligation to protect and promote intellectual freedom, JCU cannot take or complete such disciplinary action.

290 The primary judge examined whether Professor Ridd was engaged in exercising intellectual freedom in respect of each relevant allegation. However, once that question was answered in favour of Professor Ridd, his Honour concluded there could be no breach of the Code of Conduct and he could not be guilty of Misconduct or Serious Misconduct. Instead, his Honour should have made a comparison between each particular exercise of intellectual freedom and each corresponding admitted breach of the Code of Conduct and decided whether there was conflict which required JCU not to take disciplinary proceedings for Misconduct or Serious Misconduct. That exercise was not done. I should add that I do not agree with the view of the majority judges that it is "clear" that some aspects of Professor Ridd's conduct cannot be characterised as the exercise of intellectual freedom — that issue becomes less clear when his conduct is examined in the context of the course of events as a whole.

291 The primary judge also misconstrued some aspects of cl 54.1.5 of the Enterprise Agreement when considering the findings of Serious Misconduct based on Professor Ridd's failure to comply with the confidentiality directions. However, his Honour was correct to find that Professor Ridd was not prevented from disclosing the existence of the disciplinary process. In addition, the breaches of the Code of Conduct constituted by failing to comply with the confidentiality directions fall to be examined in light of cl 14 under its correct construction.

292 The question of whether Professor Ridd was required to comply with the confidentiality directions under JCU's common law right to give lawful and reasonable directions also falls to be determined in light of the correct construction of cll 14 and 54.1.5.

293 The ultimate determination to terminate Professor Ridd's employment was the product of a cumulative assessment, in the sense that the reasons of the delegate of the Senior Deputy Vice-Chancellor relied upon the initial formal censure and then the final censure having been issued to conclude that termination was warranted. I do not think that it is appropriate to finally determine only some of the factual issues in the appeal, when they are all interlinked with the proper application of the Enterprise Agreement upon its proper construction.

294 The appeal should be allowed and the orders of the primary judge should be set aside. In my respectful opinion, the proceeding should not be dismissed, but the matter should be remitted to the Federal Circuit Court for a new hearing upon the same evidence.

I certify that the preceding one hundred and five (105) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rangiah.

Associate:

Dated: 22 July 2020