

**"ACADEMIC FREEDOM AND FREE SPEECH"
THE INTERPLAY BETWEEN SCHOLARLY PURSUIT
AND BEHAVIOURAL STANDARDS IN
DISCIPLINARY PROCEEDINGS**

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SCHOLARLY PURSUIT AND BEHAVIOURAL STANDARDS IN DISCIPLINARY PROCEEDINGS

The Current Conundrum

SCHOLARLY PURSUIT AND BEHAVIOURAL STANDARDS IN DISCIPLINARY PROCEEDINGS

Did the staff member engage in conduct that was:

- ▶ contrary to the behavioural expectations that apply to all employees of the University:
 - › Under the Code of Conduct, Charter, Policies or EA
- ▶ Is the conduct "protected" as academic freedom and if so:
 - » Is it an "unfettered" protection?
 - » Are there any limits to the protection?
 - » If so, what are the limits?

TOPICS FOR TODAY

1

Freedom of speech - historically what is it?

2

What are the limitations on free speech?

3

What is "intellectual freedom" and "academic freedom"?

4

Current Case Law and Guidance

5

Practical Issues

FREEDOM OF SPEECH OVERSEAS

- ▶ In the US
 - » First amendment of the US Constitution
 - » ***"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."***



WHAT IS FREE SPEECH IN AUSTRALIA

- ▶ No constitutional right to “free speech”, international conventions subject to limitations
- ▶ What does that mean?
 - » No unfettered "right to free speech"
 - » "Implied" rights subject to certain qualifications
 - › Implied right of **political communication**
 - › Implied freedom of opinion and expression qualified by certain laws
 - » Anti-discrimination laws (eg incitement to racial discrimination)
 - » Defamation laws

IMPLIED RIGHT TO POLITICAL COMMUNICATION

- ▶ *Australian Capital Television Pty Ltd v Cth* (1992) 177 CLR 106
 - » Freedom of political communication is indispensable element in representative government – allows citizens to call out government decisions to make informed decisions at elections
- ▶ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1
 - » Representative government necessitates public discussion of political and government affairs – but that freedom is not absolute (Gaudron J)
- ▶ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520
 - » It is limited to what is necessary for the effective operation of representative government
 - » No free standing positive right (only a negative right that operates as a restraint on government)

FREE SPEECH AND DISCRIMINATION

- ▶ S 18C, *Racial Discrimination Act 1975* (Cth)
 - › it is unlawful to publicly "offend, insult, humiliate or intimidate" a person or a group of people
- ▶ S 18D, defences:
 - » Does not render it unlawful anything said or done reasonably and in good faith
 - › in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest;
 - › In making fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

FREE SPEECH AND DEFAMATION

- ▶ *Model Defamation Amendment Provisions 2020*
- ▶ New defence:
 - » **peer-reviewed statements / assessments in a scientific or academic journal**
 - » NSW, SA and Vic – amendments commencing on 1 July 2021
 - » Qld – Bill to amend defamation legislation was introduced in April 2021
 - » ACT, WA, NT or Tas – yet to see developments

FREE SPEECH, SOCIAL MEDIA & CODES OF CONDUCT IN EMPLOYMENT

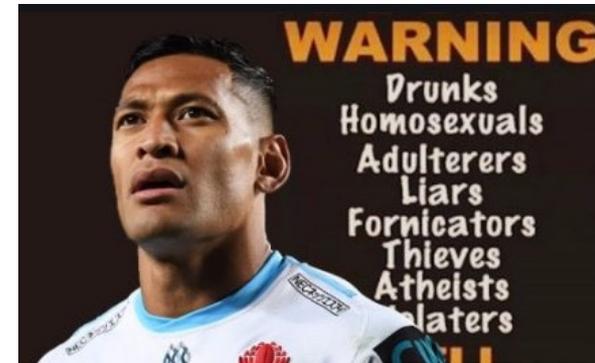
- ▶ *Comcare v Banerji* [2019] HCA 23
 - › Public servant making anonymous politically charged tweets about her department – more than 9000 tweets
 - › Department became aware of the twittersphere. Investigated and found breach of Code of Conduct and *Public Service Act* – warranting termination
- ▶ High Court examined the Code and Public Service Act:
 - › The department was meant to be apolitical, employees must behave honestly and with integrity, and must uphold employer values and integrity and good reputation
 - » Guidelines of the Code stated specifically public comments includes comments made on political or social issues on the internet
 - » "*should not be so harsh or extreme in its criticism of the government that it calls into question the employees ability to act impartially.*"

FREE SPEECH, SOCIAL MEDIA & CODES OF CONDUCT IN EMPLOYMENT

- ▶ High Court confirmed **again** that the implied freedom of political communication was not a **personal right of free speech**
 - » *Comcare v Banerji* (2019) 267 CLR 373
 - › Unanimous decision
 - › Implied freedom of political communication extends only as far as is necessary to protect the principles of representative and responsible government under the Constitution
 - » APS Code of Conduct:
 - › Required for proper functioning of government
 - › Anonymous tweets found not to excuse conduct:
 - » Risk of ceasing to be anonymous, and thereby damaging the integrity and good reputation of the APS as an apolitical and professional public service

FOLAU V RUGBY AUSTRALIA

- ▶ May 2019 Instagram post that read 'Hell awaits drunks, homosexuals, adulterers, liars, fornicators, thieves, atheists and idolators' captioned 'Those that are living in Sin will end up in Hell unless you repent. Jesus Christ loves you and is giving you time to turn away from your sin and come to him.'



ONGOING TENSIONS IN PRIVATE EMPLOYMENT

- ▶ Is the conduct contrary to expected standards of behaviour:
 - » In a contract, Code of Conduct, policy or procedure
- ▶ Does it breach the common law duties owed to the employer:
 - » Duty to act in good faith and fidelity in the interests of the employer and not to bring the employer into disrepute
- ▶ Is it conduct that:
 - » Impacts adversely on the reputation and profitability / viability of the employer
 - » Damages the interests of the employer, its employees, customers or stakeholders
- ▶ Is it in the course of employment (i.e. is it their job) or is it out of hours (social media)?
- ▶ Can they be liable for disciplinary action?

INTELLECTUAL FREEDOM AND ACADEMIC FREEDOM OF SPEECH – ARE THERE DIFFERENT RULES?

Can't howl this down: more must be done to protect free speech

MATTHEW LESH

"...shredded the idea that Australian universities have any sort of commitment to scientific integrity and free academic inquiry"

"There is this censorious culture that is fundamentally at odds with what a university should stand for."

Free speech crisis confronting Australia's universities

Unis declare war on free speech

"...it pays to check how those with power use words, pretending to protect us by restricting basic freedoms."

The failure to protect freedom of expression is seriously imperilling the discovery of truth

IS A UNIVERSITY DIFFERENT FROM OTHER EMPLOYERS?

▶ Yes:

- » Core foundation of a University is the pursuit of knowledge and critical inquiry
- ▶ It is supported by the higher education regulatory framework
 - » Tertiary Education Quality and Standards Act 2011
 - › Universities registered with TEQSA:
 - » For a higher education purpose
 - » Includes a commitment to and support for:
 - › Free intellectual enquiry
 - › (amended to: freedom of speech and academic freedom)
 - » Higher Education Support Act 2003
 - › Applies to higher education providers receiving funding
 - › Role of the Minister

PROTECTING FREE SPEECH - THE FRENCH REPORT

- ▶ 14 November 2018 - Minister Tehan MP announced independent review of University freedom of speech:
 - "Focus of the review was to assess the effectiveness of university policies and practices to address the requirements of the Higher Education Standards Framework to promote and protect freedom of expression and intellectual inquiry on Australian campuses" (my emphasis)*
- ▶ Hon Mr Robert French AC undertook review. Developed a draft code - sector consulted
- ▶ 27 March 2019:
 - » Report and draft model code released

THERE IS NO CRISIS

- ▶ After considering examples of alleged infringement of academic freedom, quoted in submissions to the review, found (p 217):
 - » *"Reported incidents in Australia in recent times do not establish a systemic pattern of action by higher education providers or student representative bodies, adverse to freedom of speech or intellectual inquiry in the higher education sector. There is little to be gained by debating the contested merits of incidents which have been the subject of report and controversy." [my emphasis]*
 - » *"Nevertheless, even a limited number of incidents seen as affecting freedom of speech may have an adverse impact on public perception of the higher education sector which can feed into the political sphere."*

No evidence to use the "**pejorative description of a 'free speech crisis' on campus**" but reputational impact of high profile incidents is significant

RECOMMENDATIONS

- ▶ A voluntary 'umbrella' Code:
 - » to guide the exercise of discretion / powers in respect of academic freedom
 - » Principles in the Code are subject to restraints, prohibitions and conditions:
 - › Imposed by law
 - › “Reasonable and proportion regulation” of conduct and restrictions imposed by the University on course delivery, duty to students, legal duties and teaching and research activities
- ▶ Amendments to HESA to define academic freedom, but not transfer responsibility to TEQSA to enforce:
 - » would diminish institutional autonomy
 - » would require TEQSA to make contested evaluative / normative judgments about breaches

PROTECTING FREE SPEECH - THE WALKER REVIEW

- ▶ 7 August 2020 - Minister Tehan MP announced a review assessing the implementation of the French Model Code to review:
 - » *ongoing commitment to the principles of the Model Code in a way that addresses the areas of non-alignment of current policies that are identified in this Report;*
 - » *the public are given confidence that there is no free speech crisis on Australian campuses."*
- ▶ 9 December 2020 found that:
 - » 23 had policies that were fully or mostly aligned to the Model Code
 - » 4 were partly aligned and 6 had policies that were not aligned (one did not respond)
- ▶ Recommendations of the Walker Review

HESA AMENDMENT

- ▶ October 2020 amendment
 - » *"Effective statutory standards can and should be confined to broadly expressed requirements that higher education providers have in place policies reflected in their domestic rules or principles and applicable to student representative bodies, the objectives of which are the protection of freedom of speech as a free-standing value and academic freedom which encompasses freedom of expression peculiar to the distinctive character of higher education institutions and their academic staff in particular."*
- ▶ Amendment to align to the French Review:
 - » Removes "free intellectual inquiry"
 - » Substitutes "Freedom of speech and academic freedom"
- ▶ Definition of academic freedom

SO WHAT IS ACADEMIC FREEDOM?

- ▶ **In the French Model Code**, *academic freedom* is defined to comprise (amongst other elements):
 - » "the freedom of academic staff to teach, discuss, and research and to disseminate and publish the results of their research;"
 - » "the freedom of academic staff and students to engage in intellectual inquiry, to express their opinions and beliefs, and to contribute to public debate, in relation to their subjects of study and research;"
 - » "the freedom of academic staff and students to express their opinions in relation to the higher education provider in which they work or are enrolled"

SO WHAT IS ACADEMIC FREEDOM?

- ▶ HESA amendment defines *academic freedom* to mean:
 - » (a) the freedom of academic staff to teach, discuss, and research and to disseminate and publish the results of their research;
 - » (b) the freedom of academic staff and students to engage in intellectual inquiry, to express their opinions and beliefs, and to contribute to public debate, in relation to their subjects of study and research;
 - » (c) the freedom of academic staff and students to express their opinions in relation to the higher education provider in which they work or are enrolled;
 - » (d) the freedom of academic staff to participate in professional or representative academic bodies;
 - » (e) the freedom of students to participate in student societies and associations;
 - » (f) the autonomy of the higher education provider in relation to the choice of academic courses and offerings, the ways in which they are taught and the choices of research

TENSIONS IN ACADEMIC FREEDOM

- ▶ Not just about protecting speech in:
 - » Teaching and research;
 - » Peer reviewed publications; and
 - » Seminars and educational forums
- ▶ Ongoing tension on what is the 'reasonable and proportionate regulation of conduct' including in:
 - » The use of social media, Twitter, Facebook and online forums
 - » Engagement with journalists and the media

TENSIONS IN ACADEMIC FREEDOM

- ▶ Can the conduct give rise to disciplinary action?
- ▶ Is the disciplinary action a reasonable and proportionate regulation of conduct that otherwise is inconsistent with a University's:
 - » Code of Conduct, Framework, rules, policies and procedures;
 - » Enterprise Agreement terms
 - » Disciplinary processes including confidentiality obligations to protect the integrity of the processes, complainant and respondent
 - » ICT policies / use of university property
- ▶ Construction of those instruments:
 - » Whether they create rights
 - » Whether academic freedom is “unfettered”

CURRENT CASE LAW

- ▶ NTEU v University of Sydney [2020] FCA 1709 (26 November 2020):
 - » Decision of Thawley J
 - » Appeal to Full Federal Court to be heard on 12 July 2021
- ▶ James Cook University v Ridd [2020] FCAFC 123 (22 July 2020)
 - » Decision of Griffiths, Rangiah and SC Derrington JJ
 - » Appeal to the High Court to be heard on 23 June 2021

NTEU V UNIVERSITY OF SYDNEY [2020]

FCA 1709

- ▶ Anderson and NTEU brought a claim of unlawful termination
- ▶ 2 prior warnings (2017 and 2018)
- ▶ Termination of employment February 2019
- ▶ Conduct included:
 - » Tweets / Facebook posts alleging the press was fabricating 'genocide threat' stories to intimidate anti-war academics
 - » After initiating disciplinary action, tweets criticising the University and others
 - » Letter from Anderson to colleagues criticising the University and the disciplinary process and that he would not comply with confidentiality directions
 - » Facebook comments and photos that contained derogatory comments about Jewish people
 - » Directions given to Anderson to remove content - which he refused

NTEU V UNIVERSITY OF SYDNEY [2020]

FCA 1709

- ▶ Court looked at intellectual freedom and found:
 - › no common understanding of academic freedom across the sector
 - › *"the Parties are committed to the protection and promotion of intellectual freedom"* in the EA did not create an enforceable right to intellectual freedom
 - › the reference to "rights" in the EA recognises the existence of rights to intellectual freedom as defined **but** it does not create them
 - › The EA contained limitations on the exercise of intellectual freedom
 - › clause stating the parties *"will uphold the principle and practice of intellectual freedom in accordance with the highest ethical, professional and legal standards"* created an enforceable obligation on employees as to how they engage in intellectual freedom

NTEU V UNIVERSITY OF SYDNEY [2020]

FCA 1709

- ▶ As a result:
 - » The Code of Conduct and other policies set out standards that apply to the exercise of intellectual freedom
 - » Intellectual freedom is not immune from disciplinary processes
- ▶ Justice Thawley held that:
 - » Although the USyd's EA made provision for "intellectual freedom", it did not give rise to an unfettered or unqualified enforceable right
 - » It was open to USyd to invoke the disciplinary processes under the EA to conclude that there had been misconduct by Anderson

NTEU V UNIVERSITY OF SYDNEY [2020]

FCA 1709

- ▶ Spokesperson from University of Sydney:

"We strongly defend freedom of speech and the ability of our staff to express their expert opinion as outlined in our Charter of Freedom of Speech and Academic Freedom. However, staff must also meet their obligations to engage in respectful debate in line with our policies and codes of conduct, and in accordance with the law"

RIDD V JCU

- ▶ Professor Peter Ridd dismissed for breaching JCU's Code of Conduct for:
 - » disrespectful and discourteous conduct
 - » threatening, insubordinate and disrespectful conduct
 - » failing to uphold the integrity and good reputation of JCU
 - » denigrating JCU, its employees and its stakeholders
 - » failing to comply with directions to maintain confidentiality of disciplinary proceedings
 - » failing to comply with multiple directions issued to him
- ▶ Ridd alleged breach of EA cl 14 (intellectual freedom) was not to the Code of Conduct cl 13

FEDERAL CIRCUIT COURT - 2019

- ▶ Judge Vasta of the Federal Circuit Court found that:
 - » Ridd had been unlawfully dismissed by JCU
 - » Ridd was exercising his right to intellectual freedom as per cl 14
 - » Cl 14 provided an unfettered right to academic freedom
 - » JCU wrongly "assumed that the Code of Conduct takes precedence over cl.14" - awarded Ridd \$1.2 million in damages
 - » Imposed further \$125,000 penalty

APPEAL TO THE FEDERAL COURT

- ▶ Federal Court set aside Judge Vasta's decision on two grounds:
 1. Ridd's exercise of intellectual freedom (clause 14) was subject to JCU's Code of Conduct - the right was not unfettered (Griffiths, Derrington and Rangiah JJ)
 2. Clause 54 and confidentiality directions were not a breach of academic freedom (Griffiths and Derrington JJ)

GRIFFITHS AND DERRINGTON JJ

"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)... The primary judge erred in mischaracterising these elements of Professor Ridd's conduct as an exercise of intellectual freedom within cl 14."

GRIFFITHS AND DERRINGTON JJ (CONT)

"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..."

REMITTED VS DISMISSING THE CLAIM?

- ▶ Griffiths and Derrington JJ:
 - » *"Nowhere in his outline of written submissions did Professor Ridd question the reasonableness at common law of JCU's directions regarding confidentiality."*
 - » *"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..."*
 - » *"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."*
- ▶ Rangiah J: considered the matter should be remitted for re-hearing due to the parties not having an opportunity to address construction of the confidentiality obligation in the Enterprise Agreement

HIGH COURT SPECIAL LEAVE APPLICATION

- ▶ Special leave granted
 - » Appeal only on clause 13 and 14 interpretation
 - » Not ground 2
- ▶ Hearing on 23 June 2021



DREW PAVLOU AND THE UNIVERSITY OF QUEENSLAND

- ▶ **Claims of 11 allegations** of misconduct in a 186-page **confidential** report
 - » Pavlou's participation in on-campus protests
 - » A photo he posted of himself outside UQ's Confucius Institute in protective clothing
- ▶ UQ Chancellor Peter Varghese
 - » *"Freedom of speech is a foundational value of the university as reflected in the Senate's adoption of the model code on freedom of speech drafted by the former Chief Justice of the High Court of Australia."* (5 June 2020)
 - » *"Neither of the findings of serious misconduct concerned Mr Pavlou's personal or political views about China or Hong Kong."* (13 July 2020)



PRACTICAL ISSUES

Potential Limitations

- Is it unlawful speech
- Outside of academic field
- Are there other limitations

Potential tensions

- Still uncertain in its application
- Implementing reviews
- Social media

PRACTICAL ISSUES - EA NEGOTIATIONS

- ▶ How do your policies align with your Enterprise Agreement?
- ▶ Drafting and interpretation
 - » "enforceable" vs "unfettered rights"
 - » Primacy vs subservient
- ▶ Disciplinary procedures and the EA:
 - » Clarity of intentions
 - » Limitations – what about the rights of others:
 - › Complainants
 - › Victimisation
 - » Investigations and confidentiality directions

QUESTIONS?

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