PROTECTION FROM INSTITUTIONAL CENSORSHIP: AN ESSENTIAL ASPECT OF ACADEMIC FREEDOM

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Traditional conceptions of academic freedom emphasise the importance of universities being free from external regulation or interference, to enable them to produce and disseminate expert knowledge through teaching, research, and scholarship. However, recent Australian court decisions and scholarship highlight the importance of protecting academic staff from disciplinary action by a university as an employer. Universities themselves may threaten academic freedom by punishing scholars for public comments within their areas of expertise. As academic freedom exists for the public benefit, rather than the benefit of universities or individual academics, legislation is needed to prevent universities from censoring scholars regarding public comment on matters within their expertise.

I INTRODUCTION

This article examines the potential conflict between the disciplinary powers of Australian universities under employment law, and significant aspects of academic freedom. Some accounts of academic freedom emphasise the importance of universities being free from external regulation or interference.[1] These accounts argue that universities should be self-governing or autonomous, in order to produce and disseminate expert knowledge through teaching, research and scholarship.[2] However, recent accounts of academic freedom in Australia highlight the importance of protecting academic staff from disciplinary action by a university as employer.[3] These accounts argue that universities themselves may threaten academic freedom by disciplining scholars who make public statements on matters within their areas of disciplinary expertise, but which breach staff codes of conduct.[4] Both accounts

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1 Eric Barendt, *Academic Freedom and the Law: A Comparative Study* (Hart Publishing, 1st ed, 2010) 22 <https://doi.org/10.1093/acprof:oso/9780199225811.001.0001> (‘*Academic Freedom and the Law*’).

2 Ibid 66.

3 See, eg, Robert French, *Independent Review of Freedom of Speech in Australian Higher Education Providers* (Report, 27 March 2019) (‘*French Review*’).

4 Ibid 143–9.

argue that universities serve a unique democratic function in producing and disseminating expert knowledge.[5] However, recent accounts of academic freedom emphasise the importance of preserving the autonomy of academic disciplines, which may be threatened by disciplinary action against individual academic staff.[6]

This article argues that academic freedom requires the protection of academic staff from disciplinary action in relation to public comments made in their areas of expertise, possibly including comments on the policies, governance, or management of the university which is their employer. In several recent and high-profile cases, Australian university administrators have taken disciplinary action against academic staff who make such comments, based on codes of conduct requiring staff to be 'collegiate' and to 'uphold the good reputation of the university'.[7] In the hands of university administrators, wide discretionary powers pose a serious risk to academic freedom in Australia. This article argues that legislation is needed to define this aspect of academic freedom and to prevent universities from taking disciplinary action which is inconsistent with its exercise.

This article is structured as follows. Part II argues that academic freedom requires academic staff, and the disciplines of which they are part, to operate autonomously. Part III argues that employment law, and particularly the disciplinary powers of employers, may work against such autonomy. Part IV argues that the autonomy of academic disciplines justifies protection against disciplinary action regarding comments by academic staff on matters within their areas of expertise. Ultimately, this article concludes that national legislation is needed to protect academics from institutional censorship.

II THE IMPORTANCE OF ALLOWING ACADEMIC DISCIPLINES TO OPERATE AUTONOMOUSLY

This Part advances three arguments explaining why academic freedom requires allowing academic disciplines to operate autonomously. First, it outlines two accounts of academic freedom, both of which highlight the unique function of academic disciplines in producing and disseminating expert knowledge. Second, this Part highlights the public interest in protecting the autonomous operation of academic disciplines. Finally, it highlights that private institutions, rather than the state, may pose the greatest threat to academic freedom.

5 Ibid 220.
6 See Part II of this article.
7 See Part III(C) of this article.

A Two Accounts of Academic Freedom

The principle of academic freedom[8] has been described as a 'defining characteristic of universities'.[9] However, it has 'no settled definition'[10] and there is a 'lack of consensus on [its] precise definition'.[11] Some accounts of academic freedom emphasise the importance of universities being free from *external* regulation or interference.[12] Primarily, but not exclusively, this involves universities being free from legal regulation and intrusion by the state.[13] These accounts of academic freedom emphasise that universities should be self-governing or autonomous, in order to produce and disseminate expert knowledge through teaching, research and scholarship. This account of academic freedom is still dominant in United States ('US') jurisprudence, which is based on the First Amendment.[14] Consistent with classic liberal conceptions of rights, this account of academic freedom regards the state as the greatest potential threat to that freedom.[15]

However, another account of academic freedom is emerging in Australian scholarship. Under this account, academic scholars may require protection from disciplinary action by the university at which they are employed.[16] Specifically, when scholars comment publicly on matters within their areas of expertise, they should not be subject to disciplinary action by their employer.[17] This is because institutional censorship may undermine the autonomy of academic disciplines, which is necessary for the production and dissemination of specialised knowledge.

These two accounts of academic freedom may overlap, in that institutional autonomy may also, incidentally, protect the autonomy of academics and disciplines (in particular, from external interference). However, these two accounts diverge on whether a university should be able to discipline an academic scholar who breaches their employment duties whilst exercising academic freedom (for example, by insulting a colleague in the course of scholarly debate). On the one hand, emphasising institutional autonomy indicates that laws and courts should not

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8 Some aspects of academic freedom, or intellectual freedom, are contained in university enterprise agreements, and in legislation: *French Review* (n 3) 177. However, this article examines academic freedom as a principle, which is not defined by or limited to these definitions or their interpretation.

9 Ibid 114. See also Barendt, *Academic Freedom and the Law* (n 1) ch 3. In *Burns v Australian National University* (1982) 61 FLR 76 ('*Burns*'), Ellicott J stated that academic freedom is 'the very principle upon which the university is founded': at 88.

10 *French Review* (n 3) 18.

11 Ibid 41.

12 Barendt, *Academic Freedom and the Law* (n 1) 22.

13 Carolyn Evans and Adrienne Stone, *Open Minds: Academic Freedom and Freedom of Speech in Australia* (La Trobe University Press, 2021) chs 1, 5.

14 Stanley Fish, *Versions of Academic Freedom: From Professionalism to Revolution* (University of Chicago Press, 2014) <https://doi.org/10.7208/chicago/9780226170251.001.0001> ('*Versions of Academic Freedom*'). See also Stanley Fish, *The First: How to Think about Hate Speech, Campus Speech, Religious Speech, Fake News, Post-truth and Donald Trump* (Simon & Schuster, 2020) ch 3 ('*The First*'). Differences between Australian and American conceptions of academic freedom are examined in Part IV(B) of this article.

15 See generally Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007) <https://doi.org/10.1093/acprof:oso/9780199225811.001.0001>.

16 Barendt, *Academic Freedom and the Law* (n 1) 23–6.

17 Ibid 43.

interfere in 'internal' university business, such as disciplinary action. On the other hand, laws may be necessary to 'provide a safeguard against abuse' by a university of its powers as employer.[18]

The following section outlines the importance of academic disciplines being allowed to operate autonomously, free from the threat of disciplinary action. Significantly such autonomy benefits the general public, and not merely individual academic scholars.

B Disciplinary Expertise and the Public Good

The importance of academic freedom derives from the 'distinctive function of universities' in producing and disseminating expert knowledge through the core activities of research, teaching and scholarship.[19] Scholars such as Carolyn Evans and Adrienne Stone emphasise that these core activities benefit the public, and not merely those directly involved in teaching, research and scholarship. They argue that teaching and learning at universities benefits society by assisting to produce 'active, engaged citizens'.[20] University education encourages students to think critically and to challenge received wisdom, which is vital to democratic government.[21] University research contributes to the production of new knowledge and new discoveries, for example in the areas of science, technology, and medicine.[22]

Whereas teaching, learning, and research typically happen *within* the walls of a university, scholarship and engagement involves interaction between scholars and the wider community. This includes, for example, academics publishing their research in scholarly journals, presenting it at conferences, writing opinion pieces for newspapers and speaking at public forums. Contributing to public debates on complex and contested topics, or 'community engagement', is an accepted and expected part of the work of academic staff.[23] By contributing to public debates on matters within their areas of expertise, academics promote a more informed public debate, particularly by presenting well-researched evidence and analysis, rational arguments and critical perspectives.[24] The unique value of academic freedom is that it can challenge orthodoxy, dogma and majority views in public debates.[25]

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18 Ibid.

19 Evans and Stone (n 13) 6, 76.

20 Ibid 83. For a more critical account of Australian university education, see Richard Hil, *Selling Students Short: Why You Won't Get the University Education You Deserve* (Allen & Unwin, 2015).

21 Evans and Stone (n 13) 57, 83. See also Ronald Dworkin, 'We Need a New Interpretation of Academic Freedom' (1996) 82(3) *Academe* 10 <https://doi.org/10.2307/40251473>. Dworkin presents an account of academic freedom based on 'ethical individualism', rather than public benefit. However, he emphasises the cultural and democratic importance of university education in promoting critical thinking: at 12.

22 Evans and Stone (n 13) 75.

23 Ibid 93. Community engagement is required in the sense that it is necessary for academic promotion, and an academic may be disciplined for not fulfilling this aspect of their duties.

24 Ibid 22, 84. Australian scholar Raewyn Connell emphasises the public nature of the academic role: Raewyn Connell, *The Good University: What Universities Actually Do and Why It's Time for Radical Change* (Monash University Publishing, 2019) 26.

25 Ibid 82. See also Catharine A MacKinnon, *Butterfly Politics: Changing the World for Women* (Harvard University Press, 2019) 244.

At universities, teaching, research and scholarship take place in the context of academic disciplines. Each discipline has particular standards and methods which are required of its members.[26] Academic disciplines 'employ methods that are designed to ensure competence and … expertise' in teaching, research and scholarship in the discipline.[27] For disciplines to produce expert knowledge, they require a high degree of autonomy or self-government.[28] That is, members of the discipline collectively determine standards required of members, rather than this being decided by the state or by university administrators.[29] Evans and Stone emphasise that academic disciplines are necessarily hierarchical in structure and therefore not 'democratic' in the sense of being open to everyone, or everyone having equal standing.[30] In this way, academic freedom is distinct from broader notions of free speech, which necessarily apply to all members of society.

Within academic disciplines, peer review is the most common mechanism for maintaining professional standards.[31] Through the process of peer review, membership of the discipline is granted, and decisions are made regarding whether to publish certain research, and whether certain work qualifies as research.[32] Peer review is used to decide applications for promotion in universities, and also to determine applications for research funding.[33] The peer review process has potential flaws, and it may 'protect orthodoxy and privilege, like a club defending its turf'.[34] Peer review does not guarantee accurate or reliable knowledge in every case.[35] However, over time, it produces a reliable body of knowledge.[36]

To operate effectively, academic disciplines require a high degree of *autonomy*, or protection from external regulation. This autonomy (or freedom) is not for the personal benefit of individual academics. Rather, it benefits the public, through the production and dissemination of expert knowledge. Essentially, academic freedom means the 'right to [exercise] independent judgment in one's own area of research or teaching'.[37] Although methods and standards differ between disciplines, generally they require adherence to standards regarding reliability, relevance, and

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26 Evans and Stone (n 13) 82.

27 Ibid 79. See also Robert Post, *Democracy, Expertise and Academic Freedom* (Yale University Press, 2012) ch 3.

28 Evans and Stone (n 13) 81.

29 Ibid 96. This underpins notions of institutional autonomy, as outlined above.

30 Ibid. Evans and Stone acknowledge that being hierarchical and (to an extent) 'closed' to outsiders may lead disciplines to be conformist and to exclude new or challenging ideas. Similarly, MacKinnon argues that institutional autonomy may operate to reinforce conformity within a discipline: MacKinnon (n 25) 246.

31 Connell (n 24) 33. See also Barendt, *Academic Freedom and the Law* (n 1) 20.

32 Connell (n 24) 33.

33 Ibid.

34 Ibid.

35 Ibid 34. Connell refers to several examples of flawed research, such as racially biased research. She notes that '[w]e need to pay attention to such cases so we do not get complacent about the solidity and splendour of science': at 34.

36 Ibid 34–5. MacKinnon is less optimistic, arguing that academics 'seldom question orthodoxy', or challenge the structure of power, due to factors including peer pressure: MacKinnon (n 25) 243, 246, 250.

37 Connell (n 24) 65. Barendt emphasises that academic freedom in fact imposes onerous obligations on academic staff: Barendt, *Academic Freedom and the Law* (n 1) 51.

accuracy.[38] These standards ensure that research and academic scholarship is done 'in a truthful way'.[39]

For these reasons, 'an academic may be overtly critical of colleagues, and of their work, in ways that might be out of place in other employment contexts'.[40] This is because 'robust [academic] discussion' is necessary in order to test ideas and arguments.[41] Suppressing open and rigorous debate is generally not in the public interest,[42] and disciplinary action by a university (for example, to ensure academics are speaking 'respectfully') may prevent the robust exchange of views needed to produce and disseminate expert knowledge.[43]

Intramural expression, or public comments by academic scholars on the policies, governance, or management of the university at which they are employed, is sometimes treated as a distinct (and even controversial) aspect of academic freedom.[44] However, such comments are an important aspect of academic freedom, and protection of academics making such comments is justified on the following grounds.[45]

First, as outlined above, academic freedom applies to areas within which an academic has expertise. Usually, those areas of expertise are defined by the discipline or disciplines within which an academic teaches, researches, or publishes. However, university policy, governance and management are areas within the expertise of *all* academics employed at a university. Evans and Stone note that academics employed at a university 'are best placed to understand the conditions in which [research and teaching] prosper and will be the most motivated to ensure that these activities occur freely and adhere to academic methods'.[46]

Second, most Australian universities are established for public purposes, specifically to teach, conduct research and scholarship, rather than for private commercial gain.[47] Being established for public purposes and funded by taxes, universities should be accountable in terms of proper governance and management. Finally, academics have an established role in university governance, for example through legislation enabling them to be elected to roles such as academic board and university council.[48] Therefore, all academic staff have a legitimate interest in the proper governance of the university at which they are employed. Further, it is in the *public* interest for scholars to highlight issues concerning university policy,

38 Evans and Stone (n 13) 79, 85. Barendt argues that academic freedom is 'constrained by the professional standards of the particular academic community': Barendt, *Academic Freedom and the Law* (n 1) 58.

39 Connell (n 24) 32 (emphasis omitted).

40 Evans and Stone (n 13) 94.

41 Ibid. Evans and Stone acknowledge the risk of bullying and harassment done under the guise of robust debate. Particularly, they acknowledge the dangers of this for junior and untenured staff: at 95.

42 Ibid. This issue is examined in more detail in Part III(B) of this article.

43 Ibid 97.

44 Barendt, *Academic Freedom and the Law* (n 1) 18; *French Review* (n 3) 76, 118.

45 Evans and Stone (n 13) 96.

46 Ibid.

47 Ibid 76.

48 See, eg, *University of Melbourne Act 2009* (Vic) s 11 (council membership). Barendt regards the participation of academic staff in university governance as an essential part of professional self-regulation: Barendt, *Academic Freedom and the Law* (n 1) 69.

governance, and management. Therefore, public comments by academic staff on these matters requires protection as an important aspect of academic freedom.

C Academic Freedom and Mill's Arguments for Free Speech

Academic freedom is distinct from broader notions of free speech.[49] However, academic freedom is to a significant extent a freedom regarding *speech*. As indicated above, it is a freedom to dissent from majority views and to challenge orthodoxy. Therefore, the arguments of John Stuart Mill are relevant to clarify the scope and nature of this freedom.[50]

Mill famously argued that open discussion and debate are valuable as they assist in the discovery of truth.[51] He particularly emphasised the negative effects of persecution, or suppression of ideas on the search for truth.[52] In particular, Mill emphasised the dangers of powerful private institutions silencing their critics or suppressing unorthodox ideas or opinions.[53] Mill regarded the speech of 'wise … individuals', such as Socrates and Christ, as being particularly valuable.[54] He argued that the public benefited from being exposed to the 'best men [sic] and the noblest doctrines'.[55] Therefore, restrictions on their speech were not merely a 'private injury' to the speaker, but were detrimental to all those denied hearing their words.[56]

These arguments have a particular relevance to academic speech, as Mill was concerned with protecting discussion and debate concerning 'the highest subjects', 'the greatest questions' and 'large and important issues'.[57] In particular, he emphasised that open debate tends to work against unquestioning acceptance of official dogma and 'received opinion'.[58] He particularly valorised those who fearlessly dissented from and challenged received opinion, often at great personal cost.[59]

Mill emphasised that received wisdom or popular opinion at one point in time is sometimes found, subsequently, to be false or incomplete.[60] Conversely, what was regarded as false or inconceivable at one time was sometimes discovered

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49 *French Review* (n 3) 103; Evans and Stone (n 13) 73.

50 Similarly, Evans and Stone argue that Mill's arguments provide a partial rationale for academic freedom: Evans and Stone (n 13) 82. On the other hand, Robert Mark Simpson argues that academic freedom and free speech more generally serve distinct purposes and that free speech on campus may undermine academic practices: Robert Mark Simpson, 'The Relation between Academic Freedom and Free Speech' (2020) 130(3) *Ethics* 287 <https://doi.org/10.1086/707211>.

51 John Stuart Mill, 'On Liberty' in Alan Ryan (ed), *Mill: Texts, Commentaries* (W W Norton, 1997) 41, 68–70. Mill also argued that free speech assists in personal development. This aspect of his argument is not relevant in this context.

52 Ibid 55.

53 Ibid 62–3. In Mill's time, powerful institutions included churches. However, in contemporary circumstances, universities could be regarded as powerful institutions. Mill's arguments focused on censorship by *private* institutions, rather than by the state.

54 Ibid 56, 59–60.

55 Ibid 59.

56 Ibid 53.

57 Ibid 67.

58 Ibid 71.

59 Ibid 58–9. As mentioned above, Mill refers to famous historical examples, such as Socrates and Christ.

60 Ibid 76–80.

to be true.[61] Therefore, those with unconventional views require protection from suppression by ignorant majorities and powerful institutions.[62] Mill argued that powerful institutions always seek to remain in power, particularly by silencing, intimidating and discrediting critics or those who express heretical views.[63]

Mill's arguments may overstate the likelihood of truth resulting from open debate, and understate its potential harms.[64] However, in relation to specialised fields of knowledge, it is more likely that open debate between scholars, or experts in a field, will result in reliable knowledge, than open debate between members of the public.[65] Also, the potential harms of scholarly debate can be regarded as acceptable, as robust discussion is an unavoidable part of challenging arguments and advancing knowledge.

These arguments support the need to protect academics from 'institutional censorship'. Mill highlighted that private institutions, rather than the state, may be the greatest threat to open and robust debate. He stressed that the protection of individual speech from censorship promotes the public interest, rather than merely the interests of an individual speaker.

Mill's conception of free speech does not provide a complete rationale for academic freedom, and free speech on campus may actually undermine certain academic practices.[66] For example, Mill's account is extremely individualistic, and it ignores the collective accountability inherent in academic disciplines. As outlined above, academic disciplines operate to exclude purported research and scholarship which does not meet professional and ethical standards.[67] On the other hand, Mill rejects any censorship of individual speech, no matter how uninformed or illogical the speech may be. Rather than providing a complete rationale for academic freedom, Mill's account of free speech provides an important reminder that private institutions may threaten the robust debate needed in the search for truth. Further, Mill's account emphasises the importance of the search for reliable knowledge, which is the primary purpose of academic disciplines.

In summary, this Part has argued that academic freedom requires protection of the autonomous operation of academic disciplines. As outlined above, the unique function of universities is to produce and disseminate expert knowledge. In universities, expert knowledge is produced in academic disciplines which have strict standards regarding teaching, research and scholarship. Disciplines function largely through open, robust, and public debate in which ideas and arguments are thoroughly tested. Although academic freedom may be exercised by individuals, it is not for their personal benefit. Rather, this freedom is necessary to produce and

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61 Ibid 78.

62 Ibid.

63 Ibid 83.

64 See, eg, Bill Swannie, 'Are Racial Vilification Laws Supported by Free Speech Arguments?' (2018) 44(1) *Monash University Law Review* 71, 104–5.

65 Kent Greenawalt, 'Free Speech Justifications' (1989) 89 *Columbia Law Review* 119, 136–7 <https://doi.org/10.2307/1122730>. See also Post (n 27). Post particularly emphasises the important role of disciplinary experts in producing reliable knowledge.

66 Simpson (n 50).

67 Post (n 27) ch 3.

disseminate expert knowledge for the public good, and scholars require autonomy for this purpose.

The next Part of this article outlines how employment law, and the disciplinary powers of universities as employers, may work against preserving this autonomy.

III EMPLOYMENT LAW MAY WORK AGAINST PRESERVING ACADEMIC AUTONOMY

This Part argues that employment law may operate to undermine the autonomy of academic staff at Australian universities. First, it outlines the subordinate and vulnerable position of employees under the common law of employment. Second, it outlines the wide discretions conferred on administrators by university codes of conduct. Finally, it examines recent Australian court proceedings in which universities have taken disciplinary action against academic staff for comments within their areas of expertise.

A The Common Law of Employment

Staff at Australian universities, including academic staff, are employees and are therefore bound by the common law of contract and the implied duties of an employee.[68] This means that staff can have their employment terminated for serious misconduct, despite having continuing employment (or 'tenure').[69] At common law, employees owe an implied duty to obey all reasonable and lawful directions by the employer.[70] This duty operates strictly and even disobedience that is not wilful can be subject to disciplinary action by the employer.[71] Further, employees owe a duty of loyalty to act in the best interests of the employer, and to place the employer's interests before their own.[72] Employees must therefore avoid a conflict of interest with their employer, and this may mean that employees who publicly criticise their employer may be disciplined and even have their employment terminated.[73]

Therefore, the common law of employment places strict obligations on employees, backed up by severe consequences including termination of employment.[74] In the employment relationship, employees are commonly in a less powerful position than the employer.[75] As Davies and Freedland explained:

68 See *Orr v University of Tasmania* (1957) 100 CLR 526.

69 See generally Louise Floyd, *Nutshell: Employment Law* (Thomson Reuters, 2nd ed, 2018) ch 5; Joellen Riley, Paul O'Grady and Carolyn Sappideen, *Macken's Law of Employment* (Thomson Reuters, 8th ed, 2016) [9.230].

70 *R v Darling Island Stevedoring & Lighterage Co Ltd* (1938) 60 CLR 601.

71 *Adami v Maison de Luxe Ltd* (1924) 35 CLR 143.

72 *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66. See also *University of Western Australia v Gray* (2009) 179 FCR 346 ('*Gray*').

73 See, eg, *Comcare v Banerji* (2019) 267 CLR 373.

74 These obligations are mitigated to some extent by laws protecting employees from unfair dismissal and adverse action by an employer, for example: see Riley, O'Grady and Sappideen (n 69) [13.50], [13.240].

75 Critical legal scholars argue that the employee-employer relationship is a legal construct which operates to legitimate unequal social and economic relations: see, eg, Alastair Edie, Ian Grigg-Spall and Paddy

> There can be no employment relationship without a power to command and a duty to obey, that is without this element of subordination in which lawyers rightly see the hallmark of the 'contract of employment'.[76]

Further, courts tend to interpret the duties of employees broadly, in a manner that upholds managerial prerogatives and the business interests of employers.[77] At common law, employers have few legal duties; most legal duties on employers are imposed by legislation.[78] Therefore, under the common law of employment, employees are in a subordinate and vulnerable position in relation to the employer.

Generally, the common law of employment applies to all types of employment. However, on occasion, Australian courts have recognised the unique nature of academic employment. For example, in *University of Western Australia v Gray* ('*Gray*'),[79] the Full Court of the Federal Court held that an invention made by a professor employed by the university was not the intellectual property of the university. Put another way, academic staff may retain certain legal rights even though they are employed by a university.[80] In *Gray*, the Full Court emphasised some distinctive features of employment at a university, such as the ability of academic and professional staff to be involved in university governance.[81] The Court also emphasised that academic staff are generally free to 'choose the subject or line of [their] research and the manner of its pursuit and … when and how to publish the products of one's research'.[82] Therefore, the Full Court reasoned, the duties ordinarily applying to employees 'sit uneasily' in relation to academic staff.[83]

In summary, academic staff are generally bound by the implied duties of employees at common law.[84] However, there is some recognition by Australian courts that these obligations may be qualified in relation to academic staff, due to the unique nature of their employment.

B Wide Discretionary Powers under Codes of Conduct

Many employers, including universities, have codes of conduct that regulate various aspects of an employee's behaviour. Like other employers, university codes impose duties on employees in relation to their behaviour towards others,

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Ireland, 'Labour Law' in Ian Grigg-Spall and Paddy Ireland (eds), *The Critical Lawyers' Handbook* (Pluto Press, 1992) 106.

76 Paul Davies and Mark Freedland, *Kahn-Freund's Labour and the Law* (Stevens & Sons, 3rd ed, 1983) 18.

77 See Ruth Dukes, 'Critical Labour Law: Then and Now' in Emilios Christodoulidis, Ruth Dukes and Marco Goldoni (eds), *Research Handbook on Critical Legal Theory* (Edward Elgar Publishing, 2019) 345, 349 <https://doi.org/10.4337/9781786438898.00027>.

78 Ibid. See also Riley, O'Grady and Sappideen (n 65).

79 *Gray* (n 72).

80 As mentioned above in *Burns* (n 9), Ellicott J highlighted the unique nature of academic employment at a university, stating that academic freedom is 'the very principle upon which the University is founded': at 88.

81 *Gray* (n 72) 388 [185].

82 Ibid 389 [186].

83 Ibid, quoted in *French Review* (n 3) 215–16.

84 In *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, the High Court of Australia held that Australian common law does not recognise a duty of good faith on employers, despite employees being under such a duty. This supports the need for *legislative* protection for academic staff when exercising academic freedom, given that courts have shown an unwillingness to do so.

and the impact of their conduct on the reputation of the university. For example, many university codes require staff to show 'respect' and 'collegiality' to other staff, and to uphold the good reputation of the university.[85]

These obligations in themselves are unobjectionable. Universities, like any employer, have a legitimate interest in maintaining a respectful and collegiate workplace and in preventing bullying and harassment.[86] Likewise, it is important for a university to be able to present a positive public image, for example, to attract external funding and revenue through student enrolments.[87]

However, codes of conduct are legally enforceable against employees, as they are regarded as directions by the employer to the employee.[88] Therefore, an employer may take disciplinary action against an employee who breaches these obligations. This can have extremely serious consequences for an employee, including termination of employment.[89] Further, such disciplinary action may undermine core aspects of academic freedom.

For example, if an academic scholar at one university publicly criticises the research of a scholar at another university in a published journal article, or at a conference, this may be regarded as not acting 'respectfully', and it may expose the first scholar to disciplinary action. If the scholar publicly criticises the research of another scholar at the same university, this may be regarded as not being collegiate or respectful. However, as outlined above, publicly commenting on and criticising the work of other scholars is the core work of academic staff.

It may be argued that such criticism can be done respectfully, and therefore codes of conduct are not in conflict with academic freedom. Put another way, codes merely regulate the *way* criticisms are made, and not the criticism itself.[90] However, in many contexts, there can be no meaningful distinction between the content of a message and how it is communicated. In his dissenting judgment in *James Cook University v Ridd*, Rangiah J observed:

> [I]t is difficult to see, for example, how an academic could make a genuine allegation that a colleague has engaged in academic fraud without being uncollegial, disrespectful and discourteous and adversely affecting [the university's] good reputation.[91]

Some scholars argue that, without codes requiring civility and respect and the upholding of a university's reputation, universities and their staff risk being

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85 *French Review* (n 3) 214–15; Evans and Stone (n 13) 97.

86 Theodore McDonald, James Stockton and Eric Landrum, 'Civility and Academic Freedom: Who Defines the Former (and How) May Imperil Rights to the Latter' (2018) 21(1) *College Quarterly* 3:1–20.

87 Martin notes that Australian government settings for 'higher education … foster conformity among institutions in pursuit of funds rather than intellectual debate': Brian Martin, 'Dilemmas of Defending Dissent: The Dismissal of Ted Steele from the University of Wollongong' (2002) 45(2) *Australian Universities' Review* 7, 14.

88 See also Riley, O'Grady and Sappideen (n 69) [5.420].

89 Martin argues that 'employees who [face disciplinary action for public comments] suffer enormously. Often their careers are destroyed and they have huge expenses, with health and relationships at serious risk': Martin (n 87) 13.

90 This was essentially the position adopted by Griffiths and Derrington JJ in *James Cook University v Ridd* (2020) 278 FCR 566.

91 Ibid 620 [264].

exposed to 'baseless accusations' of wrongdoing made by 'disgruntled' or 'vindictive' employees.[92] However, it is unlikely that such comments would be protected by academic freedom. Even scholars such as Ronald Dworkin, who argue for a robust individual right to academic freedom, accept that intentionally malicious statements are not protected from disciplinary action.[93] This is because academic freedom is underpinned by professional ethical standards and scholarly norms, such as the requirement that scholars present rational arguments and provide credible evidence. These standards and norms are enforced by academic disciplines, rather than by university administrators.

Academic freedom is of course subject to limits and exceptions.[94] In addition, universities have the opportunity and resources to publicly respond to criticisms, rather than take disciplinary action. For the reasons outlined below, speaking back may be preferable to taking disciplinary action.

Public comments by an academic scholar on the policies, governance, or management of the university at which they are employed are an important part of academic freedom.[95] However, such comments may be regarded as failing to uphold the good reputation of the university, and therefore may expose the scholar to disciplinary action. Scholars argue that the obligation to uphold the good reputation of a university effectively means that 'no [public] comment [by an academic] is safe [from disciplinary action]'.[96]

Protecting the *reputation* of a university necessarily involves protecting its commercial or business interests.[97] As mentioned above, universities must be able to attract external funding and students through presenting a positive public image. However, the distinct and overriding purpose of a university is the production and dissemination of expert knowledge.[98] Universities that prioritise business interests, including their reputation, over the creation of knowledge may be regarded as mere 'proprietary institutions' or 'sham' universities.[99] Therefore, universities should not censor academic staff who comment on university administration, policies, and governance. Rather

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92 Pnina Levine and Haydn Rigby, 'To What Extent Should Academic Freedom Allow Academics to Criticise Their Universities?' (2022) 48(1) *Monash University Law Review* 1, 44. On the other hand, some scholars argue that civility codes may be misused by 'unprincipled [university] administrators' to intimidate and silence academic workers who ask legitimate questions or who criticise administrator's policies or decisions. They argue that behavioural codes are used by 'powerful organizational figures' against less powerful members of staff: see McDonald, Stockton and Landrum (n 86) 8, 15. See also Martin (n 87) 8–9; *French Review* (n 3) 42, 117.

93 Dworkin (n 21) 13.

94 Possible limits and exceptions are examined in Part IV(A) of this article.

95 Barendt, *Academic Freedom and the Law* (n 1) 21; *French Review* (n 3) 76, 118.

96 Martin (n 87) 11.

97 *French Review* (n 3) 117. See also McDonald, Stockton and Landrum (n 86) 7. The *Fair Work Regulations 2009* (Cth) define 'serious misconduct' as including 'conduct that causes serious and imminent risk to … the reputation, viability, or profitability of the employer's business': at r 1.07(2)(b). This is a higher standard than that required by codes of conduct.

98 The *French Review* describes Australian higher education providers as 'public authorities' due to the nature of their primary funding sources, and the services they provide (education, research and scholarship): *French Review* (n 3) ch 14.

99 Post (n 27) 89.

> a university's reputation should be robust enough to handle vocal criticism and the best defence against unfair attacks is a patient, careful refutation of incorrect claims, causing those who make unsustainable criticisms to lose credibility.[100]

Universities should *speak back*, or publicly respond to criticism, rather than disciplining critics.[101] In this way

> inside criticism [that is, criticism by academic staff of the university] can be made into a source of strength [for the university] … By both tolerating or even fostering dissent, and publicizing its toleration, university managers can portray themselves as enlightened and open.[102]

There are two risks for a university which disciplines a staff member for adverse public comments about the university, rather than speaking back. First, the staff member may become a martyr, and people may tend to sympathise with and believe claims made by the disciplined staff member and not the university.[103] Second, the university may suffer even greater reputational damage, for example through adverse court decisions and negative publicity.[104]

In summary, university codes of conduct confer wide discretionary powers on universities as employers. These codes enable a university to take disciplinary action against an academic scholar in respect of conduct that may fall within the scope of academic freedom. The operation of such codes therefore needs to be limited, in order to protect academic freedom. Such protection is necessary due to the vulnerable status of academic staff under employment law, and the tendency of powerful institutions to attempt to silence dissent, as emphasised by Mill.

C Recent Court Decisions Involving Academic Freedom

This Part examines three recent Australian court proceedings involving university academics who publicly criticised the university at which they were employed.[105] In all three cases, academics were disciplined by the university, or legal action was taken against them, for public comments that appear to fall within the scope of academic freedom. These proceedings highlight the vulnerable position of academic staff under employment law, and the risks to academic freedom of wide discretionary powers enabling university administrators to discipline staff.

1 Criticism of University Governance

In 2019, the Australian Broadcasting Corporation broadcast a current affairs program on the practices of certain Australian universities concerning international students. One person interviewed was Associate Professor Gerd Schröder-Turk, an academic staff member at Murdoch University. Amongst other statements,

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100 Martin (n 87) 11.

101 The *French Review* recommended that universities embrace a culture of academic freedom and dissent: *French Review* (n 3) 118, 219.

102 Martin (n 87) 14. '[D]espite the opportunity here, no Australian university stands out as a haven for dissent'.

103 For example, there was widespread public opposition to the summary dismissal of Ted Steele by the University of Wollongong, as described in Martin (n 87) 14.

104 See ibid.

105 Other examples are examined in Martin (n 87) 8; Evans and Stone (n 13) ch 1.

Schröder-Turk expressed discomfort at the university's practice of waiving English language proficiency standards for international students.[106] In response, the university sought to remove Schröder-Turk from his elected role on the university Senate. The university also sued Schröder-Turk for damages, alleging breach of fiduciary duty and consequent loss of student income caused by his disclosure.[107] In response, Schröder-Turk alleged breach of the *Fair Work Act 2009* (Cth) ('*FWA*')[108] and whistle-blower protection legislation[109] by the university.

Scholars regard Schröder-Turk's public statements as a legitimate exercise of academic freedom, as these were public comments on the policies, governance, or management of the university at which he is employed.[110] Necessarily, these were matters within his areas of expertise.[111] Ultimately, due to widespread public criticism, the university withdrew proceedings against Schröder-Turk. However, the university's aggressive response to Schröder-Turk's public statements demonstrates the need for stronger protection of academic freedom.

2 Criticism of Research Methods

Also in 2019, James Cook University ('JCU') terminated the employment of Professor Peter Ridd following 17 allegations of misconduct by Ridd over a two-and-a-half-year period. Ridd commenced proceedings against JCU, alleging that disciplinary action against him contravened provisions in the JCU enterprise agreement and were therefore unlawful.[112] Ultimately, JCU terminated Ridd's employment based on serious misconduct. Ridd was successful at trial, with the judge finding that JCU had acted unlawfully and he was awarded over AUD1 million in compensation.[113] However, this decision was overturned on appeal, with the Full Court holding by majority that JCU had not acted unlawfully.[114]

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106 'Cash Cows: Australian Universities Making Billions out of International Students', *Four Corners* (Australian Broadcasting Corporation, 6 May 2019) 00:28:43–00:29:27 <https://www.abc.net.au/4corners/cash-cows/11084858>.

107 *Schröder-Turk v Murdoch University* [2019] FCA 1152.

108 *Fair Work Act 2009* (Cth) ('*FWA*') section 340 prohibits an employer from taking adverse action against an employee for exercising their workplace rights.

109 *Public Interest Disclosure Act 2003* (WA).

110 Evans and Stone (n 13) 97–8.

111 A subsequent investigation by the federal Tertiary Education Quality and Standards Agency found that the university had breached its own policies regarding admissions, and the university's registration as a provider of higher education was limited to four years rather than the usual seven: Aja Styles, '"Fearful and Lonely": Murdock Uni Gags Staff as Students Disillusioned over Education Quality', *WA Today* (online, 9 July 2021) <https://www.watoday.com.au/national/western-australia/fearful-and-lonely-murdoch-uni-gags-staff-as-students-disillusioned-over-education-quality-20210707-p587m5.html>.

112 The proceedings were commenced under *FWA* (n 108) section 50 which provides 'a person must not contravene a term of an enterprise agreement'. The section is a civil remedy provision. The proceedings commenced by Ridd were not for unfair dismissal. Cf Adrienne Stone, 'The Meaning of Academic Freedom: The Significance of *Ridd v James Cook University*' (2021) 43(2) *Sydney Law Review* 241.

113 *Ridd v James Cook University* (2019) 286 IR 389; *Ridd v James Cook University [No 2]* [2019] FCCA 2489, [193] (Vasta J).

114 *University v Ridd* (2020) 278 FCR 566 . The High Court of Australia dismissed an appeal: *Ridd v James Cook University* (2021) 394 ALR 12.

JCU alleged that Ridd insulted his colleagues, and therefore breached the JCU code of conduct, by stating in a television interview that the public 'can no longer trust' research produced by research centres associated with the university.[115] JCU also alleged that Ridd failed to uphold the good reputation of the university (also a breach of the code of conduct) by sending emails in which he criticised or commented on allegations, findings and disciplinary action taken by JCU against him.[116]

Conceptually, the central issue was whether the criticisms Ridd made of the research conducted by other scholars at the university were within the bounds of academic freedom.[117] The High Court held that these comments *were* protected by the JCU enterprise agreement, principally because they were within Ridd's areas of disciplinary expertise. His public statements concerned the environmental impacts of climate change, an area in which he conducted research and published.[118] Although his views on climate change are widely rejected in the scientific community,[119] he spoke as a member of the discipline of marine physics.

The High Court also affirmed that academic freedom does not depend on statements being made 'respectfully' or courteously. The Court stated that limiting the freedom to respectful communication was contrary to its 'long-standing core meaning'.[120] This conclusion is consistent with Evans and Stone's argument that Ridd's statements were essentially an 'academic dispute' over research methods and the accuracy or reliability of research outputs.[121] They argue that he should not have been disciplined by JCU for these statements, which is exactly the type of robust debate that can lead to reliable and accurate information.[122]

Further, as mentioned above, making public statements through the media in the areas of one's expertise is an accepted and even expected part of the academic role. Several statements for which Ridd was disciplined were made in the course of publicly discussing matters within relevant areas of his disciplinary expertise.[123] Criticising the methods of other researchers may be uncomfortable for those

115 The code of conduct is examined in detail in Evans and Stone (n 13).

116 The High Court held that these emails breached the confidentiality obligations in the enterprise agreement concerning the disciplinary process against Ridd: *Ridd v James Cook University* (2021) 394 ALR 12, 26 [39]. This article does not examine these issues.

117 As mentioned above, this article focuses on the principle of academic freedom, as it is defined and articulated by scholars, rather than how it was defined in the James Cook University ('JCU') Enterprise Agreement or interpreted by the Courts in these proceedings.

118 Before his employment was terminated, Ridd had been employed by JCU for 27 years. He was head of the physics department from 2009–16 and managed the marine geophysics laboratory for 15 years: *Ridd v James Cook University* (2021) 394 ALR 12, 14 [1].

119 Adam Morton and Ben Smee, 'Great Barrier Reef Expert Panel Says Peter Ridd Misrepresenting Science', *The Guardian* (online, 28 August 2019) <theguardian.com/environment/2019/aug/28/great-barrier-reef-expert-panel-says-peter-ridd-misrepresenting-science>.

120 *Ridd v James Cook University* (2021) 394 ALR 12, 31 [64].

121 Evans and Stone (n 13) 94–5.

122 Ibid 95. Evans and Stone accept that conduct that amounts to bullying or intimidation 'should not be protected' and may be subject to discipline by the employer. They also 'offer no opinion' on the substance of Ridd's arguments, which include claims regarding climate change and the impacts of rising temperatures on the Great Barrier Reef that are widely rejected in the scientific community: at 95.

123 *Ridd v James Cook University* (2021) 394 ALR 12, 16 [8].

criticised, however disciplinary action by an employer may breach academic freedom by interfering with the autonomy of the discipline.

Despite these favourable conclusions, the High Court upheld JCU's termination of Ridd's employment.[124] This is because *some* of Ridd's conduct, such as breaching confidentiality regarding the disciplinary process against him, was not protected as it did not concern his areas of disciplinary expertise.[125]

The Ridd decision highlights the vulnerable situation of scholars exercising academic freedom in Australia. Effectively, it minimises the vital role of open and robust debate between scholars in producing accurate and reliable knowledge.[126] Further, it enables universities to effectively suppress scholarly debate by exercising their powers under employment law. Suppression or censorship may lead the public to believe the suppressed voice, simply because it is being suppressed. These arguments are consistent with those advanced by Mill in his articulation of the importance of free speech.

The trial judge in the Ridd proceedings stated that JCU's conduct amounted to an 'egregious abuse of the power [of] an employer … over an employee'.[127] However, an equally serious concern is the possible impact on the general public of JCU's interference with a scholarly debate. As mentioned above, the public may conclude that the suppressed voice (Ridd's) is the more reliable or accurate, simply for being suppressed. Put another way, JCU's intrusion in the debate may distort the advancement of knowledge which is the unique function of a university.

3 Controversial Teaching Materials

As a final example, in 2019 the University of Sydney terminated the employment of lecturer Tim Anderson for conduct including displaying an image of a swastika imposed on the Israeli flag in his teaching materials, and social media posts that the university regarded as offensive and which Anderson failed to remove.[128]

Initially, Anderson was unsuccessful in arguing that this conduct was protected under the university enterprise agreement as a form of 'intellectual freedom'.[129] However, in August 2021, an appeal court held that Anderson and other staff at the university have a legal right to be protected from disciplinary action when exercising academic freedom.[130] Indeed, the Court regarded intellectual freedom as 'a central feature of university and academic life' which 'goes to the heart of the nature and character of … the university'.[131] The Court held that protection of intellectual freedom means that 'the University is obliged not to discipline or punish or threaten to discipline or punish a member of staff [who] exercises the

124 *Ridd v James Cook University* (2021) 394 ALR 12, 27 [46].

125 Ibid 26 [39].

126 See Part II of this article.

127 *Ridd v James Cook University [No 2]* [2019] FCCA 2489, [183] (Vasta J).

128 See Nick Bonyhady, 'Court Backs Academic's Free Speech in Swastika Dismissal Case', *The Sydney Morning Herald* (online, 31 August 2021) <https://www.smh.com.au/politics/federal/court-backs-academics-free-speech-in-swastika-dismissal-case-20210831-p58ngf.html>.

129 *National Tertiary Education Industry Union v University of Sydney* (2020) 302 IR 272.

130 *National Tertiary Education Industry Union v University of Sydney* (2021) 392 ALR 252.

131 Ibid [5] (Allsop CJ).

freedom … lawfully'.[132] Further, the Court held that the university code of conduct cannot limit the scope of intellectual freedom.

In summary, the proceedings discussed in this section demonstrate three important points. First, Australian universities are currently taking disciplinary action against academic staff in respect of conduct that may fall within academic freedom. Second, such disciplinary action is commonly based on codes of conduct, which give wide discretionary powers to universities as employers. Finally, existing protections, including provisions in university enterprise agreements, do not provide adequate or reliable protection for academic freedom, and stronger protection is therefore needed. The court decisions in Ridd and Anderson's proceedings are a partial victory in terms of protecting academic freedom from disciplinary action by a university. However, the decisions illustrate the fragility of this protection, in that different judges reached different conclusions regarding the interpretation of the university enterprise agreement, and the relationship between the enterprise agreement and codes of conduct.

The next Part of this article argues that legislative protection of academic freedom is necessary in Australia.

IV PROTECTING ACADEMIC FREEDOM

So far, this article has highlighted the importance of protecting academic freedom in promoting the public interest in the advancement of knowledge. It has also highlighted how employment law can work against such autonomy, particularly by a university taking disciplinary action against an employee exercising academic freedom. This Part of the article argues that legislation is needed to protect academic freedom in Australia, as neither university enterprise agreements nor non-statutory codes of conduct provide reliable or consistent protection. Rather, legislation is necessary to provide uniform national protection to academic freedom in Australia.

First, this Part sets out a definition of academic freedom, which provides the basis of legislative protection. Second, it examines similar areas of law in which employees are protected from actions by an employer that are against the public interest. Finally, it outlines why legislative protections are preferable to voluntary non-statutory codes adopted by universities.

A Defining Academic Freedom

This article has argued that an important aspect of academic freedom in Australia is the ability of academic scholars to speak publicly in their areas of expertise, without the threat of disciplinary action by their employer. This section briefly outlines how this conclusion could be operationalised in legal terms. This article adopts many of the recommendations made in the *Independent Review of*

132 Ibid [12]. On rehearing, Anderson's conduct was found to constitute the exercise of intellectual freedom under the relevant enterprise agreement: *National Tertiary Education Industry Union v University of Sydney* [2022] FCA 1265.

Freedom of Speech in Australian Higher Education Providers ('*French Review*'), including the definition of academic freedom.[133]

The *French Review* defined academic freedom as including the freedom of academic staff to:

- teach, discuss, and research and to disseminate and publish the results of their research without restriction by institutional policy, but subject to scholarly standards.
- engage in intellectual inquiry, to express their opinions and beliefs, and to contribute to public debate, in relation to their subjects of research.
- to express their opinions in relation to the university in which they work, free from censorship or sanction by the university.[134]

The definition is consistent with the scope and rationale for academic freedom as outlined in this article. Notably, point three of the definition explicitly includes 'intramural comments', or statements by an academic scholar regarding the policies, governance, or management of the university at which they are employed.

The definition does not seek to include all aspects of academic freedom. For example, it does not include aspects of academic freedom which confer protections on students, rather than academic staff. Rather, it seeks to preclude disciplinary action by a university which may threaten the exercise of academic freedom by academic staff. The overall purpose of preventing 'censorship or sanction' by a university as employer is mentioned in point three of the definition. However, legislation should explicitly provide that the 'exercise by a member of academic staff … of academic freedom shall not constitute misconduct nor attract any penalty or other adverse action'.[135] Effectively, this would provide a defence, or immunity, to disciplinary action by the employer in respect of speech within the scope of the freedom.[136] To be effective, this provision would explicitly prevail over inconsistent non-statutory rules and powers, and limit the operation of non-statutory powers exercised by university administrators.[137] An objects or purposes section should be included in the legislation, stating that the purpose is to 'ensure that freedom of speech and intellectual inquiry are treated as paramount values by universities'.[138]

Academic freedom is subject to limitations and exceptions. This article does not seek to exhaustively define those limits and exceptions, and a range of options are possible. However, as Ronald Dworkin notes, any exception to academic freedom must not subvert its underlying purpose or rationale.[139] This article supports the approach taken in the *French Review*, that academic freedom is subject to 'reasonable and proportionate measures' taken by the university to prevent speech which is 'intended to insult, humiliate or intimidate other persons and which a reasonable person would regard, in the circumstances, as likely to

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133 However, unlike the *French Review* (n 3), this article argues that legislation is necessary, rather than merely non-statutory codes. See section C of this Part.

134 *French Review* (n 3) 296.

135 Ibid 298.

136 Levine and Rigby (n 92).

137 *French Review* (n 3) 230–4, 298.

138 Ibid 295.

139 Dworkin (n 21) 14.

have that effect'.[140] On the other hand, Dworkin would limit any exception to deliberate or intentionally malicious statements.[141] Australian scholars Levine and Rigby argue that statements should be protected only if they are 'based on the honest and reasonable belief that such facts are true'.[142] This approach is consistent with the protection of free speech in defamation law.[143]

Legislative protections could be enforced through individual proceedings, or representative action (for example by an industrial union).[144] As an expert industrial body, the Fair Work Commission could determine such proceedings, similarly to anti-bullying provisions.[145] The Commission could be empowered to make any orders necessary to stop the adverse action by the university against the employee, and breach of an order may be the basis for a compensation claim.[146] Other modes of enforcement are possible, such as individual proceedings for compensation. However, given the significance of protecting academic scholars from institutional censorship, it is crucial that enforcement is quick, accessible, and legally enforceable.

B Similar Legal Protections in Employment Law

Legislation protecting academic freedom would serve similar purposes to other laws currently operating in the employment context. For example, employees are currently protected by anti-discrimination laws.[147] These laws prevent employers from exercising their common law power to hire and fire for discriminatory reasons, as this is against the public interest.

Similarly, national legislation protects employees from unfair dismissal[148] and adverse action by an employer.[149] Other protective laws include whistleblower protection legislation and public interest disclosure legislation. These laws serve similar purposes to academic freedom, by preventing employers from retaliating against employees who make public interest disclosures. However, the purpose of these laws is usually broader than academic freedom, as they seek to promote the accountability of public institutions and public officeholders.[150]

Finally, equity has long recognised a legal defence regarding certain disclosures by an employee that may otherwise constitute an actionable breach of confidence. If the disclosure involves serious wrongdoing and it is made to 'proper

140 *French Review* (n 3) 297.
141 Dworkin (n 21) 14.
142 Levine and Rigby (n 92) 41–2.
143 In defamation law, defences commonly require that the defendant acted reasonably and honestly (that is, without malice). See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
144 The *FWA* (n 108) and university enterprise agreements currently permit unions to enforce industrial protections for the benefit of employees generally.
145 *FWA* (n 108) s 789FA–FI.
146 Ibid s 789FF–FG.
147 See Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018).
148 *FWA* (n 108) pt 3.2.
149 Ibid s 340.
150 See Levine and Rigby (n 92) for a detailed analysis of these mechanisms, and a comparison with academic freedom.

authorities' then no action for breach of confidence can be maintained.[151] This is because, although there may be a breach of private legal duties as between the employee and employer, the disclosure is in the public interest. Such disclosures are justified on public policy grounds, as the disclosure of wrongdoing benefits the broader community, and an employer therefore should not be able to use private law powers to prevent such disclosures.[152]

Laws protecting an employee from disciplinary action by an employer for exercising academic freedom are justified on public interest grounds and are similar to other legal immunities in employment law. Laws protecting academic freedom would promote the public interest by preventing universities from exercising their private law powers in a way that undermines the public interest in the advancement of knowledge.

On the other hand, American constitutional law scholar Stanley Fish argues that academic freedom confers no immunity on individual academics regarding their public statements.[153] He advances three arguments as to why such statements may be the subject of disciplinary action by the employer. First, Fish argues that exempting individual academics from the 'generally applicable rules' of employment law would involve 'special treatment', rather than a 'level playing field' in terms of rights.[154] The concept of equal rights and equal treatment – at least in a formal sense – has a powerful sway in the US and other democracies. However, as outlined above, the importance of academic freedom justifies laws protecting academic staff from disciplinary action by an employer. Contrary to Fish's arguments, such protection is not for the personal benefit of individual academic staff but is justified by the public interest in academic freedom.[155] However, Fish appears to assume that disputes between an employer and employee necessarily involve a 'personal grievance' on the part of the employee.[156]

Second, Fish argues that allowing an immunity from 'generally applicable rules' would mean that academic freedom would have no boundaries, apart from 'the bounds a professor chooses for himself'.[157] Put another way, he equates granting any immunity with arbitrariness and idiosyncrasy and an unlimited and undefined scope of immunity. However, as outlined above, many immunities currently exist in employment law. These immunities protect employees from action by the employer which is against the public interest. Further, protection of academic freedom is necessary to enable academic scholars to properly perform their role

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151 See, eg, *Lion Laboratories v Evans* [1985] QB 526; *Australian Football League v The Age Co Ltd* (2006) 15 VR 419; *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 74 ALR 428. This is known as the 'iniquity' defence.

152 *Allied Mills Industries Pty Ltd v Trade Practices Commission* (1981) 34 ALR 105, 141 (Sheppard J).

153 Fish, *Versions of Academic Freedom* (n 14). See also Fish, *The First* (n 14) ch 3.

154 Fish, *Versions of Academic Freedom* (n 14) 86.

155 Fish rejects any connection between academic freedom and the maintenance of democracy or the 'common good'. Rather, he regards academic freedom as a matter of professional demarcation: Ibid 11. This argument is summarised in Fish's statement that academic work is 'just a job' (without any further political or social significance).

156 Ibid.

157 Ibid 109.

and to promote the public interest in producing and disseminating knowledge. Although this protection is broad, it has limits as outlined above.

Finally, Fish propounds a very narrow conception of academic freedom, which protects academics only regarding public statements in their specific areas of expertise.[158] Specifically, his conception of academic freedom excludes comments that are critical of an academic's discipline or the institution at which they work.[159] Fish regards academics who make comments outside their area of disciplinary expertise as necessarily engaging in 'partisan politics', rather than the core academic functions of teaching and research.[160] He argues that the advancement of knowledge is promoted by 'disinterested inquiry' and analytical inquiry, rather than academics promoting any particular cause or agenda.[161] Fish's conception of academic freedom is extremely narrow, being limited to teaching and research in a specific discipline. However, many academics teach and research across more than more one discipline, and some disciplines are necessarily 'political' in nature.[162]

In summary, Fish's narrow conception of academic freedom misconceives its nature and importance.[163] Protection of academic freedom is not for the personal benefit of individual academics. Rather, it enables academic scholars to conduct their work in accordance with scholarly standards, which promotes the public interest in the advancement of knowledge. Occasionally, scholars publicly challenge the standards and methods of their discipline – such as the case of Peter Ridd, outlined above. Fish argues that such conduct is not part of academic freedom, as it is likely to undermine the standing of the discipline or profession itself, including all its members.[164] However, criticism of methods and standards by members of a discipline can be regarded as healthy and necessary for the discipline. Specifically, such criticism may cause members of the discipline to review and possibly improve their standards and methods, which may assist in challenging conformity and groupthink. In this light, Fish's conception of academic freedom can be regarded as not only narrow but also conservative.

C Legislation is Necessary to Protect Academic Freedom

This article argues that legislation is necessary to provide enforceable protection for academic freedom in Australia. On the other hand, the *French Review* recommended protecting academic freedom through each Australian university

158 Ibid.
159 Ibid 94.
160 Ibid 30.
161 Ibid 126, 20, 18, 32.
162 It is notable that Fish, who is qualified as a literary theorist, is a highly respected constitutional and First Amendment scholar. Fish is a very prominent public speaker on various topics, including free speech and academic freedom. This seems to contradict his narrow conception of the academic role.
163 Fish's conception of academic freedom accurately reflects court decisions in the United States. These decisions emphasise the importance of institutional autonomy from the state, rather than protections for individual academics from institutional censorship. See, eg, Barendt, *Academic Freedom and the Law* (n 1) 22.
164 Fish, *Versions of Academic Freedom* (n 14).

adopting a 'model' code of conduct.[165] This section advances four reasons why codes of conduct are inadequate to protect academic freedom, and why legislation is necessary.

First, non-statutory codes are not directly enforceable by an employee. As highlighted above, codes may be enforced *by an employer,* for example by taking disciplinary action against an employee. However, codes of conduct only enable an employee to make an internal complaint to the university alleging a breach of the code. Therefore, codes do not provide effective legal protection from disciplinary action by a university in breach of academic freedom. As universities can exercise legal powers to take disciplinary action against employees, it is important that employees have legally enforceable protections against such action.

Second, legislation has a superior legal status in that it overrides inconsistent codes of conduct and common law powers of employers.[166] On the other hand, codes are generally drafted by the employer with very little involvement with employees, and they can be changed and even withdrawn with little notice.[167] The French Model Code on academic freedom is voluntary, and several Australian universities have not yet fully aligned their policies with the Model Code.[168] Further, at most universities, several different policies or codes restrict academic freedom and their interaction with each other is often unclear.[169] This lack of certainty is likely to chill academic freedom rather than promote it.

Third, the *French Review* overstated the importance of protecting universities' institutional autonomy and understated its dangers. Although the *French Review* highlighted the dangers of universities censoring academics through disciplinary action, it recommended the adoption of voluntary codes of practice, rather than legislation, in order to maintain universities' institutional autonomy.[170] However, universities as employers are subject to a range of legislation, such as occupational health and safety legislation, anti-discrimination laws and industrial laws. Therefore, institutional autonomy is a relative rather than an absolute value. Further, these legislative standards, for example under occupational health and safety laws, are adaptable to the unique circumstances of universities. Similarly, laws protecting academic freedom can be adapted to the circumstances of each university, to the extent that this is considered necessary and desirable. Protecting the institutional

165 *French Review* (n 3) ch 31. The *French Review* also recommended amending the *Higher Education Support Act 2003* (Cth): at ch 29. However, this amendment merely requires universities to have a policy on academic freedom and free speech, and it does not confer legal rights on individual academics.

166 Ibid 213–14.

167 See, eg, *Ridd v James Cook University* (2019) 286 IR 389, 431 [258] (Vasta J); Pnina Levine and Rob Guthrie, '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?' (2020) 47(2) *University of Western Australia Law Review* 310, 318, 325. On the other hand, the Full Court in *University v Ridd* (2020) 278 FCR 566 emphasised that university codes of conduct are made in consultation with staff and are approved by the University Council: at 197 [57] (Griffiths and SC Derrington JJ).

168 Sally Walker, *Review of the Adoption of the Model Code on Freedom of Speech and Academic Freedom* (Report, 9 December 2020) i.

169 *French Review* (n 3) 217–19.

170 Ibid 14–20.

autonomy of universities, rather than individual academic freedom, may allow universities to censor and punish individual academics with impunity.[171]

Legislation overcomes the limitations of non-statutory rules, particularly in terms of its enforceability by employees.[172] Legislation also provides consistent national standards protecting academic freedom, rather than having different standards at different universities. Legislation prevails over any inconsistent term in a university code of conduct or enterprise agreement.

Although the *French Review* acknowledged the importance of protecting academic scholars from institutional censorship, it emphasised the role of *cultural change* in providing this protection. In relation to intramural statements, the *French Review* stated:

> In the end there are probably no hard and fast rules which can be devised to cover that aspect of academic freedom. Far more important than rules will be a culture which embraces the inevitability of dissent on the one hand and the importance of compromise to the effective functioning of the institution.[173]

Similarly, in relation to disciplinary action by a university against an academic scholar, the *French Review* stated:

> The risk can never be eliminated but it can be reduced by appropriately limiting language in higher education rules and policies. Beyond that measure, a determining factor will be the culture of the institution. A culture powerfully predisposed to the exercise of freedom of speech and academic freedom is ultimately a more effective protection than the most tightly drawn rule. A culture not so predisposed will undermine the most emphatic statement of principles.[174]

Essentially, the *French Review* regarded cultural change as preferable to the provision of legal protections for academic scholars. This article agrees that the ultimate purpose of academic freedom is to foster a culture of dissent and discussion, rather than censorship and suppression, within universities.[175] Cultural change in Australian universities is therefore important.

However, legislation and cultural change are not mutually exclusive. Rather, legislation is an important driver of cultural change because it expresses society's shared values in an enforceable form. On the other hand, providing only unenforceable codes of conduct indicates that society does not properly value academic freedom. Legislation can promote cultural change regarding respect for academic freedom more effectively than mere codes of conduct. As the *French Review* highlighted, cultural change is particularly required *inside Australian universities* (rather than in society generally). Strong legislative protection is therefore required to ensure that universities cannot take disciplinary action against academic staff who exercise academic freedom. On the other hand, the *French*

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171 MacKinnon (n 25) 243.

172 Academic freedom can also be protected by the inclusion of appropriate terms in a university enterprise agreement. This approach has the advantage of tailoring the protection to the particular needs of staff at the institution. Such provisions are enforceable by employees. However, this approach has several significant disadvantages, including that staff at particular universities may not have sufficient bargaining power to include appropriate protection in the enterprise agreement.

173 *French Review* (n 3) 118.

174 Ibid 218–19.

175 Ibid.

Review's preference for cultural change seems to prioritise institutional autonomy over effective protection of academic scholars from institutional censorship.[176]

V CONCLUSION

This article has argued that academic freedom requires that academic disciplines be allowed to operate autonomously, free of external intrusion. This is necessary in order for academic disciplines to produce and disseminate expert knowledge, which benefits the public. Protection of academic freedom requires academic staff to be protected from disciplinary action by their employer when they publicly comment on matters within their areas of expertise.

Some accounts of academic freedom emphasise the importance of universities being free from regulation by the state. However, recent Australian scholarship highlights the importance of academic scholars being free to comply with the standards and methods of their discipline, and not being subject to disciplinary action by their employer for exercising this freedom. This article has highlighted the vulnerable situation of academic scholars, who may be subject to disciplinary action, including termination of employment, for public comments within their areas of expertise. Therefore, legislative protection from disciplinary action is necessary to give effect to academic freedom. Legislation is necessary to provide enforceable, clear, and consistent protection for academic freedom. Considering the important role of academic scholars in producing and disseminating expert knowledge for the public good, legislative protection is necessary and justified.

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176 The *French Review* (n 3) stated that it did not seek 'increased government regulation' of universities, and rather it sought voluntary change (such as adoption of model codes of conduct) rather than 'impos[ing] [rules] by statute' on universities: at 14.