

Person acting Mitchell Downes
Reply to Brisbane office
Our reference 23161
Your reference 13888/18512/80190290

22 February 2018

Clayton Utz
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By email hcray@claytonutz.com; mwilliams@claytonutz.com

Ridd v James Cook University & Ors BRG1148/2017

As you are aware, we act for Professor Ridd.

We refer to JCU's letter dated 8 February 2018 (**your letter**) and adopt the defined terms therein and otherwise in the statement of claim (**SOC**) filed in Federal Circuit Court proceeding BRG1148/2017 (**FCC Proceeding**), in respect of which JCU is the first respondent. In this letter references to "you" and "your" refers to JCU generally and specifically [REDACTED]

Your letter is a statement of allegations of serious misconduct for the purpose of clause 54.3.4 of the EA (**Third SoA**).

This letter is our client's response for the purpose of clause 54.3.4 of the EA.

Preliminary matters

1. The allegations the subject of the Third SoA concern:
 - (a) in part, the Third Confidentiality Direction given as part of the SDVC Determination, the latter of which our client seeks to have set aside for various contravention by JCU of the FWA in the FCC Proceeding;
 - (b) in part, the directions given to our client by JCU to keep the Purportedly Confidential Matters confidential, which our client seeks to have declared invalid in the FCC Proceeding;
 - (c) in part, the operation of clause 54.1.5 of the Enterprise Agreement, JCU's interpretation of which our client disagrees with and seeks declaration regarding its proper construction in the FCC Proceeding; and
 - (d) in part, the interaction between clauses 13 and 14 of the EA and the Code of Conduct, JCU's interpretation of which our client disagrees with and the proper construction of those parts of the EA and its interaction with the Code of Conduct will necessarily be determined as part of the determination of the FCC Proceeding.

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To that extent, it is entirely inappropriate for JCU to issue the Third SoA in circumstances where there is a dispute between the parties in relation to these matters and our client is seeking to have them determined by the court.

Further, the allegations the subject of the Third SoA arise out of the allegations the subject of the First SoA and the Further SoA. Alternatively, they are so intimately connected with the allegations the subject of the First SoA and the Further SoA that they ought to be considered an extension and part of that same dispute.

Our client has set out in the SOC the basis upon which he alleges that JCU, by you and the SDVC, have acted in breach of the Decision Obligations and in particular clauses 13 and 54.1.1 of the EA and the Code of Conduct in respect of the First SoA and the Further SoA. Those matters apply equally to JCU's decision to issue the Third SoA and our client repeats and relies upon them to allege that JCU, by issuing the Third SoA, has breached the Decision Obligations and in particular clauses 13 and 54.1.1 of the EA and the Code of Conduct.

The basis for our client's complaints about JCU's conduct is set out in the SOC, which has been served and in respect of which JCU has received advice from its lawyers in the FCC Proceeding, Clayton Utz, about. In any event, our client's complaints about JCU's conduct which it says is in breach of, relevantly, section 50 of the FWA have been set out in the correspondence that has passed between our office, JCU and Clayton Utz.

In the premises above, our client is of the view that the issuing of the Third SoA is part of a knowing contravention of a civil remedy provision of the FWA and part of systematic pattern of conduct relating to our client.

We reserve our client's rights in respect of this serious contravention pursuant to section 5657A of the FWA by JCU and in respect of those persons who were involved in same, as well as such other claims as may be available to our client.

Response to allegations

Adopting the headings in your letter our client responds to the allegation in the Third SoA as set out hereunder.

Concerns regarding failure to comply with confidentiality directions.

Correspondence with The Australian

Our client contends each of the First Confidentiality Direction, Second Confidentiality Direction and Third Confidentiality Direction (**Confidentiality Directions**) are invalid and unenforceable, and liable to be so declared, for the reasons set out in the statement of claim (**Invalidity Point**).

Further, all of the information the subject of the Australian Article has been in the public domain since the filing of the application on 20 November 2017, as it was referred to that document, not just the supporting affidavit (**Supporting Affidavit**) as you seem to allege, and some of the information has been in the public domain since the time of the JCU Disclosure, which I client apprehends to be earlier than the said filing date (**JCU Disclosure Point**).

If clause 54.1.5 did impose an obligation of confidence in respect of the information that you complain has been disclosed, by operation of subclause d) of that clause, it came to an end at 11.52am on 20 November 2017 (**Entry into Public Domain Time** and **Public Domain Point**).

Our client did not disclose the matters you have complained about to The Australian prior to the Entry into Public Domain Time. Any disclosures that may have been made thereafter, if there be any, are irrelevant.

Further and in any event, our client enjoys the Applicant's Rights which expressly permitted him to express disagreement with JCU's decisions, the processes used to make those decisions and express opinions about the operations of JCU (**Applicant's Rights Point**).

Our client is not obliged to comply with your request for a copy of his correspondence to The Australian, if there be any. In light of the above: it is unnecessary that he do so; the request is in substance fishing; no prima facie case of breach is made out such that its disclosure might be warranted; and, the request is not reasonable – such that our client is not obliged to comply with the request if it be a direction.

Online publication of confidential documents relating to the 2016 and the 2017 Disciplinary Processes.

Our client repeats and relies on:

- the Invalidity Point;
- the Public Domain Point; and
- the Applicant's Right's Point.

The two websites referred to were not launched or visible to the public prior to the Entry into Public Domain Time.

Your characterization of our client's conduct as repeated denigration of Professor ██████ is rejected. Notably, rather than JCU (or Professor ██████) joining issue with our client on the substance of what he has said and debating the merits of same, establishing (or alleging) that same is untrue or that same is an unreasonable opinion to hold, JCU has sought to shut down what is legitimate and proper criticism, and conduct that is expressly authorised by the Applicant's Rights.

In the premises, the documents that JCU requires to be taken down do not contain confidential information. As such, our client is not obliged to comply with that request nor is it reasonable. ON that basis, our client is not obliged to comply with the request if it be a direction.

As to your final query, the Code of Conduct does not, upon the EA's proper construction, cut down or limit the Applicant's Rights and the Third Confidentiality Direction is invalid and unenforceable and liable to be so declared.

1.3 Other alleged breaches of confidentiality direction

Our client repeats and relies on:

- the Invalidity Point;
- the Public Domain Point; and
- the Applicant's Right's Point.

All of the matters complained of post-date the Entry into Public Domain Time and the JCU Disclosure.

As to subparagraph (a) and further to the above, our client does not accept that he was under an obligation of confidence – he has repeatedly said so for the reasons repeatedly outlined in correspondence, and denies that he said he was under a "confidentiality agreement". If [REDACTED] has reported that, she is, with respect, confused. Our client accepts that he may have said word to the effect that he had been given the First Confidentiality Direction, Second Confidentiality Direction and/or Third Confidentiality Direction. That is uncontroversial.

The matters relied on to found the allegation that our client denigrated JCU to [REDACTED] are incapable of constituting denigration and in any event, our client the alleged statements, even if made, are expressly authorised by the Applicant's Rights. It is remarkable that JCU considers a statement by one of its Professors that he did not want his intellectual freedom diminished to amount to denigrating JCU.

As to subparagraph (b) and further to the above, our client gave [REDACTED] a copy of his paper (Larcombe and Ridd, 2018) (**Paper**). That was not done unsolicited and [REDACTED] agreed for it to occur. Much of what was discussed were mutual concerns about quality assurance in respect of the practice of science. If [REDACTED] was uncomfortable, she did not say so our exhibit any signs of it. You mischaracterise the email of 17 January 2018 to which you refer and your allegations in relation to it are demonstrably wrong – they are contrary to the express words of the email. Following our conversation, [REDACTED] (having agreed with my concerns) agreed to take up the issue with the Chief Scientist. She did, but made no headway. The email to which you have referred reports as much and that she had effectively met a roadblock and could not, for practical reasons advance the matter any further. The email plainly refers to the return of the Paper – see the subject description and the email under reply. The allegation is baseless and misconceived.

As to subparagraph (c) and further to the above, the statement attributed to our client does not disclose any (even allegedly) confidential information. Again the giving of the Confidentiality Directions and each of them is common ground. The allegation that by making that statement our client contravened the Confidentiality Directions or any of them is baseless and misconceived.

As to subparagraph (e) and further to the above, the statement attributed to our client does not disclose any (even allegedly) confidential information. Again the giving of the Confidentiality Directions and each of them is common ground. The allegation that by making that statement our client contravened the Confidentiality Directions or any of them is baseless and misconceived.

The University's concerns

Our client repeats and relies on:

- the Invalidity Point;
- the Public Domain Point; and
- the Applicant's Right's Point.

For the reasons set out above, the allegation that our client has engaged in serious misconduct in this regard is denied.

Concerns regarding engaging in conduct that does not up hold the integrity and good reputation of the University

Our client has expressed the view that you have treated him in the manner set out in the SOC. Our client enjoys the Applicant's Rights which expressly permitted him to express disagreement with

JCU's decisions, the processes used to make those decisions and express opinions about the operations of JCU

The 2016 Censure, Final Censure and the disciplinary process engaged in in respect of the First SoA and the Further SoA, purportedly pursuant to the EA, on their face, claim to be about other matters and our client accepts that JCU expressly denies that they were not about the views expressed by our client. For the various reasons set out in the SOC our client does not accept that is so and nor does he accept that he has breached the Code of Conduct in the manner alleged.

Just because JCU says otherwise does not make it so, and its assertions are not determinative of the matter.

This issue will be determined by the court as part of its determination of the FCC Proceeding.

There is no need to specifically address each of the statements attributed to our client at subparagraphs (a) to (f) (first reference), save to observe that:

- those statements are true, or substantially true and our client is confident that upon the determination of the FCC Proceeding they will be found to be so; and
- many of the statements are incapable of constituting the breach alleged.

As to JCU's concerns regarding the procedural fairness, again, the Applicant's Rights permit him to make such statements.

For the various reasons set out in the SOC our client does believe that he has been denied procedural fairness. Relevantly, a declaration that JCU has contravened clause 54.1.1 of the EA is sought by our client in the FCC Proceeding. The grounds fo that are se well known to JCU and are set out in the SOC.

Again, just because JCU says otherwise does not make it so, and its assertions are not determinative of the matter.

Again, this issue will be determined by the court as part of its determination of the FCC Proceeding.

There is no need to specifically address each of the statements attributed to our client at subparagraphs (a) to (c) (second reference), save to observe that:

- those statements are true, or substantially true and our client is confident that upon the determination of the FCC Proceeding they will be found to be so; and
- many of the statements are incapable of constituting the breach alleged.

As to the matters at subparagraphs (a) to (d) (third reference):

- the allegation at subparagraph (a) is demonstrably untrue. The comment is in fact and law (subject to the workplace right our client is exercising by commencing the FCC Proceeding), entirely consistent with the disciplinary process under the EA;
- the allegation at subparagraph (b)(i) is, for the reasons out lined in the SOC, untrue;
- the allegation at subparagraph (b)(ii) was part of a without prejudice conversation. In any event, properly understood it means that if JCU does not stop infringing our client's rights and dealing with him in a manner that contravenes the EA, he will resist such action (as he

is perfectly entitled to do) and the assertion of his legal rights will have consequences for JCU. Our client seeks declarations and civil penalty orders in the FCC proceeding against JCU – that is the usual relief sought in such proceedings;

- the statement at subparagraph (b)(iii), is not to the point. For the Reasons set out in the SOC our client says that that search was carried out for the Improper Purpose. This issue will be determined by the court as part of its determination of the FCC Proceeding;
- the matters at subparagraph (c) do not falsify the statement attributed to our client at subparagraph (c) (second reference) (i) – note in particular the words "resulted in a further accusation of misconduct". That statement is true – see the Further SoA;
- as to the matters at subparagraph (d), JCU has issued the First SoA and the Further SoA and dealt with them in the manner it has, which according to our client, properly understood is as set out in the SOC. Further, JCU undertook the Email Search for the Improper Purpose. All of that action, taken without any proper basis, puts our client's employment in jeopardy. Our client is the primary bread winner in his family and the income derived from his employment is the primary means by which he meets his and his family's essential needs. That was known, or ought reasonably to have been known, or was known to likely be the case, by JCU. In our client's view, that conduct by JCU is intended to terrorise him into submission and to compromise his the academic freedoms he enjoys (i.e. the Applicant's Rights) and which are essential to the proper carrying out of his work. Further, our client has in fact, found the actions of JCU to be intimidating, and a reasonable person in his position would be of a similar view;
- further in respect of subparagraph (d), our client does not accept that the Confidentiality Directions were given for his benefit or in fact benefit him. They were given as part of the conduct complained of in the immediately preceding subparagraph and to prevent the merits of the various decisions made by JCU being subjected to examination. Such examination would have found the decisions and the basis for them to be wanting and unsustainable, many on their face.

As to the matters at subparagraphs (a) to (c) (fourth reference):

- subparagraphs (a) and (b) have been addressed above; and
- our client strongly denies the allegation at subparagraph (c). Our client is not motivated by any attempt to denigrate or otherwise hurt JCU and it is with significant regret that our client has taken what he believes to be the necessary action of commencing the FCC Proceeding.

If JCU's reputation has been damaged, it has not been damaged by our client holding it to account for its unlawful, misleading and improper conduct, but rather it is its acts of engaging in that conduct that has caused such damage. Exposing and complaining about it only brings the public perception into line with the true reputation of JCU (**JCU's Conduct the Real Cause of Damage Point**).

For the reasons set out above, the allegation that our client has engaged in serious misconduct in this regard is denied.

Concerns regarding conduct that trivialises, satires or parodies the University taking disciplinary action against our client

Our client repeats and relies on:

- the Invalidity Point; and
- the Applicant's Right's Point.

The Australian Article is not concerned solely with the disciplinary process.

Further, statement attributed to our client is not directed to any particular part of The Australian Article and that statement is equivocal at best and incapable of constituting the breach alleged. Having regard to the seriousness of the allegation it is insufficient in the evidentiary sense to discharge the onus of proof.

For the reasons set out above, the allegation that our client has engaged in serious misconduct in this regard is denied.

Concerns regarding statements that are untrue, misleading and/or have the potential to damage the University's reputation

Our client repeats and relies on the JCU's Conduct the Real Cause of Damage Point.

As to the matters at subparagraphs (a) to (d):

- the statement at subparagraph (a) is true – see the email from ██████████ to our client dated 27 August 2017 at 12.40pm. Further, by the Further SoA JCU alleged that our client breached the Confidentiality Directions by communicating with his wife about the disciplinary process (**Wife Disclosure Allegation**);
- the statement at subparagraph (b) is taken out of context, but in any event is true by reason of the Wife Disclosure Allegation. "Deemed" does not mean finally determined. "That said and without any admission of wrong doing, our client will amend the website in question so that this statement is clarified.

For the reasons set out above, the allegation that our client has engaged in serious misconduct in this regard is denied.

Concerns that our client has engaged in threatening and disrespectful communications to the Dean and the University

The email of 28 November 2017 overstepped the mark and sought to impose on our client obligations that he was not subject to. In that regard there was no lawful basis to give the directions (to the extent our client cavilled with them) the Dean gave in the terms he did (**Impermissible Direction**). That direction appears to have been given in furtherance of the suite of conduct our client has complained about in the SOC.

In giving the presentation to the Sydney Institute our client was exercising the Applicant's Rights. The Dean was, by the Impermissible Direction, seeking to cut down those rights by imposing additional obligations derived from the Code of Conduct so as to restrict same.

Clauses 12 and 13 of the EA, upon the proper construction, do not support that approach.

In repelling the Impermissible Direction our client was exercising the Applicant's Rights and in doing so he was not subject to the Code of Conduct.

Notably, it is not alleged that the Dean, in fact, felt threatened and/or disrespected. No doubt the Dean, himself having regard to the dignity of our client and his needs (as he too is obliged to by

the Code of Conduct) in the context of the very difficult position JCU has placed him in by taking the action it has, was able to extend the type of understanding and perhaps occasional leeway one would expect to be given to a long serving employee.

No part of the email reply was dishonest.

Ordinarily and in isolation the reply email might raise an eyebrow however, in the context of the conduct engaged in by JCU and the giving of the Impermissible Direction it, properly characterised, was nothing more than the frank exchange that sometimes occurs between educated, professional adults dealing with difficult issues.

The email reply, in context, does not in any event satisfy the definition of serious misconduct in the EA.

For the reasons set out above, the allegation that our client has engaged in serious misconduct in this regard is denied.

Concerns regarding conflict of interest

The stated concerns are speculative and unfounded. The true position is as follows:

- the IPA has paid for accommodation and flights in relation to events at which our client has been a speaker. The meeting of those expenses is usual practice and confers no net benefit on our client. No fee was paid to our client for that work or is payable;
- our client contributed a chapter to a book published by the IPA. Although a fee was offered, that offer was declined, and no fee was paid to our client for that work or is payable. Our client has no idea as to the commercial success of the book in question. The position is no different to that of any other academic who publishes an article in a publication that is made available for sale;
- our client has disclosed to the world at large that the IPA has met some of the costs of his legal expenses – your allegations record as much. The acceptance of such assistance is not improper and creates no conflict of interest. There were and are no conditions attached to that assistance and the IPA has no say or authority over our client's actions and/or the FCC Proceeding. The disclosure of the receipt of that assistance was all that was required in the circumstances; and
- as to subparagraph (e), these allegations are denied for the reasons set out above.

Our client is doing no more than exercising his workplace rights by resisting the First SoA and the Further SoA and commencing the FCC Proceeding. To the extent that action may be said to constitute our client preferring his own interests over those of JCU, he is permitted by law to do so. Further, JCU's interests in perpetuating and acting in furtherance of its unlawful and improper conduct, is not a legitimate interest that our client is obliged to subjugate his personal interests too.

As to your request for disclosure of benefits received from the IPA:

- the IPA has paid legal fees in respect to obtaining advice in relation to resisting the First SoA in the sum of \$8,566.49; and
- save for as disclosed above, no other benefits have been received directly or indirectly from the IPA.

For the reasons set out above, the allegation that our client has engaged in serious misconduct in this regard is denied.

Conclusion

Conclusion and undertaking

All further allegations of serious misconduct are denied.

Given the overlap between the Third SoA and the FCC Proceeding it is entirely inappropriate for JCU to purport to make any determination in relation to these matters until the FCC Proceeding is determined.

For the reasons set out above and in particular under the heading Preliminary Matters, our client intends amending its statement of claim to seek appropriate relief in relation the Third SoA. We will liaise with Clayton Utz in relation to appropriate directions for this to occur so that it may be done in an orderly fashion.

We respectfully request that JCU provide an undertaking that it will not, by its servants, officers or agents, purport to determine any of the allegations the subject of the Third SoA (other than to dismiss them) until the determination of the FCC Proceeding, the agreement in writing of our client or order of the court.

If that undertaking is provided, in a demonstration of good faith, our client take such steps as are necessary to cause the supporting affidavit to be removed from the Wordpress Website and will not repost same for the duration of the FCC Proceeding.

If JCU is not prepared to give that undertaking, we request that it provide an undertaking by midday on Monday 26 February 2018 that it will not, by its servants, officers or agents, purport to determine any of the allegations the subject of the Third SoA (other than to dismiss them) prior to 5.00pm on 2 March 2018 and after that without first giving two business days' notice in writing of its intention to do so.

The latter undertaking is requested so that an application for an interlocutory injunction and the necessary supporting material can be prepared and it brought on in an orderly fashion and at a time convenient to all parties, their representatives and the court.

We await your response.

Yours faithfully

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