12 December 2019

Dear Mr French AC

You may be aware that I was recently dismissed by James Cook University (JCU) on a matter related to some public statements that I made about the quality of science claiming damage to the Great Barrier Reef. The matter is now before the courts and I understand that it is one of the first in Australia to test the limits of Freedom of Expression (FoE) and duty of a university to uphold them. I thus thought you would be interested in my observations of the internal workings of a university when there is a dispute over FoE involving an academic's right to make public comments within their area of expertise. Although my court case will be decided on the tight legal definitions in an enterprise bargaining agreement (EBA), there are wider implications to community expectations on what is the right or wrong way for a university to act, which may not be reflected in the ultimate legal decision. The case was originally scheduled for earlier this month but was delayed until the end of March due to a timetabling glitch in the Brisbane Federal Circuit Court. However, all the documentation of the arguments of both sides of the case have been filed in court and I think that these, especially JCU's submissions, will be of great interest to your enquiry.

It is important to note that the FoE is generally a very low priority for a Vice Chancellors. FoE brings in no more students or research dollars, and won't improve the universities position in the world ranking surveys. In addition, most academics care very little about FoE so infringing FoE rights will rarely cause any problems for a VC with the academic staff. Academic's indifference arises because they are unlikely to ever be in a position that they could be restricted in saying what they want. Most just want a quiet life and their work will probably be in a field that is uncontroversial, or their views would align well with the acceptable range of views that would be tolerated by a university administration. In any case, it is rare for academics to cause a VC trouble over FoE. This does not diminish the importance of FoE for if even if only 1 in 1000 academics is prevented from speaking their mind, this might be the academic with the revolutionary idea that society needs to hear, and is one of the reasons that we have universities in the first place. However, the biggest push for academic FoE is coming from outside academia.

FoE at JCU, and I presume at most Australian Universities, has some legal force largely through the enterprise bargaining agreement (EBA). It is notable that the EBA is negotiated

between the university and the National Tertiary Education Union (NTEU), and there is effectively no oversight by governments on the issue of FoE. In JCU's case, the FoE provisions on the face of it look excellent with the only restriction being that an academic must not "bully, vilify, intimidate or harass" other people. In addition, academics have the right to disagree publicly with the university about decisions that it will make, including about FoE. Universities point to the FoE clauses in the EBA's as protecting the rights of academics, but the reality can be very different.

In my case, the problem has arisen because JCU insists that the academic freedom clauses in the EBA must also be subject to the code of conduct (CoC). This has the effect of potentially completely nullifying the FoE provisions in the EBA at the whim of the university. In our legal case, we argue that JCU's interpretation of the EBA, that the CoC overrides the FoE, is in error. Legally or otherwise, JCU insists that FoE must be subject to the restrictions of the CoC. This has the effect that FoE can be curtailed by the university due to the very vague nature of the CoC, which in JCU's case includes statements such as academics will "*behave in a way that upholds the integrity and good reputation of the University".* Although this statement at first appears reasonable, upholding the "good reputation" of the university is very subjective, and it is easy for a university to claim that any controversial statements by an academic are not upholding the good reputation of the university. After all, by definition, a controversial comment will upset somebody and this could be defined by the university as diminishing the reputation of the university.

In my case I stated that a prestigious JCU research group had systematically inadequate quality assurance procedures for ensuring that their scientific results were trustworthy. I am sure that community expectations of FoE at a university would be that I had a right, even a duty, to make these statements if they are within my area of expertise and I believed them to be true. It is irrelevant if I am ultimately proved to be right or wrong on this matter. However, by JCU's definitions and actions, I was breaking the CoC by making this comment in public because JCU claimed that the reputation of the university was damaged.

There are many other hypothetical examples that one could give where a subjective claim of reputational damage can be used to claim that the CoC has been breached. As my lawyers have put it in our submissions to the court, by attaching a vague CoC , the right to FoE has been diminished "*by making it uncertain and subject to the interests of JCU. Genuine intellectual freedom challenges ideas and can test reputations. Intellectual freedom that can*

only be used to enhance and promote the interests of JCU is no freedom at all". The situation is made worse because an academic who infringes this subjective CoC will then be subject to the "*discretionary judgment of JCU in any disciplinary proceeding. This immediately results in a chilling effect on FoE because the scope of the right would be unclear and always subject to the discretionary judgment of JCU: that is, the very employer from whom the employee is intended to be protected by the FoE clauses in the EBA*".

JCU, in its court submissions, goes even further than arguing that statements that cause reputational damage are prohibited. It also claims that any statements that affect the "*profitability*" of the university are also prohibited (quoting the case of *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66 at 81, per Dixon and McTiernan JJ). This effectively means that a university becomes like a company and ignores the fundamental difference in the roles of university and a company. Any controversial statements could be argued to diminish the profitability of the university. For example, if the work of a scientists who had made substantial errors in his work was criticized, it may have an affect on the ability of that errant scientists to attract new research funds, i.e the profitability of the university is affected. The loss of future funding would likely be regarded by the community as a fair result because if the scientist is ultimately shown to be unreliable, why should he be funded in the future? But it may adversely affect the profitability of the university. Thus, by JCU's definitions, it sets itself up as little more than a massively subsidized company that will only act in its own self-defined bests interest rather than fulfilling the community accepted roles that are expected of it.

The problems are further compounded by JCU's interpretation of clauses in the EBA relating to the handling of misconduct charges against an academic who may be charged with breaking the CoC. JCU contends that it always has the right to enforce total confidentiality on the academic, i.e the academic must keep all charges against him secret. We believe that JCU's interpretation of these clauses is incorrect and this will be tested in court. In any case, it is certainly insisting on this right. The result is that the already watered-down rights to FoE are substantially reduced because the accused academic has no ability to talk about the case to other academics who may be sympathetic. This gives huge power to the university to silence any dissent. Victims are isolated, subjected to a closed disciplinary procedure where highly subjective concepts are applied. It should be added that in JCU's case, it has also resorted to a making a broadscale search of email communications to find extra evidence to support its misconduct case. The comparison with a totalitarian governments ability to

control speech becomes complete. The university has a vague CoC which can be technically breached with any controversial comment, it has complete control over the disciplinary process which is held in secret, and it has the right to monitor communication – a right that it used without hesitation.

The net affect is that it is far too risky for an academic to engage in any controversial debate that might upset the university hierarchy that has no real interest in FoE, and has all the power to crucify any transgression. Why take the risk? Only the stupid or careless will go close to the cliff-edge.

The only conclusion that can be drawn is that despite the noble sounding FoE clauses, intellectual freedom is effectively dead. One might argue that if I win my court case, it will prove that academic FoE is still alive, but there will be little consolation for other academics who may be considering making a controversial comment. All I would have proven is that if you are prepared for an 18-month legal battle, and two massive crowd funding campaigns to raise $260000 in legal help plus considerable other financial costs, then if you are lucky you might get your job back after you are fired.

Another problem is that if I win, and the court determines my statements were within my FoE rights, it will be because the NTUE had helped write an excellent and legally tight EBA, that at least theoretically protects the academic despite the best efforts of JCU to side-step it. However, in two years' time, when the EBA will be renegotiated, the university could change just a few words and the grounds upon which we may win will be taken away. The union needs only to agree to these very slight changes and the already shaky FoE provisions are totally gone. We should not have a system that relies upon the good graces of a union to protect academic freedom even though to date their actions have been excellent.

My comments are obviously based upon my experiences at JCU but most universities in Australia have similar culture of operation, and internal policies. In addition, senior administrators have similar motivations. I would thus expect the problems that I have observed at JCU could occur at many of Australia's universities.

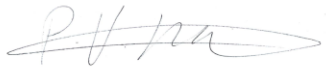
I note that in your Austin Asche speech earlier this year, you commented

"*To the extent that universities, operating under the authority of acts of parliament which create them, make legal rules affecting freedom of speech, those rules would have to comply*

with the implied freedom". In my case, I think there is little doubt that the rules that JCU has applied, legally or otherwise, have certainly taken away freedom of speech and that their actions would be a very powerful deterrent for other academics to make any comment about which the university might disapprove.

I hope these comments are useful to you. I would be happy to discuss this matter in person with you and supply you with any documentation in my possession that might be useful.

Yours faithfully



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