Peter Ridd's case - a pyrrhic victory for James Cook University

By CHRIS MERRITT[1]

In October last year when the High Court handed down a short, unanimous decision in Peter Ridd's case, the true victor in this fight over academic freedom was hard to identify. Neither of the official parties would have been entirely happy with the outcome. After 27 years at James Cook University, Ridd had failed to overturn his dismissal; and the university had been left with a big legal bill and a judgement that identified its improper attempts to silence a world-class professor of physics.

Officially, James Cook University won this case. But it's a pyrrhic victory.

The High Court broke with normal practice and refused to order Ridd to pay the university's costs. That in itself was quite a blow: the university had been represented by Bret Walker SC, who does not come cheap. But it lost something far more important than money: the reputation of this institution has been trashed.

The world has been left with the impression that this university does not understand the principle that lies at the heart of the scientific method: when searching for the truth, robust debate must prevail over courtesy. That taint will be difficult to remove.

So to describe this organisation as a winner does not capture the full impact of what happened.

When viewed from Ridd's perspective the outcome of this dispute is utterly unjust. On the substantive issue of academic freedom, he was shown to be right and the university was shown to be wrong.

It was wrong to try to temper his criticism of what he considered to be shoddy science. Yet the wrongdoers still managed to salvage a victory. And one of the factors that contributed to that outcome is right out of Kafka: Ridd had failed to respect the confidentiality of an improper disciplinary process that targeted his legitimate right to engage in robust professional discourse.

On one level, the wrongdoers won after changing the terms of the dispute. They shifted it from a principled argument about academic freedom to a bureaucratic argument about the requirements of the university's disciplinary process. Once that process was under way, the court decided that Ridd was

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obliged to remain silent about that process. He did not. And who could blame him? From his perspective it would have been a continuation of the university's campaign to silence someone who had challenged the orthodoxy on global warming and the health of the Great Barrier Reef.

But there was another factor at play - one that leaves the impression that the High Court's judgement was infected by a misconception about the nature of the argument that had been presented to the court. If that is the case, there is also a prospect that this case was wrongly decided.

But before examining that point, it needs to be made clear that this judgement falls into two halves. For Ridd, who fought to defend his right to speak robustly on matters within his field of expertise, the court's failure to overturn his dismissal is an injustice that many will find inexplicable.

It sits uncomfortably with the other half of this judgement that consists of an entirely persuasive exposition on the importance of academic freedom and why robust debate must prevail over bureaucratic demands for courtesy and collegiality.

This part of the judgement is a foundation for action by whoever happens to be education minister in the next federal government. If the next minister takes up the challenge, the real winners will be future generations - not just academics but all those who benefit from academic rigour.

This part of the decision is also a warning to university bureaucrats who might be tempted to muzzle other academics. The nation's highest court is united on the importance of intellectual freedom and, barring more judicial misconceptions, it seems inclined to side with academics should this issue again come before the court.

That, of course, assumes that other academics would have the fortitude and resources to follow Ridd's example and fight for the right to speak their mind. That is quite an assumption. In the real world, it would be a rare soul who would be prepared to risk their employment and finances in a fight over an issue of principle.

There is always a public and a private interest in protecting freedom of speech. But with academic freedom, which is a category of freedom of speech, the public interest in protecting this right predominates. It outweighs any assertion that people need to be protected from the risk of professional embarrassment when shoddy work is exposed. The public interest in exposing bad science must prevail.

That is why the next federal government needs to ensure academics will never again need to resort to private litigation to defend their right to engage in robust professional discourse. Government has a duty to protect the public interest in academic rigour.

We have already seen how government action can nudge universities in the right direction through the development of a voluntary code on academic freedom by former High Court Chief Justice Robert French.

But while a voluntary code might help, it is not a silver bullet. These codes fail to take account of the fact that universities are in the business of education. And like all businesses, they are sensitive to threats to their revenue and anything that could annoy influential stakeholders. So while voluntary codes are welcome, they are unlikely to prove decisive when public discourse by academics and students is viewed as a threat to the interests of tertiary institutions.

In his 2019 review of academic freedom, French was wary of damaging institutional autonomy. He believed a statutory standard on academic freedom, beyond the level of generality currently reflected in the higher education standards made under the Tertiary Education Quality Standards Agency Act would be disproportionate to any threat to freedom of expression that exists or is likely to exist on Australian university campuses for the foreseeable future.[2] As is well known, French favoured the voluntary approach.

But is that good enough? How realistic is it to expect a voluntary code to make a difference when academic freedom threatens relations with key stakeholders or financial backers?

This is much more than a theoretical issue: Remember Drew Pavlou? In 2020, when he was an arts student at the University of Queensland, he was suspended for two years - which was subsequently reduced to six months - for protesting against Chinese government influence on Australian university campuses.

The influence of the Chinese Communist Party within the university was a feature of the report on this incident that appeared in the Los Angeles Times. After Pavlou was jostled for his anti-China views, the US newspaper reported that on the day after the protest Chinese state media named Pavlou as a leader of the protest. The LA Times report said:

> *Xu Jie, Beijing's consul general in Brisbane, praised the "spontaneous patriotic behavior" of those who had attacked him.*

[2] Robert French, Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers, page 222

> *It was an unusual statement for a diplomat, especially considering Xu's other position: adjunct professor at the university's School of Languages and Cultures. His dual roles were an example of the increasingly close ties between Australian universities and China, their biggest source of international students.*
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> *The university didn't chastise Xu for promoting violence. Instead, it defended its relationship with Beijing — and turned on one of its brightest students.*[3]

The Chinese Communist Party had no role in Ridd's case but Ridd suspected other outside entities. The judgement shows he sent emails outlining his suspicion that he had offended "powerful organisations" and "some sensitive but powerful and ruthless egos".

Five months before the High Court's ruling, the weakness of the French code was outlined by George Williams, the deputy vide-chancellor of the University of NSW. Williams pointed out that:

> *The code permits universities to ban people from speaking on campus where their speech is likely to "involve the advancement of theories or propositions which purport to be based on scholarship or research but which fall below scholarly standards to such an extent as to be detrimental to the university's character as an institution of higher learning". Universities can use this clause to limit speech that would be lawful off-campus, perhaps on topics such as climate change or vaccination. As a result, UNSW adopted the model code without this clause.*[4]

This is why the next federal government cannot allow this issue to rest. Unless the next government takes up this issue its inaction could be an invitation for another round of litigation.

Those who read the judgement in Ridd's case will find that James Cook University was wrong to censure Ridd over a 2015 email to a journalist that said the Great Barrier Reef Marine Park Authority was grossly misusing some scientific data to make the case that the reef was greatly damaged. The same email had criticised the Australian Research Council Centre of Excellence for Coral Reef Studies - which then complained to JCU.

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[3] Los Angeles Times, An Australian student denounced his university's ties to China. Then he became a target, December 21, 2020

[4] George Williams, Free speech code for unis should apply nationwide, The Australian, June 7, 2021

The court made the point that there was no suggestion that the remarks in the email were anything other than honestly held opinions. Nothing said in that email had ever been suggested to be unlawful, defamatory, wrong or even unreasonable.

Those who read the judgement will see that the university was also wrong to have censured Ridd in 2017 for remarks on Sky News in which he said it was no longer possible to trust research on the Great Barrier Reef from the Australian Institute of Marine Science and the Australian Research Council's Centre for Excellence for Coral Reef Studies.

The university was also found to be wrong to cite his remarks to Alan Jones and Peta Credlin on Sky News and tell him his intellectual freedom did not extend to criticising "key stakeholders of the university" in a manner that was not "respectful and courteous".

Ridd's remarks during that interview led to a declaration by the university that he was guilty of serious misconduct. Yet legal academics later came to the view that it was no more than a conventional exercise of academic freedom[5]. So what was it that so annoyed the university's decision-makers? In essence an academic had merely engaged in the time-honoured practice of criticising the research of other academics.

While being interviewed, Ridd affirmed remarks he had made in a book chapter which argued that the Great Barrier Reef "[q]uietly grows and waits for the beginning of the next cycle of death and regrowth".

He added that after the reef "crashes", the "scientists ... then do the same stories and push it all around the world again". He said that "this has been going on for close to 50 years, how many more years will it take for us to cotton-on to the fact that you can no longer trust this stuff, unfortunately".

Earlier in that interview he had said:

> *" . . . 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. A lot of this stuff is coming out, the science is coming not properly checked, tested or replicated and this is a great shame because we really need to be able to trust our scientific institutions. And the fact is, I do not think we can anymore.*
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> *"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*

[5] Joshua Forrest and Adrienne Stone, The High Court's defence of academic freedom in Ridd v JCU, Australian Public Law, November 11, 2021

> *[they're] emotionally attached to their subject, and . . . You know you can't blame them, the reef is a beautiful thing."*[6]

At its core, Ridd's fight was over his right to engage in this kind of robust discourse regardless of whether he hurt the feelings of those whose work he was criticising. This goes beyond the issue of whether the reef is or is not in trouble - however important that might be. It goes to the issue of whether it is possible for the fate of the Great Barrier Reef to be freely discussed by experts without fear of retribution.

Underlying the entire dispute were two documents that took different approaches to academic freedom. The university's enterprise agreement granted staff the right to express unpopular and controversial views and pursue critical and open inquiry. But a separate code of conduct required intellectual freedom to be exercised with courtesy and respect - terms not found in the enterprise agreement.

After considering Ridd's statements to Jones and Credlin, the court determined they provided no basis for disciplinary action. This was a clear rejection of the university's argument that his intellectual freedom did not justify what it said was "criticism of key stakeholders of the university" in a manner that was not "in the collegial and academic spirit of the search for knowledge, understanding and truth" or "respectful and courteous".

Ridd lost the case for several reasons: the first is that the enterprise agreement only protected his right to make statements within his area of professional expertise and he had sent emails to external recipients that did not come within that definition. Those emails asserted that he had offended "powerful organisations" and "some sensitive but powerful and ruthless egos", and that "our whole university system pretends to value free debate, but in fact it crushes it".

From Ridd's perspective, the requirement to remain silent about the disciplinary process would have been seen as an illegitimate continuation of the university's attack on his right to express his professional opinion. He also appeared to be protected by provisions in the university's enterprise agreement that give academics the right to "express opinions about the operations of JCU" and "to express disagreement with university decisions and with the processes used to make those decisions".

It is therefore not surprising that he refused to play along. Had he done so, it would have meant accepting that bureaucrats had the right to muzzle an academic who, according to the High Court's judgement, has been ranked within the top 5 per cent of researchers globally.

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[6] Peter Vincent Ridd v James Cook University [2021] HCA 32 at paragraph 48

After the judgement was handed down Ridd described the secrecy provision of the complaint-handling mechanism as "Stasi-like". This is what he told Andrew Bolt on Sky News:

> *"In the end I was sick and tired of being told what I was or was not allowed to say. I knew I was taking a risk on that confidentiality but it just had to be done.*
>
> *"There was no choice; I couldn't live with myself and just shut up, which is what I would have had to have done."*[7]

The bizarre nature of this secrecy trap was not lost on those who were following this affair. Soon after the High Court's ruling, academics from Melbourne University wrote that one way of summarising the court's decision was that Ridd's termination was justified by his repeated failure to respect the confidentiality of a disciplinary process that should never have been commenced.[8]

The IPA's Morgan Begg, writing in The Australian, came to the same conclusion. He wrote that the implication from the ruling was that the university could launch an unlawful investigation of an employee but it would be entirely lawful to force the employee to keep that investigation secret.[9]

Logically, it seems hard to reconcile the court's view that confidentiality should prevail over disciplinary procedures with its view, in the same judgement, that courtesy and collegiality should not prevail over robust professional discourse. On this logic, Ridd had the right to express his professional opinion discourteously but not to disclose his view that his right to do so had been violated.

The secrecy trap is by no means the most troubling aspect of this decision. That honour is reserved for the reference in paragraph six of the judgement that says:

> *" . . as senior counsel for Dr Ridd frankly accepted in his oral reply, the cases for both of the parties were conducted on an all-or-nothing basis. From Dr Ridd's perspective, this forensic choice reflected the reality that, unless he was able to show that all, or almost all of the actions by JCU were contraventions of cl 14 [of the enterprise agreement] then the termination of his employment would have been justified and would*

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[7] Peter Ridd, Sky News, October 13, 2021

[8] Joshua Forrest and Adrienne Stone, The High Court's defence of academic freedom in Ridd v JCU, Australian Public Law, November 17, 2021

[9] Morgan Begg, Ruling against Ridd shines light on cancel culture, The Australian, October 13, 2021

have occurred in any event leaving him with little benefit had he sought to uphold only a few of the instances of declared contraventions."[10] *[Emphasis added]*

Here's the problem: It was never part of Ridd's pleaded case that unless he succeeded in every respect, he did not wish to prevail in any respect. The transcript of oral argument before the court shows there are just two occasions where the words "all or nothing" appear. And a reasonable reading of that part of the transcript leaves the clear impression that the reference was a statement about the logic of the parties' construction of clause 14 of the enterprise agreement and its application to the university's direction that the disciplinary proceedings should remain confidential. It cannot be read as a concession that none of Ridd's claims should succeed unless all of them were successful. Yet that is how Ridd's argument is portrayed in paragraph six of the judgement.

Here is the relevant section of the transcript, which starts with counsel for Ridd, Stuart Wood SC:

MR WOOD: Some short points, if it pleases the court . . . It was never argued that the breach of confidentiality directions by themselves – in answer to Justice Edelman's question – would constitute serious misconduct. There was no finding below that they would constitute serious misconduct and the reason for that was it was <u>all or nothing</u> for the University. They said we have the test right, you have it wrong, the code of conduct is the thing that governs everything, and clause 14 [of the enterprise agreement] has nothing to do with it.

EDELMAN: It was <u>all or nothing</u> for your client as well.

MR WOOD: Of course, of course - both ways. But if we are correct in terms of our construction of clause 14 then the directions [for confidentiality] go too far because they contravene the clause 14 rights and they also attempt to suppress - and are thereby unlawful - communication, publication of an unlawful process."[11] *[Emphasis added]*

If my reading of the transcript is correct, it suggests that the "all or nothing" reference has been misunderstood by the court as being a concession by Ridd's counsel that, in fact, was never made. The transcript does not show that Ridd was prepared to concede every aspect of the case unless he won every separate point. Such a move would defy logic as it would not serve Ridd's interests.

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[10] Peter Ridd v James Cook University [2021] HCA 32 at paragraph 6

[11] High Court transcript, Peter Ridd v James Cook University [2021] HCATrans110, page 53, at 2355, 2360 and 2365

It is difficult to avoid the conclusion that the exchange between Stuart Wood QC and Justice Edelman, quoted above, concerned the proper construction of clause 14 of the enterprise agreement and its application to the confidentiality directions that had been made by the university.

So if a broad "all or nothing" concession was never made, the court's formal decision to give the university an unqualified victory must be in doubt. This is due to the fact that the judgement makes it clear that Ridd was right on the core issue of his freedom to express his professional opinion even when he did so in a robust and discourteous manner. Keep in mind that Ridd had sought a range of remedies, including declarations, penalties and compensation.

Once the limited nature of the "all or nothing" reference is properly understood, the logical consequence is that Ridd should have been entitled to at least some remedies - including formal declarations - for those actions that were taken against him by the university that the court clearly believed were unlawful. This would be the case even if his dismissal were still found to be lawful.

Before leaving the "all or nothing" point, I want to make it clear that my attention was drawn to this issue by a senior lawyer who was passing on information from an even more senior lawyer. They both wanted this issue to be made public but were not prepared to put their names to this critique of a unanimous ruling by the High Court. However the hearing transcript tells the story.

The fact that Peter Ridd needed to litigate in order to defend academic freedom was the result of a form of group think that is creeping through universities not just in this country but through the traditional centres of Western civilisation. Douglas Murray, in his book The War on the West, says a new generation does not appear to understand even the most basic principles of free thought and free expression and how the scientific method has improved the lives of countless people around the world. Murray puts it down to a cultural war within the centres of Western civilisation in which almost everything of importance that has emerged from the West is viewed with suspicion.

According to Murray:

> *" . . . everything connected with the Western tradition is being jettisoned. At education colleges in America, aspiring teachers have been given training seminars where they are taught that even the term 'diversity of opinion' is 'white supremacist bullshit'."*[12]

So what is to be done?

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[12] Douglas Murray, The War on the West: How to Prevail in the Age of Unreason, Harper Collins, as extracted in The Australian, April 30, 2022.

Peter Ridd might have lost his personal fight, but it was just one battle in a much broader war in which freedom of speech and other core Western values are at stake. But Ridd was not fighting alone. Some of the greatest thinkers from the Western cultural tradition feature in the High Court's judgement, including philosopher and jurist Ronald Dworkin from the United States.

On the day of the ruling, education minister Alan Tudge made the point that 41 universities had aligned their policies on free speech with French's model code. In the view of the former Chief Justice academic freedom is a defining characteristic of universities - an assessment that was cited by the High Court along with the classical defence of free speech by John Stewart Mill.

According to Mill's great essay, On Liberty, whilst a prohibition upon disrespectful and discourteous conduct in intellectual expression might be a "convenient plan for having peace in the intellectual world", the "price paid for this sort of intellectual pacification, is the sacrifice of the entire moral courage of the human mind".[13]

When we look a little deeper at French's report on academic freedom, the former Chief Justice makes it explicit that the idea of academic freedom has roots that go all the way back to the heart of Western civilisation, ancient Greece.

According to the French report:

> *"The ideal of academic freedom can be traced back to Socrates' defence in Plato's Apology, before the Athenian people, of his right to discuss controversial topics with others, that those in power found unacceptable."*[14]

Despite George Williams' concerns about the shortcomings of French's model code, there is no doubt it is a step in the right direction. However there clearly need to be more steps. More than two years before the judgement, Ridd praised the code and called for it to be made mandatory at all universities, not voluntary.[15]

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[13] John Stewart Mill, On Liberty.

[14] Robert French, Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers, March 2019, page 114

[15] Peter Ridd, Robert French's code is a beacon for freedom of speech, The Australian, April 26, 2019

Alan Tudge knows this fight is not over. On the day of the judgement the education minister recognised that in some places there is a culture of closing down perceived "unwelcome thoughts" rather than debating them.

This is line with Williams' concern that governments and public institutions have become less tolerant of freedom of speech and more willing to deny people their voice. He attributes a good part of the problems to the nation's parliaments that have enacted an ever-growing list of anti-speech laws.

On free speech, Williams is the polar opposite of the bureaucrats at James Cook University who tried to silence Ridd. Williams believes freedom of speech on campus should be no different to freedom of speech everywhere in Australia. The only constraints should be those that apply under the normal law such as defamation. But while Ridd favours a mandatory code on free speech at universities, Williams goes much further. He believes the entire community needs stronger protection for freedom of speech. According to Williams:

> *"We need a free speech statute that applies across our society to provide every person with a right of free expression. This should apply a common standard to universities and other parts of our society to ensure consistent and effective protection for a vital democratic value."*[16]

The conduct of James Cook University is not an isolated incident. It is part of a cultural war that is being fought in those countries that have been built on core ideas from the Western tradition. Free speech is one of those ideas, but so is religious liberty and, most importantly, the rule of law. But all of those freedoms depend on the first - freedom of speech.

Ridd lost his personal battle. But he secured a unanimous ruling from the High Court that provides a foundation for the future defence of academic freedom. The court recognised that this doctrine has an instrumental as well as an ethical justification. It aids the search for truth in the contested marketplace for ideas. It also ensures the primacy of individual conviction - the right not to profess what one believes to be false while bestowing a duty to speak out for what one believes.[17]

The starting point for future battles will be the voluntary codes. But ranged against them is the reality that universities have powerful stakeholders that can influence these organisations in a variety of ways.

One former vice-chancellor told me that those in charge of the nation's universities are, in the main, terrified that their staff will do or say something that could jeopardise commercial relationships or imperil

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[16] George Williams, Free speech code for unis should apply nationwide, The Australian, June 7, 2021

[17] Ridd v James Cook University, ibid, at paragraph 31

future grants. In this person's assessment, that is merely part of a broader problem in which academics who challenge the dominant paradigm risk being sidelined. Group think, in this person's view, is just as big an enemy of academic freedom as the institutional self-interest of universities.

Robert French was clearly right to be wary about eroding the autonomy of the universities. But that horse has already bolted. The autonomy of these organisations has already been abridged by influential outside stakeholders - just as Ridd feared. Also at play are the contending forces of the cultural war that is under way within the nations of the West. The challenge confronting the next federal government is to decide how to ensure these influences do not undermine academic freedom. Is it good enough to limit academic freedom to discussion within a person's area of expertise? Such an approach still accepts that universities can legitimately stifle public discussion, and will encourage timidity.

The next federal government might do well to re-examine George Williams' proposal for broader statutory protection for free speech regardless of whether it takes place on campus, in academic journals or on television. The next government might also care to revisit the definition of of academic freedom that French had proposed in his report. It included a several uncontroversial elements as well as components that would protect statements inside an academic's field of expertise. French had also included one provision that would have endorsed the right of academics to speak freely in their personal capacity on any issue without constraint by their employer. This provision says academic freedom includes:

> *"The freedom of academic staff, without constraint imposed by reason of their employment by the university, to make lawful public comment on any issue in their personal capacities;"*[18]

This would have eliminated the risk that future disputes would turn on the question of whether statements are permissible because they are within an academic's area of expertise or impermissible because they fall outside a notional boundary. By protecting "lawful public comment on any issue" the French proposal would have eliminated that boundary. It would therefore also have eliminated the risk of litigation over have extent of the boundary. It would have prevented university bureaucrats from attempting to regulate public statements academics might make in their personal capacities.

So what happened to that proposal? In March, 2021, federal parliament approved amendments to the Higher Education Support Act to implement recommendations from the French report, including the report's definition of academic freedom. Every element of French's proposed definition was included in the amendment - except the provision outlined above that would have protected lawful public comment on any issue. The amendment was made in the Higher Education Support Amendment (Freedom of Speech) Bill 2020. The explanatory memorandum to the bill says:

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[18] Robert French, ibid, page 231

> *"The statutory definition in Item 4 closely aligns with the definition in the French Model Code but includes a minor technical modification recommended by the University Chancellors Council, in consultation with the Honourable Robert French AC. This modification excludes from the definition "the freedom of academic staff, without constraint imposed by reason of their employment by the university, to make lawful public comment on any issue in their personal capacities" element of the Code definition. This element of the definition was more appropriately considered to fit within the ambit of a broader societal freedom, referred to in the Model Code as "freedom of speech", rather than within the narrower concept of "academic freedom".*[19]

The decision to eliminate part of the proposed definition of academic freedom might have served the interests of the University Chancellors' Council but it has reduced the potential benefits for academics. When a future education minister addresses this issue, the thoughts of Ronald Dworkin, as embraced by the High Court in the Ridd judgement, could be a sound guiding principle:

> *"The idea that people have that right [to protection from speech that might reasonably be thought to embarrass or lower others' esteem for them or their own self-respect] is absurd. Of course it would be good if everyone liked and respected everyone else who merited that response. But we cannot recognize a right to respect, or a right to be free from the effects of speech that makes respect less likely, without wholly subverting the central ideals of the culture of independence and denying the ethical individualism that that culture protects."*[20]

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[19] Explanatory memorandum, Higher Education Support Amendment (Freedom of Speech) Bill 2020, page 10

[20] Ronald Dworkin, We need a new interpretation of academic freedom (1996) 82(3) Academe 10 at 14, as cited in Ridd v James Cook University [2021] HCA 32