

# THE RIDD CASE AND THE MODEL CODE FOR THE PROTECTION OF FREE SPEECH AND ACADEMIC FREEDOM: WINS FOR ACADEMIC FREEDOM OR LOSSES FOR UNIVERSITY CODES OF CONDUCT AND RESPECTFUL AND COURTEOUS BEHAVIOUR?

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*A successful claim for unlawful dismissal and an award of significant damages and pecuniary penalties in favour of Professor Ridd against James Cook University (‘JCU’) in the Federal Court has attracted attention in the media and in academic circles. Professor Ridd has been considered by some to be a champion of the rights of academic freedom and free speech at universities. Perhaps less publicized is the Model Code for the Protection of Free Speech and Academic Freedom at Universities (‘Model Code’) recommended by former High Court Chief Justice Robert French. The Model Code has been seen as a panacea for the protection of these rights, though it has yet to be adopted. A closer examination of the decision in *Ridd v James Cook University* (‘Ridd’) and the Model Code reveals both may have unintended consequences for universities. This paper will explore the possibility that Ridd and the adoption of the Model Code may render University Codes of Conduct effectively irrelevant and universities almost powerless when responding to discourteous and disrespectful behaviour by their staff and students.*

## I INTRODUCTION

The recent case of *Ridd v James Cook University* (‘Ridd’)<sup>1</sup> has resulted in considerable media attention. Professor Ridd’s victory in the Federal Court has been hailed by some as a win for academic freedom,<sup>2</sup> with James Cook University (‘JCU’) being criticized for ‘punishing’ him for exercising his right to this freedom.<sup>3</sup> Indeed,

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<sup>1</sup> *Ridd v James Cook University* (‘Ridd’) [2019] FCCA 997.

<sup>2</sup> This paper uses the terms ‘academic freedom’ and ‘intellectual freedom’ interchangeably.

<sup>3</sup> See, eg, Gideon Rozner, ‘Peter Ridd Wins Biggest Victory On Free Speech In A Generation’, *IPA - The Voice For Freedom* (16 April 2019) <<https://ipa.org.au/publications-ipa/peter-ridd-wins-biggest-victory->

at the time of writing, several Federal MPs have expressed concern at the decision by JCU to appeal the decision of the Federal Court. These MPs have welcomed a commitment by Attorney-General Christian Porter to examine whether the Commonwealth can assist with the funding of Professor Ridd's litigation costs for the purposes of contesting the University appeal. They assert the case 'could change the landscape of academic freedom in Australia'.<sup>4</sup> Professor Ridd has independently attracted considerable public support for the appeal case with significant funds raised for his legal costs.

Coincidentally, at around the same time as the Federal Court handed down the *Ridd* decision, the *Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers* ('the Review')<sup>5</sup> led by former High Court Chief Justice Robert French was published featuring a recommended Model Code for the Protection of Free Speech and Academic Freedom ('Model Code'). The Review was commissioned by the Minister for Education the Hon Dan Tehan MP independently of *Ridd*, primarily in response to a handful of high profile cases relating to protests against visiting speakers on Australian university campuses and attempts to 'de-platform' them.<sup>6</sup> However, the Review and the Model Code have received similar attention to *Ridd*, with the Model Code being seen as a solution to the risks confronting academic freedom and free speech within the university sector. There has been criticism directed against the leadership at several Australian universities for the reservations expressed by them in relation to the voluntary adoption of the Model Code.<sup>7</sup>

A closer look at JCU's objections to Professor Ridd's conduct leading up to his termination and its responses to the *Ridd* decision as well as the tentativeness with which at least several Vice-Chancellors at Australian universities have approached the Model Code reveal that JCU and these Vice-Chancellors arguably share a similar concern. The concern is primarily that respect, courtesy and basic civility on

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on-free-speech-in-a-generation>. See also Joe Kelly, 'MPs Back A-G Bid to Fund Ridd Case', *The Australian* (Australia, 24 July 2019) 5.

<sup>4</sup> Kelly (n 3).

<sup>5</sup> *Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers* ('Review') (March 2019).

<sup>6</sup> *Ibid* 18-19.

<sup>7</sup> See, eg, Tehan, Dan, 'Model Code Would Send a Clear Free-Speech Signal to Both Students and Staff', *The Australian* (Australia, 15 June 2019) 24. See also Lane, Bernard and Kelly, Joe, 'Unis "Fail" as Champions of Freedom', *The Australian* (Australia, 15 June 2019) 2.

Australian campuses might be sacrificed in the quest to ensure the protection of freedom of speech and academic freedom across universities. It is this concern that Vice-Chancellor Michael Spence appears to have been expressing when he asserted that:

Freedom of speech is and always must be a core value for our society. But the problem is not that freedom of speech is restricted. The problem is that it is no longer civil.

People aren't listening to each other. We're communicating in bubbles on social media or through our chosen media outlets. Only talking to people who think like we do.

We're losing the ability to disagree well — to look for evidence and to be open to the possibility that we may be wrong.

The issues we face are far too great for that not to change and I strongly believe that here on campus we have a particular role to play.

That's why we'll continue to teach our students to question respectfully, to disagree well, and to always challenge the assumptions and ideas that they, and others, believe to be true.<sup>8</sup>

The need for universities to teach students to 'question respectfully' and to 'disagree well' would likely be a view shared by most, if not all future employers and society as a whole. Indeed, the Chairwoman of Universities Australia, Deborah Terry has very accurately referred to 'the skill of being able to engage in vigorous debate without suspending courtesy [as being] one that our students will need if they are to succeed in the workplace and in the world.'<sup>9</sup> Whether *Ridd* or the Model Code will assist in both teaching students and encouraging staff to 'disagree well' and 'engage in vigorous debate without suspending courtesy' is questionable. This article considers this question through an analysis of the effect of *Ridd* and the adoption of the Model Code upon university codes of conduct which prohibit disrespectful and discourteous behaviour by their staff and students and permit universities to censure

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<sup>8</sup> Spence, Michael, 'True Free Speech Means Learning to Disagree Well', *The Daily Telegraph* (online at 19 June 2019) <<https://www.dailytelegraph.com.au/news/opinion/michael-spence-true-free-speech-means-learning-to-disagree-well/news-story/1b3a0a4899239ca97ee572f1a43311df>>.

<sup>9</sup> Terry, Deborah, 'Unis Shine in Ideas Contest', *The Australian* (online at 6 June 2019) <<https://www.theaustralian.com.au/commentary/universities-shine-in-the-contest-of-ideas/news-story/1fc91a4519df2b3e695d83b758bof8bc>>.

such behaviour.<sup>10</sup> We consider *Ridd* and the adoption of the Model Code to have possible undesirable consequences for universities, creating a number of difficulties for universities in responding to any offensive, shocking or insulting behaviours on the part of their staff and students and requiring them to give further consideration to the negotiation of future enterprise agreements.

## II THE EFFECT OF *RIDD* AND THE MODEL CODE ON UNIVERSITY CODES OF CONDUCT WHICH PROHIBIT DISRESPECTFUL AND DISCOURTEOUS CONDUCT

### A *Ridd v James Cook University*

Who is (or was) Professor Ridd at JCU? Professor Ridd was the Head of Physics at JCU from 2009 until 2016 and had managed the University's marine geophysical laboratory for 15 years. He was concerned with the accuracy of the scientific research published relating to the state of health of the Great Barrier Reef. He considered the damage to the Great Barrier Reef had been inaccurately portrayed and asserted there was a need for better quality assurance in research. Professor Ridd's concerns resulted in his making various statements in relation to the research of staff at JCU and its associated entities, such as the Australian Research Council-Centre of Excellence for Coral Reef Studies ('ARC-Centre for Excellence') which is headquartered at JCU and its partners Great Barrier Reef Marine Park Authority ('GBRMPA') and the Australian Institute of Marine Science (AIMS). JCU considered his private and public comments to be misconduct because they constituted a breach of its Code of Conduct. This culminated in the termination of Professor Ridd's employment with JCU on 2 May 2018. The University maintained

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<sup>10</sup> See, eg, University of Western Australia, 'A Code of Ethics and a Code of Conduct' (January 2014) <[http://www.hr.uwa.edu.au/\\_\\_data/assets/pdf\\_file/0007/2889475/Code-of-Ethics-and-Code-of-Conduct.pdf](http://www.hr.uwa.edu.au/__data/assets/pdf_file/0007/2889475/Code-of-Ethics-and-Code-of-Conduct.pdf)>; The University of Sydney 'Code of Conduct' (16 April 2017) <<http://sydney.edu.au/policies/showdoc.aspx?recnum=PDOC2011/65&RendNum=0>>; James Cook University 'Code of Conduct' (28 April 2019) <<https://www.jcu.edu.au/policy/corporate-governance/code-of-conduct>>; Australian National University 'Code of Conduct' (1 April 2019) <[https://policies.anu.edu.au/ppl/document/ANUP\\_000388](https://policies.anu.edu.au/ppl/document/ANUP_000388)>; Curtin University 'Curtin University Code of Conduct' (5 June 2019) <[https://complaints.curtin.edu.au/local/docs/Code\\_of\\_Conduct.pdf](https://complaints.curtin.edu.au/local/docs/Code_of_Conduct.pdf)> .

it did not wish to stifle Professors Ridd's academic freedom, claiming that his dismissal was related to the need to create and maintain a respectful workplace.<sup>11</sup>

Professor Ridd applied to the Federal Court after his dismissal asking the Court to make declarations that his termination by JCU constituted a breach of its Enterprise Agreement (EA), being the *James Cook Enterprise Agreement 2013-2016* and therefore contravened s50 of the *Fair Work Act 2009* (Cth). Ultimately, both parties asked the court to determine whether the University's 17 findings of misconduct in relation to Professor Ridd were lawful. Vasta J in the Federal Circuit Court found these findings were not lawful and ordered the University to pay Ridd \$1,094,214.47 in compensation as well as a pecuniary penalty of \$125,000.<sup>12</sup> JCU have appealed this decision.

Of significance to this paper is what Professor Ridd did that JCU found objectionable. A review of the case reveals that JCU found that Professor Ridd's actions leading up to his termination constituted misconduct in a variety of forms, namely breaches of the University's Code of Conduct, breaches of lawful and reasonable directions and breaches of confidentiality directions.<sup>13</sup> Many of JCU's findings that Professor Ridd had breached the University's Code of Conduct related to his failure to act 'in the collegial and academic spirit of the search for knowledge, understanding and truth', 'to respect the rights and reputations of others' and to 'treat fellow staff members, students and members of the public with honesty, respect and courtesy'.<sup>14</sup> It is these findings and the incidents that led to them which are of relevance to this article. They are discussed below.

The first incident concerned the content of an email that Professor Ridd sent to a journalist with News Limited in December 2015. The email questioned the reliability of reports<sup>15</sup> regarding degradation of the Great Barrier Reef by sediment, criticising the methodology used in these reports and their conclusions.<sup>16</sup> Relevantly, Professor

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<sup>11</sup> Graham Readfearn, 'Academic Peter Ridd Not Sacked for His Climate Views, University Says', *The Guardian* (online at 6 June 2018) <<https://www.theguardian.com/environment/2018/jun/07/academic-peter-ridd-not-sacked-for-his-climate-views-university-says>>.

<sup>12</sup> *Ridd v James Cook University (No.2)* ('*Ridd No 2*') [2019] FCCA 2489 (6 September 2019).

<sup>13</sup> Essentially, JCU's findings that Ridd had breached the University's Code of Conduct related to his failure to act in a collegial and respectful manner as well as in a way that upheld the integrity and good reputation of the University: see *Ridd* (n 1).

<sup>14</sup> *Ridd* (n 1).

<sup>15</sup> Details of the relevant reports are found in *Ibid* [55].

<sup>16</sup> *Ibid* [55]-[59].

Ridd made the following comments in the email, which JCU found objectionable: ‘GBRMPA, and the ARC Centre of Excellence should check their facts before they spin their story’ and ‘My 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.’<sup>17</sup> The journalist sent the email to the Head of the ARC Centre of Excellence who forwarded it on to the Senior Deputy Vice Chancellor with a complaint against Professor Ridd complaining that the latter had attacked his integrity.<sup>18</sup>

In August 2017, Professor Ridd appeared on Sky News during the *Alan Jones Report* known as ‘Jones and Co’ (with Alan Jones and Peta Credlin) asserting that contrary to media and other reports, there is nothing wrong with the coral in the Great Barrier Reef. Relevantly, in this interview, some of the comments he made which the JCU found to be unacceptable included those which asserted the scientific research of the organisations associated with JCU was untrustworthy and the scientists behind this research lacked objectivity.<sup>19</sup> Indeed, the comments made by Professor Ridd in his interview with Jones and Credlin included the statement that ‘the basic problem is that we can no longer trust the scientific organisations like the Australian Institute of Marine Science even things like the ARC Centre of Excellence for Coral Reef Studies’ and that

I think that most of the scientists who are pushing out this stuff, they genuinely believe that there are problems with the reef. I just don’t think that they are very objective about the science they do. I think their [sic] emotionally attached to their subject ...<sup>20</sup>

Other comments by Professor Ridd which JCU found to be in contravention of the University’s Code of Conduct in lacking collegiality and respect included comments made by him in an email to a student which were found by JCU to be insulting of the head of the ARC-CoE.<sup>21</sup> Specifically, Professor Ridd remarked

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<sup>17</sup> Ibid [55].

<sup>18</sup> Interestingly, the complaint made by the Head of the ARC Centre of Excellence to the Senior Deputy Vice-Chancellor of JCU used the same terminology as Professor Ridd had to voice his complaint, referring to Professor Ridd’s writing to the media ‘to spin a story’: see Ibid [57].

<sup>19</sup> *Ridd* (n 1) [81]-[82].

<sup>20</sup> Ibid [81].

<sup>21</sup> Ibid [149]-[153].

You wonder why [the head of the ARC-Centre of Excellence is the keynote speaker at the Australian Meteorological and Oceanographic Society conference]. It is not like he has any clue about the weather. He will give the normal doom science about the GBR. If I had the energy I'd come to the conference and explain why a bit of global warming would make the reef grow faster and better.<sup>22</sup>

JCU also found Professor Ridd to have breached the University's Code of Conduct in writing a disrespectful email to the Dean.<sup>23</sup> Among other things, the email included the following comments

I think you should consider your actions in all this and which side you want to be remembered as being a part of. So far it does not look encouraging but I live in hope. I have a lot of support at JCU, and they are wondering what your hand in all this is? I have given you the benefit of the doubt but I am starting to wonder. It is not too late to do the right thing.<sup>24</sup>

In censuring Professor Ridd in respect of the above incidents, JCU made it clear that it did not accept the concept of academic freedom justified Professor Ridd's lack of collegiality, respect and courtesy in respect of the above (and other) incidents and that it was the latter that it found to be objectionable.<sup>25</sup> Vasta J acknowledged the University's position in this respect, observing that JCU was 'at pains to say that it [was] not what Professor Ridd [had] said, but rather the manner in which he [had] said it, that [was] the underlying reason for the censure, the final censure and the termination'.<sup>26</sup>

What did Vasta J think of JCU's findings against Professor Ridd in relation to the conduct described above? Did Judge Vasta consider that Professor Ridd had failed to act in a collegial and respectful manner, in a way that saw him failing to 'disagree well' and in a way that involved him 'suspending courtesy'? Did he agree that in doing so, Professor Ridd had breached the University's Code of Conduct?

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<sup>22</sup> Ibid [151].

<sup>23</sup> Ibid [226]-[228].

<sup>24</sup> Ibid [227].

<sup>25</sup> See, eg, the statements made by JCU in its letter to Professor Ridd dated 21 November 2017 in relation to his interview with Jones and Credlin: Ibid [81].

<sup>26</sup> Ibid [298].

His Honour did not find it necessary to make any determination as to whether Professor Ridd's conduct was not collegial or did not respect the rights of others.<sup>27</sup> He placed little if any relevance on the University's Code of Conduct. Instead, he placed principal significance on clause 14.1 of JCU's EA which provided for JCU's commitment to the protection and promotion of intellectual freedom which was defined in clause 14.2 to include the rights of staff to, among other things:

- Pursue critical and open inquiry;
- Participate in public debate and express opinions about issues and ideas related to their respective fields of competence; [and]
- Express opinions about the operations of JCU and higher education policy more generally...<sup>28</sup>

According to Vasta J, the only limitations on the intellectual freedom of JCU's staff were to be found in clause 14.3 of its EA which provided:

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.<sup>29</sup>

Vasta J held that given these limitations, it would be incongruous to impose other limitations, such as anything provided for in the Code of Conduct. In his view, 'if the clause was truly meant to be subject to compliance with the Code of Conduct, such a limitation would have been spelt out in the clause itself'.<sup>30</sup> This conclusion was reached despite the presence of clause 14.1 of JCU's EA which provided that JCU is committed to act in a manner consistent with the protection and promotion of intellectual freedom within the University and *in accordance with JCU's Code of Conduct* which Vasta J held merely required JCU to commit itself to the Code of Conduct but importantly did not require staff to do likewise.<sup>31</sup> Nor did clause 13 of

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<sup>27</sup> However, it is noted that Vasta J did comment on the 'perjorative way' in which Professor Ridd had given his opinion regarding the Head of the ARC Centre for Excellence's qualifications to talk at the Meteorological and Oceanographic Society conference and that the text of his email to the Dean was 'disrespectful, curt and discourteous': Ibid [156] and [232].

<sup>28</sup> Clause 14 of JCU's EA as cited in *Ridd* (n 1) [17].

<sup>29</sup> Clause 14.3 of JCU's EA as cited in *Ridd* (n 1) [17] (emphasis added).

<sup>30</sup> *Ridd* (n 1) [256].

<sup>31</sup> Clause 14.1 of JCU's EA as cited in *Ridd's Case* (n 1) [17] (emphasis added).

JCU's EA which required all parties to the EA to support the Code of Conduct assist the University.<sup>32</sup>

In light of clause 14 of JCU's EA, Vasta J found that all of JCU's findings of misconduct and attempts at censuring Professor Ridd were unlawful, including those relating to the lack of collegiality, respect and courtesy shown by him to his fellow staff members and others. As to the latter, Vasta J found they were contrary to Professor Ridd's rights created by clause 14 in that Professor Ridd's conduct was an exercise of his rights pursuant to clause 14.2 and Professor Ridd had not 'harassed, vilified, bullied or intimidated' anyone who disagreed with his views. In this respect, it is noted that in finding that all of JCU's findings of misconduct against Professor Ridd were unlawful, Vasta J did not consider the question of whether its dismissal of Professor Ridd itself would have been justified in circumstances where their findings against him may have been lawful. That is, it may have been that even if JCU's findings were lawful, its punishment did not fit Professor Ridd's perceived crime and that JCU arguably had other options for disciplining Professor Ridd short of dismissal—yet this was not deliberated.

Vasta J considered JCU's Code of Conduct to be completely 'subordinate' to the other terms of JCU's EA, commenting that 'It seems incongruous that a document that can be changed by JCU admittedly after consultation (whatever that means), can override a clause in an EA which can only be changed by the Fair Work Commission'.<sup>33</sup> Vasta J said that if it is the Code of Conduct that determines the manner in which academic freedom is to be exercised, then the EA is redundant. However, to what extent has the decision in *Ridd* rendered university Codes of Conduct redundant or irrelevant, specifically in relation to the obligations that they impose on staff to act with collegiality, respect and courtesy for others? Can the drafting of an EA assist in maintaining their relevance and hence, alleviate the problems which surfaced in the *Ridd* decision?

*Ridd* leaves open two methods or 'lifelines' by which Codes of Conduct might still be of relevance to universities in responding to discourteous and disrespectful conduct by their staff. The first method or 'lifeline' can be found in Vasta J's

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<sup>32</sup> Although clause 13.3 of the EA which provided that 'The parties note that the Code of Conduct is not intended to detract from Clause 14, Intellectual Freedom' played a part in Judge Vasta's decision making, it certainly does not seem to have been critical to his findings.

<sup>33</sup> *Ridd* (n 1) [258].

comments that ‘If the whole of what [Professor Ridd] said [was] objectively an exercise of intellectual freedom, then the protection of clause 14 [would] apply...If what is occurring is in furtherance of intellectual freedom, then cl.14 protects it’.<sup>34</sup> According to Vasta J, Professor Ridd’s disrespectful and discourteous conduct was permitted given that in his view, it was engaged in pursuant to Professor Ridd’s ‘objectively’ exercising his right of academic freedom. However, if Professor Ridd’s actions had not been an exercise of his academic freedom, then JCU’s EA would not have served to protect such conduct and it would have been prohibited under the University’s Code of Conduct entitling JCU to censure Professor Ridd accordingly. So, in circumstances where a university’s EA contains a provision such as clause 14 protecting academic freedom,<sup>35</sup> the university may still be able to discipline a staff member who engages in disrespectful and discourteous behaviour proscribed by its Code of Conduct (such as swearing or disparaging a colleague or student) if this behaviour is unconnected with academic pursuits. However, the lawfulness of the university’s response in these circumstances will be dependent on the breadth of the relevant provision in the university’s EA – specifically, whether or not it extends beyond the protection of academic freedom to other unrelated conduct. Further, even if the protection provided by such a clause is limited to academic freedom, a university wishing to censure a staff member for breaching the university’s Code of Conduct will still need to seriously consider the nature of the staff member’s conduct and whether it goes beyond an exercise of academic freedom, hence, allowing its Code of Conduct to apply. *Ridd* shows that this is not always a simple, objective task!<sup>36</sup>

The second method or ‘lifeline’ relates to Vasta J’s comments that ‘If [clause 14 was] truly meant to be subject to compliance with the Code of Conduct, such a limitation would have been spelt out in the clause itself.’<sup>37</sup> Vasta J was expressly referring here to the specific drafting of JCU’s EA, exposing the weaknesses in failing

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<sup>34</sup> *Ibid* [300].

<sup>35</sup> Most universities would seem to have an equivalent provision. Indeed, 36 out of the 38 university EAs accessed for the purposes of the Review expressly referred to the rights of staff to exercise academic freedom and freedom of speech: see *Review* (n 5) 177-180.

<sup>36</sup> The difficulty of this task is demonstrated by Vasta J arguably unusual finding Professor Ridd’s email to the student in which he queried the expertise of the head of the ARC-Centre of Excellence in attending the Australian Meteorological and Oceanographic Society conference in a disparaging way to be an exercise of his academic freedom: *Ridd* (n 1) [156]-[158].

<sup>37</sup> *Ridd* (n 1) [256].

to incorporate a Code of Conduct into the EA. This leaves open the possibility for universities insisting on further limitations on provisions in their EAs guaranteeing the protection of academic freedom in future enterprise bargaining rounds to the extent that they consider their current limitations to be inadequate. Specifically, they may insist that these provisions in their EAs expressly and unambiguously provide that they are subject to compliance with their Codes of Conduct. In other words, even in circumstances where uncollegial, disrespectful and discourteous conduct is engaged in pursuant to an exercise of academic freedom, a university could prohibit such conduct if the terms of its Code of Conduct were made part of its EA either by being written into the provisions of the EA or annexed to it or otherwise expressly incorporated into the EA.<sup>38</sup>

In view of the above, although *Ridd* may have reduced the relevance of a university's Codes of Conduct in circumstances where the university's EA contains a provision protecting academic freedom, the extent of any residual relevance will depend on the drafting of the specific provision in the university's EA. Specifically, whether universities will be able to censure disrespectful and discourteous behaviour that is proscribed by their Codes of Conduct may depend upon whether any protection of academic freedom provided for in their EAs extends beyond this particular freedom and whether it extends to disrespectful and discourteous behaviour. The outcome of the decision in *Ridd* might therefore prompt a different approach to the negotiation and drafting of EAs. However, whether Australian universities will be able to take such a different approach and preserve the relevance of their Codes of Conduct or whether they may be left powerless in responding to disrespectful and discourteous conduct by their staff and students may depend on the adoption of the proposed Model Code by universities and its interpretation. We now turn to a discussion of the Model Code. This is explained further below.

### B *The Model Code*

Although the *Review* did not find there to be 'a systemic pattern of action by higher education providers..., adverse to freedom of speech or intellectual inquiry

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<sup>38</sup> See *Fair Work Act 2009* (Cth) s257 which allows an agreement to 'incorporate material contained in an instrument or other writing'.

in the higher education sector',<sup>39</sup> it considered that 'even a limited number of incidents... may have an adverse impact on public perception of the higher education sector...'<sup>40</sup> It recommended that universities and other higher education providers adopt the non-statutory Model Code to 'guide the exercise of powers and discretions, formal and informal, when their breadth allows for its application'<sup>41</sup> and 'to restrain the exercise of overbroad powers to the extent that they would otherwise be applied adversely to freedom of speech and academic freedom without proper justification.'<sup>42</sup>

The Model Code provides for its objects to include, among other things, ensuring that the freedom of lawful speech and academic freedom<sup>43</sup> are treated as 'paramount' and 'defining' values respectively, 'not restricted nor...unnecessarily burdened by restrictions or burdens other than those imposed by law and set out in the Principles of the Code.'<sup>44</sup> Such restrictions or burdens are stated to include, among others, those 'imposed by the reasonable and proportionate regulation necessary to enable the university to fulfil its duty to foster the wellbeing of students and staff'.<sup>45</sup> The Model Code defines the 'duty to foster the wellbeing of students and staff' to include:

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

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

support reasonable and proportionate measures to prevent any person from using lawful speech which a reasonable person would regard, in the circumstances, as likely to humiliate or intimidate other persons and which is intended to have either or both of those effects.<sup>46</sup>

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<sup>39</sup> *Review* (n 5) 217.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*, 219.

<sup>42</sup> *Ibid.*

<sup>43</sup> Both 'academic freedom' and 'speech' are defined in the Model Code: see *Ibid.*

<sup>44</sup> 'A Model Code for the Protection of Freedom of Speech and Academic Freedom in Australian Higher Education Providers' ('Model Code') in *Review* (n 5) 230-236.

<sup>45</sup> *Ibid.*

<sup>46</sup> The Hon French AC, Robert S (n 5).

However, it ‘does not extend to a duty to protect any person from feeling offended or shocked or insulted by the lawful speech of another’.<sup>47</sup> Given this, the Model Code arguably clearly permits disrespectful and discourteous behaviour – whether or not the behaviour constitutes an exercise of academic freedom – and a university would not be permitted to censure their staff or students for engaging in such behaviour. Indeed, the Model Code expressly prohibits a university from finding such behaviour to constitute misconduct or imposing any adverse consequences on any staff member or student who engages in it. The reason why the Model Code was drafted to allow this kind of behaviour seems to be a result of the opinion expressed in the *Review* that:

To the extent that higher education rules seek to deal with offensive or insulting or humiliating or intimidating speech, the question whether speech answers those categories in any case should be defined objectively rather than by reference to the subjective reactions of individuals which may be highly variable. Formulae such as ‘speech which a reasonable person in the circumstances would regard as insulting or humiliating or intimidating’ are to be preferred as limiting the scope of any restrictions. A further safeguard would require that the speaker intend the speech to have one or other of those effects. The word ‘offensive’ may be too broad to be used even when subject to an objective test.<sup>48</sup>

Yet, despite the *Review*’s apparent support for a ‘formula’ which prohibits ‘speech which a reasonable person in the circumstances would regard as insulting or humiliating or intimidating’, it was not incorporated in the Model Code. As explained above, the Model Code apparently permits insulting behaviour; and appears to only prohibit conduct that is reasonably likely to humiliate or intimidate to the extent that the perpetrator intended it to have that effect or threatening or intimidating conduct as a result of the victim’s exercising or proposing to exercise their freedom of speech.

Does this apparent acceptance of ‘offensive, shocking and insulting’ behaviour by the Model Code, whether an exercise of academic freedom or not, arguably extinguish the ‘lifelines’ for university Codes of Conduct and their protection of respectful and courteous conduct provided for in Vasta J’s judgment described above. Will the adoption of the Model Code by universities allow them to

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<sup>47</sup> Ibid.

<sup>48</sup> The Hon French AC, Robert S (n 5) 108.

continue to protect respectful and courteous conduct under their Codes of Conduct or will these Codes of Conduct be required to allow any disrespectful and discourteous statements on the grounds that they constitute 'offensive, shocking or insulting' speech? If the latter, will the drafting of the EAs make any difference or will universities adopting the Model Code be rendered powerless when it comes to censuring disrespectful or discourteous conduct on the part of their staff and their students?

It is arguable that the adoption of the Model Code by Australian universities will totally diminish the relevance of Codes of Conduct to the extent that they protect respectful and courteous conduct. This is because the Model Code requires universities to draft, review and amend any non-statutory policies or rules and delegated legislation in accordance with the Principles of the Code. Such non-statutory policies would include university codes of conduct. So, on the adoption of the Model Code, universities would arguably be required to amend their codes of conduct to remove any prohibition against shocking, offensive or insulting behaviour to the extent allowed by law.

It may be that the only way for universities to ensure a courteous and respectful environment subsequent to the adoption of the Model Code will be for them to insist on provisions in EAs that require courteous and respectful conduct, independently of their codes of conduct. Interestingly, the Model Code appears to preserve the paramountcy of the workplace agreement at the expense of the application of the Model Code in that there does not appear to be any provision in the Model Code requiring Universities to draft, review, amend or interpret contracts or workplace agreements in accordance with the Principles of the Model Code. Rather, the Model Code only provides that 'Any power or discretion conferred on the university under any contract or workplace agreement shall be exercised, so far as it is consistent with the terms of that contract or workplace agreement, in accordance with the Principles of the Code'.<sup>49</sup>

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<sup>49</sup> This also leaves open the possibility for universities to argue that to the extent that there may be a contractual relationship between them and their students, that the terms of that contract require respect and courtesy to others. The existence of such a contractual relationship is beyond the scope of this article. However, see generally, eg, the commentators cited by Francine Rochford, 'The Contract Between the University and the Student' in Sally Varnham, Patty Kamvounias and Joan Squelch (eds), *Higher Education and the Law* (Federation Press, 2015) 82.

### III CONCLUSION

Whether subsequent to the *Ridd* decision and the adoption of the Model Code by universities, universities will still be able to retain a culture of civility where staff and students 'disagree well' and don't 'suspend courtesy' remains to be seen. The *Ridd* case and the Model Code has raised a contest of values within universities. Does the value of academic freedom and free speech trump the right of the university as employer to provide a safe workplace conducive to research and teaching? We assert that academic freedom and free speech and the retention of the dignity of academics and students is not a binary regime. Academic freedom should encourage diversity of viewpoints, robust debate about research and continual challenge to the status quo. This is distinct from personal attacks upon colleagues. In *Ridd* the case was apparently decided upon the content of the relevant EA and in effect sidestepped the issue of whether Professor Ridd had engaged in personal attacks.<sup>50</sup> However, these issues may need to be addressed in the future.

Both *Ridd* and the Model Code present a number of challenges for universities. A consequence of both is that they may have significantly diminished the relevance of universities' Codes of Conduct. Universities will need to reconsider how they maintain an environment of civility within the academy which may require their taking a different approach to the negotiating and drafting of their EAs. Incorporating the content of their Codes of Conduct into their EAs may be one option, and will involve this content being an explicit item for negotiation. Interestingly, JCU may have taken the opposite approach in the negotiation of its current Enterprise Agreement, being the *James Cook University Enterprise Agreement 2016*, in that the latter does not contain any equivalent to clause 13 of its former EA acknowledging JCU and its staff's support of the University's Code of Conduct. Indeed, in the hearing on relief and penalty in the matter before Vasta J, JCU argued that 'because there is a new EA in existence, the circumstances which allowed [their] behaviour [towards Ridd] to occur will never happen again'.<sup>51</sup>

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<sup>50</sup> Although see footnote 38 above where Vasta J seems to have conflated these issues by asserting that disparaging remarks about another academic's qualifications were an exercise of academic freedom.

<sup>51</sup> Vasta J did not accept this submission, finding that 'the deterrence aspect is still very much alive; that is, the need for JCU to respect the rights of their employees to intellectual freedom under the EA and not attempt to restrict or encumber those rights by any reference to any other instrument not within the EA': see *Ridd* (No 2) (n 13) [166]-[167].

At present, university Codes of Conduct have the advantage of being policy documents which have not required high level scrutiny. If their content is to become part of university EAs, universities and academic unions will have to arrive at a form of words which is capable of clear and certain interpretation to avoid litigation and achieve a negotiated outcome. *Ridd* and the Model Code may have effectively put these matters on the bargaining table.